

NORTH CAROLINA REGISTER

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April 16, 2012

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Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact: Molly Masich, Codifier of Rules molly.masich@oah.nc.gov (919) 431-3071
Dana Vojtko, Publications Coordinator dana.vojtko@oah.nc.gov (919) 431-3075
Julie Edwards, Editorial Assistant julie.edwards@oah.nc.gov (919) 431-3073
Tammara Chalmers, Editorial Assistant tammara.chalmers@oah.nc.gov (919) 431-3083

Rule Review and Legal Issues

Rules Review Commission
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel joe.deluca@oah.nc.gov (919) 431-3081
Bobby Bryan, Commission Counsel bobby.bryan@oah.nc.gov (919) 431-3079

Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management
116 West Jones Street (919) 807-4700
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX
Contact: Anca Grozav, Economic Analyst osbmruleanalysis@osbm.nc.gov (919) 807-4740

NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603
contact: Amy Bason amy.bason@ncacc.org

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Erin L. Wynia ewynia@nclm.org

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street (919) 733-2578
Raleigh, North Carolina 27611 (919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney Karen.cochrane-brown@ncleg.net
Jeff Hudson, Staff Attorney Jeffrey.hudson@ncleg.net

NORTH CAROLINA REGISTER
Publication Schedule for January 2012 – December 2012

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

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Child Care Commission intends to amend the rule cited as 10A NCAC 09 .0102, .2802 and .2823.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://ncchildcare.dhhs.nc.us/general/whatsnew.asp>

Proposed Effective Date: September 1, 2012

Public Hearing:

Date: May 8, 2012

Time: 1:30 p.m.

Location: Division of Child Development and Early Education,
 319 Chapanoke Road, Suite 120, Raleigh, NC

Reason for Proposed Action: The NC Child Care Commission proposes to amend rules that are in direct response to S.L. 2011-145 that gives the Commission the rule-making authority to review and approve comprehensive, evidenced-based early childhood curricula with a reading component. These curricula shall be used as approved curricula to meet requirements for the NC Pre-K program as well as for the requirement that an approved curriculum must be used in classrooms serving 4-year old children in 4 & 5 star child care programs.

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted in writing to Dedra Alston, Rule-making Coordinator, Division of Child Development and Early Education, 2201 Mail Service Center, Raleigh, NC 27699-2201; or by email to Dedra.Alston@dhhs.nc.gov by June 15, 2012.

Comments may be submitted to: Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201, phone (919)890-7060, fax (919)662-4568, email Dedra.Alston@dhhs.nc.gov

Comment period ends: June 15, 2012

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in

G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☒ No fiscal note required

CHAPTER 09 - CHILD CARE RULES

SECTION .0100 - DEFINITIONS

NOTE: Text shown in Italics has been approved by the RRC and is pending Legislative Review. Item (35) "Temporary care" was previously published in 26 NCR 15 for public hearing. Only Item (7) "Curriculum" is to be considered for the purpose of this rule amendment.

10A NCAC 09 .0102 DEFINITIONS

The terms and phrases used in this Chapter are defined as follows except when the ~~content~~ context of the rule requires a different meaning. The definitions prescribed in G.S. 110-86 also apply to these Rules.

- (1) "Agency" as used in Section .2200 of this Chapter, means Division of Child ~~Development,~~ Development and Early Education, Department of Health and Human Services located at 319 Chapanoke Road, Suite 120, Raleigh, North Carolina 27603.
- (2) Appellant" means the person or persons who request a contested case hearing.
- (3) Basic School-Age Care" training (BSAC training) means the training on the elements of quality afterschool care for school-age children, developed by the North Carolina State University Department of 4-H Youth Development and subsequently revised by the North Carolina School-age Quality Improvement Project. Other training shall be approved as equivalent if the Division

- determines that the content of the training offered is substantially equivalent to the BSAC training.
- (4) "Child Care Program" means a single center or home, or a group of centers or homes or both, which are operated by one owner or supervised by a common entity.
- (5) "Child care provider" as defined by G.S. 110-90.2 (a) (2) a. and used in Section .2700 of this Chapter, includes the following employees who have contact with the children in a child care program: facility directors, administrative staff, teachers, teachers' aides, cooks, maintenance personnel, and drivers.
- (6) "Child Development Associate Credential" means the national early childhood credential administered by the Council for Early Childhood Professional Recognition.
- (7) "Curriculum" means a curriculum that has been approved by the NC Child Care Commission.**
- ~~(7)~~(8) "Developmentally appropriate" means suitable to the chronological age range and developmental characteristics of a specific group of children.
- ~~(8)~~(9) "Division" means the Division of Child Development and Early Education within the Department of Health and Human Services.
- ~~(9)~~(10) "Drop-in care" means a child care arrangement where children attend on an intermittent, unscheduled basis.
- ~~(10)~~(11) "Early Childhood Environment Rating Scale - Revised Edition" (Harms, Clifford, and Cryer, 2005, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of children in the group are two and a half years old through five years old, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- (12) "Experience working with school-aged children" means working with school-age children as an administrator, program coordinator, group leader, assistant group leader, lead teacher, teacher or aide.
- ~~(11)~~(13) "Family Child Care Environment Rating Scale - Revised Edition" (Harms, Cryer and Clifford, 2007, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by children in family child care homes to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- ~~(12)~~(14) "First aid kit" is a collection of first aid supplies (such as bandages, tweezers, disposable nonporous gloves, micro shield or face mask, liquid soap, cold pack) for treatment of minor injuries or stabilization of major injuries.
- ~~(13)~~(15) "Group" means the children assigned to a specific caregiver or caregivers, to meet the staff/child ratios set forth in G.S. 110-91(7) and this Chapter, using space which is identifiable for each group.
- ~~(14)~~(16) "Health care professional" means:
- (a) a physician licensed in North Carolina;
 - (b) a nurse practitioner approved to practice in North Carolina;
 - (c) a licensed physician assistant.
- ~~(15)~~(17) "Household member" means a person who resides in a family home as evidenced by factors ~~including,~~ including maintaining clothing and personal effects at the household address, receiving mail at the household address, using identification with the household address, or eating and sleeping at the household address on a regular basis.
- ~~(16)~~(18) "If weather conditions permit" means:
- (a) temperatures that fall within the guidelines developed by the Iowa Department of Public Health and specified on the Child Care Weather Watch chart. These guidelines shall be used when determining appropriate weather conditions for taking children outside for outdoor learning activities and playtime. This chart may be downloaded free of charge from <http://www.idph.state.ia.us/hcci/commom/pdf/weatherwatch.pdf>, and is incorporated by reference and includes subsequent editions and amendments;
 - (b) following the air quality standards as set out in 15A NCAC 18A .2832(d).

~~healthy air quality as forecast by the Department of Environment and Natural Resources' Air Quality Forecasts and Information web page.~~
The Air Quality Color Guide can be found on the Division's web site at <http://xapps.enr.state.nc.us/aq/ForecastCenter> or call 1-888-RU4NCAIR (1-888-784-6224); and

- (c) no active precipitation. Caregivers may choose to go outdoors when there is active precipitation if children have appropriate clothing such as rain boots and rain coats, or if they are under a covered area.

~~(17)~~(19) "Infant/Toddler Environment Rating Scale - Revised Edition" (Harms, Cryer, and Clifford, 2003, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of children in the group are younger than thirty months old, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.

~~(18)~~(20) "ITS-SIDS Training" means the Infant/Toddler Safe Sleep and SIDS Risk Reduction Training developed by the NC Healthy Start Foundation for the Division of Child Development and Early Education for caregivers of children ages 12 months and younger.

~~(19)~~(21) "Licensee" means the person or entity that is granted permission by the State of North Carolina to operate a child care facility. The owner of a facility is the licensee.

~~((20))~~(22) "North Carolina Early Educator Certification (certification)" is an acknowledgement of an individual's verified level of educational achievement based on a standardized scale. The North Carolina Institute for Child Development Professionals certifies individuals and assigns a certification level on two scales: the Early Care and Education Professional Scale (ECE Scale) in effect as of July 1, 2010 or the School Age Professional Scale (SA Scale) in effect as of May 19, 2010. Each scale reflects the amount of education earned in the content area pertinent to the ages of children served. The

ECE Scale is designed for individuals working with or on behalf of children ages birth to five. The SA Scale is designed for individuals working with or on behalf of children ages 5 to 12 who are served in school age care settings.

~~(20)~~~~((21))~~(23) "North Carolina Early Childhood Credential" means the state early childhood credential that is based on completion of required early childhood coursework taken at any NC Community College and standards found in the North Carolina Early Childhood Instructor Manual (published by the NC Community College System Office). These standards are incorporated by reference and include subsequent amendments. Other post secondary curriculum coursework shall be approved as equivalent if the Division determines that the content of the other post secondary curriculum coursework offered is substantially equivalent to the NC Early Childhood Credential Coursework. A copy of the North Carolina Early Childhood Credential requirements is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection or copying at no charge during regular business hours.

~~(21)~~~~((22))~~(24) "Owner" means any person with a five percent or greater equity interest in a child care facility, ~~however, however~~ stockholders of corporations who own child care facilities are not subject to mandatory criminal history checks pursuant to G.S. 110-90.2 and G.S. 110-91(8) unless they are ~~involved in day-to-day operations of the child care facility.~~ a child care provider.

~~(22)~~~~((23))~~(25) "Parent" means a child's parent, legal guardian, or full-time custodian.

~~(23)~~~~((24))~~(26) "Part-time care" means a child care arrangement where children attend on a regular schedule but less than a full-time basis.

~~(24)~~~~((25))~~(27) "Passageway" means a hall or corridor.

~~(25)~~~~((26))~~(28) "Person" means any individual, trust, estate, partnership, corporation, joint stock company, consortium, or any other group, entity, organization, or association.

~~(26)~~~~((27))~~(29) "Preschooler" or "preschool-age child" means any child who does not fit the definition of school-age child in this Rule.

~~(27)~~~~((28))~~(30) "School-Age Care Environment Rating Scale" (Harms, Jacobs, and White, 1996, published by Teachers College Press) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of the children in the group are older than five years, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes

subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in – May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.

- ~~(28)~~~~(29)~~~~(31)~~ "School-age child" means any child who is attending or who has attended, a public or private grade school or kindergarten and meets age requirements as specified in G.S. 115C-364.
- ~~(29)~~~~(30)~~~~(32)~~ "Seasonal Program" means a recreational program as set forth in G.S. 110-86(2)(b).
- ~~(30)~~~~(31)~~~~(33)~~ "Section" means Division of Child ~~Development.~~ Development and Early Education.
- ~~(31)~~~~(32)~~~~(34)~~ "Substitute" means any person who ~~temporarily~~ assumes the duties of a staff person for a time period not to exceed two consecutive months.
- ~~(32)~~~~(33)~~~~(35)~~ ~~"Temporary care" means any child care arrangement which provides either drop-in care or care on a seasonal or other part-time basis and is required to be regulated pursuant to G.S. 110-86.~~
- ~~(33)~~~~(34)~~~~(35)~~ "Track-Out Program" means any child care provided to school-age children when they are out of school on a year-round school calendar.
- ~~(34)~~~~(35)~~~~(36)~~ "Volunteer" means a person who works in a child care facility and is not monetarily compensated by the facility.

Authority G.S. 110-85; 110-88; 143B-168.3.

SECTION .2800 - VOLUNTARY RATED LICENSES

10A NCAC 09 .2802 APPLICATION FOR A VOLUNTARY RATED LICENSE

- (a) After a licensed child care center or home has been in operation for a minimum of six consecutive months, the procedures in this Rule apply to request an initial two- through five-star rated license or to request that a rating be changed to a two- through five-star rated license.
- (b) The operator shall submit a completed application to the Division for a voluntary rated license on the form provided by the Division.
- (c) An operator may apply for a star rating based on the total number of points achieved for each component of the voluntary rated license. In order to achieve a two- through five-star rating, for a two component license the minimum score achieved must be a least four points as follows:

TOTAL NUMBER OF POINTS	RATING
4 through 6	Two Stars

7 through 9	Three Stars
10 through 12	Four Stars
13 through 15	Five Stars

(d) Facilities with a four or five-star rated license and who are licensed to serve four-year-old children must implement a curriculum as defined in 10A NCAC 09 .0102 with their four year olds. This requirement must be met in any licensed child care facility.

~~(d)~~~~(e)~~ A Division representative shall assess the facility requesting a voluntary rated license to determine if all applicable requirements have been met to achieve the score for the requested star rating. The assessment may include a review of Division records and site visits.

~~(e)~~~~(f)~~ The Division shall provide for Infant/Toddler Environment Rating Scale Revised Edition, Early Childhood Environment Rating Scale - Revised Edition, School-Age Care Environment Rating Scale, or Family Child Care Environment Rating Scale - Revised Edition assessments to be completed, as appropriate for the program, free of charge to operators requesting an initial three or more points for program standards.

~~(f)~~~~(g)~~ Upon completion of the Division's assessment:

- (1) If the assessment indicates all the applicable requirements to achieve the score for the requested rating have been met, the Division shall issue the rating.
- (2) If the assessment indicates all the applicable requirements to achieve the score for the requested rating are not met, the Division shall notify the operator of the requirements that were not met and the requested voluntary rating shall not be issued. The operator may:
 - (A) Accept the rating for which the Division has found the operator to be eligible;
 - (B) Withdraw the request and reapply when the identified requirements to achieve the score for the requested rating have been met; or
 - (C) Appeal the denial of the requested rating as provided in G.S. 110-94.

Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3; S.L. 2011-145, s.10.7(b).

10A NCAC 09 .2823 QUALITY POINT OPTIONS

Operators may earn one additional quality point as follows:

- (1) Education options:
 - (a) Completion by staff of additional education coursework as follows:
 - (i) 75 percent of infant/toddler teachers have obtained an Infant/Toddler Certificate, or
 - (ii) 75 percent of teachers have completed an A.A.S. or higher in early childhood education/child development, or

- (iii) 75 percent of lead teachers have completed a BA/BS or higher in early childhood education/child development, or
 - (iv) All lead teachers have completed an A.A.S. or higher in early childhood education/child development, or
 - (v) 75 percent of group leaders have obtained a North Carolina School Age Care Credential or have completed six semester hours in school-age coursework, or
 - (vi) A family child care home provider has obtained an Infant/Toddler Certificate or has a BA/BS or higher in early childhood education/child development.
 - (b) Completion of 20 additional annual in-service training hours for full-time lead teachers and teachers, and staff working part-time shall complete additional hours based on the chart in Rule .0707(c) of this Chapter.
 - (c) Completion of 20 additional annual in-service training hours for family child care home providers.
 - (d) 75 percent of lead teachers and teachers shall have at least 10 years verifiable early childhood work experience.
 - (e) All lead teachers and teachers shall have at least five years verifiable early childhood work experience employed by no more than two different employers.
 - (f) Having a combined turnover rate of 20 percent or less for the administrator, program coordinator, lead teachers, teachers and group leader positions over the last 12 months if the program has earned at least four points in education.
 - (g) In a stand alone school age program, 75 percent of group leaders shall have at least five years verifiable school-age work experience employed in no more than two different school-age settings.
- (2) Programmatic options:
- (a) Use of age/developmentally appropriate curriculum that addresses five domains of development. This programmatic option shall not be available to facilities that are required to use an approved curriculum in accordance with Rule .2802(d) of this Section.
 - (b) Having group sizes decreased by at least one child per age group from the seven point level as described in Rule .2818(c) of this Section.
 - (c) Having staff/child ratios decreased by at least one child per age group from the seven point level as described in Rule .2818(c) of this Section.
 - (d) Meeting at least two of the following three programs standards:
 - (i) Having enhanced policies which include the following topics: emergency evacuation plan, field trip policy, staff development plan, medication administration, enhanced discipline policy, and health rules for attendance.
 - (ii) Having a staff benefits package that offers at least four of the following six benefits: paid leave for professional development, paid planning time, vacation, sick time, retirement or health insurance.
 - (iii) Having evidence of an infrastructure of parent involvement which would include at least two of the following: parent newsletters offered at least quarterly, parent advisory board, periodic conferences for all children, or parent information meetings offered at least quarterly.
 - (e) Completion of a 30 hour or longer business training course by a family child care home provider.
 - (f) Completion of a business training course and a wage and hour training by the center administrator that is at least 30 hours total.
 - (g) Restricting enrollment to four preschool children in a family child care home.
 - (h) Reducing infant capacity by at least one child from the seven point level for a family child care home as described in Rule .2821(g)(3) of this Section.

Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3; S.L. 2011-145, s.10.7(b).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to adopt the rule cited as 10A NCAC 41A .0106.

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

Proposed Effective Date: *October 1, 2012*

Public Hearing:

Date: *May 7, 2012*

Time: *2:00 p.m.*

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

Reason for Proposed Action: *On June 27, 2011, Governor Purdue signed into law House Bill 809 (NCGS 130A-150) which requires the Department of Health and Human Services, in collaboration with the state Healthcare-Associated Infections Advisory Group, to implement a mandatory statewide surveillance system for healthcare-associated infections by December 31, 2011. The statute also requires that the Public Health Commission adopt rules for the implementation of said system.*

This proposed amendment is necessary to make permanent the temporary adoption of the Reporting of HAI, which expires on September 10, 2012.

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

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

Comment period ends: *June 15, 2012*

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

Fiscal impact (check all that apply).

- ☒ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☐ No fiscal note required

CHAPTER 41 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL

SECTION .0100 – REPORTING OF COMMUNICABLE DISEASES

10A NCAC 41A .0106 REPORTING OF HEALTH CARE-ASSOCIATED INFECTIONS

(a) The following definitions apply throughout this Rule:

- (1) "Hospital" means any facility designated as such in G.S. 131E-76(3).
- (2) "National Healthcare Safety Network" is an internet-based surveillance system managed by the Centers for Disease Control and Prevention. This system is designed to be used for the direct, standardized reporting of healthcare quality information, including health care-associated infections, by health care facilities to public health entities.
- (3) "Health care-associated infection" means a localized or systemic condition resulting from an adverse reaction to the presence of an infectious agent(s) or its toxin(s) with no evidence that the infection was present or incubating at the time of admission to the health care setting.
- (4) "Denominator or summary data" refers to referent or baseline data required to generate meaningful statistics for communicating health care-associated infection rates.
- (5) "The Centers for Medicaid and Medicare Services - Inpatient Prospective Payment System (CMS – IPPS) rules" are regulations promulgated for the disbursement of operating costs by the Centers for Medicare and Medicaid Services for acute care hospital stays under Medicare Part A based on prospectively set rates for care.

(b) Hospitals shall electronically report all health care-associated infections required by Paragraph (c) of this Rule through the National Healthcare Safety Network and shall make the data available to the Department. Hospitals also shall:

- (1) Report all specified health care-associated infections within 30 days following the end of every calendar month during which the infection occurred;

- (2) Report all required health care-associated infection denominator or summary data for healthcare-associated infections within 30 days following the end of every calendar month; and
- (3) Comply with all reporting requirements for general participation in the National Healthcare Safety Network.

(c) Except as provided in rules of this Section, hospitals shall report the healthcare-associated infections required by the Centers for Medicare and Medicaid Services listed in the CMS-IPPS rules beginning on the dates specified therein. A summary of the HAI reporting requirements from current copy of the CMS-IPPS rules may be obtained through the CMS Quality Net site at

<http://www.qualitynet.org/dcs/ContentServer?c=Page&pagenam e=OnetPublic%2FPage%2FQnetTier2&cid=1228760487021>

The CMS IPPS rules themselves can be obtained from the CMS IPPS website at

<http://www.cms.gov/AcuteInpatientPPS/IPPS2011/list.asp#Top OfPage and>

<http://www.cms.gov/AcuteInpatientPPS/FR2012/list.asp#TopOf Page>. A copy of the current CMS-IPPS rules, applicable to this section, is available for inspection in the Division of Public Health, 225 N. McDowell Street, Raleigh NC 27601.

(d) Beginning October 1, 2012 and quarterly thereafter, the Department shall release reports to the public on health care-associated infection(s) in North Carolina.

Authority G.S. 130A-150.

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Commission for the Blind intends to amend the rule cited as 10A NCAC 63F .0403.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdhhs.gov/dsb>

Proposed Effective Date: August 1, 2012

Public Hearing:

Date: May 4, 2012

Time: 1:00 p.m.

Location: 309 Ashe Avenue, Fisher Bldg., Raleigh, NC 27606

Reason for Proposed Action: *Division of Services for the Blind, in conjunction with the Commission for the Blind, is initiating a change to the Economic Needs Schedule (10A NCAC 63F .0403 Economic Needs Schedule). This proposed rule change would require verification of income for services provided by the Vocational Rehabilitation Program which are subject to an economic needs test.*

Procedure by which a person can object to the agency on a proposed rule: *Submit written objection to: Eddie Weaver, Director, Division of Services for the Blind, 2601 Mail Service Center, Raleigh, NC 27699-2601.*

Comments may be submitted to: *Mary Flanagan, 2601 Mail Service Center, Raleigh, NC 27699-2601; phone (919) 733-9822; fax (919) 733-9769; email mary.flanagan@dhhs.nc.gov*

Comment period ends: June 15, 2012

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

Fiscal impact (check all that apply).

- ☒ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☐ No fiscal note required

CHAPTER 63 - SERVICES FOR THE BLIND

SUBCHAPTER 63F - VOCATIONAL REHABILITATION

SECTION .0400 - ECONOMIC NEED

10A NCAC 63F .0403 ECONOMIC NEEDS SCHEDULE

(a) The Division of Services for the Blind shall determine a consumer's financial eligibility for services subject to need shall be determined by application of the a financial needs test by application of the financial eligibility scale established by the General Assembly. Copies of the economic needs schedule can be found at any Division office.

(b) The Division shall obtain financial information from consumers to determine their financial eligibility to receive services listed in Rule .0402(c) of this Section. Financial information obtained may include wage and earning statement, State and Federal income tax forms, W2 form, bank statements and other information to document income or other financial resources. If the consumer does not have documents to verify income, the consumer shall complete a verification form provided by the agency and signed by the consumer's last employer, the individual who financially supports the consumer, or the agency representative who processes the consumer's public support. For the purpose of this Rule, "public support"

means economic payment provided by state or federal government to someone in economic need.

Authority G.S. 111-28; 34 C.F.R. 361.54.

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to amend the rule 15A NCAC 18A .2528.

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

Proposed Effective Date: *October 1, 2012*

Public Hearing:
Date: *May 4, 2012*
Time: *10:00 a.m.*

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

Reason for Proposed Action: *During the recent legislative session, the NC General Assembly ratified Session Law 2011-39, Senate Bill 368 on April 12, 2011, "An Act to Modify the Applicability of Certain Fencing Requirements to Public Swimming Pools...", which authorized the Commission for Public Health to adopt conforming rules by January 1, 2012. The Commission adopted the rule amendment through temporary procedures to meet the statutory effective date. This proposed amendment is necessary to make permanent the temporary amendment to the Pool Fences rule, which expires on September 10, 2012.*

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

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

Comment period ends: *June 15, 2012*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the

Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☐ **Local funds affected**
- ☐ **Date submitted to OSBM:**
- ☒ **Substantial economic impact (≥\$500,000)**
- ☒ **Approved by OSBM**
- ☐ **No fiscal note required**

CHAPTER 18 - ENVIRONMENTAL HEALTH

SUBCHAPTER 18A – SANITATION

SECTION .2500 - PUBLIC SWIMMING POOLS

15A NCAC 18A .2528 FENCES

(a) Public Swimming pools shall be completely enclosed by a fence, wall, building, or other enclosure, or any combination thereof, which encloses the swimming pool area such that all of the following conditions are met:

- (1) The top of the barrier shall be at least 48 inches above grade measured on the side of the barrier that faces away from the swimming pool. The maximum vertical clearance between grade and the bottom of the barrier shall be two inches measured on the side of the barrier that faces away from the swimming pool;
- (2) Openings in the barrier shall not allow passage of a four-inch-diameter sphere and shall provide no external handholds or footholds. Solid barriers that do not have openings shall not contain indentations or protrusions except for normal construction tolerances and tooled masonry joints;
- (3) Where the barrier is composed of horizontal and vertical members and the distance between the tops of the horizontal members is 45 inches or more, spacing between the vertical members shall not exceed four inches. Where there are decorative cutouts within the vertical members, spacing within the cutouts shall not exceed 1.75 inches in width;
- (4) Where the barrier is composed of horizontal and vertical members and the distance between the tops of the horizontal members is less than 45 inches, the horizontal members shall be located on the swimming pool side of the fence. Spacing between the vertical members shall not exceed 1.75 inches in width. Where there are decorative cutouts within the vertical

members, spacing within the cutouts shall not exceed 1.75 inches in width;

- (5) Maximum mesh size for chain link fences shall be a 2.25 inch square unless the fence is provided with slats fastened at the top or the bottom that reduce the openings to no more than 1.75 inches;
- (6) Where the barrier is composed of diagonal members, the maximum opening formed by the diagonal members shall be no more than 1.75 inches;
- (7) Access gates shall comply with the dimensional requirements for fences and shall be equipped to accommodate a locking device. Effective April 1, 2011, pedestrian access gates shall open outward away from the pool and shall be self-closing and have a self-latching device except where a gate attendant and lifeguard are on duty. Gates other than pedestrian access gates shall have a self-latching device. Where the release mechanism of the self-latching device is located less than 54 inches from the bottom of the gate, the release mechanism shall require the use of a key, combination or card reader to open or shall be located on the pool side of the gate at least three inches below the top of the gate, and the gate and barrier shall have no openings greater than 0.5 inch within 18 inches of the release mechanism; and
- (8) Ground level doors and windows opening from occupied buildings to inside the pool enclosure shall be self-closing or child protected by means of a barrier or audible alarm.

(b) Public swimming pool fences constructed prior to May 1, 2010 may vary from the provisions of Paragraph (a) of this Rule as follows:

- (1) the maximum vertical clearance between grade and the bottom of the barrier may exceed two inches, but shall not exceed four inches;
- (2) where the barrier is composed of vertical and horizontal members and the space between vertical members exceeds 1.75 inches, the distance between the tops of the bottom horizontal member and the next higher horizontal member may be less than 45 inches, but shall not be less than 30 inches;
- (3) gates other than pedestrian access gates are not required to have self-latching devices if the gates are kept locked; and
- (4) gates may swing towards a pool where natural topography, landscape position or emergency egress requirements prevent gates from swinging away from the pool.

(c) Public swimming pools permitted prior to April 1, 2010 with existing fences that do not comply with the dimensional requirements of Paragraphs (a)(1) through (a)(6) and (b)(1) through (b)(2) of this Rule shall not be denied an operation

permit solely due to the preexisting non-compliance. Operation permits shall be denied to an owner or operator that fails to comply with these provisions when:

- (1) at least 50 percent of the fence has been damaged or destroyed; or
- (2) the owner or operator elects to replace the fence.

Authority G.S. 130A-282.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 12 - LICENSING BOARD FOR GENERAL CONTRACTORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Licensing Board for General Contractors intends to amend, rules cited as 21 NCAC 12 .0204.

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

Proposed Effective Date: June 1, 2013

Public Hearing:

Date: May 9, 2012

Time: 9:00 a.m.

Location: 5400 Creedmoor Road, Raleigh, NC 27612

Reason for Proposed Action: *In response to public comment, the proposed amendment provides an alternative means by which an applicant for a limited license may meet the statutory requirement to demonstrate financial responsibility by using net worth in lieu of working capital.*

Procedure by which a person can object to the agency on a proposed rule: *Persons may submit an objection to this rule by contacting Anna Baird Choi, Rule-making Coordinator, at P.O. Box Drawer 1270, Raleigh, NC 27602*

Comments may be submitted to: Anna Baird Choi, P.O. Box Drawer 1270, Raleigh, NC 27602

Comment period ends: June 15, 2012

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the

Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required

SECTION .0200 - LICENSING REQUIREMENTS

21 NCAC 12 .0204 ELIGIBILITY

(a) Limited License. The applicant for a limited license must:

- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
- (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least seventeen thousand dollars ~~(\$17,000.00); (\$17,000) or the total net worth of the applicant or firm is at least one hundred seventy-five thousand dollars (\$175,000);~~
- (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant; and
- (4) Provide to the Board an audited financial statement with a classified balance sheet as part of the application, if the applicant or any owner, principal, or qualifier is in bankruptcy or has been in bankruptcy within seven years prior to the filing of the application. This requirement does not apply to shareholders of an applicant that is a publicly traded corporation.

(b) Intermediate License. The applicant for an intermediate license must:

- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
- (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least seventy-five thousand dollars (\$75,000.00), as reflected in an audited financial statement prepared by a certified public accountant or an independent

accountant who is engaged in the public practice of accountancy; and

- (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.

(c) Unlimited License. The applicant for an unlimited license must:

- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
- (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least one hundred fifty thousand dollars (\$150,000.00), as reflected in an audited financial statement prepared by a certified public accountant or an independent accountant who is engaged in the public practice of accountancy;
- (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.

(d) In lieu of demonstrating the required level of working ~~capital; capital or net worth under Paragraph (a)(2) of this Rule.~~ an applicant may obtain a surety bond from a surety authorized to transact surety business in North Carolina pursuant to G.S. 58 Articles 7, 16, 21, or 22. The surety shall maintain a rating from A.M. Best, or its successor rating organization, of either Superior (A++ or A+) or Excellent (A or A-). The bond shall be continuous in form and shall be maintained in effect for as long as the applicant maintains a license to practice general contracting in North Carolina or until the applicant demonstrates the required level of working capital. The application form and subsequent annual license renewal forms shall require proof of a surety bond meeting the requirements of this Rule. The applicant shall maintain the bond in the amount of three hundred fifty thousand dollars (\$350,000) for a limited license, one million dollars (\$1,000,000) for an intermediate license, and two million dollars (\$2,000,000) for an unlimited license. The bond shall list State of North Carolina as obligee and be for the benefit of any person who is damaged by an act or omission of the applicant constituting breach of a construction contract or breach of a contract for the furnishing of labor, materials, or professional services to construction undertaken by the applicant, or by an unlawful act or omission of the applicant in the performance of a construction contract. The bond required by this Rule shall be in addition to and not in lieu of any other bond required of the applicant by law, regulation, or any party to a contract with the applicant. Should the surety cancel the bond, the surety and the applicant both shall notify the Board immediately in writing. If the applicant fails to provide written proof of financial responsibility in compliance with this Rule within 30 days of the bond's cancellation, then the applicant's license shall be suspended until written proof of compliance is provided. After a suspension of two years, the applicant shall fulfill all requirements of a new applicant for licensure. The

practice of general contracting by an applicant whose license has been suspended pursuant to this Rule shall subject the applicant to additional disciplinary action by the Board.

(e) Reciprocity. If an applicant is licensed as a general contractor in another state, the Board, in its discretion, need not require the applicant to successfully complete the written examination as provided by G.S. 87-15.1. However, the applicant must comply with all other requirements of the rules in this Chapter to be eligible to be licensed in North Carolina as a general contractor.

(f) Accounting and reporting standards. Financial statements submitted by applicants to the Board shall conform to United States "generally accepted accounting principles" (GAAP). The Board shall accept non-GAAP financial statements from individual applicants wherein the only exception to GAAP is that assets and liabilities are classified as "current" and "noncurrent." The Board shall accept non-GAAP financial statements from applicants wherein the only exception to GAAP is that the applicant is not combined with a related entity into one financial statement pursuant to FIN 46R. The terminologies, working capital, balance sheet with current and fixed assets, and current and long term liabilities, used herein shall be construed in accordance with those standards referred to as "generally accepted accounting principles" (GAAP) as promulgated by the Financial Accounting Standards Board (FASB). The terminologies, audited financial statements and unqualified opinion, used herein shall be construed in accordance with those standards referred to as "generally accepted auditing standards" (GAAS).

Authority G.S. 87-1; 87-10.

CHAPTER 32 – NC MEDICAL BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Board intends to amend the rules cited as 21 NCAC 32M .0101, .0103-.0104, and .0108.

Link to agency website pursuant to G.S. 150B-19.1(c):
http://www.ncmedboard.org/about_the_board/rule_changes

Proposed Effective Date: August 1, 2012

Public Hearing:

Date: June 15, 2012

Time: 10:00 a.m.

Location: NC Medical Board, 1203 Front Street, Raleigh, NC 27609

Reason for Proposed Action:

21 NCAC 32M .0101 – This amendment will streamline the application process by no longer requiring the Primary Supervisor to sign the NP application. Additionally it adds the American Association of Critical Care Nurses Certification Corporation to the National Credentialing Bodies.

21 NCAC 32M .0103 – This amendment is to change a citation to the correct rule.

21 NCAC 32M .0104, .0108 – This amendment will clarify the process of re-approval to practice for a Nurse Practitioner who has been out of practice for a certain period of time, including reducing the amount of years from 5 to 2 that Nurse Practitioners can be out of practice before they must complete a refresher course approved by the Board of Nursing when reapplying.

Procedure by which a person can object to the agency on a proposed rule: Any person may object to the proposed amendment by attending the public hearing on June 15, 2012 and/or by submitting a written objection by June 15, 2012, to Rules Coordinator, NC Medical Board, 1203 Front Street, Raleigh, NC 27609, fax (919) 326-1131, or email Rules@ncmedboard.org. The NC Medical Board is interested in all comments pertaining to the proposed rules. All persons interested and potentially affected by the proposal are strongly encouraged to read this entire notice and make comments on the proposed rule.

Comments may be submitted to: Wanda Long, NC Medical Board, P. O. Box 20007, Raleigh, NC 27619; phone (919) 326-1100 ext. 212; fax (919) 326-1131; email Rules@ncmedboard.org

Comment period ends: June 15, 2012

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
Analysis submitted to Board of Transportation
- ☐ Local funds affected
Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required

SUBCHAPTER 32M - APPROVAL OF NURSE PRACTITIONERS

21 NCAC 32M .0101 DEFINITIONS

The following definitions apply to this Subchapter:

- (1) "Medical Board" means the North Carolina Medical Board.
 - (2) "Board of Nursing" means the North Carolina Board of Nursing.
 - (3) "Joint Subcommittee" means the subcommittee composed of members of the Board of Nursing and members of the Medical Board to whom responsibility is given by G.S. 90-8.2 and G.S. 90-171.23(b)(14) to develop rules to govern the performance of medical acts by nurse practitioners in North Carolina.
 - (4) "Nurse Practitioner" or "NP" means a currently licensed registered nurse approved to perform medical acts consistent with the nurse's area of nurse practitioner academic educational preparation and national certification under an agreement with a licensed physician for ongoing supervision, consultation, collaboration and evaluation of medical acts performed. Such medical acts are in addition to those nursing acts performed by virtue of registered nurse (RN) licensure. The NP is held accountable under the RN license for those nursing acts that he or she may perform.
 - (5) "Registration" means authorization by the Medical Board and the Board of Nursing for a registered nurse to use the title nurse practitioner in accordance with this Subchapter.
 - (6) "Approval to Practice" means authorization by the Medical Board and the Board of Nursing for a nurse practitioner to perform medical acts within her or his area of educational preparation and certification under a collaborative practice agreement (CPA) with a licensed physician in accordance with this Subchapter.
 - (7) "Supervision" means the physician's function of overseeing medical acts performed by the nurse practitioner.
 - (8) "Collaborative practice agreement" means the arrangement for nurse practitioner-physician continuous availability to each other for ongoing supervision, consultation, collaboration, referral and evaluation of care provided by the nurse practitioner.
 - (9) "Primary Supervising Physician" means the licensed physician ~~who, by signing the nurse practitioner application, who~~ shall provide ongoing supervision, collaboration, consultation and evaluation of the medical acts performed by the nurse practitioner as defined in the collaborative practice agreement. Supervision shall be in compliance with the following:
 - (a) The primary supervising physician shall assure both Boards that the nurse practitioner is qualified to perform those medical acts described in the collaborative practice agreement.
 - (b) A physician in a graduate medical education program, whether fully licensed or holding only a resident's training license, shall not be named as a primary supervising physician.
 - (c) A fully licensed physician in a graduate medical education program who is also practicing in a non-training situation may supervise a nurse practitioner in the non-training situation.
- (10) "Back-up Supervising Physician" means the licensed physician who, by signing an agreement with the nurse practitioner and the primary supervising physician(s), shall provide supervision, collaboration, consultation and evaluation of medical acts by the nurse practitioner in accordance with the collaborative practice agreement when the Primary Supervising Physician is not available. Back-up supervision shall be in compliance with the following:
 - (a) The signed and dated agreements for each back-up supervising physician(s) shall be maintained at each practice site.
 - (b) A physician in a graduate medical education program, whether fully licensed or holding only a resident's training license, shall not be named as a back-up supervising physician.
 - (c) A fully licensed physician in a graduate medical education program who is also practicing in a non-training situation and has a signed collaborative practice agreement with the nurse practitioner and the primary supervising physician may be a back-up supervising physician for a nurse practitioner in the non-training situation.
 - (11) "Volunteer Approval" means approval to practice consistent with this Subchapter except without expectation of direct or indirect compensation or payment (monetary, in kind or otherwise) to the nurse practitioner.
 - (12) "Disaster" means a state of disaster as defined in G.S. 166A-4(1a) and proclaimed by the Governor, or by the General Assembly pursuant to G.S. 166A-6.
 - (13) "National Credentialing Body" means one of the following credentialing bodies that offers certification and re-certification in the nurse practitioner's specialty area of practice: American Nurses Credentialing Center (ANCC); American Academy of Nurse Practitioners (AANP); American Association

of Critical Care Nurses Certification Corporation (AACN); National Certification Corporation of the Obstetric, Gynecologic and Neonatal Nursing Specialties (NCC); and the Pediatric Nursing Certification Board (PNCB).

Authority G.S. 90-8.1; 90-8.2; 90-18(c)(14); 90-18.2.

21 NCAC 32M .0103 NURSE PRACTITIONER REGISTRATION

- (a) The Board of Nursing shall register an applicant who:
- (1) has an unrestricted license to practice as a registered nurse in North Carolina and, when applicable, an unrestricted approval, registration or license as a nurse practitioner in another state, territory, or possession of the United States;
 - (2) has successfully completed a nurse practitioner education program as outlined in Rule .0105 of this Subchapter;
 - (3) is certified as a nurse practitioner by a national credentialing body consistent with 21 NCAC 36 .0120(7) and (9); 36 .0801(13); and
 - (4) has supplied additional information necessary to evaluate the application as requested.
- (b) Beginning January 1, 2005, new graduates of a nurse practitioner program, who are seeking first-time nurse practitioner registration in North Carolina shall:
- (1) hold a Master's or higher degree in Nursing or related field with primary focus on Nursing;
 - (2) have successfully completed a graduate level nurse practitioner education program accredited by a national accrediting body; and
 - (3) provide documentation of certification by a national credentialing body.

Authority G.S. 90-18(c)(14); 90-18.2; 90-171.36.

21 NCAC 32M .0104 PROCESS FOR APPROVAL TO PRACTICE

- (a) Prior to the performance of any medical acts, a nurse practitioner shall:
- (1) meet registration requirements as specified in 21 NCAC 32M .0103 of this Section;
 - (2) submit an application for approval to practice;
 - (3) submit any additional information necessary to evaluate the application as requested; and
 - (4) have a collaborative practice agreement with a primary supervising physician.
- (b) A nurse practitioner seeking approval to practice who has not practiced as a nurse practitioner in more than ~~five~~ two years shall complete a nurse practitioner refresher course approved by the Board of Nursing in accordance with Paragraphs (o) and (p) of 21 NCAC 36 .0220 and consisting of common conditions and their management directly related to the nurse practitioner's area of education and certification.
- (c) The nurse practitioner shall not practice until notification of approval to practice is received from the Board of Nursing after both Boards have approved the application.

(d) The nurse practitioner's approval to practice is terminated when the nurse practitioner discontinues working within the approved nurse practitioner collaborative practice agreement and the nurse practitioner shall notify the Board of Nursing in writing. The Boards may extend the nurse practitioner's approval to practice in cases of emergency such as sudden injury, illness or death of the primary supervising physician.

(e) Applications for approval to practice in North Carolina shall be submitted to the Board of Nursing and then approved by both Boards as follows:

- (1) the Board of Nursing shall verify compliance with Rule .0103 of this Subchapter and Paragraph (a) of this Rule; and
 - (2) the Medical Board shall verify that the designated primary supervising physician holds a valid license to practice medicine in North Carolina and compliance with Subparagraph (a) of this Rule.
- (f) Applications for approval of changes in practice arrangements for a nurse practitioner currently approved to practice in North Carolina:
- (1) addition or change of primary supervising physician shall be submitted to the Board of Nursing and proceed pursuant to protocols developed by both Boards; and
 - (2) request for change(s) in the scope of practice shall be submitted to the Joint Subcommittee.
- (g) A registered nurse who was previously approved to practice as a nurse practitioner in this state who reapplies for approval to practice shall:
- (1) meet the nurse practitioner approval requirements as stipulated in Rule .0108(c) of this Subchapter; and
 - (2) complete the appropriate application.

(h) Volunteer Approval to Practice. The North Carolina Board of Nursing shall grant approval to practice in a volunteer capacity to a nurse practitioner who has met the qualifications to practice as a nurse practitioner in North Carolina.

(i) The nurse practitioner shall pay the appropriate fee as outlined in Rule .0115 of this Subchapter.

(j) A Nurse Practitioner approved under this Subchapter shall keep proof of current licensure, registration and approval available for inspection at each practice site upon request by agents of either Board.

Authority G.S. 90-18(c)(14); 90-18.2; 90-171.20(7); 90-171.23(b); 90-171.42.

21 NCAC 32M .0108 INACTIVE STATUS

- (a) Any nurse practitioner who wishes to place her or his approval to practice on an inactive status shall notify the Board of Nursing.
- (b) A nurse practitioner with an inactive approval to practice status shall not practice as a nurse practitioner.
- (c) A nurse practitioner with an inactive approval to practice status who reapplies for approval to practice shall meet the qualifications for approval to practice in Rules .0103(a)(1), .0104(a) and (b), ~~.0104(a); .0106(b)~~; .0107; and .0110 and (b)(1) of this Subchapter and receive notification from the Board of

Nursing of approval prior to beginning practice after the application is approved by both Boards.

(d) A nurse practitioner ~~with an inactive approval to practice status of greater than five~~ who has not practiced as a nurse practitioner in more than two years shall complete a nurse practitioner refresher course approved by the Board of Nursing in accordance with Paragraphs (o) and (p) of 21 NCAC 36 .0220 and consisting of common conditions and their management directly related to the nurse practitioner's area of education and ~~certification.~~ certification in order to be eligible to apply for approval to practice.

Authority G.S. 90-18(c)(14); 90-18.2; 90-171.36.

CHAPTER 57 – APPRAISAL BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Appraisal Board intends to amend the rules cited as 21 NCAC 57A .0201-.0204, .0211, .0301-.0304, .0407, .0501; 57B .0101-.0103, .0210, .0602-.0603, .0605-.0607, .0611; and 57D .0102, .0311-.0312.

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

Proposed Effective Date: January 1, 2013

Public Hearing:

Date: July 17, 2012

Time: 9:00 a.m.

Location: 5830 Six Forks Road, Raleigh, NC 27609

Reason for Proposed Action: Agency review of rules determined that several rules were unnecessary or needed clarification. The trainee exam is outdated and no longer necessary. The agency sees a need for a mandatory update class to make sure appraisers have current knowledge of state law and Board rules, as well as other topics. Since the new AQB criteria went into effect in 2008, all states must now have the same appraisal curriculum, so there is no longer a need for a five year limit for education. The AQB will now regulate the requirements for trainees, and the proposed rule changes bring the state into compliance with their criteria. Appraisal Management Company (AMC) rules have also been reviewed. There was no provision to cancel an application if required information was sent, and there are applications that have been waiting for a response for over a year. The requirement to send notice to an appraiser only by registered mail and only to the address in the Appraisal Board's records proved to be cumbersome and ineffective. Current rules do not allow an AMC to remove an appraiser from its panel for a business reason unrelated to conduct of the appraiser, which forces AMCs to keep appraisers on its panel when there is no need. In addition, AMCs will have to pay a fee per appraiser per state to the Appraisal Subcommittee, and they wish to purge their panels before that fee is implemented. Clarification was needed

regarding when requests for additional information or other data could be requested.

Procedure by which a person can object to the agency on a proposed rule: Send written comments to Roberta Ouellette, NC Appraisal Board, 5830 Six Forks Road, Raleigh, NC 27609. Email comments to Roberta@ncab.org. Fax to (919) 870-4859. Attend the public hearing on July 17, 2012.

Comments may be submitted to: Roberta Ouellette, 5830 Six Forks Road, Raleigh, NC 27609; phone (919) 870-4854; fax (919) 870-4859; email Roberta@ncab.org

Comment period ends: July 17, 2012

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required

SUBCHAPTER 57A - REGISTRATION LICENSING, CERTIFICATION AND PRACTICE

SECTION .0200 - TRAINEE REGISTRATION, APPRAISER LICENSING AND CERTIFICATION

21 NCAC 57A .0201 QUALIFICATIONS FOR TRAINEE REGISTRATION, APPRAISER LICENSURE AND CERTIFICATION

(a) Applicants for trainee registration and for certification as a certified real estate appraiser must satisfy the qualification requirements stated in G.S. 93E-1-6 and in this Section.

(b) Applicants for trainee registration shall have completed, within the five-year period immediately preceding the date application is made, hours of education as set forth in 21 NCAC 57B .0101 or education found by the Board to be equivalent to

such courses. Applicants for trainee registration must possess a high school diploma or a GED.

(c) Applicants for certification as a certified residential real estate appraiser shall have ~~completed, within the five year period immediately preceding the date application is made, completed~~ 200 hours of education as set forth in 21 NCAC 57B .0102 or education found by the Board to be equivalent to such courses. In addition, applicants for certification as a certified residential real estate appraiser must hold an Associate's degree, or higher, from an accredited college, junior college, community college, or university. In lieu of the Associate's degree requirements, applicants shall have successfully completed 21 semester credit hours in the following collegiate subject matter courses from an accredited college or university: English composition; principles of economics (macro or micro); finance; algebra; geometry or higher mathematics; statistics; introduction of computers, including word processing and spreadsheets; and business or real estate law. Applicants shall have obtained at least 2,500 hours of appraisal experience acquired ~~within the five year period immediately preceding the date application is made and~~ over a minimum period of two calendar years. Applicants must have been engaged in real estate appraising for at least two calendar years prior to the date application is made. At least 50 percent of this appraisal experience must have been of one to four family residential properties in which the sales comparison approach was utilized in the appraisal process.

(d) Applicants for certification as a certified general real estate appraiser shall have completed 300 hours of education as set forth in 21 NCAC 57B .0103 or education found by the Board to be equivalent to such courses. In addition, applicants for certification as a certified general estate appraiser must hold a Bachelor's degree or higher from an accredited college or university. In lieu of the Bachelor's degree requirements, applicants shall have successfully completed 30 semester credit hours in the following collegiate subject matter courses from an accredited college university: English composition, micro economics, macro economics, finance, algebra, geometry or higher mathematics, statistics, introduction of computers, including word processing and spreadsheets, business or real estate law, and two elective courses in accounting, geography, business management or real estate. Applicants shall have obtained at least 3,000 hours of appraisal experience acquired ~~within the five year period immediately preceding the date application is made and~~ over a minimum period of two and a half calendar years of which at least 50 percent must have been in appraising non-residential real estate. Applicants must have been engaged in real estate appraising for at least two and one-half calendar years prior to the date application is made. At least 50 percent of the non-residential appraisal experience must have been of special use properties such as schools, churches, or hospitals in which the income approach is not applicable or of improved properties in which the income approach was utilized in the appraisal process.

(e) Applicants for certification who are currently registered trainees must submit a copy of their complete appraisal log. Applicants for certification who are currently licensed or certified appraisers must submit an appraisal log showing that they possess the requisite amount and length of experience as set forth in Paragraphs (c) and (d) of this Rule. All applicants shall

provide to the Board copies of appraisal reports and work files in support of experience credit. In order for an appraisal to be given experience credit, it must comply with the Uniform Standards of Professional Appraisal Practice (USPAP) and with any applicable state statutes or rules.

(f) When a trainee or a licensed real estate appraiser becomes a certified real estate appraiser, his previous registration or licensure shall be immediately canceled by the Board. When a certified residential real estate appraiser becomes certified as a general real estate appraiser, his previous certification shall be immediately canceled by the Board.

(g) In the event that the Board asks an applicant to submit updated information or provide further information necessary to complete the application and the applicant fails to submit such information within 90 days following the Board's request, the Board shall cancel the applicant's application and the application fee shall be retained by the Board. An applicant whose application has been cancelled and who wishes to obtain a registration or certificate must start the licensing process over by filing a complete application with the Board and paying all required fees.

(h) An applicant may request that his or her application be withdrawn at any time before final action is taken by the Appraisal Board on the application.

~~(i) If an application is withdrawn, cancelled or denied, the applicant must wait six months from the date the application is withdrawn, cancelled or denied to file a new application.~~

~~(i)~~(i) If an applicant has a current open complaint before the North Carolina Appraisal Board or an appraiser licensing board from any other state, or if the applicant has pending criminal charges in this or any state, the application shall be accepted but no further action shall be taken on the application until the complaint or criminal charges are resolved. For the purposes of this Section, criminal charges do not include speeding tickets or traffic infractions.

Authority G.S. 93E-1-6(a); 93E-1-10.

21 NCAC 57A .0202 FITNESS FOR REGISTRATION OR CERTIFICATION

(a) The Appraisal Board shall consider the fitness for registration or certification of each ~~applicant who has passed the appropriate examination.~~ applicant. When the fitness of an applicant is in question, action by the Board shall be deferred until the applicant has affirmatively demonstrated that the applicant possesses the requisite competency, truthfulness, honesty and integrity.

(b) When the application is deferred, the Board shall notify the applicant and the applicant shall be entitled to demonstrate his or her competency or fitness for registration or certification at a hearing before the Board.

(c) The inquiry into fitness for registration or certification may include consideration of whether the applicant has had any disciplinary action taken against any professional license in North Carolina or any other state, or whether the applicant has committed or done any act which, if committed or done by any real estate trainee or appraiser, would be grounds under the provisions hereinafter set forth for disciplinary action including the suspension or revocation of registration, licensure, or

certification, whether the applicant has been convicted of or pleaded guilty to any criminal act, or whether any such actions or charges are pending.

(d) All applicants for registration or certification shall obtain a criminal records check from Carolina Investigative Research, Inc., an agency designated by the Appraisal Board to provide criminal record reports. This records check must have been performed within 60 days of the date the completed application for registration or certification is received by the Board. Applicants shall pay the designated reporting service for the cost of these reports.

(e) Notice to the applicant that his or her competency or fitness for registration or certification is in question shall be in writing, sent by certified mail, return receipt requested, to the address shown upon the application. The applicant shall have 60 days from the date of receipt of this notice to request a hearing before the Board. Failure to request a hearing within this time constitutes a waiver of the applicant's right to a hearing on his or her application for registration or certification, and the application shall be deemed denied. Nothing in this Rule shall be interpreted to prevent an applicant from reapplying for registration or certification.

Authority G.S. 93E-1-10.

21 NCAC 57A .0203 REGISTRATION, LICENSE AND CERTIFICATE RENEWAL

(a) All registrations, licenses and certificates expire on June 30 of each year unless renewed before that time.

(b) A holder of a trainee registration, an appraiser license or certificate desiring the renewal of such registration, license or certificate shall apply for same in writing upon the form provided by the Board and shall forward the renewal fee as prescribed in G.S. 93E-1-7(a). Forms are available upon request to the Board. The renewal fee is not refundable under any circumstances.

(c) All trainees, licensees and certificate holders, either resident or non-resident, who are required by G.S. 93E-1-7 to complete continuing education as a condition of renewal, must satisfy the continuing education requirements set forth in Rule .0204 of this Section.

(d) An applicant for renewal who initially ~~obtained qualified for his license or certificate by reciprocity licensure or certification with another state~~ may keep that license or certificate even if the applicant has moved to a different state, as long as the North Carolina license or certificate is continuously renewed pursuant to this section. Such an applicant for renewal does not have to maintain licensure with the appraiser regulatory authority of the state upon whose qualification requirements the ~~reciprocal~~ license or certificate was granted.

(e) Any person who acts or holds himself out as a registered trainee, licensed or certified real estate appraiser while his trainee registration, appraiser license or certificate is expired shall be subject to disciplinary action and penalties as prescribed in G.S. 93E.

Authority G.S. 93E-1-7(a),(b); 93E-1-10.

21 NCAC 57A .0204 CONTINUING EDUCATION

(a) All registered trainees, real estate appraiser licensees and certificate holders shall, upon the renewal of their registration, license or certificate in every odd-numbered year, present evidence satisfactory to the Board of having obtained continuing education as required by this Section. Trainees and appraisers who initially registered with the Board after January 1 of an odd numbered year are not required to show continuing education credit for renewal of their registration in that odd numbered year.

(b) Each trainee, licensee and certificate holder who must complete continuing education pursuant to Paragraph (a) of this Rule must complete 28 hours of continuing education before June 1 of every odd numbered year. Seven of the required 28 hours must be obtained by completing a mandatory update course developed by the Board in accordance with 21 NCAC 57B .0603(12). Except as provided in Paragraphs (g) and (h) of this Rule, such education must have been obtained by taking courses approved by the Board for continuing education purposes, at schools approved by the Board to offer such courses. Such education must relate to real estate appraisal and must contribute to the goal of improving the knowledge, skill and competence of trainees, and licensed and certified real estate appraisers. There is no exemption from the continuing education requirement for trainees or appraisers whose registered, licensed or certified status has been upgraded to the level of licensed residential, certified residential or certified general appraiser since the issuance or most recent renewal of their registration, license or certificate, and courses taken to satisfy the requirements of a higher level of certification shall not be applied toward the continuing education requirement. Trainees, licensees and certificate holders shall not take the same continuing education course more than once during the two year continuing education cycle.

(c) Each appraisal continuing education course must involve a minimum of three and one-half classroom hours of instruction on real estate appraisal or related topics such as the application of appraisal concepts and methodology to the appraisal of various types of property; specialized appraisal techniques; laws, rules or guidelines relating to appraisal; standards of practice and ethics; building construction; financial or investment analysis; land use planning or controls; feasibility analysis; statistics; accounting; or similar topics. The trainee, license or certificate holder must have attended at least 90 percent of the scheduled classroom hours for the course in order to receive credit for the course.

(d) Each trainee, licensee and certificate holder who is required to complete continuing education pursuant to Paragraph (a) of this Rule must, as part of the 28 hours of continuing education required in Paragraph (b) of this Rule, complete the seven hour National USPAP update ~~course, course between October 1 of an odd-numbered year and June 1 of an even numbered year, as required by the Appraiser Qualifications Board of the Appraisal Foundation, or its equivalent, prior to June 1 of every even numbered year.~~ equivalent. USPAP is updated every other even numbered year, and each trainee, licensee and certificate holder shall take the most recent USPAP update course prior to June 1 of every even numbered year.

(e) A licensee who elects to take approved continuing education courses in excess of the requirement shall not carry over into the subsequent years any continuing education credit.

(f) Course sponsors must provide a certificate of course completion to each trainee, licensee and certificate holder successfully completing a course. In addition, course sponsors must send directly to the Board a certified roster of all who successfully completed the course. This roster must be sent within 15 days of completion of the course, but not later than June 15 of each year. In order to renew a registration, license or certificate in a timely manner, the Board must receive proper proof of satisfaction of the continuing education requirement prior to processing a registration, license or certificate renewal application. If proper proof of having satisfied the continuing education requirement is not provided, the registration, license or certificate shall expire and the trainee, licensee or certificate holder shall be subject to the provisions of Rules .0203(e) and .0206 of this Section.

(g) A current or former trainee, licensee or certificate holder may request that the Board grant continuing education credit for a course taken by the trainee, licensee or certificate holder that is not approved by the Board, or for appraisal education activity equivalent to a Board-approved course, by making such request and submitting a non-refundable fee of fifty dollars (\$50.00) as set out in G.S. 93E-1-8(d) for each course or type of appraisal education activity to be evaluated. Continuing education credit for a non-approved course shall be granted only if the trainee, licensee or certificate holder provides satisfactory proof of course completion and the Board finds that the course satisfies the requirements for approval of appraisal continuing education courses with regard to subject matter, course length, instructor qualifications, and student attendance. Appraisal education activities for which credit may be awarded include teaching appraisal courses, authorship of appraisal textbooks, and development of instructional materials on appraisal subjects. Up to 14 hours of continuing education credit may be granted in each continuing education cycle for participation in appraisal education activities. Trainees or licensed or certified appraisers who have taught an appraisal course or courses approved by the Board for continuing education credit are deemed to have taken an equivalent course and are not subject to the fee prescribed in G.S. 93E-1-8 (d), provided they submit verification satisfactory to the Board of having taught the course(s). A trainee, licensee or certificate holder who teaches a Board-approved continuing education course may not receive continuing education credit for the same course more than once every two years, regardless of how often he teaches the course. Requests for equivalent approval for continuing education credit must be received before June 15 of an odd-numbered year to be credited towards the continuing education requirement for that odd-numbered year. Equivalent approval shall be granted only for courses that are 7 hours or longer, and shall only be granted for a minimum of 7 hours.

(h) A trainee, licensee or certificate holder may receive continuing education credit by taking any of the Board-approved precertification courses, other than Basic Appraisal Principles and Basic Appraisal Procedures, or their approved equivalents. ~~These courses shall not be used for both continuing education credit and for credit for licensing purposes.~~ Trainee, licensees

and certificate holders who wish to use a precertification course for continuing education credit must comply with the provisions of 21 NCAC 57B .0604.

(i) ~~A trainee, licensee or~~ certificate holder who resides in another ~~state state~~, and is currently ~~licensed by the appraiser certification board of that state~~ credentialed in another state and is active on the National Registry in another state may satisfy the requirements of this section by providing a current letter of good standing from ~~the resident~~ another state showing that the licensee has met all continuing education requirements in the ~~resident other state~~, state, including the most recent edition of USPAP. A ~~trainee~~, licensee or certificate holder who became licensed in North Carolina by reciprocity licensure or certification with another state and now resides in North Carolina may renew by letter of good standing for his or her first renewal as a resident of North Carolina only if the ~~trainee or~~ appraiser moved to North Carolina on or after January 1 of an odd numbered year. If ~~a trainee or an~~ appraiser was a resident of this state before January 1 of an odd-numbered year, the ~~trainee or~~ appraiser must comply with the requirements of this section regardless of how the ~~registration~~, license or certificate was obtained.

(j) A trainee, licensee or certificate holder who returns from active military duty on or after February 1 of an odd-numbered year is allowed to renew his or her registration, license or certificate in that odd-numbered year even if the required continuing education is not completed before June 1 of that year. All required continuing education must be completed within 180 days of when the trainee, licensee or certificate holder returns from active duty. Failure to complete the required continuing education within 180 days is grounds for revocation. This Rule applies to an individual who is serving in the armed forces of the United States and to whom G.S. 105-249.2 grants an extension of time to file a tax return.

Authority G.S. 93B-15; 93E-1-7(a); 93E-1-10.

21 NCAC 57A .0211 APPLICANTS CERTIFIED IN ANOTHER STATE

(a) Applicants for ~~registration, licensure~~ certification who are not residents of North Carolina must file an application as stated in Rule .0101 of this Subchapter. In addition, nonresident applicants must also consent to service of process in this state and file an affidavit of residency with the application. If the applicant is licensed by the appraiser licensing board of the applicant's resident state, the applicant must also file with the application a letter of good standing from the appraiser licensing board of the resident, which was issued under seal by that licensing board no later than 30 days prior to ~~within 30 days of~~ the date application is made in this state.

(b) Applicants for certification who are residents of North Carolina and who are certified in another state may file an application as stated in Rule .0101. The applicant must file a letter of good standing from the other state, which was issued under seal by that licensing board no later than 30 days prior to the date of application is made in this state.

~~(b)(c)~~ Applicants for registration or certification shall obtain a criminal records check from Carolina Investigative Research, Inc., an agency designated by the Appraisal Board to provide

criminal record reports. This records check must have been performed within 60 days of the date the completed application for registration or certification is received by the Board. Applicants shall pay the designated reporting service for the cost of these reports.

~~(e)(d)~~ An appraiser whose certification is suspended in North Carolina may not apply for certification in this state under this Rule while the certification is suspended. An appraiser whose certification was revoked in North Carolina may not apply for certification in this state under this Rule for five years after the date of revocation.

Authority G.S. 93E-1-9(a) and (b); 93E-1-10; Title XI, Section 1122(a); 12 U.S.C. 3351(a).

SECTION .0300 - APPRAISER EXAMINATIONS

21 NCAC 57A .0301 TIME AND PLACE

(a) Applicants who have completed the education and experience requirements for certification as set forth in 21 NCAC 57A .0201 shall be issued an examination approval form. The examination approval form is valid for three attempts at the examination or for one year from date of issuance, whichever comes first.

(b) Examinations for ~~real estate trainee registrations and~~ appraiser certificates shall be scheduled at such times and places as determined by the Executive Director and the Board-approved private testing service. Applicants for the examination shall be scheduled for examination based on their successful completion of appraiser educational qualification requirements stated in G.S. 93E-1-6 and filing an application with the Board. Violation of examination procedures and instructions is grounds for denial, suspension or revocation of a ~~registration or~~ certificate.

(c) Examination results are valid for 24 months from the date the examination is successfully completed.

Authority G.S. 93E-1-6(c); 93E-1-10.

21 NCAC 57A .0302 SUBJECT MATTER AND PASSING SCORES

(a) The examination for ~~trainee registration and for~~ certification as a certified residential real estate appraiser shall test applicants on the following subject areas:

- (1) Influences on Real Estate Value;
- (2) Legal Considerations in Appraisal;
- (3) Types of Value;
- (4) Economic Principles;
- (5) Real Estate Markets and Analysis;
- (6) Valuation Process;
- (7) Property Description;
- (8) Highest and Best Use Analysis;
- (9) Appraisal Statistical Concepts;
- (10) Sales Comparison approach;
- (11) Site Value;
- (12) Cost Approach;
- (13) Income Approach (Gross Rent Multipliers, Estimation of Income and Expenses, Operating Expense ratios);
- (14) Valuation of Partial Interests; and

(15) Appraisal Standards and Ethics.

(b) In addition to the subject areas listed in Paragraph (a) of this Rule, the examination for certification as a certified general real estate appraiser shall test applicants on the following subject areas:

- (1) Direct Capitalization;
- (2) Cash Flow Estimates;
- (3) Measures of Cash Flow; and
- (4) Discounted Cash Flow Analysis.

(c) The testing service shall inform applicants whether they have passed the examination, and shall inform them of their actual score only if they fail the examination.

Authority G.S. 93E-1-6(c); 93E-1-10.

21 NCAC 57A .0303 RE-EXAMINATION

(a) Applicants for ~~a trainee registration or~~ an appraiser certificate who fail to pass or appear for any examination for which the applicant has been scheduled by the Board-approved private testing service, may schedule a subsequent examination and shall pay the prescribed examination testing fees to the Board-approved private testing service.

(b) Applicants may take the examination no more than three times per application. If an applicant fails the examination, the applicant must wait a minimum of 30 days before retaking the examination. If the applicant does not pass the examination by the third attempt at the examination or within one year of the date of issuance of the examination approval form, the application is cancelled. ~~If the application is cancelled, the applicant must wait six months before filing a new application for registration or certification and must meet all the qualification requirements for original approval.~~

Authority G.S. 93E-1-6; 93E-1-10.

21 NCAC 57A .0304 CHEATING AND RELATED MISCONDUCT

Applicants shall not cheat or attempt to cheat on an examination by any means, including both giving and receiving assistance, and shall not communicate in any manner for any purpose with any person other than an examination supervisor during an examination. Violation of this Rule shall be grounds for dismissal from an examination, invalidation of examination scores, and denial of ~~a trainee registration, an~~ appraiser ~~license or~~ certificate, as well as for disciplinary action if the applicant holds a trainee registration, an appraiser license or certificate.

Authority G.S. 93E-1-6(c); 93E-1-10.

SECTION .0400 - GENERAL APPRAISAL PRACTICE

21 NCAC 57A .0407 SUPERVISION OF TRAINEES

(a) A ~~licensed or~~ certified real estate appraiser may engage a registered trainee to assist in the performance of real estate appraisals, provided that the ~~licensed or certified real estate~~ appraiser:

- (1) has been ~~licensed or~~ certified for at least ~~two~~ three years;

- (2) has no more than ~~one trainee working under his or her supervision at any one time, if the supervisor is a licensed real estate appraiser, three trainees working under him at any one time.~~ A certified residential appraiser may have two trainees working under his or her supervision at any one time. Once at least one of those trainees has completed 50 percent of the required appraisal experience to upgrade, a certified residential appraiser may add another trainee. ~~At no time may a certified residential appraiser have more than three trainees working under his or her supervision.~~ A certified general appraiser may have three trainees working under his or her supervision. Prior to the date any trainee begins performing appraisals under his or her supervision, the supervisor must inform the Board of the name of the trainee. The supervisor must also inform the Board when a trainee is no longer working under his or her supervision;
- (3) actively and personally supervises the trainee on all appraisal reports and appraisal related activities until the trainee is no longer under his or her supervision;
- (4) reviews all appraisal reports and supporting data used in connection with appraisals in which the services of a trainee is utilized, and assures that research of general and specific data has been adequately conducted and properly reported, application of appraisal principles and methodologies has been properly applied, that the analysis is sound and adequately reported, and that any analysis, opinions, or conclusions are adequately developed and reported so that the appraisal report is not misleading;
- (5) complies with all provisions of Rule .0405 of this Section regarding appraisal reports;
- (6) ~~prepares and furnishes to each trainee, whose services were utilized in connection with the appraisal, a report describing the nature and extent of assistance rendered by the trainee in connection with the appraisal, and places a copy of such report in the supporting file for the appraisal within 30 days of the date the appraisal report was signed.~~ reviews and signs the trainee's log of appraisals, which must be updated at least every 30 days. In addition, the supervisor must make available to the trainee a copy of every appraisal report where the trainee performs more than 75 percent of the work on the appraisal; and
- (7) has not received any disciplinary action regarding his or her appraisal license or certificate from the State of North Carolina or any other state within the previous ~~two~~ three years. For the purposes of this Section, disciplinary action means an active ~~suspension~~ or a revocation, suspension, a downgrade of a credential or a revocation.
- (b) Active and personal supervision includes direction, guidance, and support from the supervisor. The supervising appraiser shall have input into and full knowledge of the appraisal report prior to its completion, and shall make any necessary and appropriate changes to the report before it is transmitted to the client. In addition, the supervisor must accompany the trainee on the inspections of the subject property on the first 50 appraisal assignments or the first 1500 hours of experience, whichever comes first, for which the trainee will perform more than 75 percent of the work. After that point, the trainee may perform the inspections without the presence of the supervisor provided that the trainee is competent to perform those inspections, and provided that the subject property is less than 50 miles from the supervisor's primary business location. The supervisor must accompany the trainee on all inspections of subject properties that are located more than 50 miles from the supervisor's primary business location.
- (c) The trainee must maintain a log on a form that includes each appraisal performed by the trainee, the type of property appraised, type of appraisal performed, complete street address of the subject property, the date the report was signed, the ~~points~~ experience hours claimed, the name of the supervisor for that appraisal, the supervisor's license or certificate number, and whether the supervisor accompanied the trainee on the inspection of the subject. The log must show all appraisals performed by the trainee and must be updated at least every 30 days.
- (d) An appraiser who wishes to supervise a trainee must attend an education program offered by the Appraisal Board regarding the role of a supervisor either before such supervision begins, or within 90 days after such supervision begins. If the supervisor does not take the class within 90 days after the supervision begins, a trainee may no longer work under the supervision of that supervisor until the class is taken.
- (e) Trainees must assure that the supervisor has completed and sent the Supervisor Declaration Form to the Appraisal Board on or before the day the trainee begins assisting the supervising appraiser. Trainees shall not receive appraisal experience credit for appraisals performed in violation of this Paragraph.
- (f) Supervising appraisers shall not be employed by a trainee or by a company, firm or partnership in which the trainee has a controlling interest.
- (g) If a trainee signs an appraisal report or provides significant professional assistance in the appraisal process and thus is noted in the report as having provided such assistance, ~~all licensed and certified appraisers signing that appraisal report must have notified the Appraisal Board before the appraisal is signed that they are supervisors for the trainee.~~ the appraiser signing the report must have notified the Appraisal Board before the appraisal is signed that he or she is the supervisor for the trainee. If more than one appraiser signs the report, the appraiser with the highest level of credential must be the declared supervisor for the trainee. If all appraisers signing the report have the same level of credential, at least one of them must be declared as the trainee's supervisor before the report is signed.

Authority G.S. 93E-1.6.1; 93E-1-10.

SECTION .0500 - STANDARDS OF APPRAISAL PRACTICE

21 NCAC 57A .0501 APPRAISAL STANDARDS

Every registered trainee, and licensed and certified real estate appraiser shall, in performing the acts and services of a registered trainee, or licensed or certified real estate appraiser, comply with the following provisions of the "Uniform Standards of Professional Appraisal Practice" promulgated by the Appraisal Standards Board of the Appraisal Foundation: Definitions, Preamble, Ethics Rule, Record Keeping Rule, Competency Rule, Scope of Work Rule, Jurisdictional Exception Rule, Statements on Appraisal Standards, and Standards Rules 1, 2 and 3, all of which are hereby incorporated by reference. This incorporation by reference includes subsequent amendments and editions of those provisions.

Authority G.S. 93E-1-10.

SUBCHAPTER 57B - REAL ESTATE APPRAISAL EDUCATION

SECTION .0100 - COURSES REQUIRED FOR REGISTRATION, LICENSURE AND CERTIFICATION

21 NCAC 57B .0101 REGISTERED TRAINEE COURSE REQUIREMENTS

(a) Each applicant for registration as a trainee shall complete a minimum of 90 hours of precertification education, consisting of the following;

- (1) A minimum of 30 hours in Basic Appraisal Principles;
- (2) A minimum of 30 hours in Basic Appraisal Procedures;
- (3) A minimum of 15 hours in Residential Market Analysis and Highest and Best Use; Use or 30 hours in General Appraiser Market Analysis and Highest and Best Use; and
- (4) A minimum of 15 hours in The Uniform Standards of Professional Appraisal Practice (USPAP).

(b) Credit for these courses must be earned from a Board-approved course sponsor or school and all course content shall be approved by the Appraisal Board in accordance with the rules in this Subchapter. These courses must be completed within the five-year period immediately preceding the date when application for registration is made to the Board.

(c) Basic Appraisal Principles shall be a prerequisite to taking Basic Appraisal Procedures, and Basic Appraisal Procedures shall be a prerequisite to taking either Residential or General Market Analysis and Highest and Best Use. The 15 hour USPAP course may be taken any time after the successful completion of Basic Appraisal Procedures.

(d) These four courses must have been obtained in a classroom setting. No credit will be given for these courses taken by any other method, such as correspondence school courses or on-line courses.

Authority G.S. 93E-1-6(a); 93E-1-8(a); 93E-1-10.

21 NCAC 57B .0102 CERTIFIED RESIDENTIAL REAL ESTATE APPRAISER COURSE REQUIREMENTS

(a) Each applicant for certification as a certified residential real estate appraiser shall complete a minimum of 200 hours of precertification education, consisting of the following:

- (1) A minimum of 30 hours in Basic Appraisal Principles;
- (2) A minimum of 30 hours in Basic Appraisal Procedures;
- (3) A minimum of 15 hours in Residential Market Analysis and Highest and Best Use;
- (4) A minimum of 15 hours in Residential Appraiser Site Valuation and Cost Approach;
- (5) A minimum of 30 Hours in Residential Sales Comparison and Income Approaches;
- (6) A minimum of 15 hours in Residential Report Writing and Case Studies; ~~and~~
- (7) A minimum of 15 hours in The Uniform Standards of Professional Appraisal Practice (USPAP);
- (8) A minimum of 15 hours in Statistics, Modeling and Finance;
- (9) A minimum of 15 hours in Advanced Residential Applications and Case Studies; and
- (10) A minimum of 20 hours of appraisal subject matter electives.

Credit for these courses must be earned from a Board-approved course sponsor or school.

(b) An applicant who is currently registered with the Board as a trainee shall satisfy the educational requirements to become a certified residential real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in Residential Appraiser Site Valuation and Cost Approach;
- (2) A minimum of 30 Hours in Residential Sales Comparison and Income Approaches;
- (3) A minimum of 15 hours in Residential Report Writing and Case Studies;
- (4) A minimum of 15 hours in Statistics, Modeling and Finance;
- (5) A minimum of 15 hours in Advanced Residential Applications and Case Studies; and
- (6) A minimum of 20 hours of appraisal subject matter electives.

(c) An applicant who is currently a licensed residential appraiser shall satisfy the educational requirements to become a certified residential real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in Statistics, Modeling and Finance;
- (2) A minimum of 15 hours in Advanced Residential Applications and Case Studies; and
- (3) A minimum of 20 hours of appraisal subject matter electives.

(d) An applicant who is not currently registered by the Board as a trainee or who is not currently licensed by the Board as a

licensed residential real estate appraiser must have completed all required courses ~~within the five year period immediately preceding the date application is made to the Board, no earlier than January 1, 2013.~~

(e) An applicant who is currently registered by the Board as a trainee or who is currently licensed by the Board as a licensed residential real estate appraiser must have completed all courses required beyond those required for his current registration, licensure or certification ~~within the five year period immediately preceding the date application is made to the Board, no earlier than January 1, 2013.~~

(f) The Basic Appraisal Principles, Basic Appraisal Procedures, Residential Market Analysis, USPAP and Residential Sales Comparison and Income Approach classes must have been obtained in a classroom setting. All other courses in this section may be taken on-line via the Internet.

Authority G.S. 93E-1-6(b); 93E-1-8(a); 93E-1-10.

21 NCAC 57B .0103 CERTIFIED GENERAL REAL ESTATE APPRAISER COURSE REQUIREMENTS

(a) An applicant for certification as a certified general real estate appraiser shall complete the following precertification courses;

- (1) A minimum of 30 hours in Basic Appraisal Principles;
- (2) A minimum of 30 hours in Basic Appraisal Procedures;
- (3) A minimum of 30 hours in General Appraiser Market Analysis and Highest and Best Use;
- (4) A minimum of 15 hours in Statistics, Modeling and Finance;
- (5) A minimum of 30 hours in General Appraiser Sales Comparison Approach;
- (6) A minimum of 30 hours in General Appraiser Site Valuation and Cost Approach;
- (7) A minimum of 60 hours in General Appraiser Income Approach;
- (8) A minimum of 30 hours in General Appraiser Report Writing and Case Studies;
- (9) A minimum of 30 hours of appraisal subject matter electives; and
- (10) A minimum of 15 hours in The Uniform Standards of Professional Appraisal Practice (USPAP).

Credit for all courses must be earned from a Board-approved course sponsor or school, and all courses shall comply with the course content standards prescribed in Rule .0302 of this Subchapter.

(b) An applicant who is currently registered with the Board as a trainee shall satisfy the educational requirements to become a general real estate appraiser by completing the following education:

- (1) A minimum of 30 hours in General Appraiser Market Analysis and Highest and Best Use;
- (2) A minimum of 15 hours in Statistics, Modeling and Finance;
- (3) A minimum of 30 hours in General Appraiser Sales Comparison Approach;

- (4) A minimum of 30 hours in General Appraiser Site Valuation and Cost Approach;
- (5) A minimum of 60 hours in General Appraiser Income Approach; and
- (6) A minimum of 30 hours in General Appraiser Report Writing and Case Studies; and
- (7) A minimum of 30 hours of appraisal subject matter electives.

(c) An applicant who is currently licensed with the Board as a licensed residential real estate appraiser shall satisfy the educational requirements to become a general real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in General Appraiser Market Analysis and Highest and Best Use;
- (2) A minimum of 15 hours in Statistics, Modeling and Finance;
- (3) A minimum of 15 hours in General Appraiser Sales Comparison Approach;
- (4) A minimum of 15 hours in General Appraiser Site Valuation and Cost Approach;
- (5) A minimum of 45 hours in General Appraiser Income Approach;
- (6) A minimum of 15 hours in General Appraiser Report Writing and Case Studies; and
- (7) A minimum of 30 hours of appraisal subject matter electives.

(d) An applicant who is currently certified with the Board as a certified residential real estate appraiser shall satisfy the educational requirements to become a general real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in General Appraiser Market Analysis and Highest and Best Use;
- (2) A minimum of 15 hours in General Appraiser Sales Comparison Approach;
- (3) A minimum of 15 hours in General Appraiser Site Valuation and Cost Approach;
- (4) A minimum of 45 hours in General Appraiser Income Approach; and
- (5) A minimum of 10 hours in General Appraiser Report Writing and Case Studies.

(e) An applicant who is not currently registered by the Board as a trainee or who is not currently licensed or certified by the Board as a licensed residential or certified residential real estate appraiser must have completed all the required courses ~~within the five year period immediately preceding the date application is made to the Board, no earlier than January 1, 2013.~~

(f) An applicant who is currently registered by the Board as a trainee or who is not currently licensed or certified by the Board as a licensed residential or certified residential real estate appraiser must have completed all courses required beyond those required for his current registration, licensure or certification ~~within the five year period immediately preceding the date application is made to the Board, no earlier than January 1, 2013.~~

(g) The Basic Appraisal Principles, Basic Appraisal Procedures, USPAP, and General Appraiser Income Approach classes must have been obtained in a classroom setting. All other courses in this section may be taken on-line via the Internet.

Authority G.S. 93E-1-6(c); 93E-1-8(a); 93E-1-10.

**SECTION .0200 - COURSE SPONSOR STANDARDS
FOR PRELICENSING AND PRECERTIFICATION
EDUCATION**

21 NCAC 57B .0210 COURSE RECORDS

Schools and course sponsors must:

- (1) retain on file for five years copies of all grade and attendance records for each approved course and must make such records available to the Board upon request;
- (2) retain on file for two years a master copy of each final course examination, and such file copy shall indicate the answer key, course title, course dates and name of instructor. Examination file copies shall be made available to the Board upon request;
- (3) within 15 days of course completion, but not later than June 15 of each year, submit to the Board a roster of all students who satisfactorily completed the course; course along with the course evaluations. Rosters and evaluations must be sent together by mail, not by fax or other electronic means; and
- (4) participate in the Board's course and instructor evaluation program. Schools and course sponsors shall provide each student with a course evaluation form upon completion of the course, and shall tally the results of the evaluation forms onto one form. Schools and course sponsors shall send the completed course evaluation forms and the tally to the Board within 15 days of course completion. contact information for the Appraisal Board so that students may contact the Board with questions or concerns regarding the course.

Authority G.S. 93E-1-8(a); 93E-1-10.

SECTION .0600 - CONTINUING EDUCATION COURSES

21 NCAC 57B .0602 APPLICATION AND FEE

- (a) Course sponsors seeking approval of their courses as appraisal continuing education courses must make written application to the Board. A course sponsor must be the owner of the proprietary rights to the course for which approval is sought or must have the permission of the course owner to seek course approval. If the course for which approval is sought is one that may be offered outside North Carolina, and the course owner wants the Board to approve such course when it is conducted outside North Carolina, application must be made by the course owner. After receipt of a properly completed application, the Board will review the application pursuant to the criteria set forth in 21 NCAC 57B .0603 and shall notify the sponsor of its decision.
- (b) The original application fee shall as prescribed in G.S. 93E-1-8(d) for each course for which approval is sought, provided that no fee is required if the course sponsor is an accredited

North Carolina college, university, junior college, or community or technical college, or if the course sponsor is an agency of the federal, state or local government. The fee is non-refundable. A course sponsor may offer approved courses as frequently as is desired during the period for which approval is granted without paying additional fees.

(c) Each application must be accompanied by copies of all course materials, including handbooks, slides, overheads, and other non-published materials. The application must also include the title, author, publisher and edition for each published textbook. Each application must also have a timed outline for the course.

(d) The application must state the name of the instructor for the course.

(e) Application for approval of the Board's update course shall be made by July 1 of every odd-numbered year for the two year continuing education cycle that begins on July 1 of the odd-numbered year. Update course approval shall be for one year with an automatic one year renewal, so as to expire on June 30 of the following odd-numbered year.

Authority G.S. 93E-1-8(c),(d).

**21 NCAC 57B .0603 CRITERIA FOR COURSE
APPROVAL**

The following requirements must be satisfied in order for course sponsors to obtain approval of a course for appraiser continuing education credit:

- (1) The subject matter of the course must comply with the requirements of Rule .0204 of Subchapter 57A and the information to be provided in the course must be both accurate and current.
- (2) The course must involve a minimum of three and one-half classroom hours of instruction on acceptable subject matter. A classroom hour consists of 50 minutes of classroom instruction and 10 minutes of break time. Instruction must be given for the full number of hours for which credit is given. Instructors may not accumulate unused break time to end the class early.
- (3) The course instructor(s) must:
 - (a) possess the fitness for licensure required of applicants for trainee registration, real estate appraiser licensure or certification; and
 - (b) either:
 - (i) two years' full-time experience that is directly related to the subject matter to be taught;
 - (ii) a baccalaureate or higher degree in a field that is directly related to the subject matter to be taught;
 - (iii) two years' full-time experience teaching the subject matter to be taught;

- (iv) an equivalent combination of such education and experience; or
 - (v) be approved by the Board pursuant to 57B. 0606(11).
- (4) If two or more instructors shall be utilized to teach a course during the approval period and the course shall be taught in states other than North Carolina, it is sufficient for the course sponsor to show that it has minimum instructor requirements comparable to these requirements. The inquiry into fitness shall include consideration of whether the instructor has had any disciplinary action taken on his or her appraisal license or any other professional license in North Carolina or any other state, or whether the instructor has been convicted of or pleaded guilty to any criminal act.
- (5) The course must be one involving a qualified instructor who, except as noted in Item (6) of this Rule, shall be physically present in the classroom at all times and who shall personally provide the instruction for the course. The course instructor may utilize videotape instruction, remote television instruction or similar types of instruction by other persons to enhance or supplement his personal instruction; however, such other persons shall not be considered to be the course instructor and the course instructor must be physically present when such indirect instruction by other persons is being utilized. No portion of the course may consist of correspondence instruction. The instructor must comply with Rule .0306(c) of this Subchapter. Instructors for the National USPAP courses must be certified by the Appraiser Qualifications Board of the Appraisal Foundation. Current Appraisal Board members shall not teach continuing education courses during their term of office on the Board.
- (6) A trainee or appraiser may receive up to 14 hours of credit every two years in the period ending on June 1 of each odd numbered year for participation in a course offered on-line via the Internet. A sponsor seeking approval of a computer-based education course must provide the Board access to the course via the internet at a date and time satisfactory to the Board and the Board shall not be charged any fee for such access. To be approved for credit, an on-line course must meet all of the conditions imposed by the Rules in this Subchapter in advance, except where otherwise noted. The course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and other participants. The sponsor of an on-line course must have a reliable method for recording and verifying attendance. A participant may periodically log on and off of an on-line continuing education course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. The course design and delivery mechanism for an on-line course offered on the Internet must have received approval from the International Distance Education Certification Center (IDECC). A course completion certificate must be forwarded to the student as stated in Rule .0607 of this Section, and a course roster must be sent to the Appraisal Board in accordance with Rule .0608 of this Section.
- (7) The course must be an educational program intended to improve the knowledge, skill and competence of trainees, and licensed and certified real estate appraisers. Activities not eligible for approval as a continuing education course include in-house training programs of a firm, organization or agency, trade conferences or similar activities.
- (8) The course sponsor must certify that the course shall be conducted in accordance with the operational requirements stated in Rule .0606 of this Section and that the course sponsor will comply with all other applicable rules contained in this Section.
- (9) The course title may not include the words "Uniform Standards of Professional Appraisal Practice" or "USPAP" unless the course is either the 15 hour National USPAP course or the 7 hour National USPAP update course. If the course is the 7 hour National USPAP course, the course title must state which edition of USPAP will be taught in that specific course.
- (10) Each course must utilize a textbook or course materials that have been approved by the Board.
- (11) If the course content is related to technology, such as software, hardware, electronic devices, manuals, or databases, the course shall be developed specifically for utilization in the real estate appraisal business in order to be approved for continuing education credit. Such courses shall not require the student to purchase specific products, and shall not use the course to sell or advertise particular products or software.
- (12) The Board shall develop an update course which shall be conducted by instructors approved by the Board under this Subchapter. The subject matter of this course shall be determined by the Board, which shall produce instructor and student materials for use by instructors and course sponsors. The Board

shall prepare a new course for each two-year period beginning no later than September 1 of an odd-numbered year and ending on June 30 of the next odd-numbered year. Sponsors must acquire the Board-developed course materials and utilize such materials to conduct the update course. The course must be conducted exactly as prescribed by the rules in this Subchapter and the course materials developed by the Board. All course materials that are developed by the Board for use in an update course and that are subject to the protection of federal copyright laws are the property of the Board. Violation of the Board's copyright with regard to these materials shall be grounds for disciplinary action. Sponsors must provide trainees and appraisers participating in their classes a copy of the student materials developed by the Board.

- (13) Instructors for the update course shall be certified appraisers who meet the criteria in Item (3) of this Rule. Persons who wish to instruct the update course shall be approved by the Board. Approval of an update course instructor authorizes the instructor to teach the update course for any approved update course sponsor. Approval of update course instructors expires on June 30 of every odd-numbered year. Applicants who wish to become instructors for the update course must attend an educational workshop sponsored by the Board.

Authority G.S. 93E-1-8(c); 93E-1-10.

21 NCAC 57B .0605 CONTINUING EDUCATION CREDIT HOURS

The course approval issued to a course sponsor shall include the number of hours of continuing education credit that will be awarded for the course. The minimum number of continuing education credit hours awarded for a course shall be three and one-half hours, and the maximum number of continuing education credit hours awarded for a course, regardless of its length, shall be thirty hours. Continuing education credit hours shall not be carried forward into subsequent licensing periods. No continuing education credit shall be given for courses taken before the person is registered, licensed or certified.

Authority G.S. 93E-1-8(c); 93E-1-10.

21 NCAC 57B .0606 COURSE OPERATIONAL REQUIREMENTS

Course sponsors must at all times assure compliance with the criteria for course approval stated in Rule .0603 of this Section and must also comply with the following requirements relating to scheduling, advertising and conducting approved appraisal continuing education courses:

- (1) Courses must be scheduled and conducted in a manner that limits class sessions to a

maximum of eight classroom hours in any given day and that includes appropriate breaks for each class session. A classroom hour consists of 50 minutes of classroom instruction and ten minutes of break time. For any class meeting that exceeds 50 minutes in duration, breaks at the rate of ten minutes per hour must be scheduled and taken at reasonable times.

- (2) Course sponsors must not utilize advertising of any type that is false or misleading in any respect. If the number of continuing education credit hours awarded by the Board for a course is less than the number of scheduled classroom hours for the course, any course advertisement or promotional materials which indicate that the course is approved for appraiser continuing education credit in North Carolina must specify the number of continuing education credit hours awarded by the Board for the course.
- (3) Course sponsors must, upon request, provide any prospective student a description of the course content sufficient to give the prospective student a general understanding of the instruction to be provided in the course.
- (4) Courses must be conducted in a facility that provides an appropriate learning environment. At a minimum, the classroom must be of sufficient size to accommodate comfortably all enrolled students, must contain a student desk or sufficient worktable space for each student, must have adequate light, heat, cooling and ventilation, and must be free of distractions that would disrupt class sessions. Sponsors are required to comply with all applicable local, state and federal laws and regulations regarding safety, health and sanitation. Sponsors shall furnish the Board with inspection reports from appropriate local building, health and fire inspectors upon the request of the Board. Sponsors must supply separate restroom facilities for males and females. Classes may not be held in a personal residence under any circumstances.
- (5) The course sponsor must require students to attend at least 90 percent of the scheduled classroom hours in order to satisfactorily complete the course, even if the number of continuing education credit hours awarded by the Board for the course is less than the number of scheduled classroom hours. Attendance must be monitored during all class sessions to assure compliance with the attendance requirement. Instruction must be given for the number of hours for which credit is given. Instructors may not accumulate unused break time to end the class early.
- (6) Instructors must require reasonable student attentiveness during class sessions. Students

must not be permitted to engage in activities that are not related to the instruction being provided.

- (7) Course sponsors for which an application fee is required by Rules .0602(b) and .0611(b) of this Section must fairly administer course cancellation and fee refund policies. In the event a scheduled course is canceled, reasonable efforts must be made to notify preregistered students of the cancellation and all prepaid fees received from such preregistered students must be refunded within 30 days of the date of cancellation or, with the student's permission, applied toward the fees for another course.
- (8) Upon request of the Board, the course sponsor must submit to the Board a videotape in a manner and format which depicts the instructor teaching portions of any continuing education course specified by the Board and which demonstrates that the instructor possesses the basic teaching skills described in Rule .0306(c) of this Section.
- (9) Course sponsors shall provide the Board with the dates and locations of all classes the sponsor is or will be offering in the State of North Carolina at least 30 calendar days before such class is offered, unless circumstances beyond the control of the course sponsor require that the course be rescheduled. If the dates or location of the classes change after such information is provided to the Board, the course sponsor must notify the Board of such changes.
- (10) ~~Course sponsors must participate in the Board's course and instructor evaluation program. Course sponsors must require that students complete a course evaluation form upon completion of the course, and shall tally the results of the evaluations onto one form. Course sponsors must also send the completed course evaluation forms and the tally to the Board together with the roster required pursuant to 21 NCAC 57B .0608. Course sponsors shall provide each student with contact information for the Appraisal Board so that students may contact the Board with questions or concerns regarding the course.~~
- (11) If an instructor has any disciplinary action taken on his or her appraisal license or any other professional license in North Carolina or any other state, or if the instructor has been convicted of or pleaded guilty to any criminal act, the school or course sponsor must report that fact to the Board within 15 business days.
- (12) All courses, except those taught on-line via the Internet, must have a minimum number of five students enrolled in the course.

Authority G.S. 93E-1-8(c); 93E-1-10.

21 NCAC 57B .0607 CERTIFICATION OF COURSE COMPLETION

Course sponsors must issue a certificate of course completion within 15 days of completion of the course to all students who satisfactorily complete an approved course. If the course sponsor is located in North Carolina, the certificate, which the student must retain for a period of ~~5~~ two years, must bear the signature or signature stamp of a person designated by the course sponsor to sign such certificate. North Carolina-based course sponsors must notify the Board in advance of the person(s) designated to sign certificates of course completion for courses conducted in North Carolina. If the course sponsor is not located in North Carolina, the certificate of course completion must show the name of the course sponsor, the name of the course, the number of classroom hours, the course dates, the state or city where the course was conducted, and the full name of the student.

Authority G.S. 93E-1-8(c); 93E-1-10.

21 NCAC 57B .0611 RENEWAL OF APPROVAL AND FEES

(a) Board approval of appraisal continuing education courses (except the seven hour National USPAP update course and the Board's update course) expires on the next December 31 following the date of issuance. In order to assure continuous approval, applications for renewal of Board approval, accompanied by the prescribed renewal fee, must be filed with the Board annually on or before December 1. All applications for renewal of course approval received on or before December 1, which are incomplete as of that date, as well as all applications for renewal of course approval submitted after December 1, shall be treated as original applications for approval of continuing education courses. Schools and course sponsors must send a copy of all course materials every third renewal of a continuing education course.

(b) The annual fee for renewal of Board approval shall be that specified in G.S. 93E-1-8(d) for each course for which renewal of approval is requested, provided that no fee is required for course sponsors that are exempted from original application fees by Rule .0602(b) of this Section. The fee is non-refundable.

(c) Application for approval of the even-numbered year edition of the seven hour National USPAP update course shall be made when the instructor for the course has been certified by the Appraiser Qualifications Board of the Appraisal Foundation to teach that edition of USPAP. Such approval shall expire on December 31 of the following even numbered year. This course approval may be renewed in the fall of the even-numbered year, and shall expire on September 30 of the following odd-numbered year.

Authority G.S. 93E-1-8(c),(d); 93E-1-10.

SUBCHAPTER 57D - APPRAISAL MANAGEMENT COMPANIES

**SECTION .0100 - APPLICATION FOR APPRAISAL
MANAGEMENT REGISTRATION**

21 NCAC 57D .0102 FILING AND FEES

- (a) Each application for registration shall be accompanied by the required application fee. The Board shall reject and return to the applicant any application which is incomplete or not accompanied by the required fee or fees. Application fees accompanying complete applications are not refundable.
- (b) The application fee shall be three thousand five hundred dollars (\$3,500).
- (c) Payment of application fees shall be made by certified check, bank check or money order payable to the North Carolina Appraisal Board.
- (d) In the event that the Board asks an applicant to submit updated information or provide further information necessary to complete the application and the applicant fails to submit such information within 90 days following the Board's request, the Board shall cancel the applicant's application and the application fee shall be retained by the Board. An applicant whose application has been cancelled and who wishes to obtain a registration must start the process over by filing a complete application with the Board and paying all required fees.
- (e) An applicant may request that its application be withdrawn at any time before final action is taken by the Appraisal Board on the application. The application fee shall not be refunded.

Authority G.S. 93E-2-3; 93E-2-4; 93E-2-6.

**SECTION .0300 - APPRAISAL MANAGEMENT
COMPANY PROCEDURES**

**21 NCAC 57D .0311 REMOVAL OF AN APPRAISER
FROM AN APPRAISAL PANEL**

- (a) If an appraisal management company decides to remove an independent appraiser from its list of qualified appraisers, the appraisal management company shall notify the appraiser in writing of the reason for removal.
- (b) Such notice shall be sent to the appraiser by registered mail, return receipt requested, to the appraiser's address business address contained in the records of the Appraisal Board. any established method that provides clear proof of delivery, including but not limited to registered mail, return receipt requested.
- (c) ~~The~~ If applicable, the notice shall include a description of the appraiser's illegal conduct, substandard performance, or

otherwise improper or unprofessional behavior, or of any violation of the Uniform Standards of Professional Appraisal Practice or state licensing standards.

(d) It shall also notify the appraiser of any dispute resolution process that the appraisal management company may have in place through which the appraiser may dispute the removal.

(e) Nothing shall prevent an appraisal management company from removing an appraiser from its panel for business convenience or other reasons that are unrelated to the appraiser's acts or omissions.

Authority G.S. 93E-2-3; 93E-2-7(a).

**21 NCAC 57D .0312 REQUESTING ADDITIONAL
INFORMATION FROM AN APPRAISER**

An appraisal management company may request that a real estate appraiser who performs an appraisal for the appraisal management company ~~consider~~ provide additional information as follows:

- (1) An appraisal management company may request that the appraiser consider additional appropriate property information, such as additional comparable sales. Such request shall be made within 30 days of the date the appraisal is first transmitted by the appraiser to the appraisal management company.
- (2) An appraisal management company may request that the appraiser provide further detail, substantiation, or explanation for the appraiser's value conclusion, or to correct errors in an appraisal report. There is no time limit on such requests.
- (3) Any request under this Rule shall be sent to the appraiser in writing or by electronic means.
~~appropriate property information, provide further detail, substantiation, or explanation for the appraiser's value conclusion, or to correct errors in an appraisal report. If the appraisal management company requests that an appraiser consider additional information, such request shall be sent to the appraiser in writing or by electronic means within 30 days of the date the appraisal is transmitted by the appraiser to the appraisal management company.~~

Authority G.S. 93E-2-3; 93E-2-7.

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) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

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Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby

Randall May
A. B. Elkins II
Joe Webster

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Filed

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

2012 FEB 29 PM 2: 25

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 ABC 02087

	Office of	
	Administrative Hearings	
NC Alcoholic Beverage Control Commission,)	
Petitioner)	
)	
v.	)	DECISION
)	
CK2, LLC,)	
T/A Quick Mart,)	
Respondent)	

This contested case was heard before Donald W. Overby, Administrative Law Judge, Office of Administrative Hearings, on August 15, 2011, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: K. Renee Cowick
Assistant Counsel
NC ABC Commission
Raleigh, NC

For Respondent: Robert C. Ekstrand
Law Offices of Ekstrand & Ekstrand, LLP
Durham, NC

STATUTES AND RULES

N.C.G.S. §18B-104(a)
N.C.G.S. §18B-302(a)(1)
N.C.G.S. §18B-1005(a)(3), (b)
4 NCAC 2S.0208, .0213
N.C.G.S. 14-435
N.C.G.S. 14-269.3
N.C.G.S. Chap. 90

EVIDENCE

Petitioner introduced into evidence one CD and one DVD as illustrative of the testimony concerning a box of purported counterfeit CDs and DVDs. There is only one copy of the CD and DVD and they are not to be reproduced.

Respondent introduced a copy of the surveillance DVD.

ISSUES

1. Whether Respondent's employees and corporate officers, Cassandra Adkins and Kuldeep Singh, failed to superintend in person or through a manager the business for which a permit was issued (to wit, drug, weapons and counterfeit goods violations), on or about April 16, 2010, at 1:00 PM, in violation of G.S. §18B-1005(b).
2. Whether Respondent's employee, Mark Adkins, did possess counterfeit CDs and DVDs, while on the licensed premises, on or about April 16, 2010, at 1:00 PM, in violation of G.S. §14-435 and §18B-1005(a)(3).
3. Whether Respondent's employee, Stephanie Moore, possessed a controlled substance or other illegal drug in violation of Chapter 90 of the North Carolina General Statutes, while on the licensed premises (to wit, morphine), on or about April 16, 2010, at 1:00 PM, in violation of ABC Commission Rule 4 NCAC 2S.0208.
4. Whether Respondent's employee, Mark Adkins, did carry a gun, rifle or pistol into an establishment in which alcoholic beverages are sold, on or about April 16, 2010, at 1:00 PM, in violation of G.S. §14-269.3 and §18B-1005(a)(3).
5. Whether Respondent's employee, Mark Adkins, knowingly possessed drug paraphernalia to inject, inhale or otherwise introduce into the body a controlled substance which would be unlawful to possess, while upon the licensed premises, on or about April 16, 2010, at 1:00 PM, in violation of G.S. §18B-1005(a)(3) and §90-113.22(a).
6. Whether Respondent's employee, Mark Mathews Adkins, interfered or failed to cooperate with Investigator Husketh, an officer engaged in the performance of his duties, on or about April 16, 2010, at 1:00 PM, in violation of ABC Commission Rule 4 NCAC 2S.0213.
7. Whether Respondent's employee, Narinder Singh, sold a malt beverage to Andrew Hall and Stephen Mihaich, persons less than 21 years old, while on the licensed premises, on or about October 29, 2011, at 9:46 PM, in violation of G.S. §18B-302(a)(1).

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

FINDINGS OF FACT

1. Respondent has held permanent Malt Beverage, Unfortified Wine and Fortified Wine ABC permits since October 2008 for an establishment located at 3801 North Duke Street, Durham, North Carolina (hereinafter "licensed premises").
2. Cassandra Adkins and Kuldeep Singh are the owners of the licensed premises. At all relevant times herein, neither Ms. Singh nor Ms. Adkins were present on the licensed premises.
3. On April 16, 2010, at approximately 1:00 pm, Durham Police Department Investigators Brian Black ("Black") and Jerry Husketh ("Husketh") participated in the execution of a search warrant at Respondent's establishment. The search warrant was for illegal gambling devices.
4. Black went to the back office and saw a cigar box sitting in front of Respondent's employee, Mark Adkins ("Mr. Adkins"). Black asked Mr. Adkins to exit the back office while the search was being conducted. Black then opened the cigar box and found a fully loaded Taurus handgun.
5. Mrs. Adkins testified that the gun found in the office was for her protection but it was not in her possession. Mrs. Adkins properly obtained a permit to purchase the handgun and admitted she does not have a permit to carry a concealed weapon. The permit to buy does not convey any other rights concerning the weapon other than the ability to purchase. Mrs. Adkins stated that the gun remained at the store but that no one was allowed to handle or use it except her; however, she was rarely in the store and the gun was easily accessible by other employees. C. Adkins was aware prior to April 16, 2010, that Mr. Adkins had a felony conviction in another State.
6. Black testified that he observed various items which could be drug paraphernalia about the premises, including small plastic baggies, large plastic baggies, digital scales, marijuana grinders and rolling papers. No other evidence was offered to corroborate his observations, including any of the items themselves or photographs of the items or testimony from fellow officers who were present.
7. Respondent's employee, Stephanie Yvette Moore ("Moore"), was present during the execution of the search warrant. Moore asked Black several times for her medicine for her back pain. During the interaction, Black discovered two white tablets which he identified as morphine. There is no evidence that the substance in the medicine bottle was morphine or any other narcotic medicine. Moore stated that she did not have a prescription for the medicine and that her sister had given her the tablets.
8. In addition to assisting with the search behind the counter, Husketh also provided security as the search was being conducted. A crowd gathered and was becoming unruly. Husketh contends that Mr. Adkins was verbally abusive and combative during the search, especially when officers were attempting to gain access to the store safe. According to Husketh, he asked Mr. Adkins to sit on a stool on several occasions. Husketh contends Mr. Adkins would stand up and not follow officers' instructions. Further he contends that on one occasion when

Mr. Adkins stood up in defiance of officers' orders, he bumped into Husketh. Husketh struggled with Mr. Adkins in placing Mr. Adkins in handcuffs.

9. A video recording of the incident does not corroborate Husketh's version of the events. While it appears to show Mr. Adkins continuing to talk, it does not show Mr. Adkins bumping Husketh. Husketh's contentions that Mr. Adkins was going in a direction toward items which could have posed a danger likewise are not borne out by the video.

10. The search also uncovered a large box of counterfeit CDs and DVDs.

11. Alcohol Law Enforcement Special Agent P. Armstrong ("Armstrong") and Durham ABC Board Law Enforcement Investigator Ray Richardson ("Richardson") responded to Respondent's establishment.

12. Richardson has been trained by representatives of the recording industry, motion picture association, Gucci, Nike, Prada, North Carolina Secretary of State and private investigators in identifying counterfeit trademarks. In late 2009, Richardson was sworn into the North Carolina Secretary of State task force regarding counterfeit trademarks.

13. Richardson gave Armstrong his opinion as to which CDs and DVDs were counterfeit and which were not. Armstrong seized the counterfeit CDs and DVDs. Armstrong was not present for the contested case hearing in that he was on active duty training with the military.

14. Mrs. Adkins admitted that she knew the CDs and DVDs were being sold in the store.

15. Respondent's corporate officer, Mrs. Adkins, is not present at the store every day. Mrs. Adkins has no other job or source of income. All three employees and Mrs. Adkins have a key to the office.

16. On October 29, 2010, Andrew Barksdale III ("Barksdale") and Stephen Mihaich ("Mihaich") were working with the Durham Police Department to conduct alcohol compliance checks at locations with ABC permits. In working with the Durham Police Department on this occasion, they entered eight different stores attempting to buy alcohol.

17. Both Barksdale and Mihaich were under age to possess or purchase alcohol on October 29, 2010. Barksdale's date of birth is December 7, 1992. Mihaich's date of birth is August 18, 1993.

18. Barksdale and Mihaich entered Respondent's establishment. Mihaich wore a video recording device concealed in the button of his shirt. Barksdale retrieved an Ice House malt beverage from the cooler and presented it to Respondent's employee, Narinder Singh ("N. Singh"). N. Singh did not request to see Barksdale's identification and did not inquire as to Barksdale's age. N. Singh sold the malt beverage to Barksdale.

19. Durham Police Department Officers Chris Andrews ("Andrews") and Joseph M. Stewart ("Stewart") functioned as "cover officers." They observed Barksdale and Mihaich as

they entered Respondent's establishment and then exited approximately two minutes later with a bag. They also debriefed Barksdale and Mihaich after the visit. The description of the clerk provided by Barksdale and Mihaich was forwarded to Officer Patrick D. Dolan ("Dolan"). Dolan went to Respondent's establishment and issued a criminal citation to N. Singh.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction in this matter.
2. Respondent contends violations of N.C.G.S. § 18B-1005(a)(3). Subsection "a" requires knowledge on the part of the "permittee, or his agent or employee." In North Carolina a person acts "knowingly" when he or she is aware or conscious of what he or she is doing, or is aware of the circumstances around them. North Carolina does not recognize the doctrine of "willful blindness" wherein there is a deliberate avoidance of knowledge. The person must actually know, not merely "should have known." See, *Underwood v. State Bd. of Alcoholic Control*, 278 NC 623, 181 S.E. 2d 1 (1971); *State v. Bogle* 190 NC 324 (1989).
3. Respondent's employee, Mark Adkins, did knowingly possess counterfeit CDs and DVDs, while on the licensed premises, on or about April 16, 2010, at 1:00 PM, in violation of G.S. §14-435 and §18B-1005(a)(3). In as much as he was an employee and at times the store manager, and was acting at the very least as an employee on April 16, 2010, his knowledge is relevant, not the knowledge of the permittee.
4. Petitioner Commission has failed to prove that Respondent's employee, Stephanie Moore, possessed a controlled substance or other illegal drug in violation of Chapter 90 of the North Carolina General Statutes, while on the licensed premises (to wit, morphine), on or about April 16, 2010, at 1:00 PM.
5. N.C.G.S. §14-269.3 specifically states that a person must carry a gun, rifle, or pistol into an establishment where alcoholic beverages are sold and consumed. (Emphasis added) Other similar statutes within Chapter 35 prohibit even the possession of weapons on various premises. This one does not. Criminal statutes are to be viewed strictly and narrowly and the plain language of this statute requires the person to carry the weapon into such a premise. While evidence may exist to find that Mark Adkins constructively possessed the weapon, there is no evidence to show that he carried the weapon into the premises in violation of G.S. §14-269.3 and §18B-1005(a)(3).
6. Petitioner Commission has failed to prove that Respondent's employee, Mark Adkins, knowingly possessed drug paraphernalia to inject, inhale or otherwise introduce into the body a controlled substance which would be unlawful to possess, while upon the licensed premises, on or about April 16, 2010, at 1:00 PM. No corroborative evidence was offered and many of the items identified, if not all, would have been legal for the store to possess and to offer for sale.

7. While there is not sufficient evidence to support a finding that Mr. Adkins bumped or resisted Husketh, and Husketh's testimony was not corroborated by the video, there is sufficient evidence to support finding Respondent's employee, Mark Adkins, failed to cooperate with Investigator Husketh on April 16, 2010, in violation of ABC Commission Rule 4 NCAC 2S.0213.

8. Respondent's employee, Narinder Singh, sold a malt beverage to Andrew Barksdale and Stephen Mihaich, persons less than 21 years old, while on the licensed premises, on or about October 29, 2011, at 9:46 PM, in violation of G.S. §18B-302(a)(1).

9. Respondent contends violations of N.C.G.S. § 18B-1005(b) by failure of the permittee to properly superintend in person or through a manager. Subsection "b" does not require knowledge on the part of the "permittee, or his agent or employee" as in subsection "a."

10. Respondent's employees and corporate officers, Cassandra Adkins and Kuldeep Singh, failed to superintend in person or through a manager the business for which a permit was issued on or about April 16, 2010, at 1:00 PM, in violation of G.S. §18B-1005(b) as follows:

- a. Mr. Adkins is a convicted felon and unlawfully constructively possessed a firearm on the premises on April 16, 2010. Ms. Adkins, his wife and permit holder, was aware of these facts and circumstances and continued to leave the weapon in the office;
- b. Mr. Akins possessed counterfeit CDs and DVDs on the premises and offered them for sale on April 16, 2010;
- c. Mr. Singh sold malt beverage to underage persons on October 29, 2010.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge recommends that the ABC Commission suspend Respondent's ABC permits for a period of 30 days.

ORDER AND NOTICE


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, NC 27699-6714, in accordance with G.S. §150B-36(b).

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. §150B-36(a)

The agency is required by G.S. §150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys on record and to the Office of Administrative Hearings.

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

This is the 29th day of February 2012.




Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

K Renee Cowick
Assistant Counsel
NC ABC Commission
4307 Mail Service Center
Raleigh, NC 27699-4307
ATTORNEY FOR PETITIONER

Robert C Ekstrand
Ekstrand and Ekstrand LLP
811 Ninth Street
Suite 260
Durham, NC 27705
ATTORNEY FOR RESPONDENT

This the 1st day of March, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

STATE OF NORTH CAROLINA
WAKE COUNTY

Filed

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

NORTH CAROLINA BOARD
OF FUNERAL SERVICE

Petitioner,

) Office of
) Administrative Hearings

11 BMS 01794

v.

DAVID B. LAWSON AND
DAVID B. LAWSON
MORTUARY, INC.

Respondents.

NORTH CAROLINA BOARD
OF FUNERAL SERVICE

Petitioner,

11 BMS 11820

v.

DAVID B. LAWSON AND
DAVID B. LAWSON
MORTUARY, INC.

Respondents.

RECOMMENDED ORDER

Having presided over a hearing on the above-captioned contested cases on October 26, 2011 and having issued an Order for Summary Suspension, effective October 26, 2011, the undersigned Administrative Law Judge of the Office of Administrative Hearings issues the following Recommended Order against David B. Lawson ("Lawson") and David B. Lawson Mortuary, Inc. ("Lawson Mortuary") (collectively the "Respondents"), pursuant to N.C. Gen. Stat. § 150B-40.

PROCEDURAL HISTORY

1. This matter is properly before the Office of Administrative Hearings ("OAH"), which has both personal and subject matter jurisdiction. The parties were properly noticed for hearing.

North Carolina Board of Funeral Service v. Lawson and David B. Lawson Mortuary, Inc.
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2. On February 16, 2011, through counsel, the North Carolina Board of Funeral Service ("Petitioner Board" or the "Board") filed a Petition for Hearing (11 BMS 1794), alleging that Respondents had engaged in acts or omissions in violation of the statutes and regulations administered by the North Carolina Board of Funeral Service.
3. On March 23, 2011, both Respondents and the Board, through counsel, filed their respective Prehearing Statements.
4. On or around June 21, 2011, OAH issued a Notice of Hearing, setting the hearing date for 11 BMS 1794 on August 24 - 26, 2011.
5. On July 26, 2011, counsel for Respondents filed a Motion for Withdrawal of Counsel. On July 28, 2011, the presiding Administrative Law Judge issued an Order Allowing Withdrawal of Counsel for Respondents.
6. On August 1, 2011, the Board, through counsel, filed a Motion to Compel Respondents to comply with the Board's discovery demands.
7. On August 8, OAH issued to Respondents a Request for Response to Motion, providing Respondents 10 days to file a written response setting forth objections to the Motion to Compel.
8. On August 17, 2011, the Board, through counsel, filed a Motion for Continuance, in light of its outstanding Motion to Compel and the unavailability of a key witness due to an incapacitating illness.
9. On August 19, 2011, the presiding Administrative Law Judge granted to Motion for Continuance and rescheduled the hearing for October 26 - 28, 2011.

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10. On September 30, 2011, the Board, through counsel, filed a Petition for Hearing for Supplemental Violations (11 BMS 11820) and requested that said Petition be joined for hearing with 11 BMS 1794.
11. On October 6, 2011, the Board, through counsel, submitted a Prehearing Statement for contested case 11 BMS 11820.
12. On October 6, 2011, the Chief Administrative Law Judge granted the Board's request to consolidate 11 BMS 1794 and 11 BMS 11820 for hearing.
13. On October 7, 2011, OAH issued an Amended Notice of Hearing, providing that 11 BMS 1794 and 11 BMS 11820 would be heard together on October 26 – 28, 2011.
14. On October 24, Lawson verbally asked OAH to continue the hearing scheduled to begin on October 26, 2011. Lawson's request for a continuance was denied.

FINDINGS OF FACT

1. As licensees, both Respondents are subject to the statutes and rules governing the practice of funeral service in North Carolina. For all times relevant to this proceeding, Lawson was the president, owner, and manager of Lawson Mortuary.
2. Prior to June 22, 2007, Lawson Mortuary was licensed by the Board as Funeral Establishment No. 69 and Preneed Establishment No. 829. Prior to June 22, 2007, Lawson was licensed to practice funeral services as Funeral Service Licensee No. 1073.
3. In 2006, Petitioner Board became aware that Respondents had engaged in certain violations of law related to the practice of funeral services. On June 22, 2007, the Respondents entered into a Consent Order with Petitioner whereby Lawson's funeral service license and Lawson

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Mortuary's funeral establishment permit were revoked. However, these revocations were stayed based on certain conditions.

4. Pursuant to the June 22, 2007, Consent Order, Lawson Mortuary and Lawson also voluntarily surrendered the preneed establishment license and all individual preneed sales licenses. Neither Lawson nor Lawson Mortuary has held a preneed establishment license since voluntarily surrendering that license to Petitioner on June 26, 2007.

A. Preneed Contract between Respondents and Miles

5. On or about May 25, 2009, Mr. James H. Miles, Sr. paid to Respondents \$3,700 in connection with a revocable preneed funeral contract.
6. Respondents did not use the forms required by Petitioner Board when they entered into the revocable preneed funeral contract with Mr. Miles.
7. Respondents did not deposit the \$3,700 paid by Mr. Miles into a trust account; instead, Respondents deposited the funds into their general operating account.
8. Respondents failed to file a preneed contract with Petitioner Board or pay the contract filing fee for Mr. Miles.
9. On or around August 26, 2010, Mr. Miles' daughter, Ms. Marie Williams—on behalf of Mr. Miles—asked Lawson to return the \$3,700 because Mr. Miles no longer wished to use the services of Lawson Mortuary.
10. Although Lawson indicated to Ms. Williams that he would return the \$3,700 within a couple of days, he failed to do so.
11. Between August 26, 2010 and September 11, 2010, Mr. Miles and his family made repeated attempts to contact Lawson in an effort to retrieve the \$3,700.

North Carolina Board of Funeral Service v. Lawson and David B. Lawson Mortuary, Inc.
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12. On September 13, 2010, Mr. Miles filed a consumer complaint against Lawson Mortuary, alleging that Respondents had failed to refund Mr. Miles the \$3,700.

13. On September 15, 2010, Respondents returned the \$3,700, plus \$60 in interest, to Mr. Miles.

14. Respondents did not have a preneed license from Petitioner Board before offering or selling a preneed funeral contract to Mr. Miles.

B. Preneed Contract between Hamilton and Respondents

15. On or around January 28, 2008, Ms. Farrie Lee Hamilton paid to Respondents \$7,964.30 in connection with a revocable preneed funeral contract.

16. Respondents did not use the forms required by Petitioner Board when they entered into the revocable preneed funeral contract with Ms. Hamilton

17. Respondents did not deposit the \$7,964.30 paid by Ms. Hamilton into a trust account; instead, Respondents deposited the funds into their general operating account.

18. Respondents failed to file a preneed contract with Petitioner Board or pay the contract filing fee for Ms. Hamilton.

19. On or around April 21, 2011, Ms. Farrie Lee Hamilton decided to end the preneed funeral contract with Respondents. Ms. Hamilton's daughter, Ms. Diane Hamilton Jones—on behalf of Ms. Hamilton—attempted to contact Respondents on numerous occasions on and after April 21, 2011 to obtain a refund of the \$7,964.30.

20. On or around May 10, 2011, Ms. Diane Hamilton Jones—on behalf of Ms. Farrie Lee Hamilton—filed a Preneed Recovery Fund Application for Reimbursement with Petitioner Board.

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21. On or around August 10, 2011, Petitioner Board approved Ms. Hamilton's Preneed Recovery Fund Application for Reimbursement.
22. On or around August 30, 2011, Petitioner Board paid Ms. Jones \$7,964.30, plus \$137.68 in interest, from the Preneed Recovery Fund, pursuant to N.C. Gen. Stat. § 90-210.66 and 21 N.C. Admin. Code 34D .0400, due to Respondents' unlawful actions.
23. To date, Respondents have not repaid Ms. Jones the money owed to her or reimbursed the Preneed Recovery Fund.
24. Respondents did not have a preneed license from Petitioner Board before offering or selling a preneed funeral contract to Ms. Hamilton.

C. Preneed Contract between Harvey and Respondents

25. Ms. Corrina Harvey, who also goes by Sue Harvey, paid to Respondents \$5,000.73 in connection with a revocable preneed contract in 2010.
26. Respondents did not use the forms required by Petitioner Board when they entered into the revocable preneed funeral contract with Ms. Harvey.
27. Respondents did not deposit the \$5,000.73 paid by Ms. Harvey into a trust account; instead, Respondents deposited the funds into their general operating account.
28. On or about September 9, 2011, Ms. Corrina Harvey contacted Petitioner Board with concerns about her preneed contract with Respondents.
29. Respondents failed to file a preneed contract with Petitioner Board or pay the contract filing fee for Ms. Harvey.
30. Respondents have not made a refund to Ms. Harvey for her preneed funeral contract.

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Recommended Order

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31. Respondents did not have a preneed license from Petitioner Board before offering or selling a preneed funeral contract to Ms. Harvey.

D. Fraud in the Practice of Funeral Service

32. On or around June 23, 2011, Mrs. Ella Troxler entered into a contract with Respondents for funeral services on behalf of her deceased husband, Mr. Daniel Troxler.

33. Upon entering into the contract, Mrs. Troxler paid Lawson \$1,500 and agreed to pay the remaining balance of \$8,435.90 with Mr. Troxler's life insurance proceeds.

34. Mrs. Troxler then assigned over \$20,000 in insurance proceeds to Lawson. Lawson told Mrs. Troxler that he would return to her the remainder of the life insurance proceeds that would not be used for the funeral service.

35. To date, Respondents have not repaid Ms. Troxler, despite her repeated requests for the money she is owed.

E. Failure to Provide Records to the Board

36. Since December 15, 2010, Petitioner Board has requested Respondents to produce, among other things, all preneed contracts and similar documents in which Mr. Lawson has agreed to provide services on a preneed basis after June 22, 2007.

37. In addition, during the discovery phase of this administrative hearing, Petitioner Board again requested all preneed contracts and similar documents in which Mr. Lawson has agreed to provide services on a preneed basis after June 22, 2007.

38. To date, Respondents have not produced the requested documents.

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F. Handling of Walton's Remains

39. On August 11, 2010, at the request of the Carrboro Police Department, Lawson removed the remains of Ms. Linda Walton from her residence, which were in a state of decomposition.
40. On August 12, Lawson took Ms. Walton's body to Triad Cremation Society, Inc., so that the body could be stored in a cooler.
41. On August 13, Triad Cremation Society, Inc. returned Ms. Walton's body to Respondents.
42. From August 13 until August 20, Respondents stored Ms. Walton's body for a majority of the time in a hearse that was parked outside of Lawson Mortuary during a period of extreme and sustained heat. During this time, Ms. Walton's body continued to decompose and exhibited evidence of infestation by the presence of flies and maggots and a strong odor. Respondent made numerous contacts, including Respondent, to try to find suitable and legal alternatives for Ms. Walton's body. He was not presented with any viable alternatives by anyone, including Respondent.
43. On August 20, Respondents returned Ms. Walton's body to Triad Cremation, which cremated her remains.

CONCLUSIONS OF LAW

1. Respondents violated the provisions of Articles 13A or 13D of Chapter 90 of the North Carolina General Statutes, the rules and regulations of the Petitioner Board, as set forth in 21 N.C. Admin. Code 34, and the standards set forth in Funeral Industry Practices, 16 C.F.R. § 453, in violation of N.C. Gen. Stat. § 90-210.25 (e)(1)(j) by:
 - a. Selling preneed funeral contracts without a license, contrary to N.C. Gen. Stat. § 90-210.67;

North Carolina Board of Funeral Service v. Lawson and David B. Lawson Mortuary, Inc.

11 BMS 01794 and 11 BMS 11820

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- b. Making funded funeral prearrangements without a license, contrary to N.C. Gen. Stat. § 90-210.67;
 - c. Using an unapproved preneed contract form, contrary to N.C. Gen. Stat. § 90-210.62;
 - d. Failing to deposit preneed funeral funds into an account with a financial institution or insurance company, contrary to N.C. Gen. Stat. § 90-210.61;
 - e. Failing to provide a timely refund of preneed funeral funds under a revocable contract, as required by N.C. Gen. Stat. § 90-210.65;
 - f. Failing to maintain records required of preneed contracts, contrary to N.C. Gen. Stat. §§ 90-210.61; 90-210.68(a);
 - g. Failing to provide preneed funeral services records to the Board, when requested, contrary to N.C. Gen. Stat. §§ 90-210.23; 90-210.68(a);
 - h. Committing fraud or misrepresentation in the practice of preneed funeral planning and in the practice of funeral service, contrary to N.C. Gen. Stat. §§ 90-210.25(e)(1)b and 90-210.69(c)(4); and
 - i. Embezzling, or fraudulently or knowingly and willingly misapplying or converting preneed funeral funds to their own use or the use of any corporation, association or entity for any purpose other than for a preneed funeral contract, contrary to N.C. Gen. Stat. § 90-210.70 (a).
2. Respondents violated the terms of the Consent Order entered into by the Respondents and the Board on June 22, 2007.

North Carolina Board of Funeral Service v. Lawson and David B. Lawson Mortuary, Inc.

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3. Although Respondents' treatment of Ms. Walton's body was disrespectful, there was not a reasonable alternative for Respondents to store her remains under the facts presented at hearing.
4. Pursuant to the undersigned's Recommended Order, the funeral establishment permit of Lawson Mortuary, Inc. and the funeral service license of Lawson were summarily suspended, effective October 26, 2011, until further action is taken by the North Carolina Board of Funeral Service.

RECOMMENDED DECISION

1. Based on the findings of fact and conclusions of law, the undersigned recommends the following sanctions:
 - a. The funeral establishment permit of Lawson Mortuary, Inc. and the funeral service license of Lawson be REVOKED;
 - b. Within 15 days of service of the Final Agency Decision, Respondents be ORDERED to produce to the North Carolina Board of Funeral Service the following documents:
 - i. Copies of any and all contracts for funeral services, other than at-need funeral services, entered into by Lawson and/or Lawson Mortuary since June 22, 2007;
 - ii. Copies of all checks, account statements, deposit slips and other records of payment for funeral services, other than at-need funeral services, since June 22, 2007;

North Carolina Board of Funeral Service v. Lawson and David B. Lawson Mortuary, Inc.

11 BMS 01794 and 11 BMS 11820

Recommended Order

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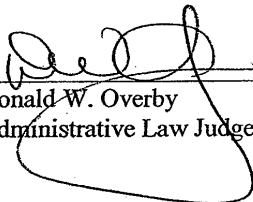
- iii. Copies of all insurance policy applications, forms or other documents in which Lawson or Lawson Mortuary has or had any financial ownership interest, including but not limited to ownership, beneficiary designations, or assignments since June 22, 2007.
- c. Respondents COMPLY with the following before filing any application for reinstatement of any license:
 - i. Lawson Mortuary, Inc. and Lawson shall have made restitution to all consumers of preneed or at-need funeral services, pursuant to the North Carolina statutes and regulations governing the practice of funeral service;
 - ii. Lawson Mortuary, Inc. and Lawson shall have reimbursed the Preneed Recovery Fund for all claims paid due to the actions of Respondents, pursuant to the North Carolina statutes and regulations governing the practice of funeral service;
 - iii. Respondent Lawson shall meet all requirements for a lapsed funeral service license, including but not limited to completing annual continuing education in effect at the time of application and payment of all required fees; AND
 - iv. Filing of all documents with Petitioner Board ordered herein.
- d. No application for reinstatement shall be approved without a hearing before the Board. Respondents shall have the burden to demonstrate to the satisfaction of the Board (i) compliance with this Recommended Order; and (ii) fitness to resume practice in North Carolina.

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NOTICE

1. The undersigned's Recommended Order in these contested cases will be reviewed by the agency making the final decision. The agency making the final decision in these contested cases is required to give each party an opportunity to file exceptions to this Decision and to present written arguments to those in the agency who will make the final decision, in accordance with N.C.G.S. § 150B-36(a).
2. The North Carolina Board of Funeral Service will make the final decision in these contested cases, pursuant to N.C. Gen. Stat. § 150B-42.

This the 8th day of Nov, 2011



Donald W. Overby
Administrative Law Judge


A copy of the foregoing was mailed to:

M. Jackson Nichols
Catherine E Lee
Allen & Pinnix, P.A.
PO Drawer 1270
Raleigh, NC 27602
ATTORNEYS FOR PETITIONER

David B Lawson
David B Lawson Mortuary Inc
115 E. Harden Street
Graham, NC 27253
RESPONDENT

David B Lawson and David B Lawson
Mortuary Inc
PO Box 825
Graham, NC 27253
RESPONDENT

This the 8th day of November, 2011.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

FILED

STATE OF NORTH CAROLINA

2012 JAN -4 PM 1:33

IN THE OFFICE OF

ADMINISTRATIVE HEARINGS

COUNTY OF FORSYTH

10 DHR 09629

OFFICE OF
ADMIN HEARINGS

Eugene J Byrom,
Petitioner,

vs.

Department of Health and Human Services,
Division of Health Service Regulation,
Respondent.

DECISION

This contested case was heard before Beecher R. Gray, administrative law judge, in Forsyth County on October 17, 2011 and November 29, 2011. Petitioner's proposed decision was filed on December 19, 2011. Respondent's response was filed on December 22, 2011.

APPEARANCES

Petitioner: Reginald D. Alston, Esq.

Respondent: Derek L. Hunter, Assistant Attorney General

ISSUE

Whether Respondent's decisions to substantiate an allegation of patient abuse against Petitioner and to place his name on the Health Care Personnel Registry as having abused a patient is supported by the evidence.

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. As of September 22, 2010, Petitioner Eugene Byrom was employed by the Baptist Retirement Home-Brookridge Assisted Living ("Brookridge") in Winston-Salem, North Carolina as a medical care technician and health care personnel.
3. At some point in the early afternoon, Diana Rodriguez, an activities assistant at Brookridge, went outside to look for a kitten in order to show it to a resident, as directed by her supervisor. Activities Assistant Rodriguez was accompanied by Activities Assistant Keyra Rochez.

4. After unsuccessfully searching for the kitten outside the building, Activities Assistants Rodriguez and Rochez went into the building to find Petitioner and ask whether he knew where the kitten was located.
5. Activities Assistants Rodriguez and Rochez went down the hallway looking for Petitioner. Activities Assistant Rochez was not as far down the hallway as Activities Assistant Rodriguez, but was within easy hearing range and as close as an arm's length away.
6. Female resident R.A.'s door was open just enough that Activities Assistant Rodriguez was able to peek her head in to look for Petitioner. Activities Assistant Rodriguez's testimony was that she saw Petitioner and R.A. just outside the bathroom door, which opens into R.A.'s room. She further testified that she saw Petitioner standing behind R.A., who was fully clothed, and reaching his arms around her with his hands on her breasts while making a rubbing motion and moaning.
7. Activities Assistant Rodriguez testified that she was in shock at what she saw but made no effort to make eye contact with Petitioner, intervene, or otherwise stop the shocking behavior that she testified to having seen. Activities Assistant Rodriguez stepped back from the doorway, never having gone into the room, and joined Activities Assistant Rochez. In spite of being in shock at what she believed was grossly improper behavior constituting abuse of a patient, Activities Assistant Rodriguez declined to immediately intervene and did not tell Activities Assistant Rochez what she had witnessed.
8. With Activities Assistant Rochez accompanying her, Activities Assistant Rodriguez proceeded to the office of her supervisor, Amanda Robertson, and told her what she had observed from R.A.'s doorway. Supervisor Robertson and Activities Assistant Rodriguez proceeded, at some undetermined amount of time, to report the incident to Latonya Smith, the resident advocate.
9. Activities Assistant Rodriguez eventually made her way to the office of the facility administrator, William Wood, where she related to him what she had seen in R.A.'s room and what she had done about it. Administrator Wood testified that Activities Assistant Rodriguez gave the outward appearance of being upset and shaken. Sometime later that day, Administrator Wood interviewed Petitioner and terminated Petitioner's employment with Brookridge. Petitioner at all times denied that he had engaged in any conduct which could be construed as abusive to R.A. and specifically stated that he did not commit the act alleged by Activities Assistant Rodriguez.
10. There was no evidence produced in this hearing that anyone at Brookridge checked on R.A. with any degree of urgency and there was no record of an examination of any kind to determine any physical harm the event might have caused her. R.A. was a patient with Alzheimer's disease who was aphasic (unable to speak), not cognizant, and, thus, never interviewed.

11. Health Care Personnel Registry Investigator Jeanne Goss, RN, MSN, investigated this alleged incident at Brookridge. She interviewed Administrator Wood, Activities Assistant Rodriguez, Activities Assistant Rochez, Petitioner, and Supervisor Robertson. Resident R.A. was not interviewed because of incompetency and aphasia, likely associated with her diagnosis of Alzheimer's disease.
12. Through this interviewing process, Investigator Goss sought to determine the credibility of the only purported eyewitness, Activities Assistant Rodriguez, by weighing the degree of shock and true, genuine upset the interviewees reported seeing on the face of Activities Assistant Rodriguez during the day of September 22, 2010, after the alleged abuse she witnessed. Investigator Goss gave particular weight to such statements made by Activities Assistant Rochez, who accompanied Activities Assistant Rodriguez down the hall toward R.A.'s room on September 22, 2010. Activities Assistant Rochez stated to Investigator Goss during the interview that she saw a "funny look" on Activities Assistant Rodriguez's face after the alleged incident. Investigator Goss based her decision to substantiate abuse upon this method of determining the credibility of the purported eyewitness, Activities Assistant Rodriguez.
13. It is notable in this case that Investigator Goss interviewed the two principle witnesses, Activities Assistants Rodriguez and Rochez, together, at the same time, and in the same room, with no opportunity for Investigator Goss to get unbiased, independent answers from either of them.
14. Investigator Goss was aware that purported eyewitness Activities Assistant Rodriguez made no effort at intervention when she alleges that she saw Petitioner abusing R.A. Investigator Goss was unable to make a determination as to whether R.A. was wearing a gate belt, a device used to hold onto a patient, at the time of the alleged incident.
15. Abuse is defined as the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting harm, pain, or mental anguish. Sexual abuse includes, but is not limited to, unwanted fondling of a female's breasts. Respondent substantiated sexual abuse of Resident R.A. by Petitioner based upon Investigator Goss's investigation and report.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, I make the following conclusions of law.

1. The parties properly are before the Office of Administrative Hearings.
2. The greater weight of the evidence produced in this contested case hearing does not support the decision made by Respondent to substantiate sexual abuse of Resident R.A. by Petitioner on September 22, 2010.

DECISION


Based upon the foregoing findings of fact and conclusions of law, I find that Respondent's decision substantiating sexual abuse of Resident R.A. by Petitioner on September 22, 2010 is not supported by the evidence and is REVERSED.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services. The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys 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 04 day of January, 2012.


Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Reginald Alston
8 West Third Street, Suite 260
Winston Salem, NC 27101
ATTORNEY FOR PETITIONER

Derek L Hunter
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699
ATTORNEY FOR RESPONDENT

This the 4th day of January, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA

2012 FEB 27 PM 3:04

IN THE OFFICE OF

COUNTY OF JACKSON

ADMINISTRATIVE HEARINGS

11 DHR 03108

Rosanna Vernetta Leigh,	Office of	
Petitioner,	Administrative Hearings	
)	
vs.	)	DECISION
)	
Department of Health and Human Services)	
Division of Health Service Regulation,)	
Respondent.)	

This contested case was heard before Beecher R. Gray, Administrative Law Judge, in Haywood County, North Carolina on October 7, 2011. Petitioner was represented by Gary E. Kirby of the Jackson County Bar. Respondent State Agency was represented by Josephine Tetteh, Assistant Attorney General, North Carolina Department of Justice. Petitioner submitted a draft proposed decision on February 13, 2012.

ISSUE

Whether Respondent's decision to list Petitioner's name in the North Carolina Health Care Personnel Registry and the North Carolina Nurse Aide Registry is supported by the evidence.

FINDINGS OF FACT

1. The Parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. Petitioner is a former employee of Mountain Trace Nursing and Rehabilitation Center (hereinafter, "the Facility") in Jackson County, North Carolina as a nurse's aide.
3. Respondent is a North Carolina State Agency charged with investigating allegations of abuse or neglect by nurse aide health care personnel and, if allegations are verified by Respondent, a written account of the findings is entered onto the North Carolina Nurse Aide Registry and the North Carolina Health Care Personnel Registry.
4. A medicare/Medicaid-certified nursing facility is required by the Code of Federal Regulations at 42 CFR 483.13(c)(1)(ii)(B) to avoid employing any individual who has a finding of abuse or neglect entered into the State Nurse Aide Registry or the State Health Care Personnel Registry.

5. On February 23rd of 2011, Respondent informed Petitioner that an investigation of events on or about October 19, 2010 had led the Department to conclude that Petitioner had neglected a resident (hereinafter "L.A.") at the Facility.
6. The alleged act of negligence was that Petitioner left resident L.A. alone on a shower chair while Petitioner obtained supplies from a laundry alcove just outside the bathroom. The resident fell and sustained injury and bruising on a shoulder and knee. The investigation revealed that Petitioner knew that L.A. was a fall risk but left the resident alone in a shower and failed to ask other staff for assistance which resulted in the resident falling.
7. From such Finding of Neglect and resulting entry in the State Nurse Aide Registry and the Health Care Personnel Registry, Petitioner gave timely Notice of Appeal by filing a contested case petition.
8. The facts relied upon by Respondent included that Petitioner was experienced at a former nursing facility and properly was put through a training program at the Facility which included shadowing a more experienced worker. In truth, Petitioner's prior nursing facility experience was on a night shift of a nursing home, part-time, while she was attending school. Her work history did not include the bathing or feeding of residents on that shift at the prior nursing facility.
9. While Petitioner had completed the Facility's orientation and training program, she had only a few days of experience working alone with the residents. She began orientation on October 4th, 2010 and this incident with resident L.A. occurred on October 19th, 2010. Petitioner had worked with resident L.A. perhaps one time before, but that was with another aide present during her training.
10. The Care Plan for L.A., known to Petitioner, required two persons to move her from bed to shower or toilet. Preparing to bathe L.A. on October 19th, Petitioner had sought and received assistance of another aide to move the resident from bed to shower but the assisting aide then left the area to return to her duties elsewhere.
11. Respondent relied upon the need for two persons to move the resident and the existence of bed restraints as evidence that Petitioner should have known that the patient could not be left alone in the shower. In fact, the Care Plan for L.A. did not at that time state that L.A. could not be left alone, but that two persons were required to transport her from bed to shower or toilet. Further, there was an event on October 19th that complicated Petitioner's work situation with resident L.A.
12. After resident L.A. was seated in the shower and the assisting aide left the area, resident L.A. had a large bowel movement which created a slippery condition on the floor of the shower facility. Petitioner considered the bowel movement as creating a slip and fall hazard for the resident and herself and stepped out of the shower and out of the resident's room to a laundry alcove a few feet outside L.A.'s door. As she was retrieving more towels to deal with the bowel movement she heard L.A. fall in the shower.

13. Respondent considered the existence of a call signal in the shower as evidence of a lack of care by Petitioner such that she could have stayed with L.A. and signaled for help. While such could have been an alternative course of action, it is not what Petitioner considered at the time of this incident in "the heat of the moment."
14. At the time of this incident, Petitioner was young, inexperienced, and slight of build.
15. Neglect is defined as a failure to provide goods or services necessary to avoid physical harm, mental anguish, or mental illness according to Respondent's Investigation Conclusion Report (R. Ex. 25).

BASED UPON the foregoing findings of fact I make the following

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Considering the youth, inexperience, and lack of specifics of the Care Plan to require two persons to bathe the patient, and considering that experienced staff first assisted, then left Petitioner alone, and considering the resident's unexpected bowel movement on the shower floor, it is not evident that Petitioner failed to provide service necessary to avoid physical harm when she stepped just outside the room to an alcove to retrieve additional towels for clean-up.
3. While Petitioner might have taken a different course of action by staying with the resident and using a call button, the results of that course of action are unknown. L.A. could have attempted to stand or slipped in her own waste and Petitioner may not have been successful in preventing injury then. Such is all speculation. Examining Petitioner's actions in this case, a judgment call on her part, it cannot be found that she was at the time neglecting service to her patient or miss-performing her duties to this patient by very briefly stepping out of the room to retrieve supplies to deal with the situation.

DECISION

Having heard and considered the evidence submitted and the arguments of the parties, I find that Respondent's findings of substantiation against Petitioner for neglect of health care facility resident L.A. are not supported by sufficient evidence and are REVERSED.

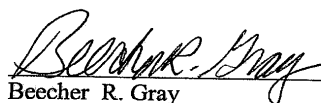
NOTICE

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

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys 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 27 day of February, 2012.




Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Gary E. Kirby
Attorney at Law
PO Box 713
Sylva, NC 28779
ATTORNEY FOR PETITIONER

Josephine Tetteh
Assistant Attorney General
N.C. Dept. of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 28th day of February, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF

2012 FEB 14 AM 10:50

ADMINISTRATIVE HEARINGS

COUNTY OF ROWAN

Office of
Administrative Hearings

11 DHR 05295

DONNA ALICIA PANT DEESE,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF HEALTH SERVICE
REGULATION, HEALTH CARE
PERSONNEL REGISTRY,

DECISION

Respondent

This contested case was heard before Julian Mann III, Chief Administrative Law Judge, on August 22, 2011 in High Point, North Carolina and September 13, 2011, in Salisbury, North Carolina. The record closed on December 5, 2011, upon receipt of Petitioner's draft proposed decision. By order of January 18, 2012, the date to enter this decision was extended until February 17, 2012.

APPEARANCES

Petitioner: Jennifer Davis Hammond
Attorneys at Law PC
215 North Main Street
Salisbury, NC 28144
Attorney for Petitioner

For Respondent: Josephine N. Tetteh
Derek L. Hunter
Assistant Attorneys General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegations that Petitioner abused two residents (HC and MR) at Lutheran Home at Trinity Oaks in Salisbury, NC.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-255

N.C. Gen. Stat. § 131E-256

N.C. Gen. Stat. §150B-23

42 CFR § 488.301

10A N.C.A.C. 130.0101

EXHIBITS

Petitioner's exhibits 1-7, 9-17 were admitted into the record. Petitioner's exhibit 18 was admitted for illustrative purposes only.

Respondent's exhibits 1-14, 16, 20-24 were admitted into the record.

PETITIONER'S WITNESSES

Donna Alicia Pant Deese (Petitioner)

Kimberly Miller (coworker)

Tamara Naylor (coworker)

Essence Smith (coworker)

Surada Reid (coworker)

Cynthia 'Cindy' Haynes (HCPR Nurse Investigator)

RESPONDENT'S WITNESSES

Felicia Carter (coworker)

Pamela Merritt (coworker)

Joyce Nance (supervisor)

Cynthia 'Cindy' Haynes (HCPR Nurse Investigator)

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

FINDINGS OF FACT

1. Petitioner, Donna Alicia Pant Deese, was a nursing assistant at Lutheran Home at Trinity Oaks ("Lutheran") in Salisbury, North Carolina. Lutheran is a health care facility and therefore subject to N.C. Gen. Stats. §131E-255 and §131E-256. Petitioner was hired by Lutheran as a nursing assistant on August 26, 1991 and was continuously employed at Lutheran for nearly twenty years. (8/22/11 T. pp. 41 – 42, 49, 117; Resp't Exs. 1 and 5)
2. As part of her job duties at Lutheran, Petitioner was required to lift a specified weight; utilize safety standards and maintain a safe environment. Petitioner's job duties also include maintaining privacy for residents at all times. (9/13/11 T. p. 11; Resp't Ex. 1 pp. 1 – 3)
3. Petitioner received training concerning residents' rights; communication skills with verbal and non-verbal residents; daily living activities and skills; assistance skills for residents to dangle, stand and walk; and instructions on Lutheran's abuse investigation and reporting policy. Petitioner was also trained on the management of residents with special needs including combative residents and residents with dementia. (8/22/11 T. pp. 117 – 119, 9/13/11 T. p., 13; Resp't Exs. 2 - 3)
4. Over the course of nearly twenty years of continuous employment at Lutheran, Petitioner had no incidents of any serious consequence except for one non-serious incident of expressing an inappropriate comment. However, more recently, Petitioner's co-workers began to notice, generally, that Petitioner was interacting with residents in a more aggressive manner. (8/22/11 T. pp. 45 – 46; 9/13/11 T. pp. 9, 24; Pet'r Ex. 15; Resp't Exs. 5 and 14)
5. On the morning of March 17, 2011, Petitioner requested that certified nursing assistant, Felicia Carter ("Carter") assist Petitioner with Resident H.C.'s shirt. Petitioner was assigned to Resident H.C. Carter is an employee at Lutheran. (8/22/11 T. pp. 51, 118 – 119, 123 – 124; 9/13/11 T. p. 13; Resp't Ex. 10)
6. Previously, in changing of Resident H.C.'s shirt on March 17, 2011, Petitioner found Resident H.C. to be stiff, not easy to sit up and resistant. (8/22/11 T. pp. 44, 53; Resp't Ex. 5)
7. H.C. was a seventy-eight (78) year old male resident. His diagnoses included the following: Alzheimer's disease; other specified organic brain syndrome; diabetes mellitus; and hypertension. H.C. had an impaired sense of balance and was at risk of falling. H.C. was a total care resident whose needs must be anticipated and performed for him. H.C.'s hair was short in front, on top, and back. The length of H.C.'s hair, which approximates one-half inch, was not of sufficient length to grab and pull. (8/22/11 T. pp. 54-55, 145, 147; 9/13/11 T. p. 19; Resp't Exs. 4, 16, 21).

8. Petitioner worked with H.C. in the past and was aware of H.C.'s condition. The facility's approach and expectation for changing H.C.'s shirt was to sit H.C. on the side of the bed in order to change him. Nurse aides were to speak slowly and distinctly to H.C. and listen to him carefully. (8/22/11 T. pp. 57 – 58, 119 – 120, 128, 148 – 149, 180 – 181; Resp't Ex. 4)

9. H.C. was in bed when Petitioner and Carter entered his room. Petitioner stood on the right side of H.C.'s bed, and Carter stood on the left side. (8/22/11 T. pp. 119, 125)

10. Petitioner held H.C. by one hand and placed the other hand to H.C.'s head and pulled him into a sitting position. Carter intervened and called out Petitioner's name. Petitioner responded, "Gosh he is so stiff." H.C. said "oh God, help me". (8/22/11 T. pp. 125 – 127, 151; 9/13/11 T. p. 19; Resp't Exs. 9, 10).

11. Following the changing of H.C.'s shirt, Carter left Resident H.C.'s room. Petitioner stayed behind to attend to H.C.'s needs. (8/22/11 T. p. 56)

12. H.C. did not complain of pain or discomfort after this procedure. H.C. did not exhibit any physical signs of redness or bruising. (R. Ex. 14).

13. M.R. was a resident at Lutheran. M.R. was a ninety-two (92) year old male resident. His diagnoses included the following: Alzheimer's disease; unspecified hypothyroidism; dementia; hypertensive chronic kidney disease; coronary atherosclerosis; congestive heart failure; chronic kidney disease; anxiety; hematuria; abdominal pelvic swelling and muscular wasting. Resident M.R. had a potential for falls due to an unsteady gait and lack of safety awareness. (8/22/11 T. pp. 31, 120, 158, 181; 9/13/11 T. p. 10; Resp't Ex. 22).

14. M.R. moves slowly due to his medical condition. The facility approach, expectation and training in such circumstances was for two staff members to assist M.R. and use a gait belt. Under M.R.'s care plan, nurse aides must allow him time for tasks, offer verbal cues and offer simple instructions. M.R.'s needs must be anticipated and performed for him. (8/22/11 T. pp. 158, 180 – 182; Resp't Ex. 4).

15. M.R.'s Speech Clarity assessment on February 21, 2011, described M.R.'s speech pattern as "clear speech – distinct intelligible words." P. Ex. M.R.'s Hearing, Speech, Vision, Cognitive Patterns, Mood Analysis, and the like.

16. M.R.'s wife was in M.R.'s room at the time of the second incident and no one inquired of her as to the incident or any resulting effect; the evidence does not demonstrate M.R.'s wife heard or saw anything concerning the incident, although she was present in the room. (Testimony of Petitioner, Pamela Merritt, and Cindy Haynes).

17. Although there was conflicting testimony as to whether M.R.'s bathroom door was open or closed, the Petitioner's evidence demonstrated that M.R.'s bathroom door was open. (Testimony of Petitioner and Tamara Naylor).

18. A few hours later, after the incident with H.C. about 10:30 a.m., medication aide and certified nursing assistant Pamela Merritt ("Merritt") asked Petitioner to assist in taking M.R. to the bathroom. Merritt was an employee of Lutheran in Salisbury, North Carolina. (8/22/11 T. pp. 56 – 57, 119 – 120, 152 – 153, 155 – 156; Resp't Ex. 8).

19. Petitioner has worked with M.R. in the past and was aware of his condition. In Petitioner's experience, M.R. can be combative. (8/22/11T. pp. 60 – 61, 75, 120, 180; Resp't Ex. 4).

20. When M.R. finished using the bathroom, Petitioner and Merritt prepared to assist him back into his geri-chair. After standing, M.R. held on to the hand rail and refused to let go. Merritt began coaxing M.R. to let go of the hand rail so he could be put in the geri-chair. Petitioner grabbed M.R. by the back of his pants, and forcefully moved him into his geri-chair. (8/22/11T. pp. 155 – 156, 160 – 161; Resp't Exs. 7, 8).

21. On witnessing Petitioner's actions, Merritt whispered (or similar words) Petitioner's name sharply. Petitioner responded "he gets on my damned nerves, girl". Merritt's written statement to the Lutheran Home is void of any response by Petitioner. (R. Exs. 7, 8, 9 and 10). (8/22/11 T. pp. 156 – 157; Resp't. Ex. 8).

22. Following the incident with H.C. and after Merritt's experience with the M.R. incident, Carter notified Merritt. Merritt immediately notified the charge nurse. Assistant Director of Nursing, Joyce Nance ("Nance") was made aware of the incidents. Nance has been employed with Lutheran in Salisbury, North Carolina where she has been for the past thirty-one (31) years. (8/22/11T. pp. 128 – 129, 162, 174 – 175; 9/13/11 T. pp. 6 – 7; Resp't Exs. 10, 14).

23. Lutheran has a zero tolerance policy towards abuse. Lutheran's policy is that when a staff member witnesses abuse, they are required to report it to the facility. (8/22/11 T. pp. 145, 163; 9/13/11 T. pp. 13 – 14; Resp't Ex. 3).

24. After learning of the allegations of abuse, Nance filled out a 24-hour report and sent the form to the Health Care Personnel Registry. On the form, Nance documented Resident injury/Mental Anguish Description as "No- both have advanced dementia." Both M.R. and H.C. were non-interviewable. Consistent with Lutheran's written and established policies, Petitioner was asked to go home pending a facility investigation. At that time, Petitioner was made aware of the allegation involving Resident H.C. (8/22/11 T. pp. 64 – 65, 177, 179; 9/13/11T. pp. 10, 16, 18, 30, 36; Pet'r Ex. 1; Resp't Exs. 3, 11, 14).

25. Nance obtained permission for and conducted a facility investigation. Nance recorded statements from Carter and Merritt separately and privately. (8/22/11 T. pp. 20, 129, 176 – 178; 9/13/11T. pp. 10, 14; Pet'r Exs. 5, 6; Resp't Exs. 7, 9, 12).

26. Nance attempted to obtain a statement from Petitioner by calling and leaving multiple messages for Petitioner. Petitioner did not return to the facility because she had been previously told that any other incidents could be grounds for termination, and because Petitioner was disgusted. (8/22/11 T. pp. 66 – 68; 9/13/11T. pp. 15 – 18; Resp't Exs. 5, 6, 14).

27. Following her investigation, Nance sent the results of her investigation on the 5-Working Day Report to the HCPR. Nance substantiated the allegations of abuse against Petitioner. (9/13/11T. pp. 18 – 19; Pet'r Ex. 2; Resp't Exs. 6, 13).

28. Cynthia Haynes ("Haynes") has been a nurse investigator with the Health Care Personnel Registry. Nurse Investigator Haynes is charged with investigating allegations against health care personnel in facilities. Accordingly, she received and investigated the allegation that Petitioner had abused M.R. and H.C. at Lutheran. Nurse Investigator Haynes has been a nurse for over twenty-nine (29) years. She has conducted over two hundred and eighty screenings (280) and forty-five (45) investigations. (9/13/11 T. pp. 27 – 30; Resp't Ex. 23).

29. Nurse Investigator Haynes reviewed the facility documents and conducted her own investigation by interviewing people involved with the incidents, including Petitioner, Carter and Merritt, reviewing the residents' medical records; reviewing facility witness statement; and reviewing Petitioner's personnel record. Nurse Investigator Haynes found H.C. non-interviewable. Nurse Investigator Haynes was unable to interview M.R. because he passed away eleven (11) days after the incident with Petitioner. Nurse Investigator Haynes documented her findings. (8/22/11 T. pp. 46 – 47; 9/13/11 T. pp. 29 – 37; Pet'r Ex. 16; Resp't. Ex. 23).

30. Following the conclusions of her investigation, Nurse Investigator Haynes notified Petitioner of her decision to substantiate the allegations of abuse. (9/13/11 T. p. 37; Pet'r Ex. 14; Resp't Ex. 24).

31. Abuse is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." Haynes determined Petitioner willfully abused Residents H.C. and M.R. causing pain and mental anguish. (9/13/11T. pp. 35 – 37; Resp't. Ex. 23).

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 131E and 150B of the North Carolina General Statutes.

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

3. The North Carolina Department of Health and Human Services, Division of Facility Services, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a registry that contains the names of all health care personnel working in health care facilities who are subject to a finding by the Department that they abused a resident in a health care facility or who have been accused of abusing a resident if the Department has screened the allegation and determined that an investigation is warranted.

4. As a Nurse Aide working in a health care facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.

5. Lutheran is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b).

6. "Abuse" is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. 10A NC.A.C. 130.0101, 42 CFR § 488.301. The "term 'willful' has multiple meanings in the law – from 'malicious' to 'not accidental' – depending on the context in which it is used." *Western Care*, DAB No. 1921, at 14. The Board concluded that section 483.13(b) does not require that the purpose of the actor be to inflict harm, but rather requires that the action have been undertaken deliberately. *Britthaven, Inc.*, DAB No. CR1259.

7. N.C. Gen. Stat. § 14-32.2 is the criminal statute governing patient abuse and states:

It shall be unlawful for any person to physically abuse a patient of a health care facility or a resident of a residential care facility, when the abuse results in death or bodily injury.

8. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has substantially prejudiced Petitioner's rights and has exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23.

9. N.C. Gen. Stat. § 131E-256(1)(a) requires the Department of Health and Human Services ("Department") to maintain a registry containing the names of all health care personnel working in health care facilities in North Carolina who have been subject to findings of abuse of a resident.

10. The Health Care Personnel Registry must be consistent and fair in its application of the law to health care personnel.

11. Petitioner, who worked continuously at Lutheran for nearly twenty years without incident (except for one non-serious incident) has met her burden of proving by a preponderance of the evidence that the decision of the Respondent to substantiate a finding of abuse against Petitioner was erroneous.

12. Separated by a matter of only a few hours on the morning of March 17, 2011, Petitioner was accused of two incidents of patient abuse in contrast to nearly twenty years of continuous employment without a serious incident. Petitioner did not willfully inflict injury, unreasonable confinement, intimidation, or punishment upon either H.C. or M.R. which resulted in physical harm, pain or mental anguish and therefore cannot be found to have "abused" either H.C. or M.R. There is insufficient evidence by the preponderance in the record to establish and conclude that Petitioner's conduct in regard to H.C. or M.R. resulted in physical harm, pain, or mental anguish or was otherwise sufficient to support a finding of abuse. Petitioner did not abuse either H.C. or M.R.

13. Since Respondent's decision to substantiate this allegation of abuse against Petitioner is not supported by the preponderance of the evidence, Respondent, therefore, substantially prejudiced Petitioner's rights and acted erroneously by placing a substantiated finding of abuse against Petitioner's name on the Nurse Aide Registry and the Health Care Personnel Registry.

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

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to place a finding of abuse by Petitioner's name on the Nurse Aide Registry and the Health Care Personnel Registry should be, and is hereby **REVERSED**.

NOTICE

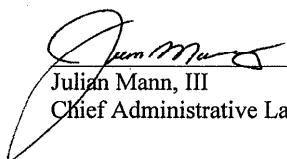
The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Resources, Division of Health Service Regulation.

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 14th day of February, 2012.

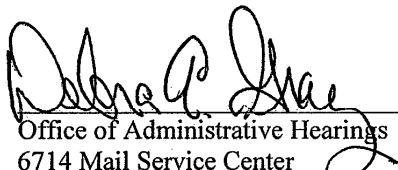

Julian Mann, III
Chief Administrative Law Judge

A copy of the foregoing was mailed to:

Jennifer Davis Hammond
Davis & Davis
215 North Main Street
Salisbury, NC 28144
Attorney for Petitioner

Josephine N. Tetteh
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Attorney for Respondent

This the 14 day of February, 2012.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431-3000
FAX: (919) 431-3100

Filed

STATE OF NORTH CAROLINA ^{2012 FEB 13 AM 10:27} IN THE OFFICE OF
COUNTY OF PITT Office of ADMINISTRATIVE HEARINGS
Administrative Hearings 11 DHR 08755

At Home Personal Care Services Inc.)	
Petitioner)	
)	
vs.	)	DECISION
)	
NC Dept of Health & Human Services)	
Division of Medical Assistance)	
Respondent)	

This contested case was heard before Donald W. Overby, Administrative Law Judge, on October 20, 2011, in Greenville, North Carolina.

APPEARANCES

For Petitioner: Curtis B. Venable, Attorney at Law
Ott Cone & Redpath, P.A.
P.O. Box 3016
Asheville, NC 28802

For Respondent: Brenda Eaddy, Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

ISSUE

Whether the Department of Health and Human Services correctly determined that Petitioner, At Home Personal Care Services, Inc. received an overpayment of \$102,361.28 as a result of allegedly improperly documenting claims for personal care services delivered to Medicaid recipients; or whether the requested recoupment amount constituted over-payments and were improper.

EXHIBITS

As stipulated by the parties as to authenticity and admissibility:

Petitioner's Exhibits:

Patient records and documents of patient L.Ch., Exhibit Petitioner – 1.
Patient records and documents of patient C.C., Exhibit Petitioner – 2.
Patient records and documents of patient W.C., Exhibit Petitioner – 3.

Patient records and documents of patient B.G., Exhibit Petitioner – 4.
Patient records and documents of patient R.H., Exhibit Petitioner – 5.
Patient records and documents of patient J.L., Exhibit Petitioner – 6.
Patient records and documents of patient A.P., Exhibit Petitioner – 7.
Patient records and documents of patient Q.B., Exhibit Petitioner – 8.
Patient records and documents of patient J.B., Exhibit Petitioner – 9.
Patient records and documents of patient L.Cr., Exhibit Petitioner – 10.
Patient records and documents of patient F.E., Exhibit Petitioner – 11.
Patient records and documents of patient M.E., Exhibit Petitioner – 12.
Patient records and documents of patient B.Gu., Exhibit Petitioner – 13.
Patient records and documents of patient G.L., Exhibit Petitioner – 14.
Patient records and documents of patient H.M., Exhibit Petitioner – 15.
Patient records and documents of patient M.M., Exhibit Petitioner – 16.
Patient records and documents of patient C.M., Exhibit Petitioner – 17.
Patient records and documents of patient E.S., Exhibit Petitioner – 18.
Patient records and documents of patient F.S., Exhibit Petitioner – 19.
Patient records and documents of patient E.W., Exhibit Petitioner – 20.

Respondent's Exhibits admitted:

Treatment notes for Patient A.P., Exhibit, Respondent A.

WITNESSES

Witness for Petitioner:

Regina Gilliam, RN, Owner
At Home Personal Care Services, Inc.

Witness for Respondent:

Dionne Manning, RN, MS
N.C. Division of Medical Assistance
Program Integrity Unit

APPLICABLE STATUTES, RULES AND POLICIES

42 U.S.C. §§ 1396a – 1396v
42 C.F.R. Parts 455 and 456, generally
N.C. Gen. Stat. Ch. 108A, Article 2, Parts 1 and 6
N.C. Gen. Stat. Ch. 150B
10A N.C.A.C. 22, O & F et seq.
N.C. State Plan for Medical Assistance
Medical Coverage Policy #3C (revised, dated August 1, 2007)

FINDINGS OF FACT

1. The Division of Medial Assistance (DMA) section of Respondent state agency is responsible for administering and managing North Carolina's Medicaid plan and program. Pursuant to N.C. Gen. Stat. §108A-54, Respondent DMA is authorized to adopt rules, regulations, and policy for program operation.

2. This Court will take official notice to Respondent's rules, regulations, and policy.

3. Petitioner is a personal care services (PCS) provider. Petitioner has entered into a Medicaid Participation Agreement contract with Respondent wherein Petitioner agreed to provide nurse and nurse aide services to Medicaid recipients pursuant to Medicaid rules, regulations and policy, and generally recognized community nursing standards.

4. This matter is before the Court due to a recoupment action. Respondent has determined that claims submitted by Petitioner for payment did not follow Medicaid rules and regulations.

5. Regarding this post payment review, Respondent maintains Petitioner errors included:

a. The nurse assessor failing to record the time spent on the PACT form assessments;

b. Providing services to recipients who did not meet medical necessary criteria;

c. Missing documentation and billing for services not provided.

6. Respondent's witness, Ms. Dionne Manning testified to the effect that the purpose of the audit is to find out if the services that were paid for had been actually rendered.

I. PACT FORM ASSESSMENT TIME

7. Respondent identified instances in the cases where the nurse assessor did not document the time in and/or the time out on the PACT form. Respondent contends that in all the cases identified as noncompliant regarding time in - time out requirements, Section 7.9 of Clinical Coverage Policy 3C is applicable.

8. Section 7.9 of Clinical Coverage Policy 3C is applicable to the Registered Nurse supervisor making supervisory visits in the recipient's home. All of the cases at issue herein concerning recording the time in/time out are for the assessment performed as part of the PACT form; and therefore Section 7.4 of Clinical Coverage Policy 3C applies.

9. As relevant to this issue, Section 7.4.1 provides "[t]he PACT form documents all of the following: a. The date, time and duration of the assessment." The only parts at issue

herein are the time and the duration in that the Petitioner did not provide the time in and time out. The date of the assessment is given.

10. Section 7.4.2 requires the RN assessor to certify that he or she completed the in-home assessment, determined the need of the recipient and developed a plan of care. It then, in bold type, specifies what happens if the assessor certifies to a material and false statement, including being investigated for fraud and being reported to the licensing Board. Similar requirements are established for the certifying physician, including referral to the NC Board of Medicine.

11. In accord with the requirements of the policy, each Pact form requires the certification, which states "I certify that I, and no one else, have completed the above in-home assessment. . . ."

12. Petitioner's owner, Ms. Regina Gilliam, RN, performed all of the questioned assessments, with the exception of two. All of the questioned assessments have the assessor's printed name, are signed and dated.

13. The essential and critical part of assessment is that it is actually being performed in person and at the recipient's home. Failure to do so is actionable by fraud investigation and being reported to the proper licensing board. In each instance herein the assessor has attested to the fact that she and no one else did in fact perform an in home assessment of the patient's condition. There is ample other evidence on the form to confirm to the degree possible that the assessment was in fact performed on that recipient in the recipient's home on the date as stated.

14. In each instance, Ms. Gilliam offered that the time in/time out was not recorded because she was not going to bill for those services because she was concerned that it would take time away from the actual provision of services—a reasonable explanation.

15. Section 7.4.1 states that the documentation on the PACT form "serves as the basis for determining whether the recipient qualifies or continues to qualify for PCS." It also requires that "all fields on the form must be completed as applicable." (Emphasis added) While providing the time in/time out is useful information and would not ordinarily be seen as surplusage, such information certainly is not critical to forming an opinion of whether or not the recipient would qualify for PCS.

16. Petitioner concedes its non-compliance in not providing the time in/time out; however, likewise, Respondent's witness concedes no attempt was made by Respondent to try to correct the omission, nor to give Petitioner any opportunity to correct the documentation. There is no suggestion of fraud or any other impropriety in the completion of these PACT forms. There is no assertion that the recipients did not qualify and need the services.

II. DOCUMENTING MEDICAL NECESSITY

17. Respondent maintains Petitioner accepted and provided services to Medicaid recipients who did not need assistance with 2 activities of daily living (ADL).

18. Section 7.4 "Physician Authorization for Certification and Treatment (PACT) Form of Respondent's Clinical Coverage Policy No. 3C (revised date August 1, 2007) states the documentation requirements with which providers of personal care services must comply prior to receiving either authorization to deliver personal care services or to obtain payment for the services delivered. The PACT form of Section 7.4 is the basis which outlines the findings of medical necessity and what services are to be rendered based on those findings.

19. Section 3.2 articulates what constitutes "medical necessity." It states "medical necessity means that if the plan of care is not implemented, the recipient's medical condition will deteriorate."

20. Section 3.2.1 addresses Activities of Daily Living. It states in pertinent part: "PCS covers aide services rendered in the private residence of a recipient who requires assistance with a minimum of two unmet activities of daily living (ADLs). . . . An unmet need exists when the recipient cannot independently perform at least two personal care tasks because of a physical or cognitive impairment; . . ." (Emphasis added)

21. This issue centers on interpretation of the plain language of Section 3.2.1, particularly the word "independent." Section 3.2.1 requires that the recipient cannot "independently perform at least two personal care tasks. . . ." Column A of the PACT form is labeled "ADL Self-Performance Scores." A score of "0" (zero) is INDEPENDENT. (Capitals in original) Common sense and logic dictate that anything beyond this rating is NOT independent; i.e., that the recipient cannot perform that task independently as set forth in Section 3.2.1. A score of "1" requires assistance, and, logically if the recipient does not get that assistance then he or she may not accomplish that task.

22. Column B of the PACT form is labeled "ADL Support Provided Scores." A score of "0" (zero) means that recipient does not need any help for set up or physical help. A score of 1 means that the recipient needs help with set up only; i.e., that recipient cannot perform that task completely independently.

23. Respondent's witness, Ms. Manning, testified that a recipient only qualifies if he or she is rated at least #2 in both Column A and Column B of the PACT form. She further testified that one only qualifies if "hands-on" assistance is required.

24. When questioned by the court, Ms. Manning could provide no other or further authority for this requirement other than it was the Respondent's requirement. There is nothing within the policy nor otherwise presented that states that the recipient only qualifies if he or she requires hands-on assistance.

25. The plain language of the policy and the face of the PACT form are not consistent with Respondent's interpretation.

26. Recipients LC and CC both have met the requirements of Section 3.2.1, and it was error for Respondent to attempt to recoup for payments made for their care.

27. For Recipients WC and JL, there are discrepancies on the face of the PACT form. For each, only one ADL is rated "1" or more in Column A and 2 or more are rated "1" or more in Column B. In the third column, which is to be checked "if agency assistance is needed (unmet needs)", WC has four checks and JL has three. (Parenthesis in the original) Each has two or more ADLs identified by number from page two of PACT as being a "Task to Be Accomplished" page 4. The forms in their entirety show that there was "medical necessity" requiring the services rendered for WC and JL.

28. Petitioner notes that the RN did not correctly understand filling out the form and she was sent for more training as soon as the error was discovered.

29. The PACT assessment form for L.Ch., C.C., W.C. and J.L. reflect that each had unmet personal care needs in at least two categories, and met the requirements for medical necessity. Respondent was in error in finding that the medical necessity requirements were not met.

30. Respondent's witness, Ms. Manning, stated that if she had conducted the audit and found incomplete information she would have asked questions. She did not do this audit and the auditor performed this audit did not ask any questions to try to ascertain accurate information.

III. QUESTIONABLE DOCUMENTATION ON SERVICE LOGS

31. Respondent also identified cases where Petitioner did not produce the required and proper documentation of the in-home visits for review.

32. Section 7.10 of Clinical Coverage Policy No. 3C sets forth the parameters for the in-home visits by the aides and their required documentation of each visit.

33. In the matter of recipient BG, the question arises concerning the ADL for mobility, particularly "ambulation" as recorded on the aide's timesheet which appears to be the weekly log for this recipient. The aide wrote in "as needed" beside "ambulation assistance" and then no other checks were put down for any other dates to indicate any assistance for ambulation.

34. The PACT form notes on page 4, tasks to be accomplished, that 15 minutes is allotted each day for section #19—ambulation. Within that section a subset is "non-ambulatory/transfer." The form also shows that "one person physical assist" is required for BG when being helped with either the tub or shower.

35. From the method used to record the activities for BG, it is impossible to tell to the minute exactly how much time is spent on each ADL. The timesheet records time spent for "full bath/partial bath" each day the aide was there. The non-ambulation could be subsumed within that time spent.

36. It is reasonably expected that to be in compliance with the policy that some amount of time would be spent on each ADL identified in the PACT form in accord with the time allotments in the plan of care. Common sense would also dictate that if the entire 15 minutes allotted are not used in any one ADL, that time could be used for another ADL; or conversely if more time is used than allotted, time could be “borrowed” from another ADL. It is ludicrous to think that an exact amount of time would be used for each service each day without variation, and that to vary that amount of time would be sanctionable by demanding the return of money spent on the service.

37. Section 7.10 requires recording the “date, time spent providing services, and tasks provided.” “Services” is in the plural; in the aggregate. There is no requirement to record the exact amount of time spent on each ADL on each day. To engage in that amount of detailed record-keeping would be both very cumbersome and very time consuming for the Providers.

38. It is obvious from BG’s PACT form that she is in need of the services, requiring far more help than the minimum of two ADLs. For this particular week, the aide only provided two hours of service on two days.

39. Regarding the services to AP, the discrepancy is reflected in two separate timesheets submitted for the same week, February 18, 2010. One timesheet shows no time spent in “transfer assistance” whereas the other time sheet has checked that transfer assistance was provided by the aide every day. Petitioner does not know how or when the change was made, whether or not both timesheets were in the file simultaneously, and when or if one was removed from the file, or by whom. While Petitioner is an otherwise credible witness, she attempts to explain this situation by what she has been told and by speculating, to no avail.

40. Regarding the services to RH, the discrepancy is primarily reflected on the aide timesheet for the week of December 24, 2009. The notations “per request” by foot care, “non-ambulatory” beside ambulation assistance, and “as needed” beside incontinence care make it difficult to determine the time spent overall in attending to the ADLs for RH. Although the timesheet has space for employee comments, there were no explanations for this time period. The discrepancies on this log and the existence of two different logs make these records suspect. Petitioner contends that reference to the call logs could help fill in the missing information but that the auditor did not request any further information.

41. Respondent was in error to attempt to recoup money for services rendered to BG. Respondent was not in error in attempting to recoup money for services to AP and RH.

IV. APPLICATION OF APA RULE-MAKING

42. Petitioner contends alternatively that Respondent has unique authority to create binding requirements through a process outside of the Administrative Procedures Act. N.C. Gen. Stat. § 108A-54.2. It is true that our legislature has made clear that agencies can bind citizens only through the Administrative Procedures Act rule-making process. N.C. Gen. Stat. §150B-18. The key to the Respondent’s unique exemption to the rule-making requirements of this State lies in the specific authority granted which is to create “medical coverage policies.” For the time in

question, “medical coverage policy” had not been defined by our legislature. See, Session Law 2011-399, Sections 4 and 6.

43. Giving the words their ordinary and customary usage and understanding, the word “medical” would seemingly be referring to policies concerning medical determinations. The word “coverage” would logically refer to applicable coverage for medical programs. Taken together, the General Assembly has given the Respondent the authority to create binding policies upon citizens outside the Administrative Procedures Act rule-making process that relate to defining how particular “medical” conditions are “covered” by our State’s Medicaid program. This exemption from the Administrative Procedures Act rule-making requirement does not equate all policies and procedures of Respondent being considered as “medical coverage policy.” Otherwise, our legislature would have granted an unlimited exemption from the rule-making requirements within the Administrative Procedures Act. See e.g. N.C. Gen. Stat. §150B-1(d).

44. While this Tribunal is in agreement in general terms with Petitioner’s argument as to the applicability and/or enforceability of the rule-making provisions of the APA, that argument is specifically not addressed herein.

CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearings for this contested case hearing. Jurisdiction and venue are proper, and this matter was filed in a timely and appropriate fashion. All parties necessary are properly joined.

2. The burden of proof is with the Petitioner.

3. A critical part of the issue herein is whether or not Respondent should be allowed to recoup money from Petitioner when services have been rendered but there has been error in documentation.

4. The Code requires proper documentation. Likewise, each provider signs a “participation agreement” wherein he or she agrees to operate and provide services in accordance with state law and all manner of rules, regulations, policies, manuals, bulletins and the like which would command proper documentation.

5. The North Carolina Administrative Code has two provisions which are entitled “Recoupment”, 10A NCAC 22F .0601 and 10A NCAC 22F .0706.

6. 10A NCAC 22F .0706 speaks to recoupment of overpayments and how the money will be distributed.

7. The Code states at 10A NCAC 22F .0601 “the Medicaid agency will seek full restitution of any and all improper payments made to providers by the Medicaid program.” (Emphasis added) “Improper payments” are not defined in the Code; however, in reading *in pari materi* other sections one may discern the meaning and intent.

8. 10A NCAC 22F .0103 also similarly states that the Division shall institute methods and procedures to, among other things, "recoup improperly paid claims."

9. The Administrative Code states at 10A NCAC 22F .0103 that "The Division shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting, and disposing of cases involving fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services." (Emphasis added). "Error" is the only misdeed applicable; i.e., there are no allegations of fraud, abuse, overutilization or use of medically unnecessary or inappropriate services.

10. 10A NCAC 22F .0103 also lists measures and procedures to be taken whenever a Provider has violated any of the listed missteps or misdeeds. Among the items listed that the Respondent shall institute are methods and procedures to "establish remedial measures including but not limited to monitoring programs, referral for provider peer review those cases involving questions of professional practice, and analyze and evaluate data and information to establish facts and conclusions concerning provider and recipient practices.

11. In section 10A NCAC 22F .0501 (captioned "general") it is stated that the Division will safeguard against Provider's practices that provide medically unnecessary and medically inappropriate health care and services, and to ensure that quality of care rendered recipients meets acceptable standards.

12. In section 10A NCAC 22F .0602 the code addresses "administrative sanctions and remedial measures" for program abusers. Among those sanctions and remedial measures are warning letters, suspension or termination as a provider, probation with close monitoring, or "flagging" a provider for manual review. There has been no assertion or allegation in this proceeding that Petitioner was in any way responsible for program abuse; however, it is instructive that program abusers are allowed remedial measures whereas the Providers are allowed no latitude for error when audited.

13. There has been no assertion or allegation in this proceeding that Petitioner was in any way responsible for fraud as defined in N.C. G. S. § 108A-63, i.e., there is no allegation or assertion of the Petitioner "knowingly and willfully making or causing to be made any false statement or representation of material fact" or other type of fraud as defined therein.

14. Respondent contends that petitioner improperly was paid for services which were not "medically necessary" but those allegations were based on pact forms which were not filled out correctly. Other wise, there is no allegation or assertion that petitioner provided medically unnecessary or medically inappropriate services. In reading the pact forms in their totality for these questioned recipients, each of the questioned pact forms shows that each recipient did indeed meet the requirements for services. Respondent's interpretation of needing scores of 2 or more and needing "hands-on" assistance are incorrect.

15. In this audit, the auditor did not ask any questions or make any attempts to try to ascertain the true status of these cases. No remedial measures were offered, other than those initiated by the Provider. It seems inconceivable that remedial measures are offered to those identified as abusers of the program but not those who make clerical errors.

16. Respondent's approach in this audit allows for no errors in documentation without very serious consequences. That approach ignores the very human element that humans will make mistakes—including this auditor and the Respondent in general. "To err is human"—no one is above making mistakes, but there should not be such drastic consequences as here without some ability to rectify errors.

17. Respondent's witness ms. Manning stated to the effect that the purpose of the audit is to find out if the services that were paid for had been actually rendered. That interpretation is consistent with the code provisions and whether or not the payments were "improper." Applying that interpretation, then it should not be sufficient to recoup money from the provider when there is no question that the services were rendered but clerical errors were made in the documentation. To allow such is tantamount to a "taking" by the agency from someone who has provided a service to the state.

18. It is incongruous to recoup the money paid to render needed and valuable services provided by this Petitioner for not providing times for a particular service which was not even billed. Respondent is out nothing, and in fact, has profited by Petitioner not billing for the service. The "punishment does not fit the crime."

19. Respondent was in error in concluding that the PACT forms did not justify paying for services for LC, CC, WC and JL.

20. Respondent was in error to attempt to recoup monies from petitioner based on Petitioner's failure to record on the pact form the time in/time out while performing the assessment. Therefore, respondent was in error with respect to the following patients: Q.B., J.B., L.Cr., F.E., M.E., B.Gu., G.L., H.M., M.M., C.M., E.S., F.S., and E.W.

21. There is sufficient and reliable documentation concerning BG to justify payment for the services rendered. Respondent was in error to attempt to recoup money for services rendered to BG. Petitioner failed to carry its burden concerning AP and RH because the discrepancies within the documentation for those two cases is such as to render the documentation questionable and unreliable. Respondent was not in error in attempting to recoup money for services to AP and RH.

22. The amount of the recoupment should be adjusted in accordance with these findings and conclusions of law.

23. In making the findings and conclusions herein, it is not necessary to address Petitioner's argument as to the applicability and/or enforceability of the rule-making provisions of the APA to the provisions of the Code cited herein.

DECISION

The amount of the recoupment should be adjusted in accordance with these findings and conclusions of law.


NOTICE

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

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

The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services. This 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' attorneys of record and to the Office of Administrative Hearings.

This the 13th day of February, 2012.



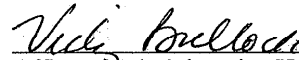
Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

Curtis B. Venable
Ott Cone & Redpath PA
PO Box 3016
Asheville, NC 28802
ATTORNEY FOR PETITIONER

Brenda Eaddy
Assistant Attorney General
NC Dept of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 13th day of February, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

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STATE OF NORTH CAROLINA	FILED	IN THE OFFICE OF
COUNTY OF GUILFORD	2011 JAN - 3 P 12:03	ADMINISTRATIVE HEARINGS
Christina Bullard Petitioner,	)	11 DHR 09717
v.	) OFFICE OF	
	) ADMINISTRATIVE	
	) HEARINGS	DECISION
Department of Health and Human Services,)	
Division of Health Service Regulation,)	
Respondent.)	

THIS MATTER came on for hearing before the undersigned, on October 25, 2011, in High Point, North Carolina.

APPEARANCES

Petitioner: Christina Bullard
2149 River Meade Drive
High Point, North Carolina 27265

For Respondent: Josephine N. Tetteh
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner abused Resident MA of Guilford Health Care in Greensboro, North Carolina and entered findings of abuse by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-255
N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23
42 CFR § 488.301
10A N.C.A.C. 130.0101

EXHIBITS

Respondent's Exhibits 1 – 27 were admitted into the record.

Petitioner's Exhibit 1 was admitted into the record.

WITNESSES

Christina Bullard (Petitioner)
LeStarr Hannah (Charge Nurse)
Donita Odom (Supervisor)
Thurshell Gray (Supervisor)
Linda Waugh (HCPR Investigator)

THE FINDINGS OF FACT are made after careful consideration of the sworn testimony, whether visual and/or audio, of the witnesses presented at the hearing, and the entire record in this proceeding. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case.

From the sworn testimony and the admitted evidence, or the lack thereof, the undersigned makes the following:

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Christina Bullard, was a health care personnel at Guilford Health Care ("GHC") in Guilford County, North Carolina. GHC is a skilled nursing facility and therefore subject to N.C. Gen. Stats. §131E-255 and §131E-256. (T pp. 8-9, 71; Resp't Ex. 1)
2. Petitioner was trained on abuse and neglect of patients; residents' rights; care of the cognitively impaired; specialized needs of residents/patients; and understanding Alzheimer's disease/dementia. Petitioner was also aware of GHC's clinical policies relating to abuse. (T pp. 9, 11-12; Resp't Exs. 2 - 4)
3. Petitioner was trained on her position at GHC. Petitioner was trained on how to take care of residents with chapped lips. The facility approach and expectation for taking care of a resident with chapped lips is to use a readily available facility care-kit to moisturize the resident's lips. Towels are not appropriate because of the roughness and because of infection control issues. (T pp. 9, 33-34, 46, 58-59)
4. Petitioner has been previously counseled for tardiness and improper care of residents. The type or degree of improper care was not explained; however, the same witnesses who

testified regarding this also testified that they did not believe Petitioner would abuse the resident. (T pp. 20-22, 49, 56, 79)

5. Petitioner is aware that it is abuse to hit a patient; to grab a patient's face; and that it is not appropriate to abuse a patient. (T p. 12)

6. On March 30, 2011, Petitioner was assigned to take care of Resident MA. Petitioner was the only nursing assistant assigned to Resident MA for the shift. At all times relevant to this proceeding, MA has been a resident of GHC. Resident MA was admitted to the facility with the following diagnoses: hypertension; dementia; and osteoporosis. Resident MA is an eighty-nine (89) year old resident. (T pp. 13, 31-33; Resp't Exs. 18, 21, 22)

7. No other staff member was permitted to assume care for Resident MA while Petitioner was assigned to Resident MA without a hand-off. (T pp. 32-33)

8. Resident MA is in a wheelchair and is non-ambulatory. Resident MA does not have a history of self-injurious behavior. Resident MA has never made an allegation (of abuse or otherwise) against a staff member. (T pp. 45, 48, 61, 78-79; Resp't Exs. 18, 22)

9. During the morning shift, Petitioner went to LeStarr Hannah ("Nurse Hannah") and indicated that she (Petitioner) had tried to get 'chap' off Resident MA's lips. At all times relevant to this proceeding, Nurse Hannah was the charge nurse on the unit, and an employee of GHC. Hannah was the nurse for Resident MA during the shift. (T pp. 27-28, 32-34, 38, 89; Resp't Ex. 10)

10. Nurse Hannah's testimony was that MA was very demented and could get **combative** (emphasis added) at times, and was unpredictable as to how she would respond to an attendant's approach. "She's very confused. **Very confused** (emphasis added)". (T p. 31)

11. After receiving the report, Nurse Hannah went into Resident MA's room with Petitioner. Nurse Hannah observed small, reddened lacerations on Resident MA's lips at that time. (T pp. 29, 38; Resp't Ex. 10)

12. Petitioner testified and the credible evidence showed that around lunchtime, Petitioner returned to Nurse Hannah and reported a bruise to Resident MA's right cheek. While walking towards Resident MA's room, Petitioner told Nurse Hannah that Resident MA was saying Petitioner had caused the bruise. (T pp. 29-30, 74; Resp't Ex. 10) To the finder of fact, Petitioner presented as a credible witness, even though it is recognized that she was an interested witness, and was making this statement against self-interest.

13. When Petitioner and Nurse Hannah arrived at Resident MA's room, Petitioner approached Resident MA and tried to touch the area where she had observed the bruise. Resident MA became visibly agitated. Hannah observed a bruise in the area Petitioner had indicated. (T p. 30; Resp't Exs. 10, 11)

14. Nurse Hannah asked Resident MA how she had sustained the bruise to her face. Resident MA indicated that Nurse Hannah's sister had done it. MA illustrated this by contemporaneously identifying that person as the Petitioner when she saw her walking by her doorway and that she was responsible for the bruise. (T p. 30; Resp't Exs. 10, 11)

15. Nurse Hannah also testified that because of MA's dementia, she could have confused Petitioner with someone else. (T p.37)

16. Nurse Hannah immediately notified her supervisor, Donita Odom ("Odom"). At all times relevant to this proceeding, Odom was the unit manager at GHC. (T pp. 30, 39-41; Resp't Ex. 13)

17. Odom and Nurse Hannah returned to Resident MA's room and questioned her. Resident MA repeated the information she had given Nurse Hannah. Odom observed a fresh, bluish-green bruise on Resident MA's face. (T pp. 31, 41-42, 76-77; Resp't Ex. 13)

18. Odom also testified that in MA's initial statement of March 30, she had been hit in the top, in the butt, and in the cheek. (T p. 43)

19. Further testimony from Odom was that MA is confused, could be combative at times, and at around 90 years of age, bruises easily. (T pp. 44-45)

20. Odom received a written statement from Petitioner. At the same time, Odom also suspended Petitioner pending the facility investigation. (T p. 43; Resp't Ex. 7)

21. Odom acknowledged that when she was interviewed by Nurse Investigator Waugh, she stated that she had interviewed MA on April 1, 2011 and that MA told her that she had been hit on the jaw, but did not want to talk about it. Odom further affirmed that MA was not alert or orientated to time and place; Odom further concluded that she did not think Petitioner would **intentionally abuse** (emphasis added) MA, but she thought Petitioner may have been too rough with MA (T p. 49)

22. Odom completed the Health Care Personnel Registry ("HCPR") 24-hour report and sent it to the HCPR. Odom also notified her supervisor, Thurshell Gray ("Gray"). At all times relevant to this proceeding, Gray was the Director of Nursing at GHC. (T pp. 42, 52-53; Resp't Exs. 16, 17)

23. Gray and Odom conducted a follow-up interview with Resident MA on April 1, 2011. Resident MA conveyed the same information she had previously told Odom and Hannah. Gray also interviewed other residents who had been taken care of by Petitioner on March 30, 2011. (T p. 42-43, 54; Resp't Exs. 14, 19 - 20)

24. Gray took pictures of the bruise on Resident MA's face and completed a facility investigative report. (T pp. 59-60; Resp't Exs. 17, 24)

25. After being shown the photo of MA (Exhibit R-24), Gray testified that based on her extensive nursing experience, the bruise looked like a thumbprint. (T p. 50)

26. After further inquiry, for clarification of the record, Gray testified that her opinion differed from the statements of MA as to how MA's bruise might have been received. (T p. 62)

27. After her investigation, Gray sent the results of her findings in a 5-day working report to the HCPR. (T p. 61; Resp't Exs. 21)

28. At all times relevant to this matter, Linda Waugh ("Nurse Investigator Waugh") was a nurse investigator with the Health Care Personnel Registry. Nurse Investigator Waugh is a registered nurse with over fourteen years of experience. Nurse Investigator Waugh's experience includes long-term skilled nursing facilities. Nurse Investigator Waugh is charged with investigating allegations against health care personnel in the central north region of North Carolina, including Guilford County. Accordingly, she received and investigated the allegation that Petitioner had abused Resident MA at GHC. (T pp. 66-68; Resp't Ex. 26)

29. Nurse Investigator Waugh reviewed the facility documents and conducted her own investigation, which included interviewing individuals involved with the incident. (T pp. 71-72; Resp't Ex. 26)

30. In the course of her investigation, Nurse Investigator Waugh interviewed Odom (RN), who had previously conducted the facility's investigation of this matter. Waugh testified as to her interview with Odom and her investigation, which was memorialized in Exhibit R-18. In this exhibit Nurse Investigator Waugh stated that Odom acknowledged that on March 30, she (Odom) interviewed MA who recounted, "She beat me up, and this is not the first time this has happened". By way of illustration, MA took her fist and said that she hit me on the butt, on my top, and my cheek - - identifying her alleged assailant as LeStarr's sister. (T p.77)

31. Nurse Investigator Waugh found several inconsistencies in Petitioner's statements including the following:

- a. Petitioner was unable to give a reason for the presence of an injury on Resident MA's face when neither she (Petitioner) nor Nurse Hannah had seen a bruise on Resident MA's face before Petitioner went in to Resident MA's room. (T pp. 22, 48, 73-74, 78, Ex. 9)
 - i. Petitioner was the only assigned caregiver for Resident MA during the shift. (T p. 32; Resp't. Ex. 6)
 - ii. The nurse on the preceding shift did not indicate to Nurse Hannah that there had been an injury to Resident MA's face. Indeed, Nurse Hannah did not see any bruise on Resident MA's face earlier in the shift. (T pp.78, 81)
 - iii. A skin sweep had been done on Resident MA's face prior to this incident and no bruise was noted on Resident MA's face at the time. (T p. 60)
- b. Petitioner indicated that she had seen a man leaving Resident MA's room. However, Petitioner did not report this observation to the facility. Furthermore,

none of the facility witnesses or staff, who were present in the vicinity at the time and had full visibility of the area, saw any man entering Resident MA's room or on the floor at the time of the shift. (T pp. 34-35, 50, 82, 89; Resp't. Ex. 10)

- i. Petitioner indicated the man she saw may have been one of Resident MA's 'numerous' family members. However, other facility witnesses stated that Resident MA had very few family members and none who fit the description Petitioner later gave. (T pp. 45, 54-55, 74)
- ii. Petitioner did not tell Odom or Nurse Hannah about seeing a man outside Resident MA's room. (T pp. 80-81)
- iii. A review of visitor logs did not show visitors on that day. Further, no one saw visitors come in or go out. (T pp. 55, 84)
- c. Petitioner denied returning to Resident MA's room and trying to touch Resident MA's face after reporting the incident to Nurse Hannah. To the contrary, Nurse Hannah indicated that Petitioner came into Resident MA's room with her (Nurse Hannah) and that Resident MA reacted visibly when Petitioner tried to touch Resident MA's face. Resident MA permitted Nurse Hannah to touch Resident MA. (T pp. 18, 29-30, 36, 75, 81-82; Resp't. Ex. 9)
- d. Petitioner failed to follow facility protocol, expectation, and her training in cleaning Resident MA's lips. Petitioner used a towel to apply Vaseline to Resident MA's lips instead of using the readily available facility lip care kits. (T pp. 33-34)
(See also Resp't Ex. 26)

32. Odom testified that neither she nor any other nurse on the hall knows when a resident has a visitor. (T p.50)

33. Nurse Investigator Waugh concluded her investigation and substantiated abuse. (T pp. 82-83; Resp't. Ex. 26)

34. In substantiating abuse, Nurse Investigator Waugh stated that MA consistently stated that she had been hit, although these statements were not consistent with the only injury, the bruise. MA, an Alzheimer's patient, stated that she had been "beat up" and that she had been struck on her top, cheek, and butt (she was non-ambulatory and wheel chair-bound). These statements were contrary as to how some of the experienced nursing staff, witnesses for the Respondent, opined that the injury may have occurred. This was evident in the testimony of Gray who stated that the bruise shown in Resp't. Ex. 24 looked "like a thumb print". (T p. 60).

35. Abuse is defined as the "willful (emphasis added) infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish". Investigator Waugh determined Petitioner willfully abused Resident MA causing pain and mental anguish. (T pp. 83-85; Resp't. Ex. 26). It should be noted that the testimony of Investigator Waugh as to willfulness related to the physical touching of MA in an attempt to wash her face, **not hitting her** (emphasis added). (T p. 84). However, this is contradicted by

Investigator Waugh's Investigator's Conclusion Report which concludes by stating the following: "The allegation that on or about 3/30/2011, Christina Bullard, Nurse Aide, abused a resident, MA, by **hitting** (emphasis added) MA in the face, resulting in the resident sustaining a bruise to her right jaw line, is substantiated".(Resp't. Ex. 26-p8)

36. Following the conclusions of her investigation, Nurse Investigator Waugh notified Petitioner of her decision to substantiate the allegation of abuse. (T p. 85; Resp't Ex. 27)

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 131E and 150B of the North Carolina General Statutes.
2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.
3. As a health care personnel working in an adult care facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.
4. "Abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish".
5. To suggest that on or about March 30, 2011, Christina Bullard, a Health Care Personnel, abused resident (MA) by hitting the resident in the face, resulting in the resident sustaining a bruise to her right jaw line, would be the equivalent of holding Petitioner to a standard of absolute liability for any injury sustained by the resident while in the care of Petitioner.
6. In giving deference to the decision of the Respondent, the undersigned must also give consideration to and weigh the in-court testimony of the witnesses for the Respondent; its evidence; and that of the Petitioner. The deference given to the Respondent requires the undersigned to consider whether its decision was arbitrary or contrary to rule or law. To accept the first allegation would require a postulation that Nurse Investigator Waugh's report was correct in concluding that there was abuse, as told by the confused MA, by the Petitioner hitting her. After the production of evidence and testimony at hearing, the same Nurse Investigator concluded that the willfulness component of abuse occurred by Petitioner's touching MA in an attempt to wash her face, not by hitting her. The allegation of how the abuse occurred has become somewhat of a moving target based on the proof at hearing.
7. In making this determination, the undersigned observed that there were discrepancies of the witnesses for each of the parties. In weighing these discrepancies with the **very confused** and out of court statements of Resident MA, coupled with the **willfulness** component of the definition of abuse, and the contrary finding of Respondent's Investigation Conclusion Report of June 30, 2011, with the testimony of Investigator Waugh on October 25, 2011, would require the undersigned to make a leap of faith to affirm the findings of the Respondent.

DECISION

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to place a finding of abuse by Petitioner's name on the Health Care Personnel Registry should be **REVERSED**.

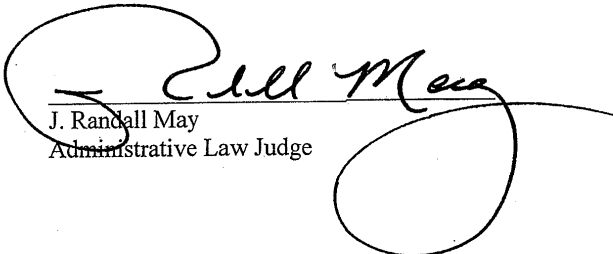
NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Resources, Division of Health Service Regulation.

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 3 day of January, 2012.

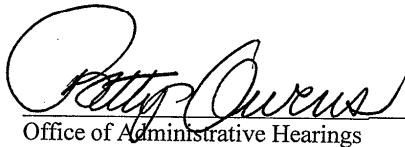

J. Randall May
Administrative Law Judge

A copy was mailed to:

Christina Bullard
2149 River Meade Drive
High Point NC 27265
PETITIONER

Josephine N. Tetteh
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 8th day of January, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
(919) 431-3000
(919) 431-3100

Filed

STATE OF NORTH CAROLINA

2011 DEC 22 PM 1:05

IN THE OFFICE OF

COUNTY OF WAKE

ADMINISTRATIVE HEARINGS
10 DOJ 07779

Office of

Administrative Hearings

Darryll Grey DeCotis,
Petitioner,

)

)

vs.

)

PROPOSAL FOR DECISION

)

North Carolina Criminal Justice Education and
Training Standards Commission,
Respondent.

)

)

THIS MATTER was heard before Beecher R. Gray, Administrative Law Judge, under authority of N.C.G.S. § 150B-40(e) on July 19, 2011, and August 23, 2011, in Raleigh, North Carolina.

APPEARANCES

Petitioner: Jeffrey P. Gray
Bailey & Dixon, LLP
434 Fayetteville Street, Suite 2500
Raleigh, NC 27601

Respondent: Angel E. Gray
Catherine F. Jordan
Assistant Attorneys General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether the law and evidence support Respondent's proposed suspension of Petitioner's certification as a law enforcement officer under a notice of probable cause to suspend dated September 26, 2010, for commission of a Class B misdemeanor and lack of good moral character.

EXHIBITS

Petitioner's exhibits 1-5 were admitted.
Respondent's exhibits 1-19 and 21 were admitted.

STATUTES AND RULES AT ISSUE

12 NCAC 9B .0101(3)
12 NCAC 9A .0103(23)(b)
12 NCAC 9A .0204(b)(3)(A)
12 NCAC 9A .0205(b)(1)
N.C.G.S. § 14-223
N.C.G.S. § 17C-10(c)

In making the below FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper. On September 26, 2011, Respondent mailed Petitioner notice of the proposed suspension of his certification as a law enforcement officer and Petitioner received the notice.
2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers, including denying, revoking, or suspending such certification.
3. Rule 12 NCAC 09A .0204(b)(3)(A) provides that Respondent Commission may suspend, revoke, or deny the certification of a criminal justice officer when Respondent Commission finds that the applicant for certification or the certified officer has committed or been convicted of a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B Misdemeanor.
4. Rule 12 NCAC 09A .0205(b)(1) provides that, when Respondent Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five (5) years; however, the Commission may either reduce or suspend the period of sanction under paragraph (b) of this rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing where the cause of the proposed sanction is the commission or conviction of a criminal offense other than those listed in paragraph (2) of this rule. Resisting, obstructing, or delaying an officer in violation of N.C.G.S. § 14-223 is listed in 12 NCAC 09A .0205(a).

5. Petitioner Darryll Grey DeCotis ("Petitioner") is certified as a Criminal Justice Officer with Respondent Criminal Justice Education & Training Standards Commission ("Respondent"). He first was employed as a public safety officer with Havelock Public Safety and, on August 4, 2000, applied for certification on a Form F-5A, Report of Appointment, for appointment as a police officer with the Cary Police Department.
6. N.C.G.S. § 17C-10(c) empowers Respondent Commission to set other qualifications for employment of criminal justice officers, including standards for good moral character. Rule 12 NCAC 09A .0101(3) requires that every employed criminal justice officer be of good moral character.
7. Petitioner served as a police officer in Cary from August, 2000 until his resignation in July, 2009. On his Form F-5B, Report of Separation, filed with Respondent, the reason for separation was stated as "resignation" and it was noted under "Employability" that the agency would not consider Petitioner for re-appointment. His statement on the F-5B prompted an investigation by Respondent. Richard Squires, an investigator with Respondent, investigated this matter and testified at the hearing.
8. Respondent admitted into evidence a Personnel Complaint Tracking Form from the Cary Police Department describing an April 22, 2001 incident wherein an officer with the Cary Police Department was called to an accident scene on Weston Parkway. When he arrived, he found Petitioner lying on the side of the road. When the officer questioned Petitioner, Petitioner stood up and started to walk away to a wooded area south of Weston Parkway.
9. Petitioner refused to identify himself and did not stop when the officer told him to stop. The officer, however, did not pursue him. Petitioner's written explanation of the incident indicated that he had been to a party with his wife at the Embassy Suites in Cary and had become intoxicated. After a confrontation with an individual on the dance floor, Petitioner made the decision that he was too intoxicated to remain and began walking home. He tripped and fell on the side of the road and was sitting there rubbing his leg when the Cary police officer approached him. He did not recall the officer asking him for identification, but he did recall running towards the woods. At the time, he was mourning the loss of his grandmother and admitted that he had had too much to drink. Petitioner expressed his remorse for the incident. He received an oral warning.
10. Respondent next admitted into evidence documentation of the oral warning that Petitioner received from the Cary Police Department for violation of Chapter 2, Section 1.02 of the Cary Police Department General Orders for failing to maintain the high level of moral conduct and ethical standards expected by the public of law enforcement agencies and for violation of the Department's Code of Ethics for behaving in a manner that discredited the agency. The oral warning was dated April 25, 2001.
11. Respondent next admitted into evidence the Internal Affairs Investigation of an incident involving alleged sexual misconduct by Petitioner and a female Animal Control Officer, Michelle Bellanger, who shared office space with Petitioner in a fire station in Cary. The

investigation centered on inappropriate statements made by Petitioner, inappropriate use of computerized communications equipment, and an allegation that Petitioner had touched Officer Bellanger in an inappropriate manner. In the course of the investigation, both Petitioner and Officer Bellanger were administered polygraph examinations and it was determined that Petitioner was truthful and that Officer Bellanger was deceptive. The Internal Affairs Investigation recommended a Step 2 Written Warning for Petitioner and that Officer Bellanger be terminated. Petitioner received a Step 2 Written Warning for violation of the Cary Police Department General Order Chapter 2, Section 1.02 for failing to maintain the high level of moral conduct and ethical standards expected by the public of law enforcement agencies and General Order Chapter 2, Section 1.07 regarding treatment of persons in the performance of duty for unnecessarily abusive language or gestures.

12. Respondent next admitted into evidence documentation of the Step 2 Written Warning Petitioner received from the Cary Police Department, dated December 16, 2002.
13. Respondent admitted into evidence an Internal Investigation report, dated June 30, 2008, wherein Petitioner was investigated for a traffic stop involving a motorcyclist who was under the suspicion for being the possible perpetrator of break-ins in the Town of Cary. Upon arriving at the scene, Petitioner inquired of the other officers whether their recording equipment and cameras were turned on and then made a statement to the suspect as to whether or not he thought the police chase was funny and inquired, "Would it be funny if I throw you off the bridge?" Petitioner then handcuffed the suspect at the edge of the bridge railing and searched his bookbag. Petitioner's response was contained within the Internal Investigation report and indicated that he asked if the cameras and recording equipment were turned on because he did not have an operational MDVR that night and, as a training officer for its operation, he intended to use it as a training tool.
14. Petitioner admitted that, after chasing the suspect in a game of "cat and mouse," he had lost his temper. He admitted that he could have used the word "mother-fucker" since he had used that word in the past, but could not recall whether he did so on this occasion. During the search, Petitioner discovered that the suspect was in possession of marijuana and he was arrested for possession of marijuana. The report concluded that Petitioner, then a Corporal, acted in an unprofessional manner. On July 15, 2008, Petitioner received a Step 2 Written Warning for violation of Cary Police Department General Order Chapter 2, Section 1.02 for failing to maintain the high level of ethical standards expected by the public of law enforcement agencies and for conduct unbecoming a member and for violation of General Order Chapter 2 Section 1.07 regarding treatment of persons in the performance of duty for his failure to be courteous to the public. Petitioner lost his rank of Corporal and no longer was a supervisor.
15. Respondent then admitted into evidence an Internal Investigation report, dated May 4, 2009, wherein Petitioner was alleged to have been intoxicated and entered his neighbor's property and interfered with deputies who were called to the scene to investigate his conduct. The Internal Investigation tended to show that, on the evening of May 2, 2009, Wake County Sheriff's deputies were called to another residence on the street where

Petitioner lived to investigate suspicious activity. Upon arriving at the scene, the deputies learned that the caller had heard someone knock on her front door and saw two men leave by walking down her sidewalk. The investigating deputies found Petitioner and his neighbor, Stephen Martin, sitting in the garage of Petitioner's home. One of the deputies approached Petitioner and determined that both subjects were intoxicated. As other deputies arrived at the scene, the investigating deputy saw Petitioner's uniform hanging in his garage and asked if he was with the Cary Police Department. While asking for identification, the deputy noticed a badge in his wallet and he asked if Petitioner was a law enforcement officer. The investigating deputy began filling out a trespass form. The scene deteriorated with belligerent conduct by Petitioner's neighbor, Mr. Martin, and Petitioner; Petitioner asked that a supervisor be called to the scene.

16. As part of the Internal Investigation, Petitioner was interviewed and he admitted that he and his neighbor were drinking heavily on the day in question. His wife was out of town and his neighbor was moving away, so the two of them decided to drink. Both were heavily intoxicated when the deputies arrived and the deputies accused him of going over to his neighbor's house. He also had a confrontation with one of the deputies who was attempting to antagonize him because of statements being made by his neighbor.
17. Petitioner stated that he could not reason with the deputy so he asked to speak with a supervisor.
18. The conclusion of the investigation was that Petitioner had engaged in detrimental personal conduct and violated Cary Police Department General Order, Chapter 2, Section 1.02 for conduct unbecoming a member and General Order Chapter 2, Section 1.13 for professional law enforcement conduct.
19. Petitioner received a Notice of Pre-Disciplinary Hearing, dated May 22, 2009, for the above incident.
20. By letter dated May 26, 2009, Petitioner resigned from the Cary Police Department.
21. Petitioner then applied to the Winston-Salem Police Department which conducted a background investigation of him and requested a statement by Petitioner of his law enforcement career with the Cary Police Department. This statement was admitted into evidence as Respondent's Exhibit 19.
22. Petitioner served as an officer with the Winston-Salem Police Department for approximately six (6) months. He resigned from the Winston-Salem Police Department to become Chief of Police in the Town of Bolton.
23. Petitioner was sent a Proposed Suspension of Law Enforcement Officer Certification, dated September 26, 2010, stating that Respondent's Probable Cause Committee had found probable cause to suspend his certification for committing a criminal offense defined in 12 NCAC 09A .0103 as a Class B Misdemeanor. His Proposed Suspension noted that there was credible evidence that, on or about May 2, 2009, Petitioner

committed a Class B misdemeanor offense of resisting officers in violation of N.C.G.S § 14-223 for the incident involving the investigation by the Wake County Sheriff's Department at his residence. The alleged resistance was that one of the responding deputies repeatedly had to stop Petitioner from trying to go back into his residence. Further, Respondent's Probable Cause Committee found probable cause existed to believe that Petitioner lacked the good moral character required of law enforcement officers for the three incidents where he was the subject of an internal investigation in 2001, 2002, and 2008.

24. On cross examination, Investigator Squires testified that he did not make a recommendation to the Probable Cause Committee in his report. He explained that the lack of good moral character could be based on a pattern of misconduct or on one act that was so egregious that Respondent would feel that the individual does not have sufficient moral character to be certified. Petitioner's counsel specifically asked if he could explain what about the bridge incident would constitute a lack of good moral character under Respondent's rules. Mr. Squire stated that Petitioner's statement while he was attempting to question the suspect that he could push him off the side of the bridge would constitute a lack of good moral character.
25. Investigator Squires explained that there is always a preliminary investigation whenever the block on the F-5B Report of Separation is checked indicating that the individual would not be considered for re-appointment. Investigator Squires was shown Petitioner's Exhibit 1, which was his F-5B Report of Separation from the Winston-Salem Police Department indicating that the agency would consider Petitioner for re-appointment and that it would recommend him for employment elsewhere as a criminal justice officer.
26. Additionally, Investigator Squires indicated that Respondent's Exhibit 19, the statement by Petitioner to the Winston-Salem Police Department of his disciplinary actions with the Town of Cary, appeared to have been accurate based upon the information he obtained from the Town of Cary. He then acknowledged that Petitioner was hired by the Winston-Salem Police Department and became certified by the Commission after revealing all of the disciplinary actions alleged as a lack of good moral character.
27. Investigator Squires also acknowledged that Petitioner was exonerated of the charge that he physically touched the Animal Control Officer Bellanger. There was nothing in any of the internal affairs investigations from the Town of Cary that showed that Petitioner was deceptive in the investigation of any of the four matters.
28. Lieutenant Joseph Clifton was a Sergeant at the time of the 2001 incident where Petitioner received a Written Warning for failing to identify himself to a Cary Police Officer while walking home intoxicated and was later the Internal Affairs Investigator for the 2009 incident involving the Wake County Sheriff's deputies. He testified to these various internal affairs investigations.
29. Upon cross-examination, Lieutenant Clifton admitted that it is not illegal to be publicly intoxicated in North Carolina, nor is it illegal to refuse to show a law enforcement officer

identification as long as one is not driving a motor vehicle, fishing, boating or engaged in some other activity that requires a license and identification. Further, he stated that at no time did Petitioner deny any of his conduct. He admitted that he was drunk on the night in question. He testified that Petitioner attempted to apologize to the Cary police officer who stopped him that night but that the officer was not receptive to an apology.

30. Major David Wolfe, who was Petitioner's supervisor at the time of the 2001 incident, testified about the investigation into that incident and the levels of punishment for disciplinary actions in the Cary Police Department. Major Wolfe was unable to explain what about the 2001 incident constituted an immoral act. He also confirmed that no one on the Town's legal staff made a determination as to whether Petitioner's conduct was an immoral act prior to disciplining him for violation of a General Order of the police department.
31. Further, Major Wolfe testified that it did concern him that Petitioner may have a drinking problem and that they should pay attention to it in the future.
32. Major Brad Hudson testified that, at the time of the 2002 incident involving Animal Control Officer Bellanger, he was the supervisor over the Special Services, Community Services, and Animal Control Office located in Fire Station No. 5 in Cary. The incident had been reported to him by then-Major Patricia Bazemore. During his interview of Petitioner, Petitioner stated to him that he never felt that his statements to Officer Bellanger were sexual harassment and that the phrase, "You owe me a blow job," was a flippant way of responding when someone asked him for a favor that they would owe him a favor in return. Petitioner told him that there never was any intent to "collect on" what he said and that he and the Animal Control Officer were just joking around. Because Officer Bellanger stated that Petitioner had touched her and Petitioner denied it, Major Hudson asked that they each take a polygraph examination. Although he recommended termination of Officer Bellanger, she was not terminated. At no point did Petitioner deny making the statements; he did, however, deny that he ever touched her inappropriately. Major Hudson also testified that there was no indication that Petitioner ever was being dishonest or deceptive during his investigation. In regards to the allegation of inappropriately touching Officer Bellanger, the polygraph examination supported that Petitioner was being truthful.
33. Respondent called two officers, a detective and a patrol officer, who were present during the 2008 incident involving the stop of the motorcycle. The stop occurred on the two-lane bridge over Interstate 40 at Cary Town Boulevard. The stop occurred at night, but the patrol officer could not recall the time. The motorcyclist was being pursued and made the decision to stop on the bridge. The pursuing detectives pulled their rental car, which they were using as an undercover car, in front of the motorcycle. The patrol officer testified that when Petitioner arrived, he asked if the officer had his camera or body microphone on and the patrol officer replied that he did not. He testified that Petitioner asked the suspect if he could search one of the compartments on the motorcycle and when the guy said, "No," he told him he would, "Put him over the bridge if he did not let him search it." The patrol officer testified that Petitioner used the "f -

word” a number of times. Petitioner put the suspect up against the bridge barrier overlooking Interstate 40 in order to handcuff him. A search of the motorcycle revealed marijuana.

34. On cross-examination the patrol officer testified that he thought it was “a little bit” unsafe for Petitioner to search the suspect at the edge of the bridge. He stated that he did not think the act was “immoral” or that it showed some type of moral flaw. On re-direct examination, however, he stated that Petitioner did not conduct himself in a manner that an officer with the Cary Police Department should. The detective at the scene testified to essentially the same events as the patrol officer and acknowledged that the motorcyclist made the decision as to where to stop.
35. Captain Tracy Jernigan, the supervisor of Internal Affairs of the Cary Police Department at the time of the bridge incident, also testified. Captain Jernigan testified that, during the investigation, Petitioner admitted that he made the statement to the suspect about throwing him off the bridge but that it was a “pretext type of statement” and that he said it because the suspect appeared to him to think the whole traffic stop was a joke. The officers had chased the suspect for approximately twenty (20) minutes, putting him and others at risk, and Petitioner did not like the way the suspect was carrying himself. Petitioner’s oral statements in the investigation were consistent with his written statements. In his written statement, Petitioner, who recently had been promoted to Corporal, admitted that his actions were not those that would be expected of a newly-promoted supervisor. Captain Jernigan acknowledged that Petitioner received discipline including a demotion back to his previous rank of Senior Officer. He stated that it would have been a safer alternative for Petitioner to have searched the suspect by placing him in front of the patrol officer’s vehicle or putting him on the ground. Captain Jernigan testified that his only involvement in the 2009 incident involving the Wake County Sheriff’s Department was that he assigned Lieutenant Joseph Clifton to be the investigator.
36. On cross-examination, Captain Jernigan testified that all of the stories of the officers present at the scene on the bridge appeared to be consistent, including Petitioner’s. The suspect never complained to the Cary Police Department about Petitioner’s conduct. Captain Jernigan attempted to interview him as part of the Internal Affairs Investigation but was unable to do so.
37. Deputy Chief Barry Nickalson of the Cary Police Department testified on behalf of Respondent. He stated that he has known and worked with Petitioner since 2000 and would describe him as an “excellent officer.” He further testified that Petitioner’s abilities, expertise, and knowledge, as they pertain to law enforcement and the technical side of his job, were excellent. He stated that he was responsible for considering all of the previous disciplinary actions regarding Petitioner when the report on the 2009 incident with the Wake County Sheriff’s Department came to his attention. He testified that Petitioner’s performance had been excellent and the Department had used him in a variety of assignments. He testified that Petitioner demonstrated his proficiency generally with every assignment from voluntary opportunities to troubleshooting problem

areas in the Department. Regarding the latter, Deputy Chief Nickalson testified that Petitioner would come in and "[get] things straight for us." He testified that, at that time, Petitioner demonstrated the kind of behavior and performance that they were looking for in future leaders. He weighed the aggravating and mitigating factors to determine whether he should be given a pre-disciplinary hearing as a prerequisite to termination.

38. On cross-examination, Deputy Chief Nickalson was asked at what point he realized that Petitioner had an alcohol problem. Initially he denied that he knew Petitioner had an alcohol problem. He was then shown an e-mail message that he sent to Chief Patricia Bazemore two days after the 2009 incident wherein he states, in reference to Petitioner, that "alcohol continues to be a problem with him and it would seem a sad situation." He admitted that it was his "thoughts" that Petitioner had an alcohol problem. Deputy Chief Nickalson stated that he was not aware at the time that Petitioner was enrolled in the Town of Cary's Employee Assistance Program for his alcohol problem, but that that is not something that he is generally made aware of.
39. Deputy Chief Nickalson testified that Petitioner accepted his demotion over the incident at the bridge, although Petitioner thought it too harsh. He had accepted all other punishments resulting from disciplinary action with the Cary Police Department. He stated that Petitioner has always been honest and had never told him or anyone else in the Department a falsehood. He testified that Petitioner never has been disrespectful to anyone in the Department, including supervisors or anyone else in a position of command. Deputy Chief Nickalson admitted that the Town of Cary has higher expectations of its officers than other departments.
40. Three deputies involved in the investigation at Petitioner's residence in July, 2009 testified to the events that occurred that night. Deputy Kevin Moore was the first officer to arrive at the scene and had been given a description of the two (2) suspects that were seen walking down the sidewalk of the complainant's house. After interviewing the complainant, Deputy Moore went to Petitioner's house and observed that his neighbor and he appeared to match the description of the two (2) suspects. He asked both men if they had been at their neighbor's house and they "just kinda looked at me and didn't really say a whole lot." He repeated himself and then asked if they had identification. Petitioner went inside his house to retrieve his identification and the neighbor, Stephen Martin, had identification on his person. Deputy Moore said that he was not investigating a crime and was merely investigating the complaint of the neighbor. While talking to Petitioner and his neighbor, Deputy Moore noticed a Cary Police Department uniform jacket hanging in the garage. He also noticed target practice targets hanging in the garage. When Petitioner returned from inside the house, Deputy Moore asked him if he was a law enforcement officer and Petitioner opened his wallet, showed him his badge and said, "No, I am not...see..., just being kinda smart." The second officer, Deputy Isreal Romero, arrived on the scene approximately ten minutes after Deputy Moore. He arrived on the scene as a precautionary matter. Apparently, Deputy Romero would not allow Petitioner to return inside his home and Petitioner "got in Deputy Romero's face." Prior to this conduct, Deputy Moore had already made the decision to complete a trespass form for both Petitioner and his neighbor and was in the process of completing the form.

Petitioner requested a supervisor be called to the scene and Sergeant Carey Denning was called. After this, they all began standing around waiting for Sergeant Denning to arrive, which he did about thirty (30) minutes later. Deputy Moore testified that he recalled only a single incident where Petitioner attempted to go back into his residence.

41. On cross-examination, Deputy Moore testified that the only thing about the exchange of words between Deputy Romero and Petitioner that kept him from filing out his form was that he is going to respond when he sees anybody "get up in a co-worker's face like that." Deputy Moore testified that he did not hear what Deputy Romero said to Petitioner. Further, he did not hear Petitioner state to Deputy Romero that he needed to go inside to go to the bathroom. Deputy Moore testified that at no time did he feel physically threatened by Petitioner.
42. On re-cross examination, Deputy Moore clarified that Deputy Romero was not the third responding deputy at the scene. The third responding deputy was Deputy Jacobs. He recalled that Deputy Jacobs was standing near Deputy Romero and Petitioner but did not hear Deputy Jacobs say anything to Petitioner. He did not hear Deputy Jacobs making threatening or antagonistic statements towards Petitioner.
43. Deputy Casey Miller, who arrived fourth on the scene, described Petitioner's demeanor as agitated. He said he was mildly cooperative and appeared to be agitated that the deputies were present on his property. He said his tone of voice was somewhat sarcastic but there was "... nothing too outstanding while I was there."
44. Deputy Miller stated that the neighbor, Mr. Martin, was pretty much the agitator on the scene and that Petitioner just stood there. He testified that he did not remember specifically, but recalled that Deputy Moore was completing the trespass forms when he arrived on the scene. When he briefed him on what was occurring, he did not say anything specific about making arrests or charging.
45. On cross-examination, Deputy Miller stated that he did not observe anything on the scene that appeared to have constituted resisting, obstructing, or delaying an officer by Petitioner. He described the situation between Deputy Jacobs and Petitioner as being "a little heated at each other." Deputy Miller testified that Deputy Jacobs no longer was employed with the Wake County Sheriff's Department and had separated from that agency a couple of months after this incident.
46. Respondent recalled Lieutenant Joseph Clifton who testified to the Internal Affairs Investigation of the 2009 incident involving the Wake County Sheriff's Department. The investigation tended to reveal that Petitioner and his neighbor had been drinking together and, at some point, Petitioner's neighbor went over to another neighbor's home and Petitioner went over to retrieve him. The two returned to his garage. The deputies arrived shortly thereafter and the confrontation started from that point.
47. Petitioner admitted that he was very intoxicated and that things began "spiraling down" at the scene. He testified that he thought it was best that he ask that a supervisor come to

the scene because one of the deputy sheriffs grabbed him by the arm when he was trying to go into his house to go to the bathroom. Lieutenant Clifton interviewed Deputy Romero who told him that Petitioner kept attempting to walk into his house and he felt that it was an officer safety issue. Lieutenant Clifton's Internal Affairs Investigation determined that Petitioner's behavior during this incident was detrimental personal conduct in violation of the Cary Police Department General Order Chapter 2, Section 1.02, "Immoral Conduct/Conduct Unbecoming An Officer" and General Order Chapter 2, Section 1.13, "Non-Professional Law Enforcement Conduct." Although Petitioner told Lieutenant Clifton during his interview that Deputy Jacobs was making antagonistic statements on the scene and trying to provoke a confrontation, Lieutenant Clifton did not ask Deputy Jacobs about these statements when he interviewed him.

48. On cross-examination, Lieutenant Clifton clarified that the Department's offenses regarding immoral conduct and conduct unbecoming an officer are found in the same General Order, but that Petitioner's behavior on May 5, 2009 was not immoral, it was merely conduct unbecoming an officer. He also explained that the non-professional law enforcement contacts constituted a violation because he had had contact with another law enforcement officer and failed to report it to his supervisor.
49. Chief Patricia Bazemore of the Cary Police Department stated that she has been employed by the Cary Police Department for 25 years. She has known Petitioner since he first was employed by the Department in 2000, and described him as "an outstanding police officer." She stated that he had resigned from the Cary Police Department over the incident regarding the Wake County Sheriff's Department but that Petitioner had had several incidences--only one that was performance-related--involving his job at the Cary Police Department. Chief Bazemore recalled each of the other three (3) incidents. She related that, regarding the 2002 incident with Animal Control Officer Bellanger, it was she who Officer Bellanger first approached about her discomfort with some of the interactions that were taking place between Petitioner and her and Chief Bazemore was asked to talk to him about it.
50. Chief Bazemore further testified that she was uncertain as to whether Petitioner was actually ever given his Notice of Pre-Disciplinary Hearing or if his resignation was based upon discussions of his entering into the pre-disciplinary process. During a meeting with Petitioner and his wife, she told him what the outcome of her investigation was and what her recommendation to the Town Manager was going to be. She testified that Petitioner was very remorseful for his actions and was embarrassed by his actions. She stated that Petitioner had "always done a fantastic job as a Cary Police Officer." She testified that her decision to recommend termination of Petitioner was because, in her opinion, his reputation and abilities to perform his duties as a Cary Police Officer had been jeopardized based upon the totality of all the circumstances over his career. She then qualified that statement by stating that at the command staff level "we" were very pleased with Petitioner's performance and he always did a "phenomenal job" with special assignments.

51. On cross-examination, Chief Bazemore testified that she was aware of the situation in 2001 where Petitioner was drunk off duty and was approached by a Cary Police Officer while lying on the shoulder of the road.
52. Chief Bazemore also clarified that the inappropriate use of the mobile data computer was mutual between Petitioner and Officer Bellanger and Officer Bellanger was receptive and participated in the inappropriate messaging willingly.
53. Prior to the incident with the handcuffing and searching of the suspect on the bridge, Petitioner had been an officer with Cary Police Department for eight years. Chief Bazemore testified on cross-examination that Petitioner had never had a substantiated use of force complaint filed with him during his time with the Cary Police Department. Chief Bazemore admitted that there was no evidence to refute the truth of Petitioner's statement that his intent in inquiring about whether there were any cameras or recording devices on the scene of the motorcycle stop was so that he could use it for training purposes later.
54. Chief Bazemore then stated that, in dealing with the issue on the bridge, the Cary Police Department was "not dealing with moral issues. We were dealing with our department general orders. And it's the conduct unbecoming." (Tp. 278.) She further testified that she had been present when Lieutenant Clifton testified about the General Orders having both combined into one and he acknowledged that they were two different issues.
55. Chief Bazemore also confirmed Lieutenant Clifton's previous testimony that there was no citizen complaint from the suspect about Petitioner's conduct on the bridge.
56. Chief Bazemore was questioned regarding her knowledge of the 2009 incident involving the Wake County Sheriff's Department. She stated that she was concerned about Petitioner's behavior and knew that alcohol was involved.
57. Although subpoenaed, Deputy Romero failed to appear for either the July 19, 2011 or the August 23, 2011 hearing.
58. Chief Scott Cunningham, the former Chief of the Cary Police Department and current Chief of the Winston-Salem Police Department, testified on behalf of Petitioner. Chief Cunningham was chief of the Cary Police Department for two and one-half years and was Chief Bazemore's predecessor. He had 24 years of service with the Police Department in Tampa, Florida before joining the Cary Police Department. Petitioner was an officer in the department while Chief Cunningham was Chief. When Chief Cunningham joined the Cary Police Department, the 2001 incident involving Petitioner lying intoxicated on the roadside had occurred approximately four (4) years previously. Although Chief Cunningham considered it a bad situation and a bad choice, Petitioner had demonstrated on the job that he would be a good choice for the assignments that he had given him. The 2002 incident involving Animal Control Officer Bellanger occurred after Chief Cunningham left Cary and there were no incidences involving Petitioner during Chief Cunningham's term as Chief. Upon resigning from the Cary Police Department, Petitioner contacted Chief Cunningham about being hired by the Winston-Salem Police

Department. Chief Cunningham was aware of the issues regarding disciplinary actions and had his background investigators go to the Cary Police Department and review Petitioner's personnel file.

59. Chief Cunningham stated that the disciplinary issues were of concern to him and "troublesome," but he had two conversations with Petitioner about his joining the Winston-Salem Police Department as an officer. Chief Cunningham reviewed all of the findings from Petitioner's personnel file from the Cary Police Department and made a decision, based on his on-duty performance and discussions with Petitioner, others within his agency, and the Cary Police Department, that he would hire Petitioner.
60. As a condition of his hire, Petitioner and Chief Cunningham had an understanding that, at the Chief's sole discretion, he could conduct random alcohol tests of Petitioner. Chief Cunningham felt assured that Petitioner was adequately dealing with his alcohol problem prior to being hired as an officer and, "To the extent that I think anyone can [deal with one's alcohol problem], yes [he has], I think it is a permanent ongoing situation." Petitioner told him the therapists and counselors he was seeing in relation to his issues with alcohol.
61. Chief Cunningham testified that, looking at the "combined totality of all the circumstances" and the alcohol-based incidences, there was a concern about Petitioner's moral character, but when one looks at everything, Petitioner's performance and all that he had done and was doing, he felt comfortable that Petitioner would meet the criteria to maintain his certification and employment with the Winston-Salem Police Department. Chief Cunningham testified that, if he had had concerns about Petitioner and his ability to perform, he would not have hired him.
62. On cross-examination, Chief Cunningham testified to the exemplary job that Petitioner did for the Cary Police Department in a number of different areas. He also testified further to his decision to hire Petitioner as an officer in Winston-Salem, reiterated that Petitioner's performance as a law enforcement officer balanced out his alcohol issues, and stated that, had he not been convinced that Petitioner was addressing his alcohol problems, he would not have hired him.
63. Petitioner was employed with the Winston-Salem Police Department approximately five (5) to six (6) months and left to take a position as Chief of Police in the Town of Bolton, North Carolina.
64. Petitioner testified on his own behalf. Petitioner stated that he had first been sworn in as a law enforcement officer in Havelock, North Carolina in 1994. Upon leaving Havelock, he joined the Cary Police Department where he was employed for nine (9) years. After resigning from Cary, he joined the Winston-Salem Police Department, but was there only a short period before he then became the Chief of Police for the Town of Bolton. He was hired by the Town of Cary in July, 2000 and was engaged in general patrol duties in the Town. In Havelock, which is a public safety department, he had been a fireman, an EMT, and a police officer all combined into one job.

65. Petitioner testified about the incident in 2001 and stated that he and his wife had gone to the "Second Chance Prom" at the Embassy Suites since neither of them attended a prom in high school. He had been dealing with the death of the grandmother who raised him and he was drinking heavily. He was intoxicated before they arrived at the Embassy Suites. An incident occurred on the dance floor where someone kept bumping into his wife and him and, instead of causing a scene, he decided to leave. He testified that he did not drive to the Embassy Suites and did not even contemplate driving home, but chose to walk. A car struck some orange barrels in the road and, when he turned to look, he fell off the sidewalk and hurt his shin. When the officer arrived, he was sitting on the sidewalk rubbing his shin. He was wearing a rented tuxedo and did not recall if he had identification or not. He denied that he ran away from the scene and said he just walked away quickly.
66. Petitioner then testified to the 2002 incident with Animal Control Officer Bellanger. They had been sharing office space in a fire station for approximately six (6) months. The working environment was very jovial and people told jokes of a sexual nature. Everyone participated in this type of joke. He explained that, in certain cliques or groups of friends or close officers, this type of joke was common in the Cary Police Department. He testified that he was "absolutely stunned" when the allegation of inappropriate touching was made against him. Petitioner did not deny the inappropriate language or the inappropriate use of the mobile data computer. The first that Petitioner learned of these allegations was when then-Major Bazemore called him into her office and told him what she had been told. Petitioner testified that the statements he made were not intended in the literal sense. Petitioner was ultimately exonerated of the allegations of inappropriate touching.
67. Petitioner then explained his thought process regarding the motorcycle incident. He testified that for about two weeks Triangle-area law enforcement had been looking for a motorcyclist who would pull up in front of a business, take off his full face helmet, throw it through the front door, steal items from inside the store, and drive off. The individual on the motorcycle matched the description from roll call. Petitioner spotted this individual and the individual began playing a game of "cat and mouse," starting to make a turn down one street and then turning down another. He was informed over the radio that the suspect had been stopped by a patrol officer and two detectives working on special assignment looking for the motorcyclist. Petitioner arrived on the scene and the motorcyclist was sitting on his motorcycle on the bridge. There were two plain-clothed officers and a uniformed officer. Petitioner's first thought was whether the suspect had been searched. In his opinion, the officers on the scene were "frozen." He did not know if these officers had even frisked the suspect for weapons. Petitioner made the immediate decision to take control of the situation. He felt that his response was appropriate at the time. He did not believe he endangered the individual by searching him at the railing of the bridge. He felt that, based upon how the vehicles were positioned on the bridge, to have searched him elsewhere would have endangered the suspect; while it was a bridge railing, it was still safer than being in the middle of the road. Petitioner did not deny using profanity towards the suspect. Petitioner testified to being an instructor in the Life

Program, a program in Cary designed for troubled teens where the use of profanity is not only frequent, but encouraged to gain control of the participants in the program. According to the Cary Police Department's "Response to Resistance and Aggression" policy, the suspect was at the second level, which would be verbal commands.

68. Petitioner has never had a use of force complaint against him in any of the law enforcement agencies where he has worked.
69. Petitioner accepted his disciplinary action of a demotion and the attendant reduction in pay.
70. Petitioner then explained the 2009 incident involving the Wake County Sheriff's deputies. As reflected in the Internal Affairs Report, he and his neighbor made a conscious decision to start drinking. Petitioner's wife and family were out of town and his neighbor was preparing to leave the neighborhood to move into a new house. While drinking, they began discussing a tragic incident that had occurred in one of the other houses in the neighborhood: The wife had had breathing difficulties and the husband called Petitioner to the home to assist her while awaiting an ambulance to arrive. Petitioner used his training as an EMT to attempt to assist the wife. She actually died in the home with Petitioner present. The new occupants of this house had never interacted with any of the other neighbors in the cul-de-sac. While Petitioner was inside going to the bathroom, evidently his neighbor thought it would be a good idea to go knock on the new occupants' door and find out why they were unfriendly. When Petitioner returned from the bathroom, he saw his neighbor headed towards the other neighbors' porch and went to retrieve him. He did so and then walked back to his garage. The Wake County Sheriff's deputies arrived a short time later.
71. When Petitioner first saw the deputies' car, he had no inkling that they were coming to his house. When Deputy Moore arrived at his home and began questioning him, Petitioner did not have any identification on his person so he had to go inside to retrieve it. He was allowed to do so unescorted. He did not identify himself to Deputy Moore as a Cary Police Officer because of the policy in the Town of Cary against "self-identifying" when off duty. He stated that his understanding of the purpose of the policy was to keep officers from trying to get special privileges because of their position. At the time, he did not believe he had done anything wrong. His neighbors had never told him not to come on their property and he did not believe that he had trespassed. At no time did Petitioner attempt to obstruct Deputy Moore from furthering his investigation by not identifying himself to Deputy Moore as a law enforcement officer. Petitioner testified that his neighbor basically "said all the wrong things" that someone could say to a law enforcement officer, including threats, in an attempt to goad a response from the deputies. Petitioner had a lot of Marine Corps and police memorabilia in his garage and the neighbor kept referring to it. At no time did Petitioner make any statement to the officers about being a former Marine, being a police officer, or that he was going to cause any harm. Petitioner said it was evident to him that Deputy Jacobs was "obviously getting worked up" by the comments of his neighbor because he was whispering things in his ear that only Petitioner could hear such as "You ain't so bad, I'll kick your ass," and "You

ain't nothing." At that point, Petitioner thought it would be best to have a supervisor come to the scene. He felt like the situation was going downhill very quickly.

72. Petitioner testified that he was mistaken when Deputy Moore first testified as to which deputy was Romero and which deputy was Jacobs. He testified that it was Jacobs who would not allow him to go back in the house to go to the bathroom. It had been approximately two (2) hours since he had gone to the bathroom while his neighbor decided to go to the other neighbor's house. Petitioner did not see anything different from being allowed to go inside the house to retrieve his identification and returning to the house to go to the bathroom. He had made no threats to harm the deputies in any way.
73. Petitioner stated that his family was out of town and he had no intention to drive that evening or any intention to leave his property, so he thought it was safe to consume alcohol.
74. Petitioner admitted that he had alcohol-related problems or issues and testified that he started drinking heavily in the Marine Corps. When he became a civilian and joined local law enforcement, he did not drink as much. He also recalled that he did not drink quite as much at the time of the 2001 incident. The 2008 incident on the bridge caused him to start drinking again; he lost his rank of Corporal and actually was up for a thirteen percent (13%) raise that year and received nothing. He also was ineligible for promotion for another 18 months.
75. Petitioner testified that he actually sought and received help off and on over the years for his problem with binge drinking, with the first time being around 2002. He knew that he battled alcohol addiction and spoke both directly and indirectly with therapists for "quite some time." He began to get help on a weekly basis beginning around the later part of 2007 or the beginning of 2008.
76. Petitioner testified that he no longer drinks alcohol. Petitioner testified that he agreed with Chief Cunningham's view that alcohol was going to be a struggle for him for the rest of his life. He recognizes that it truly is a problem, noting that some people call it a "disease." He further recognizes that he has struggled with it in the past.
77. Petitioner testified that, as part of the investigation, he acknowledged to Chief Bazemore that he had a problem with alcohol. Chief Bazemore did not give this any consideration in her decision as to whether or not to terminate his employment with the Cary Police Department.
78. Petitioner testified that, regarding the 2009 incident with the Wake County Sheriff's deputies, he had not violated the law nor had he obstructed or delayed the investigation. He considers himself to be a person of good character and a moral person. He admitted that, while his conduct was "not stellar," it did not indicate any type of immorality or a lack of good moral character.

79. Petitioner then testified to the different roles and responsibilities he held in the Cary Police Department, including traffic crash reconstructionist, member of the motorcycle team, firearms instructor, crime prevention instructor, and coordinator for the North Carolina Special Olympics Law Enforcement Torch Run. Although he was disciplined for the incident on the bridge, Chief Bazemore asked him to remain the coordinator for the Torch Run and a firearms instructor.
80. In his time with the Cary Police Department, Petitioner testified that his performance evaluations were either "Above Standard" or "Exemplary."
81. Petitioner's performance evaluation with the Town of Bolton was admitted into evidence as Petitioner's Exhibit 5. That performance evaluation also was "Exemplary."
82. Petitioner testified that he believed that his issues regarding the use of alcohol now were behind him. He would like to continue in his capacity as a law enforcement officer in North Carolina in the future. He stated that he believes he is a person of character because he has admitted it when he has done something wrong and has accepted his punishment. He does not believe that any of his conduct rises to the level of immoral conduct or conduct showing a lack of good moral character.
83. On redirect examination, Petitioner testified that he was never disciplined by the Cary Police Department for the 2009 incident involving the Wake County Sheriff's deputies. After being shown the Notice of Predisciplinary Hearing, he was allowed to resign.
84. Petitioner also clarified his thinking regarding his inquiry during the 2008 incident on the bridge about whether recording devices or cameras were on. He testified that he had just gotten back from a mobile video instructor course and wanted to utilize this event for safety training, especially due to the vehicle positioning. He stated that he probably would still have used expletives to get the suspect's attention even if there had been cameras filming the encounter.
85. Officer Patrick Merrill, a police officer with the Cary Police Department for 13 years, testified on behalf of Petitioner. Officer Merrill is currently employed by Forsyth County Schools and is a gang and drug investigator. Prior to joining the Cary Police Department, he was an officer with the Fayetteville Police Department for approximately two (2) years. He testified that he worked very closely with Petitioner in Cary as a firearms instructor and a member of the pistol team. They were also involved in the Citizens Police Academy. During that period, Officer Merrill had the opportunity to judge Petitioner's abilities and qualifications as a law enforcement officer. In his opinion, Petitioner is "simply one of the finest police officers I have ever served with in my nearly 20 years of law enforcement, extremely moral. His integrity is strong. He is a very strong family man. And his knowledge of the job itself is strong as well. I can't say enough about Darryl DeCotis." When asked whether he agreed with Chief Bazemore's assessment of Petitioner being an "exemplary officer," Officer Merrill replied, "Absolutely." Officer Merrill testified that he has worked with Petitioner in two different

law enforcement agencies since 2000 and has formed an opinion of Petitioner in his community. In his opinion, he is a person of high moral character.

86. Deputy Jonathan Moore, a deputy with the Wake County Sheriff's Department, testified on behalf of Petitioner. Deputy Moore was an officer with the Cary Police Department for 10 years, and worked with Petitioner. Prior to that time, he worked as a police officer in Fayetteville, North Carolina. He did not work directly with Petitioner but served with him on special teams such as the Cary Police Department Honor Guard and the Cary Police Pistol Team. He also worked with him during the Special Olympics and as a firearms instructor. Deputy J. Moore stated that he was familiar with Petitioner's reputation in the Cary Police Department and as a law enforcement officer. He stated that he had the highest opinion he could possibly have of Petitioner as a police officer and thought the same of him when Petitioner was made "Officer of the Year" by the Cary Police Department in 2007. Deputy J. Moore stated this honor was voted on by the staff of the Cary Police Department. He stated that Petitioner was highly regarded by the citizens of the Cary and that he was involved with Petitioner in the Citizens Police Academy. He believes Petitioner is honorable, intelligent, trustworthy, "deadly honest," and the kind of person he hoped would be there when he needed somebody. Deputy J. Moore testified that he regretted that he did not realize that Petitioner had a drinking problem and wished he had caught it sooner. Both he and Petitioner are former Marines, and Deputy J. Moore stated that the things Marines see create a lot of alcoholics in the Marine Corps. He said that alcohol abuse is common in the Marine Corps but he feels Petitioner dealt with his alcohol abuse and binge drinking since the 2009 incident with the Wake County Sheriff's deputies. He knows for a fact that Petitioner will not even go to a bar now and is no longer consuming alcohol.

87. Deputy J. Moore stated that he did not share the concerns expressed by Cary Police Chief Bazemore when she stated that the 2009 incident jeopardized Petitioner's ability to work with the Wake County Sheriff's Department if he continued as an officer with the Cary Police Department.

88. Ingrid Wright of Cary, North Carolina testified on behalf of Petitioner. She is self-employed with a real estate company. She attended the Cary Police Academy, a program offered through the Police Department. She worked closely with Petitioner to create Citizens Assisting Police ("CAP") which now has approximately 130 members and donates 7,000 volunteer hours each year to the Town of Cary. She testified that none of this would have been possible were it not for Petitioner. She then related all the activities that the CAP volunteers perform.

89. Ms. Wright has known Petitioner for 11 years and formed an opinion of Petitioner during that time. She agreed with Chief Bazemore's assessment that Petitioner is an exemplary officer, but she also knows him personally and has developed an opinion of his moral character. She considers him to be a person with high moral character and trustworthy. Ms. Wright testified that she was not aware until hearing the testimony at this hearing that Petitioner had a drinking problem and that she wished she had known so she could have been a better friend to him. She never saw any signs in his professional life that

indicated that he may have had a problem with alcohol. She has never seen him intoxicated at work. She always found him to be "100% sober and 100% professional."

90. Ms. Wright had never heard Petitioner use profanity, expletives, or "four-letter words." She thought that, in fact, most times he was so polite that people were not nice in return. She said that there is nothing about the sort of language that she is now aware he used during the 2008 bridge incident that changes her opinion of him.
91. Kathy Long of Fuquay-Varina, North Carolina testified on behalf of Petitioner. Ms. Long testified that she retired on disability from the Cary Police Department in June, 2008 as a result of injuries she sustained on-duty in a motorcycle accident. She was a Lieutenant but, following the accident, voluntarily took a reduction in rank because she was no longer able to work in the field. She served with the Cary Police Department for over 19 years and met Petitioner in August, 2001. She worked closely with Petitioner in the Citizens Police Academy and in various other assignments. It was only after her accident that Petitioner became a motorcycle officer; he was a Community Services Officer at the time she worked with him.
92. Ms. Long worked also with Petitioner in the Life Program and explained that it was Cary Police Department's version of the "Scared Straight" program in which a boot camp-type setting was used to attempt to positively influence the behavior of children. The use of profanity was common in that program and its use was condoned by the Cary Police Department.
93. Ms. Long also worked with the Cary Police Academy where Officer Merrill taught and Ms. Wright participated and graduated from.
94. Ms. Long specifically testified about the 2008 incident involving Animal Control Officer Bellanger. She was Captain of the Drugs and Vice Unit and shared the office space at Station 5 with Petitioner and Officer Bellanger. She said they were a very close knit group and "like a family." There was a lot of joking and kidding and she has found that police officers and nurses have a "sick sense of humor." It is that type of humor that gets them through the day. She stated that she had to change her accrued law enforcement humor when she got out of law enforcement. She testified that Petitioner always was respectful with his peers, his supervisor, and everyone else.
95. Ms. Long had retired from the Cary Police Department before the 2009 incident with the Wake County Sheriff's deputies. She testified that nothing she had heard during the two days of testimony at this hearing changed her opinion of Petitioner's moral character. She stated that he was deserving of the honor he received in 2007 when he was awarded the Cary Police Department's "Officer of the Year."
96. Elton Daniels, Management Advisor for the Towns of Bolton, Nevassa, and Northwest, North Carolina, testified on behalf of Petitioner. Elton Daniels also is a Magistrate for Judicial District 13B in North Carolina and has held this position for three (3) years. As Management Advisor, his duties are similar to those of a Town Manager but he is

working on a grant basis for these three (3) small towns. He has a Bachelor of Arts Degree in Political Science and a Masters Degree in Public Administration. These three (3) towns received a grant through the School of Government at Chapel Hill. Advisor Daniels interviewed all the candidates for Chief of Police of Bolton and made a recommendation to the Town Council that they hire Petitioner. He has worked with Petitioner as Petitioner has rebuilt the Town of Bolton's Police Department under a grant. In the two (2) years since he's been at the Town of Bolton, Petitioner has improved the Police Department to the point that people are willing to move back into the Town because of the Department's reputation. In addition to his administrative duties, Petitioner has helped with the hiring process for two (2) additional officers and an administrative assistant, as well as handling the budgeting aspects of the Department. As a Magistrate, Advisor Daniels deals with police officers on a daily basis and considers Petitioner to be one of the best he ever has dealt with. Advisor Daniels was not aware of some of the incidents that had occurred regarding Petitioner, having heard them for the first time during the two (2) days of testimony at this hearing, but he considers Petitioner to be a truthful person. Advisor Daniels would have no concerns about Petitioner continuing as a law enforcement officer in the future. He testified that his grant with the three (3) towns now is up and he hopes to get a permanent position as town manager of a town and would "love to bring him on where I will be next."

97. Frank Wilson, Mayor of the Town of Bolton, North Carolina, testified on behalf of Petitioner. He was part of the interview process when Petitioner applied to be Chief of Police for the Town of Bolton. He has had the opportunity to work with Petitioner as Chief of Police and is aware of his reputation in the Town. The citizens are very pleased with him. Petitioner had a performance evaluation performed upon him last year, which the Mayor signed. It was admitted into evidence as an Exhibit. His performance is considered to be "Exemplary." Mayor Wilson said that he has heard the testimony over the last two days of the hearing and could only form an opinion as to what he has seen and heard while working with Petitioner over the last year and a half and that Petitioner is "an exemplary officer and a fine person."
98. Petitioner has been trying to deal with an alcohol problem for a period of time and is making a personal effort to correct this problem. One of the incidents for which he was disciplined by the Cary Police Department involved alcohol.
99. Deputy Moore, the primary investigating deputy, did not personally witness any action by Petitioner constituting resisting, obstructing, or delaying an officer and did not contemplate charging Petitioner with a violation of N.C.G.S. § 14-233.
100. Neither of the deputies that could have been obstructed or delayed--Deputy Jacobs and Deputy Romero--testified. One was subpoenaed for two (2) separate days of the hearing and failed to appear; the other no longer is employed by the Wake County Sheriff's Department.
101. The evidence of a violation of N.C.G.S. § 14-233 primarily is found in the Internal Affairs Investigation Report and testimony of the Investigator.

102. Deputy Miller testified that the incident over Petitioner not being allowed to go back into his residence only lasted “a few seconds.”

CONCLUSIONS OF LAW

1. Both parties properly are before the Office of Administrative Hearings. Jurisdiction and venue are proper and both parties received proper notice of the hearing.
2. There is no factual or legal basis to conclude that Petitioner lacks good moral character. The totality of the evidence demonstrates that Petitioner is a person of good moral character and has been a dedicated professional law enforcement officer in North Carolina for many years. Petitioner is morally fit to continue to serve as a law enforcement officer in North Carolina and has good moral character as required by N.C.G.S. § 17C-10(b) and 12 NCAC 9B .0101(3).
3. Moral character is a vague and broad concept *See, Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at pp. 11 – 12 (_____, ALJ) and cases cited therein.¹ Police administrators, officers, and others have considerable differences of opinion as to what constitutes good moral character. *Mims, supra.* at p. 12, Conclusion of Law 12. In *Mims*, the Sheriff's Education and Training Standards Commission offered the testimony of someone who claimed to be knowledgeable regarding moral character. He testified that there are six components to good moral character of law enforcement officers: trustworthiness, respect, responsibility, fairness, citizenship, and being a caring individual. *Mims*, at p. 7, Finding of Fact 48. Applying those criteria here, the evidence demonstrates that Petitioner met each of those criteria and other moral character components which demonstrate his good moral character.
4. While having good moral character is an ideal objective for everyone, the lack of consistent and clear meaning of that term within Respondent's rule and the lack of clear enforcement standards or criteria for application of the rule renders enforcement actions problematic and difficult. *Mims, supra.* at p. 12, Conclusion of Law 4. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. *Mims, supra.* at pp. 12 and 13.

¹ See, *Mims*, at p. 11. The United States Supreme Court has described the term “good moral character” as being “unusually ambiguous.” In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained:

The term good moral character ...is by itself...*unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experience, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal view and predilections, *can be a dangerous instrument* for arbitrary and discriminatory denial...(emphasis added).

5. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. *See, In Re Rogers*, 297 N.C. 48, 58 (1979) (“whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.”); *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ). The three (3) incidents alleged in this case are insufficient to rise to the required level of proof to establish that Petitioner lacks good moral character. Under *In Re Rogers*, an instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character. In *Gray v. N.C. Sheriffs Education and Training Standards Commission, Id.*, the good moral character rule was interpreted: “Good moral character has been defined as ‘honesty, fairness and respect for the rights of others and for the laws of state and nation.’” *Gray*, at p. 18, Conclusion of Law 5, citing *In Re Willis*, 299 N.C. 1, 10 (1975). *Gray* further explained that “[g]enerally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places [sic] of clear and especially severe misconduct.” *Id.*, citing *In Re Rogers*, 297 at 59. Here, there is clearly no severe, egregious, or clear misconduct warranting any finding of a lack of good moral character.

6. Police officers and others make occasional honest mistakes and sometimes exercise poor judgment. For example, in *Andreas Dietrich v. N.C. Highway Patrol*, 2001 WL 34055881, 00 OSP 1039 (August 13, 2001, Gray, ALJ), the hearing involved a state trooper characterizing state officials harshly. That case involved the review of free expression concerns and found no just cause for formal disciplinary action. “Troopers, like other public employees and officials, will occasionally say things that they should probably not say. Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard.” *Id.*, at p. 13, Conclusion of Law 12. In this case, the charge of lack of good moral character does not fit the facts and evidence. At worst, Petitioner had lapses in judgment which are insufficient to establish a lack of good moral character. This, coupled with an admitted problem with alcohol and binge drinking at the time, indicate that his behavior in each incident was isolated.

7. The totality of the facts and circumstances surrounding Petitioner’s conduct does not warrant a finding that Petitioner lacks good moral character. The substantial evidence in this case is that Petitioner retains a good moral character. Therefore, the evidence demonstrates that there is no proper basis for revocation or suspension of Petitioner’s law enforcement certification for lack of good moral character.

8. Petitioner did commit the Class B misdemeanor offense of resisting, obstructing, and delaying officers in violation of N.C.G.S. § 14-233, but he did so under the influence of alcohol.

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, I find that, in the discretion of the Commission, Petitioner's law enforcement certification should be suspended and that this suspension be suspended for a period of three (3) years, conditioned on Petitioner's continued good behavior and performance of duties. If Respondent Commission declines to agree to suspend the suspension of Petitioner's law enforcement certification, I then find that there is insufficient evidence that Petitioner committed the Class B misdemeanor or resisting, obstructing, and delaying law enforcement officers.

NOTICE AND ORDER

The North Carolina Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

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 N.C. Gen. Stat. § 150B-36(b).

This the 22 day of December, 2011.

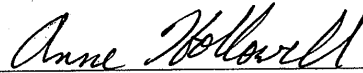

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Jeffrey P. Gray
Bailey & Dixon
P O Box 1351
Raleigh, NC 27602
ATTORNEY FOR PETITIONER

Catherine F. Jordan
Angel E Gray
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 22nd day of December, 2011.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

Filed

2011 DEC 19 PM 2:06

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

Office of
COUNTY OF CARTERET Administrative Hearings

WILLIAM & KATHY TEAGUE)	
Petitioners,)	
)	
v.)	
)	
NORTH CAROLINA DEPARTMENT	)	10 EHR 4673
OF ENVIRONMENT AND NATURAL)	
RESOURCES, DIVISION OF)	
COASTAL MANAGEMENT,)	
Respondent.)	

JAMES & VICKY SNEAD,)	
Petitioners,)	
)	
v.)	
)	
NORTH CAROLINA DEPARTMENT	)	10 EHR 4674
OF ENVIRONMENT AND NATURAL)	
RESOURCES, DIVISION OF)	
COASTAL MANAGEMENT,)	
Respondent.)	

ALVIN RAYNOR,)	
Petitioner,)	
)	
v.)	
)	
NORTH CAROLINA DEPARTMENT	)	10 EHR 4689
OF ENVIRONMENT AND NATURAL)	
RESOURCES, DIVISION OF)	
COASTAL MANAGEMENT,)	
Respondent.)	

The above captioned matter was heard on August 2-5, 2011, at the Craven County Courthouse, New Bern, North Carolina, before the Honorable Donald W. Overby, Administrative Law Judge, on three consolidated Petitions for Contested Case Hearing regarding the Division of Coastal Management's denial of Coastal Area Management Act ("CAMA") major development permits for each of the three Petitioners, located on neighboring lots in Morehead City, Carteret County, North Carolina.

APPEARANCES

For Petitioners: Wesley C. Collins, Esq.
Harvell & Collins
1107 Bridges Street
Morehead City, North Carolina 28557

For Respondent: Christine A. Goebel, Esq.
Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27602

ISSUE

Did Respondent deprive Petitioners of property, and exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in denying Petitioners' respective CAMA major development permit applications?

TESTIFYING WITNESSES

Heather Styron, Field Representative, Division Coastal Management, Morehead City, NC
Patricia (Trish) Murphey, Marine Biologist Supervisor, Division of Marine Fisheries, Morehead City, NC
Michael Ted Tyndall, Assistant Director, Division Coastal Management, Morehead City, NC
Joanne Steenhuis, Senior Environmental Specialist, Division of Water Quality, Wilmington, NC
Richard Carraway, N.C. Geodetic Survey, Morehead City, NC
Dr. Louis B. Daniel, III, Director, Division of Marine Fisheries, Morehead City, NC
James M. Snead, Petitioner
William J. Teague, Petitioner
Doug Huggett, Major Permits Coordinator, Division Coastal Management, Morehead City, NC
Fred "Fritz" Rhode, (formerly with DMF) NMFS, Morehead City, NC
Anne Deaton, Habitat Protection Section Chief, Division of Marine Fisheries, Morehead City
Mark Golitz, Petitioners' Neighbor, Morehead City, NC
Tim Newcomb, Licensed Land surveyor

PETITIONERS' EXHIBITS

1. Horne General Permit (GP) '08, Whiskey Creek
2. Weiss GP '09, Middle Creek
3. Resh GP '09 Pages Creek
4. Pruna GP '08, Charles Creek
5. Donovan GP '08, Virginia Creek
6. Bebe CAMA major permit '07, Whiskey Creek
7. Warwick CAMA major permit '10, Hewlett's Creek

8. Dalton CAMA major permit '08, Pages Creek
9. Coble/Pollock CAMA major permit '07,
10. Oak Park at Whiskey Creek CAMA major permit '07, Whiskey Creek
12. Taylor CAMA major permit '06, Whiskey Creek
13. Brynn Marr Homes CAMA major permit '09, Charles Creek
14. Parsley CAMA major permit '10, Masonboro Sound
16. Teague main file
17. Snead main file
18. Raynor mail file
19. DMF's Guidelines for Permit Review
21. PNA map
23. PNA map
25. PNA map
26. PNA map
28. PNA map
29. PNA map
31. - 43. Tide Gage Data for various sites
54. Photo of Resh
55. Photo of Resh
56. Photo from end of cul-de-sac
57. Photo in Whiskey Creek
58. Photo in Whiskey Creek
59. Photo of Resh
72. - 93. Photos of sites in Whiskey Creek
94. Photo of twin-prop boat floating
95. Photo
96. Photo
98. Photo of Calico Creek
99. Photo of Calico Creek
100. Photo of Calico Creek
101. Photo of Calico Creek
102. Photo in Dill Creek
103. Photo of Calico Creek
104. Mrs. Teague's dock
105. Photo in Dill Creek
106. Photo in Dill Creek
107. - 111. Photos of Calico Creek
112. Photo in Dill Creek
113. Photo of Calico Creek
114. Photo of Calico Creek
115. Photo in Dill Creek
116. Photo of Calico Creek
117. Photo of Calico Creek
118. Photo in Dill Creek
119. Photo of Calico Creek
120. Photo of Calico Creek

- 121. Photo in Dill Creek
- 122. Photo in Dill Creek
- 123. – 128. Photos of Calico Creek
- 129. Photo in Dill Creek
- 130. – 133. Photos of Calico Creek
- 134. Photo in Dill Creek
- 135. Photo in Dill Creek
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- 138. Photo of Dill Creek
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- 171. Photo in Dill Creek
- 172. – 180. Photos of Calico Creek
- 181. Photo in Dill Creek
- 182. Photo of Dill Creek
- 183. Photo of Calico Creek
- 184. Photo in Dill Creek
- 185. – 191. Photos of Calico Creek
- 192. Photo in Dill Creek
- 193. – 195. Photos of Calico Creek
- 196. Photo in Dill Creek
- 197. Photo of Calico Creek
- 198. Photo of Calico Creek
- 199. Photo in Dill Creek
- 200. Photo in Dill Creek

- 201. Photo of Calico Creek
- 206. Sherman GP
- 207. Harrison GP '04
- 208. Harrison GP '05
- 209. Gatt GP
- 210. Mays GP
- 211. Willis GP
- 213. Oversized aerial photograph of the site
- 214. 15A NCAC 07H.1205 (effective 7/1/09)
- 215. 15A NCAC 07H.1205 (effective until 7/1/09)
- 216. Email- Snead to T/R/G
- 217. Email- Teague to Steenhuis & McMillian
- 218. Email- Raynor-Steenhuis
- 220. Google map- Morehead City/Beaufort
- 221. Google map- Morehead City/Beaufort
- 223. Google map- Bogue Inlet
- 224. Google map- Bogue Inlet to N. Topsail
- 225. Google map- New River Inlet
- 227. Google map- Figure 8 Island
- 229. Google map- Site 7, Warwick
- 231. Google map- Sites 8 & 3 (Dalton & Resh)
- 235. Google map- Site 5, Donovan
- 236. Google map- Masonboro Inlet
- 239. Google map- larger scale
- 241. Google map- Snow's Cut to Kure Beach
- 242. Google map
- 244. Google map- Sites 1, 7, 6, 12
- 245. Kirchner '05
- 246. Ted's 12/06 Staff Memo on permit elevation policy
- 247. Snow's Cut Corps tidal station data
- 250. – 255. Photos of Resh site
- 256. Photo of Site 8
- 257. Photo of Site 8
- 258. – 260. Photos of Donovan, Virginia Creek
- 261. – 263. Photos of Coble
- 264. Respondent's discovery answers and verification
- 265. DWQ to Teague re: more info
- 266. DWQ to Snead re: more info

RESPONDENT'S EXHIBITS

- 1. Items From DCM's Teague Permit File
 - A. 5-28-08 Cover Letter from Vinson to Styron enclosing first app.
 - B. 9-14-09 Letter from Styron to Teague acknowledging complete application
 - C. 9-8-09 Teague Major Permit app, including DCM forms, site plans, narrative

- D. 9-10-09 Field Investigation/Bio Report of Styron for Teague
 - E. 10-1-09 DWQ More Info Letter from Steenhuis to Teague
 - F. 9-23-09 Comments from WRC to DCM re: Teague app.
 - G. 9-17-09 Objection from DMF to DCM re: Teague app.
 - H. 8-20-09 Memo from Styron to Huggett with permit recommendations
 - I. 10-20-09 Letter from Govoni to Teague re: Permit Review Hold
 - J. 5-22-10 Letter from Collins to Huggett enclosing Subdivision Restrictions
 - K. 7-22-10 Denial Letter from Gregson to Teague
2. Items from DCM's Snead Permit File
- A. 5-23-08 Cover Letter from Vinson to Styron enclosing first app.
 - B. 8-4-09 Letter from Snead to Styron enclosing revised permit app.
 - C. 8-13-09 Letter from Styron to Snead acknowledging complete application
 - D. 10-5-09 Letter from Howell to Snead acknowledging Snead's hold request
 - E. 8-10-09 Snead Major Permit app
 - F. 8-13-09 Field Investigation/Bio Report of Styron for Snead
 - G. 10-1-09 DWQ More Info Letter from Steenhuis to Snead
 - H. 8-11-09 Memo from Styron to Huggett with permit recommendations
 - I. 8-31-09 Comments from WRC to DCM re: Snead app.
 - J. 8-27-09 Objection from DMF to DCM re: Snead app.
 - K. 7-22-10 Denial Letter from Gregson to Snead
3. Items from DCM's Raynor Permit File
- A. 5-30-08 Cover Letter from Vinson to Styron enclosing first app.
 - B. 4-3-09 Cover Letter from Vinson to Styron enclosing first revisions
 - C. 8-21-09 Cover Letter from Vinson to Styron enclosing more revisions
 - D. 8-25-09 Letter from Styron to Raynor acknowledging complete application
 - E. 8-24-09 Raynor Major Permit app
 - F. 8-25-09 Field Investigation/Bio Report of Styron for Raynor
 - G. 10-1-09 DWQ More Info Letter from Steenhuis to Raynor
 - H. 9-23-09 Comments from WRC to DCM re: Raynor app.
 - I. 8-28-09 Objection from DMF to DCM re: Raynor app.
 - J. 8-25-09 Memo from Styron to Huggett with permit recommendations
 - K. 10-20-09 Letter from Govoni to Raynor re: re: Permit Review Hold
 - L. 7-22-10 Denial Letter from Gregson to Raynor
4. Petitioners' earlier observation pier CAMA GPs
- A. Teague 4-18-07 CAMA GP#48473C
 - B. Teague 7-26-07 CAMA GP#49849C (reissue of earlier permit)
 - C. Snead 4-18-07 CAMA GP#48474C
 - D. Raynor 8-17-07 CAMA GP#49841C
8. 12-11-06 Memo from Tyndall to DCM Regulatory Staff re: piers in shallow water areas
12. 11-10-08 email from Vinson to Ps' re: DMF "flip-flopped"
13. 2-28-08 email from Vinson to P's re: DMF "verbal agreement"
16. 7-25-08 email from Trish to DMF co-workers re: Vinson/Stops with replies

17. T/S/R cover sheets for Heather's files, with her notes about meetings and contact
18. Materials from Heather's Teague file- showing application deficiencies
19. Materials from Heather's Snead file- showing application deficiencies
20. Materials from Heather's Raynor file- showing application deficiencies

Based upon careful consideration of the applicable law, testimony, and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. The Division of Coastal Management ("DCM") is charged with enforcement of the Coastal Area Management Act ("CAMA"), N.C. Gen. Stat. § 113A-100 *et seq.*, and the State Dredge and Fill Law, N.C. Gen. Stat. § 113-229, the controlling statutes and regulations include the Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 *et seq.*, and the rules promulgated thereunder, and the rules of the Coastal Resources Commission, primarily found in Title 15A, Subchapter 7H of the North Carolina Administrative Code ("NCAC").
2. Petitioner Kathy Teague ("Teague") owns property on Calico Creek in Morehead City, Carteret County, North Carolina. Mrs. Teague's husband Bill Teague is also a named Petitioner in this case, but is not on title to the property at issue. (T pp. 402, 410-11) Mr. Teague acted as Mrs. Teague's authorized agent in the CAMA permitting process. (T p. 402, 410) The interests of Mrs. Teague were properly represented in this contested case hearing by Mr. Collins.
3. Petitioners James and Vickey Snead ("Snead") own property on Calico Creek in Morehead City, Carteret County, North Carolina. Mr. Snead testified that when they purchased the property in 2003, they assumed the rules would have allowed them to build a dock with slips because there were others in the area. (T pp. 392-93) Having a slip was "very important" to Mr. and Mrs. Snead for their retirement home. (T p. 393)
4. Petitioner Alvin Raynor ("Raynor") owns property on Calico Creek in Morehead City, Carteret County, North Carolina. Dr. Raynor did not testify in person at the hearing. (T p. 469)
5. The Teague, Snead and Raynor (collectively "Petitioners") properties are all on Calico Creek and lie within the Estuarine System Area of Environmental Concern (AEC), specifically Coastal Wetlands, Public Trust Areas, and Estuarine Waters AECs. As such, the Division of Coastal Management (DCM) has jurisdiction over any development on their property, and the proposed addition of slips/lifts to their existing observation piers requires a CAMA permit pursuant to N.C. Gen. Stat. § 113A-118.
6. On or about May 23, 2008, Petitioners Snead, submitted an application to DCM requesting the issuance of a major permit for the installation of one 12.5' x 12.5' strap-

style boat lift with permanent “stops” eighteen inches (18”) above the substrate at the end of an existing pier (Petitioners’ Exhibit 17).

7. On or about May 28, 2008, Petitioners Teague, submitted an application to DCM requesting the issuance of a major permit for the installation of one 12.5’ x 12.5’ strap-style boat lift with permanent “stops” eighteen inches (18”) above the substrate at the end of an existing pier (Petitioners’ Exhibit 16).
8. On or about May 30, 2008, Petitioner Raynor, submitted an application to DCM requesting the issuance of a major permit for the installation of one 12.5’ x 12.5’ strap-style boat lift with permanent “stops” eighteen inches (18”) above the substrate at the end of an existing pier (Petitioners’ Exhibit 18).
9. A “stop” on a boat lift is a physical barrier that is placed on the pilings of a boat lift to prevent the boat lift cradle or boat on a strap-style lift from descending below a certain point (T. p. 564-566).
10. The waters of Calico Creek adjoining Petitioners’ property are designated by the Marine Fisheries Commission as a Primary Nursery Area (PNA).
11. 15A NCAC 03I.0101(4)(f) defines PNAs as “those areas in the estuarine system where initial post-larval development takes place. These are areas where populations are uniformly very early juveniles.” PNAs are an invaluable natural resource to the State.
12. Dr. Louis Daniel, Director of the Division of Marine Fisheries (DMF) testified that boats sitting on the bottom of a PNA or “kicking” the bottom of a PNA can hurt the important fisheries species in the area, and make the PNA less productive. (T pp. 330-31) Dr. Daniel testified that dredging in a PNA is illegal, and prop wash or kicking may be considered dredging. (T p. 346) Ms. Anne Deaton, Habitat Protection Section Chief for DMF echoed Dr. Daniel’s testimony, and added that of all the fish habitats and stages, the nursery stage is considered by biologists to be the most critical so that the fish can get big enough to resist predators and other environmental impacts. (T p. 707)
13. Between April 18, 2007 and August 18, 2007, all three Petitioners were issued CAMA General Permits (“GP”) to build observation piers (without formalized slips) into Calico Creek. (R’s Ex. 4A-4D) The GPs for Teague and Snead have type-written notes on them which indicate that “This facility is located within a Primary Nursery Area and is not for boating use. No slips are permitted for vessels-motorized, sail or other. Any kicking or prop wash will be considered a violation of this permit, and of the CAMA and D&F Act.” (R’s Ex. 4A-4D) Mr. Snead and Mr. Teague testified that Petitioners piecemealed the projects between the observation pier and the boat slips/lifts based on the advice of Petitioners’ marine contractor, Mr. Bailey. (T p. 393, 413)

CAMA MAJOR PERMIT APPLICATIONS

14. As set forth above, in the spring of 2008, Petitioners each applied for a CAMA Major Permit to add formalized boat slips with boat lifts to each of their existing observation piers.
15. Since DMF had raised concerns in the past that DCM was permitting boat slips and lifts in shallow PNA, SAV, or shellfish beds through the CAMA general permit process, DCM Assistant Director Ted Tyndall issued guidance to field staff, through a memo dated December 11, 2006, directing DCM staff to either process the permit as a CAMA major permit, or check with DMF about any concerns before issuing a CAMA general permit, using their best professional judgment to decide each case. (T pp. 105-119, 710-15, 814-23; R's Ex. 8) DMF's concerns were primarily raised during interagency meetings and communication about the Coastal Habitat Protection Plan (CHPP). (T p. 105-119, 710-15, 814-23) This policy was then added to the Coastal Resources Commission's rules, and became effective as a rule on July 1, 2009. (T pp. 36) Throughout this contested case hearing, this was referred to as the "2-foot policy" and/or the "2-foot rule".
16. DCM Field Representative Heather Styron had been instructed concerning the "2-foot rule" since she started with DCM in August of 2007. She followed the rule in Petitioners' cases with her supervisor's approval, requiring Petitioners to proceed with the CAMA major permit process because the water depth at Petitioners' sites was so shallow and was in a PNA. Ms. Styron stated that her supervisor was familiar with DMF's concerns about slips in shallow PNAs, specifically in Calico Creek, and was confident it would require CAMA major permit review. (T pp. 19-21, 28, 37, 93-94)

CAMA MAJOR PERMIT PROCESSING – COMPLETE APPLICATION ISSUE

17. Petitioners contend in part that Respondent and/or its agents unreasonably delayed in the processing of the application in order to allow for new regulations to take effect, which could potentially increase the burden on the Petitioners' application.
18. Ms. Styron testified that Ms. Vinson (Transcript incorrectly says Benson), the consultant hired by Petitioners, contacted her sometime before she first submitted the Petitioners' applications in the spring of 2008. (T p. 485) There were several revisions to the Petitioners' permit applications made by Ms. Vinson between May of 2008 and August/September 2009 when all three applications were finally accepted as complete. (T pp. 487-88) Ms. Styron would regularly contact Ms. Vinson during this 18 month period to check on the status of the permit application corrections and if she was still planning to make the necessary changes. (T pp. 490-500)
19. There were significant omissions or errors in the initial applications that needed to be corrected after the initial submittals in the Spring of 2008, and it took Petitioners' consultant Ms. Vinson until August/September of 2009 to complete them. The errors and omissions included: improper measurements of the proposed slip, incorrectly listing

normal high water depths instead of normal low as required by 15A NCAC 07J. 0203(b)(2), omitting “not applicable” in blank spaces as required by rule 15A NCAC 07J. 0204(b)(2), incorrectly measuring the water body width, insufficient vicinity map, failing to show on-site coastal wetlands areas, failing to depict the channel on the site plans, labeling dock ownership and riparian lines on the plats, and using an incorrect tidal range number. (T pp. 502-11)

20. Mr. Snead testified that Ms. Vinson was waiting to complete Petitioners’ permit applications because “she was waiting for other permits to go through the permitting process that involved lifts with straps, with stops, in a primary nursery.” Ms. Vinson was aware of these projects and hoped to use them as a precedent, and so was advising Petitioners not to rush. Petitioners followed her advice on complete application timing. (T pp. 395-96)
21. Although the Petitioners’ applications were found to be incomplete by DCM upon original submission, the Petitioners’ applications were eventually accepted as complete by DCM, and proceeded through processing. (Petitioners’ Exhibits 16, 17 and 18) On September 10, 2009, DCM accepted the Snead application for major permit as complete. (Petitioners’ Exhibit 17, T. p. 773) On September 8, 2009, DCM accepted the Teague application for major permit as complete. (Petitioners’ Exhibit 16, T. p. 773) On August 24, 2009, DCM accepted the Raynor application for major permit as complete. (Petitioners’ Exhibit 18, T. p. 774)
22. Respondent was not responsible for any delay in the Petitioners’ applications being accepted by DCM as being complete.

CAMA MAJOR PERMIT PROCESSING TIME ISSUE

23. As part of the CAMA major development permitting process, numerous state and federal agencies were contacted to comment, to determine compliance or concern for Petitioners’ projects with these various agencies’ subject matter specialties. A total of four agencies expressed concern with this project, including DCM, DMF, the North Carolina Wildlife Resources Commission (WRC), and the Division of Water Quality (DWQ). (R’s Ex. 1E-1H, 2H-2K, 3G-3J)
24. On February 19, 2009, DMF Marine Biologist Supervisor Patricia (Trish) L. Murphey sent a letter to Doug Huggett, the manager of the major permits and federal consistency unit for DCM. The letter recommended denial of Petitioners’ projects due to significant adverse impacts to shallow bottom habitat and shell habitat by prop dredging within a PNA. (T pp. 607-09; R’s Ex. 1G, 2J, 3I)
25. Ms. Murphey was accepted as an expert in Fisheries Biology. (T p. 601) Ms. Murphey’s comments for Petitioners’ projects were based primarily on the fact it is a PNA, the depth at low water on the sites, and the distance to deep water. (T pp. 63-65, 624) To assist her in making comments to DCM, Ms. Murphey consulted DMF’s Habitat Authorization

- Permit Review guidelines document. (T pp. 78-79, 610; P's Ex. 19) This document was intended to help provide consistency in permit reviews by DMF. (T p. 709)
26. DMF Habitat Protection Section Chief, Ms. Anne Deaton, was qualified as an expert in fisheries biology. (T p. 706) Ms. Deaton reviewed and approved Ms. Murphey's recommendation to deny Petitioners' boat slips/lifts. (T pp. 718-19)
 27. Dr. Louis Daniel, the Director of DMF, was accepted an expert in fisheries biology. Dr. Daniel reviewed Ms. Murphey's and Ms. Deaton's recommendations for DCM to deny Petitioners' applications based on significant adverse impacts to fisheries resources. Dr. Daniel agreed with his staff that because the applications were for boat slips and lifts in a PNA with 0-0.5' of water in Calico Creek, significant adverse impacts would occur. (T pp. 368, 719) Dr. Daniel's review and agreement that Petitioners' projects would cause significant adverse effects to the PNA and fisheries resources was his professional and expert opinion. (T p. 374)
 28. Ms. Deaton's and Dr. Daniel's review help ensure consistency in making recommendations to DCM for CAMA permit applications. (T p. 708) Ms. Deaton testified that the recommendations against granting Petitioners' CAMA permits were consistent with other decisions of DMF. (T p. 721) Mr. Huggett agreed that DMF's comments on Petitioners' applications were in line with others he's seen in his CAMA major permit review role. (T p. 762)
 29. On June 4, 2008, July 20, 2009, and July 21, 2009, Ms. Styron with DCM visited the sites, and then prepared Field Investigation Reports on the proposed development for each project. These reports noted the PNA designation for the site, along with a water quality classification of SC-HQW. Ms. Styron also noted the "water depths are at an average of 0 inches to -6 inches at [Normal Low Water] NLW in this area with an average daily tidal range of 2.5'." In addition, the "effects from the shallow water depths at NLW with egress and ingress have the potential to cause significant excavation through prop wash kicking." (T pp. 512-19; R's Ex. 1D, 2F, 3F)
 30. In August of 2009, Ms. Styron sent DCM Major Permits Processing Coordinator Doug Huggett three project recommendations that Petitioners' boat slips applications be denied as they were inconsistent with 15A NCAC 7H.0208(a)(2)(B) and 15A NCAC 7H.0208(b)(1) due to the very shallow water at NLW in this area, so that any boating had the potential to cause significant excavation through prop wash kicking. This would be considered new excavation which is not allowed within primary nursery areas per the Coastal Resources Commission's rule 15A NCAC 7H.0208(b)(6). (T pp. 520-21; R's Ex. 1H, 2H, 3J)
 31. In August and September 2009, WRC's Northeast Coastal Region Coordinator Maria T. Dunn sent DCM's Huggett a letter supporting the comments and concerns made by DMF regarding Petitioners' projects. (T pp. 757-60; R's Ex. 1F, 2I, 3H)

32. On October 1, 2009, DWQ Senior Environmental Specialist Joanne Steenhuis sent each Petitioner a letter. Ms. Steenhuis indicated that she sent those letters to DCM regarding Petitioners' applications because DMF had indicated there would be significant adverse impacts to fisheries resources, which, in turn, qualifies as a degradation of water quality, which would result in the denial of a 401 Water Quality Certification. (T pp. 171-74, 550; P's Ex. 17; R's Ex. 1E, 2G, 3G)
33. Ms. Steenhuis testified as to what her intentions were in sending the letters to the Petitioners; however, the language of the letter itself was plain and unambiguous. The Petitioners were entitled to rely on that plain language.
34. Ms. Steenhuis' letter incorrectly states that the applications were either incomplete or provided inaccurate information. The letter went on to indicate that DWQ "needed additional information" or that DWQ was heading towards denial of the Water Quality Certification due to significant adverse impacts to the PNA. (R's Ex. 1E, 2G, 3G)
35. The only additional information sought by DWQ was that the "propose[sic] boat slip with lift be removed from the application." The boat slip and lift was the only thing sought in the application. (Emphasis added) In other words, the "additional information" sought was for the Petitioners to withdraw their applications. The absurdity of DWQ's position continues in the letter by saying, in essence, that if the Petitioners did not provide the additional information by withdrawing their petitions that the projects would be held as incomplete until they did in fact withdraw their petitions.
36. On October 5, 2009, Mr. Snead sent an email to Ian McMillian (DWQ) and Jonathan Howell (DCM), asking that his application be put on hold for 60 days as directed by Ian McMillan. (T. p. 391) On October 5, 2009, Jonathan Howell sent a letter to Mr. Snead acknowledging his request for the abeyance. (Respondent's Exhibit 2D)
37. On October 6, 2009, Mr. Teague sent an email to Joanne Steenhuis, Ian McMillan, Daniel Govoni, Trish Murphy, Heather Styron, Jonathan Howell, Alvin Rayer, Jim Snead, and Mark Golitz in which he requests that the final decision on his application be delayed "until 12/15 (or earlier, if requested by me)." (Petitioners' Exhibit 217)
38. On October 11, 2009, Dr. Raynor wrote to Joanne Steenhuis (DWQ), Ian McMillian (DWQ), and Heather Styron (DMF): "I received your letter dated October 1, 2009, entitled "REQUEST FOR MORE INFORMATION/HEADING TOWARDS DENIAL." I do not wish to remove my application for a boat slip with lift, but instead, request that you give full consideration to my application which was acknowledged as complete in a letter to me from Heather Styron dated August 25, 2009." (Petitioners' Exhibit 18; T. p. 180)
39. On October 20, 2009, Daniel Govoni, Assistant DCM Major Permits Coordinator sent a letter to Mr. Teague and Dr. Raynor notifying them that their applications would be placed in "abeyance" because the NC Division of Water Quality had requested more

information, and a water quality certification must be issued for the application to proceed.

40. Mr. Govoni tells Mr. Teague and Dr. Raynor by this letter that they “will be given five working days” to provide the information requested by DWQ in order for DWQ to issue a water quality certification. (Respondent’s Exhibit 1 (I)) If the applicants were able to provide a water quality certification within the five days then the clock would continue to run. The “information” requested by DWQ is to withdraw their applications. In actuality, a water quality certification was not going to be issued for these applications.
41. The Govoni letter goes on to say that failure to provide the “information” means that the application will be suspended until such time as that information is provided. In other words, unless the applications are withdrawn the process will NEVER end, which was acknowledged by Mr. Huggett. (T. p. 797) (Emphasis added)
42. By following the process in these applications, DWQ, a state agency and a part of this process, was allowed to put ridiculous conditions on issuance of water quality certifications without moving to deny the applications, which meant that these applications would be in limbo into perpetuity and the only option the applicants had to comply with DWQ was to withdraw their individual applications—completely and utterly illogical to equate with “additional information.”
43. 15A NCAC 07J .0204 addresses processing CAMA major permit applications such as those at issue herein. 15A NCAC 07J .0204(d) sets forth the conditions upon which an application could be held in abeyance. “If the application is found to be incomplete or inaccurate after processing has begun” the application may be terminated until corrected. There is no indication that the applications were incomplete or inaccurate. Neither the Respondent nor any state or federal agency determined that the applications were incomplete or inaccurate.
44. Alternatively, 15A NCAC 07J .0204(d) provides that “if additional information from the applicant is necessary to adequately assess the project,” the application could be terminated or held in abeyance until the information was provided by the applicant. The only information sought by DWQ’s letter and adopted by reference by Respondent was NOT information necessary to adequately assess these projects, but was to completely withdraw what was being sought in their individual applications. (Emphasis added) There was no information the Petitioners could have provided which would have made their applications more clear for Respondent to assess the applications and none was sought.
45. Water quality certifications are issued by the Division of Water Quality, not the respective applicants. The applicants are only responsible for providing the information requested for the issuance of the certification by the Division of Water Quality. (T. 449-450) Once the Division of Water Quality issues a water quality certification, it is provided by the Division of Water Quality to everyone who would need to see the

certification. The applicant is not responsible for providing the certification to the agencies involved. (T. 449-450).

46. Through Mr. Huggett, DCM's position is that the "REQUEST FOR MORE INFORMATION/HEADING TOWARDS DENIAL" letter sent to Petitioners by the Division of Water Quality did not operate to stop the 75 or 150 day processing "clock". (T. 781). It is DCM's position that the processing clock on the Teague and Raynor applications did not stop until the DCM letters (the Govoni letters) were sent to Petitioners Teague and Raynor, respectively. (T. p. 781)

47. The reason that DCM sent the Govoni letters to Petitioners was because the Division of Water Quality was ostensibly asking for more information in the Steenhuis letter. (T. p. 782). By sending the Govoni letter, Respondent was adopting DWQ's position as set out in the Steenhuis letter.

48. In the late fall of 2009, after Ms. Steenhuis sent her letters to Petitioners, there was a meeting on site to discuss the proposed slips/lifts. Those present were Ms. Steenhuis from DWQ, Ms. Murphey from DMF, Ms. Styron and Ms. Barrett with DCM (along with Assistant Major Permit Coordinators Mr. Govoni and Mr. Howell), and Petitioners Mr. Sneed, Mr. Teague, Mr. Golitz (a property owner on Calico Creek but not a Petitioner in this case). (T pp. 178-79, 386, 406, 553) The concerns about the slips/lifts in a PNA in such shallow water at NLW were discussed, as well as the possible redesign opportunity of a community dock on a lot within the subdivision that was not in the Calico Creek PNA. (T pp. 178-79, 182, 387)

49. Petitioner Mr. Sneed said his recollection of the meeting was that Petitioners indicated they would not change their plans to a community dock, and wished the permit process to continue, even with a denial. (T p. 388-89) Mr. Teague's impression of the meeting was that Petitioners expressed that the permits should proceed with processing, even if it resulted in a denial. (T p. 408) While there were some variations on the recollections of Respondent's witnesses who attended that meeting, it seems certain from all that there was frustration from the Petitioners present as well as Mr. Golitz. In light of all that had and was transpiring with the applications at that time, the Petitioners recollection that they asked for the process to continue even if it meant denial is credible.

50. While no written request from Petitioners to re-start the processing of the Petitioners' applications was received until after Mr. Collins began to represent them, and sent a request by email to Mr. Huggett on July 9, 2010, none was required. (T pp. 771-78)

51. Mr. Huggett indicated that DCM requires requests to take an application off hold in writing by the applicant or authorized agent to protect DCM legally and avoid confusion. (T pp. 785-86, 789) The Govoni letter, nor any other correspondence with Petitioners, stated that Petitioners were required to request in writing that the abeyance be lifted and the process to continue. There is no statute, rule or written policy that requires such request to be in writing. The Petitioners were not on notice of any such requirement. Mr. Huggett was not aware of any such statute, rule or written policy.

52. Petitioners Snead and Teague had verbally told Respondent to proceed with the process at the meeting in late November 2009 and Dr. Teague had told Respondent by correspondence October 11, 2009 to continue with the process.
53. Upon completing his permit application review and review of agency comments, Mr. Huggett recommended Petitioners' CAMA permit applications be denied, and Assistant Director Tyndall agreed with this recommendation. (T pp. 828-30) By certified letters from Director Jim Gregson, dated July 22, 2010, all three applications were denied.
54. The Coastal Area Management Act mandates that all CAMA major permit applications shall be either approved or denied within 75 days of the application being accepted as complete. An additional 75 day extension may be allowed in extraordinary cases. (T. p. 769)
55. N.C.G.S 113A-122(c) provides: "Failure of the Commission to approve or deny an application for a permit pursuant to this section within 75 days from receipt of application shall be treated as approval of the application, except the Commission may extend the deadline by not more than an additional 75 days in exceptional cases."
56. 15A NCAC 07J .0204(d) as discussed above sets forth the conditions under which the applications may be held in abeyance, terminated or otherwise suspended so that the clock does not run on the 75 day time limit.
57. Petitioners were not responsible for any delay in processing the applications. Short of withdrawing their respective applications as requested by DWQ, the entire process was beyond the applicants' control.
58. In an effort to try to resolve issues concerning the applications, by cover letter dated March 22, 2010, Petitioners submitted through counsel restrictive covenants executed on March 11, 2010 and recorded in the Carteret County Register of Deeds Office on March 19, 2010. The restrictive covenants would limit the type of lifts used and the method of maneuvering on the water by Petitioners, enforceable by the other subdivision homeowners. (T pp. 765-68; R's Ex. 1J) Respondent had concerns about enforceability with the restrictive covenants regarding the use of boats, lifts, or stops. (T pp. 586, 608, 736)
59. The time from acceptance of the completed applications until they were ultimately denied far exceeds the maximum allowed of 150 days for each application, even giving latitude for any time administratively held in abeyance at the Petitioners' request.

DISPARATE TREATMENT

60. Petitioners allege in their Prehearing Statements that "Respondent acted arbitrarily and capriciously in that its decision on [these particular applications] is not consistent with its decisions regarding other similar applications in similarly situated project sites located

within PNAs.” Respondents contend that the differences in the tidal amplitudes and other characteristics between Petitioners’ sites at Calico Creek and sites identified by Petitioners in the Wilmington district, particularly Whiskey Creek, are a significant difference between the sites, and that the projects are not similarly situated and are distinguishable.

61. Based upon the decision rendered herein, it is not necessary to reach the issue disparate treatment and especially as to the application of the different tidal amplitudes as raised by Petitioners’ evidence.

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.
2. The Office of Administrative Hearings (OAH) has jurisdiction to hear this case pursuant to N.C.G.S. § 113A-121.1 and N.C.G.S. § 150B-23. It is stipulated that all parties are properly before the OAH and that the OAH has jurisdiction of the parties and the subject matter. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties. The parties received proper notice of the hearing in the matter.
3. Petitioners bear the burden of proof on the issues. Peace v. Employment Sec. Comm’n, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998).
4. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioners have met their burden in showing that the agency substantially prejudiced petitioners’ rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep’t of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995).
5. The relevant Statute in this case is N.C.G.S. § 113A, Article 7, "Coastal Area Management Act" (CAMA). Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and the State Dredge and Fill Law, N.C. Gen. Stat. § 113-229, and various regulations promulgated thereunder by the Coastal Resources Commission. The associated administrative rules for coastal management, found at 15A N.C.A.C. 07 *et seq.* are also applicable. These are the rules of the Coastal Resources Commission (CRC) for the administration of CAMA.
6. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the Coastal Resources Commission has designated Areas of Environmental Concern and has adopted use standards or State

guidelines for development within them, located at 15A N.C.A.C. 07H.0100 et seq Under CAMA, development in an Area of Environmental Concern (AEC) requires a permit. N.C.G.S. § 113A-118. Division staff is charged by the CRC to regulate development within the CRC's designated areas of AEC's within the 20 coastal counties. N.C.G.S. § 113A-103(2) DCM's role is to review and permit development in accordance with CAMA, North Carolina General Statutes, and the administrative rules for coastal development.

7. Petitioners' shoreline property on Calico Creek is within the Estuarine System AEC; and, as such, DCM has administrative permitting authority over any development extending from Petitioners' property into Calico Creek. N.C. Gen. Stat. §§ 113A-107, -113, -118.
8. Petitioners' proposed project to add boat slips with boatlifts and/or slings to their existing observation piers requires the application for a CAMA Major Development Permit. N.C. Gen. Stat. § 113A-118.
9. DCM's direction to Petitioners' consultant Ms. Vinson to process the boat slip applications through a CAMA major permit process was proper, pursuant to DCM's policy (R's Ex. 8), 15A NCAC 7J .1106, and 15A NCAC 7H. 1204(d).
10. There was no improper delay by DCM in getting complete applications from Petitioners.
11. Petitioners William and Kathy Teague, James and Vicky Snead, and Alvin Raynor have standing to bring this case and are properly before the Office of Administrative Hearings.
12. N.C.G.S 113A-122(c) provides: "Failure of the Commission to approve or deny an application for a permit pursuant to this section within 75 days from receipt of application shall be treated as approval of the application, except the Commission may extend the deadline by not more than an additional 75 days in exceptional cases."
13. The Petitioners' applications for major permits were not approved or denied within 75 or 150 days of being accepted as complete.
14. The only rule, statute or law that allows for the abeyance of the 75 of 150 day processing period is 15A NCAC 07J.0204(d).
15. 15A NCAC 07J.0204(d) provides: "If the application is found to be incomplete or inaccurate after processing has begun or if additional information from the applicant is necessary to adequately assess the project, the processing shall be terminated pending receipt of the necessary changes or necessary information from the applicant. During the pendency of any termination of processing, the permit processing period shall not run. If the changes or additional information significantly alters the project proposal, the application shall be considered new and the permit processing period will begin to run from that date." (*Emphasis added*).
16. There is no indication that the applications were incomplete or inaccurate. Neither the Respondent nor any state or federal agency determined that the applications were

incomplete or inaccurate. The Petitioners' applications were complete and accurate; therefore, those portions of 15A NCAC 07J.0204(d) are not applicable to stay the processing clock.

17. The information that was purportedly requested from the Petitioners that Respondents contend served to stop the processing clock is either removal of the boat lifts from the applications or a water quality certification.
18. Water quality certifications are provided by the Division of Water Quality, not applicants for CAMA permits; thus, the failure to provide a water quality certification does not constitute "additional or necessary information from the applicant," and cannot serve as a basis for stopping the processing clock.
19. The Petitioners' applications only sought to install boat lifts. If the Petitioners removed the boat lifts from the applications, there would be nothing left to permit. Therefore, failure to remove of the boat lifts from the applications cannot serve to stop the processing clock. Additionally, removal of the boat lifts from the applications is not "information" necessary to assess the project.
20. It was error as a matter of law for DWQ to place any type of administrative hold or delay on these projects based on its stated reasons; i.e. that the Petitioner's should remove the request from the applications in order to be approved, or that the Petitioners should provide a water quality certification.
21. It was error as a matter of law for Respondent to blindly rely on DWQ's irrational request for "additional information" when in fact there was no further information Petitioners could provide short of withdrawing their respective applications.
22. The conundrum created by DWQ was without end—the proverbial "Catch 22." Respondent cannot merely sit idly by while DWQ ties up these applications. In fact, Respondent admits that DWQ cannot hold up the process, and Respondent initiated the administrative hold by adopting as its own DWQ's position of the need for additional information.
23. There is evidence in the record that Petitioners Snead and Teague requested a 60 day delay of the processing of their applications.
24. The Respondent failed to offer any evidence or authority that would allow an applicant to voluntarily delay the processing of their respective application for major CAMA permit. Assuming *arguendo* that such a delay is allowed in the law, the terms of the delay were established by the correspondence from Petitioners Snead and Teague. As such, any voluntary abeyance of the processing clock was limited to 60 days, which expired no later than mid-December, 2009; leaving the processing period of the Snead and Teague applications well in excess of 75 or 150 days.
25. There is no authority that allows DCM to require a written request for removal of a voluntary stay of application processing.

26. Petitioner Raynor did not request an abeyance of processing, and specifically informed DWQ and DCM on October 11, 2009 to proceed with his application as submitted. Petitioners Teague and Snead verbally requested the applications proceed as submitted.
27. This Tribunal is extremely concerned about the potential for significant environmental impact by these applications; however, Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule in denying Petitioners' respective CAMA major development permit applications.

DECISION

Based on the foregoing findings of fact and conclusions of law, Respondent's decisions to deny Petitioners' applications for CAMA major development permits are REVERSED. Petitioners have met their burden of proof in showing that Respondent deprived Petitioners of property, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in denying Petitioners' respective CAMA major development permit applications, as alleged in Petitioners' petitions for a contested case hearing under N.C. Gen. Stat. § 150B-23(a).

ORDER

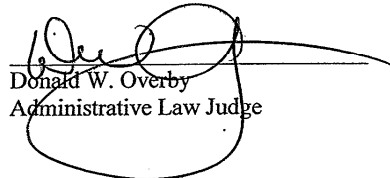
It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the 19th day of Dec, 2011.


Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

Wesley C. Collins, Esq.
Harvell & Collins
1107 Bridges Street
Morehead City, North Carolina 28557

Christine A. Goebel
Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27602

This the 19th day of December, 2011.

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

Filed

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IN THE OFFICE OF
ADMINISTRATIVE HEARING
09 OSP 06538

WAKE COUNTY

Office of
Administrative Hearings

MILLIE E. HERSHNER
Petitioner,

v.

NC DEPARTMENT OF ADMINISTRATION and
THE NC HUMAN RELATIONS COMMISSION
Respondent.

DECISION

This case was heard before the Honorable Administrative Law Judge Donald W. Overby on October 6 and 7, 2011 in the office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Petitioner: John Walter Bryant
J.W. Bryant Law Firm, PLLC
P.O. Drawer 909
Raleigh, NC 27602

Respondent: Ann Stone
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

WITNESSES

For the Respondent
John A. Campbell
McKinley Wooten
Richard Boulden

For the Petitioner
Maggie Faulcon
Linda Huggins
Millie E. Hershner

EXHIBITS FOR RESPONDENT:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

EXHIBITS FOR PETITIONER:

A, A-1, B, B-1, B-2, B-3, C, C-1, C-2, C-3, C-4, D, E-1, E-2, E-3, E-4, E-5, E-6, E-7, F, G, H, I, J, K, L, M, N-1, O, P, Q-1, Q-2, Q-3, R-1, R-2, R-3, R-4, R-5, R-6, R-7 and R-8

ISSUE FOR DETERMINATION:

Did Respondent meet its burden of proof that it had just cause to dismiss Petitioner in accordance with N.C.G.S. § 126-35? Was the Petitioner dismissed from her job as an Attorney I with the Human Relations Commission for “just cause” due to her insubordination, violation of known or written work rules of the Commission and/or releasing confidential information to the detriment of the Commission?

DECISION

Based upon consideration of the sworn testimony of the witnesses presented at the hearing, the documents which are part of the record and exhibits offered, received and admitted into evidence and the entire record in this proceeding, the Court makes the following:

FINDINGS OF FACT

1. The North Carolina Human Relations Commission [hereinafter “HRC”] was created by N.C.G.S. § 143B-391 and is a Division of the Department of Administration with a number of statutorily created duties, including enforcing and administering the State Fair Housing Law. It also promotes, through education and outreach, the principles of equal opportunity and justice and nondiscriminatory acts even with employment. (T p. 14).

2. HRC has the ability to investigate and litigate Fair Housing claims pursuant to N.C.G.S. § 41A-7(e) and, pursuant to N.C.G.S. § 99D-1 (b1), to “...bring a civil action on behalf, and with the consent, of any person subject to a violation of [that] Chapter” dealing with civil rights.

3. Petitioner was employed by the North Carolina Department of Administration (hereinafter “NCDOA”), Human Relations Commission (hereinafter “HRC”) as a staff attorney (Attorney I) until her dismissal on August 24, 2009.

4. At all times relevant to this matter, the HRC had an Executive Director who was appointed by and served at the pleasure of the Governor of the State of North Carolina, investigators known as “Human Relation Specialist/Investigators” and positions for two staff attorneys, an Attorney I and an Attorney II. The Attorney II served as General Counsel of the HRC, received a higher pay rate and supervised the Attorney I. [T-312]

5. The HRC investigates claims of discrimination and determine whether or not such claims should be designated as “cause” when there is evidence of unlawful discrimination or “no cause” when evidence of unlawful discrimination is not found. When appropriate, HRC would then attempt to remedy the discrimination through settlement and discourse or with litigation if appropriate and/or necessary. [T-354-55]

6. The Petitioner, Millie E. Hershner, received an undergraduate degree, a Master's degree in Cell Biology and was working on her PhD in Cell Biology, but discontinued her education and became a stay-at-home mother for the next eighteen years. [T 348]

7. When the youngest of her three children left home for college, Ms. Hershner enrolled in the night school program at N.C. Central University School of Law, graduating Cum Laude in 2001. She passed the N.C. Bar Examination that same year. [T-348]

8. Ms. Hershner worked in law in the private sector for two years. She sought a job with the N.C. State Government because at that time, if one worked for five years with the State and reached the age of sixty-five years old, one could be eligible for State retirement benefits. [T-349]

9. Ms. Hershner interviewed for the Attorney I Position at the HRC with Sherry Brooks, who at that time held the Attorney II position as "Agency Counsel" with the HRC. The Attorney I position was open because of the resignation of Victoria Homick from the HRC. [T-350]

10. On June 15, 2005, Ms. Hershner was hired by HRC as an Attorney I. Ms. Brooks began to train Ms. Hershner in the duties and obligations of attorneys in both the position of Attorney I and Attorney II, explaining to Ms. Hershner that she, Ms. Brooks, was exploring other opportunities and may not be at the HRC much longer. Should Ms. Brooks leave, Ms. Hershner would be the only attorney working for the agency and with little experience. [T-350-51, Exhibit A]

11. Within four months of Ms. Hershner being hired, Sherry Brooks did in fact leave the employment of the HRC, leaving the Attorney II position vacant. As the only attorney for the agency, Ms. Hershner performed the work of both attorneys for approximately six months. [T-351]

12. Richard Boulden graduated from law school in 1986 and passed the N.C. Bar Examination in 1989. He worked at various jobs in the legal field. In 1995, after a divorce, he was not employed for a period of approximately two years. He was employed in non-legal employment for approximately eight years before being hired as an Investigator for the HRC in approximately 2003. Mr. Boulden was hired by Sherry Brooks, who at the time of his hiring was the acting Executive Director of the HRC. [T-249-52]

13. When Victoria Homick resigned her Attorney I position in 2005, Mr. Boulden was still employed as an Investigator with the HRC. He applied for the Attorney I position vacated by Ms. Homick. [T-253]

14. Ms. Brooks was responsible for making the hire for the Attorney I position and she had worked with and known Mr. Boulden since 2003. In filling the Attorney I position, she hired Ms. Hershner over Mr. Boulden. [T-253, 350]

15. The North Carolina Department of Administration uses the "Performance Management System" [PMS] which is an employee management system to purportedly facilitate the evaluation and management of employees and staff and which requires annual recorded performance appraisals for all Department of Administration employees. [Exhibit A]

16. The PMS requires that a "Work Plan" be established at the beginning of the annual work cycle, and at least one "Interim Review" be conducted in the middle of the annual work cycle. Additional Interim Reviews may be conducted during the work cycle, but are optional. A "Final Appraisal" should be conducted at the end of the annual work cycle. All reviews are required to be conducted and recorded by the employee's supervisor, signed by the employee, the employee's Supervisor and the employee's manager, which are made a part of the employee's employment file with the Department of Administration. [Exhibit A, T-57-60]

17. Ms. Hershner's employment began after that year's work cycle for HRC had begun and at the time of the end of the cycle on March 31, 2006, the Attorney II position had not been filled, so her Final Appraisal was conducted by the Executive Director of the HRC at that time, Mr. George Allison, without a direct Manager's signature or participation. [Exhibit A, T-360]

18. On Ms. Hershner's first PMS Work Plan conducted by Mr. Allison, her work was rated as "VG" in all but five of the thirty-four categories in which she was evaluated and in those five categories, she received a rating of "G". Ms. Hershner's overall rating was "VG", which meant that overall Ms. Hershner "...[met] the defined job expectations and, in many instances, exceed[ed] job expectations...[and was]...generally doing a very good job." [Exhibits A, B]

19. The only constructive remark which suggested any necessary change in her performance on that work evaluation in Exhibit A written by Mr. Allison, was that he believed Ms. Hershner perhaps became too involved with trying to assist her clients with non-legal matters, a criticism with which Ms. Hershner wrote she generally agreed. She clarified in writing on the evaluation that it had occurred on only one occasion rather than "occasionally" as Mr. Allison had written when she was concerned about a client's need for therapeutic assistance for severe depression. [T-361, Exhibit A]

20. When Ms. Brooks left the employment of the HRC approximately four months after Ms. Hershner was hired, leaving the Attorney II position vacant, both Mr. Boulden and Ms. Hershner applied for the Attorney II position. Then Executive Director, George Allison, hired Richard Boulden to replace Ms. Brooks as the Agency Counsel, making him Ms. Hershner's supervisor. [T-254]

21. Until Mr. Boulden became the HRC Agency Counsel and her supervisor, there is no evidence that Ms. Hershner had ever had any disagreement with Mr. Boulden, except one instance regarding the "cause" or "no cause" determination of the Robinson case. In that case, Mr. Boulden was the HRC investigator assigned to conduct the investigation. [T354]

22. In the Robinson case, Mr. Boulden and Mr. Allison agreed that the claim should be determined "cause" and Mr. Boulden had preliminarily written the case up as if it would be

determined a "cause" case. The next step in the HRC process is attorney review. In conducting her attorney review, Ms. Hershner investigated the matter and disagreed with Mr. Boulden and determined that the matter should be a "no cause" case. [T-354-56]

23. The matter was a source of considerable disagreement in the case review between the three, which ended in an impasse when Ms. Hershner explained that Rule 11 of the Rules of Civil Procedure prohibited her from signing the pleadings in a case which she knew was not supported by the law or the facts. [T-356]

24. In order to resolve the dispute, Ms. Hershner suggested that they consult an independent attorney to analyze the case and make a recommendation on the "cause" or "no cause" determination, and if that attorney agreed that the matter should be "caused", then Ms. Hershner would agree to write it up and sign off on it in that way. [T-357]

25. Mr. Boulden selected Victoria Homick, the attorney Ms. Hershner was hired to replace at the HRC, to review the case. On review Ms. Homick agreed with Ms. Hershner that the Robinson matter should be "no cause". [T-356-58]

26. The Robinson determination had not been completed when Mr. Boulden was hired to fill the Attorney II position vacated by Sherry Brooks and become the Agency Counsel on April 1, 2006.

27. Ms. Hershner objected to the manner in which Mr. Boulden wrote the final determination in as much as it read as if it was meeting all the factors of a "cause" determination, but illogically concluded "no cause". Ms. Hershner also objected because Mr. Boulden's final version left out many relevant pieces of information. Mr. Boulden became angry at Ms. Hershner and at one point shouted at her to give him the Robinson file. Mr. Boulden had written the final determination using much the same phraseology that he had used as the investigator in writing it as a "cause" case. [T-262, 358-59, 338-39]

28. On June 14, 2007, Ms. Hershner was called to a meeting in the office of the Executive Director by Mr. Boulden with Mr. Allison and Mr. Boulden for her annual Performance Management review.

29. Prior to that meeting and since Mr. Boulden had become her supervisor the previous April, Mr. Boulden had not met with Ms. Hershner to establish a Work Plan, had not conducted any Interim Review with her, had set no goals for her, and had done nothing to either train her himself or direct her to receive any training.

30. Prior to the June 14, 2007 meeting, Mr. Boulden had never informed Ms. Hershner that she was failing to meet his expectations in any way and he had never criticized her job performance in any way. [Exhibit B, T-362-365]

31. In the June 14, 2007 meeting, Mr. Boulden gave Ms. Hershner her performance evaluation for the time period April 1, 2006 through March 31, 2007. (Petitioner's Exhibit B)

32. This was the very first review Mr. Boulden had ever completed on an employee for HRC. He informed Ms. Hershner upon handing her the negative "BG" review that she had fifteen minutes to read and sign as the review had to be turned in by noon that very day. [T-364, Exhibit B]

33. On the performance review, there is no written plan and no written interim review. Neither had been performed by Mr. Boulden as required by the Department of Administration. Of the thirty-five ratings of Ms. Hershner's performance for the cycle, Mr. Boulden graded Ms. Hershner as "below good" ("BG") on fourteen, "good" ("G") on nineteen and "very good" ("VG") on two. On one of these ratings in the comment section he wrote she was "very good" ("VG"), but only graded her as "good." Her overall rating was assessed as "below good" ("BG"), despite the fact that there were more "G" ratings than "BG" ratings. [Exhibit B]

34. Ms. Hershner appealed her "BG" evaluation to the Department of Administration's Human Resources Management Office. She set out her disagreement with Mr. Boulden's and Mr. Allison's annual evaluation in two letters dated June 19, 2007 and July 15, 2007. [Exhibit B1 (also Respondent's 10) and B2 (also Respondent's 11)]

35. On July 24, 2007 Mr. Boulden filed with the Human Resources Management Office a document he entitled "Addendum to the Performance Appraisal of Millie Hershner" in which he attempts to fill in information to justify the low performance review scores. [Exhibit B3]

36. After Ms. Hershner's June 19, 2007 Appeal Letter [Exhibit B1] pointed out that Mr. Boulden had failed to follow procedure and was prohibited by the Performance Management Guidelines from giving her a "BG" evaluation without first pointing out any deficiencies by way of setting goals, giving warnings or conducting interim reviews, on July 25th, Mr. Boulden and Mr. Allison amended their "BG" evaluations of Ms. Hershner, to "G", but left the negative comments as a part of Ms. Hershner's file. [See letter of McKinley Wooten Exhibit C]

37. In an attempt to further defend herself in the "BG" evaluation, Ms. Hershner contacted members of the public whom she had assisted in her role as HRC Attorney I and requested that they write letters on her behalf because of the poor Performance Review she had been given. Those letters were admitted into evidence as Exhibits E1, E2, E3, E4, E5, E6 and E7, which were sent by the authors directly to Mr. Allison and all were highly complementary of the job Ms. Hershner had done for the authors. [T372-75] These client letters are not consistent with Mr. Boulden and Mr. Allison's "BG" review.

38. Ms. Virginia Radcliffe, the author of one of the letters, asked Ms. Hershner about the substance of the problem with her evaluation. To respond, Ms. Hershner provided Ms. Radcliffe with a copy of the Performance Evaluation marked as Exhibit B and the two letters she had sent marked as Exhibits B1 and B2. These letters were not made a part of her employment file, but perhaps should have been since they directly impacted her performance review. [T-375-76]

39. Mr. McKinley Wooten, Jr., Deputy Secretary of the N.C. Department of Administration considered and ruled upon Ms. Hershner's appeal of her Performance Evaluation in his letter of August 16, 2007. Mr. Wooten considered the Performance Evaluation of June 14, 2007 (Exhibit B), the letters above (Exhibits B1, B2 and B3) and another "Performance Management System appraisal signed by Mr. Boulden and Dr. Allison on 7/25/07" which was signed and dated the day after the document admitted into evidence as Exhibit B3, authored by Mr. Boulden, which removed all the "BG" ratings and replaced them with "G" ratings, but left the prior negative comments about Ms. Hershner's work unchanged. [Exhibit C]

40. In his August 16, 2007 directive, Deputy Secretary Wooten wrote that it was "alarming" and "inexcusable" that Mr. Boulden failed to conduct an interim review of Ms. Hershner and yet gave her numerous "BG" ratings when the "development portion" of the plan was "devoid" of any comments. Mr. Wooten noted that the "revised" appraisal dated July 25, 2007, referenced above, changed all the "BG" ratings and replaced them with "G" ratings, without changing any of the comments, which was "incongruous" with a "G" rating. Mr. Wooten Ordered that Mr. Boulden change these comments, within five days, to be revised to reflect the "G" rating. It is clear from Mr. Wooten's review that Mr. Boulden, and Mr. Allison in his concurrence of the evaluation, had failed in the way that Ms. Hershner had been evaluated and managed. [Exhibit C]

41. As is evident by Exhibits C2, C3 and C4, this matter was not resolved until at least October 5, 2007 when Ms. Hershner authored Exhibit C4 to Mr. Allison who had allowed Ms. Hershner to write her own comments to the Performance Evaluation for the cycle. Apparently Mr. Boulden had not complied with Mr. Wooten's order to change the evaluations comments within five days. [T-372]) Mr. Boulden, Mr. Allison and Ms. Hershner all continued employment at HRC while this employment issue of Ms. Hershner's negative and apparently unjustified Review was very slowly, and not in a timely fashion, replaced at the order of Deputy Wooten.

42. Despite the foregoing, on December 12, 2007, Mr. Boulden wrote on Ms. Hershner's first "Interim Review" the following: "Millie's performance has been quite good so far this cycle. She has worked hard and settled several cases. She perfected an appeal and filed a good brief, working long hours to do so. A credible job-keep up the good work." [Exhibit L]

43. Only a few weeks after this positive Interim review of Ms. Hershner by Mr. Boulden, on January 3, 2008, a decision was made by the HRC that the Virginia Radcliffe State Court case would no longer be handled by the HRC. Ms. Radcliffe is the same individual with whom Ms. Hershner discussed her first annual Performance Review, the performance review that she appealed to Mr. Wooten. Ms. Radcliffe is also the same individual with whom Ms. Hershner shared the two letter/documents which should have been in Ms. Hershner's employment file so that Ms. Radcliffe could better understand the circumstances of Ms. Hershner's appeal of her negative review conducted by Mr. Boulden.

44. On that day, Mr. Boulden called Ms. Radcliffe to inform her of the HRC decision not to be involved in her case any longer. Ms. Radcliffe was not happy with that news. After the phone call to Ms. Radcliffe, Mr. Boulden sent an email to Mr. Allison and Ms. Hershner

explaining that Ms. Radcliffe was upset and had promised to complain to administration officials higher up. The pertinent portion of that email for this finding read as follows: “At any rate, I’m sure we can expect more inquiries for the Gov., the commissioners, Sec. Cobb, and anyone else she can think of to complain to. With your permission George, I think I should be the only person to respond to the inquires, so we do not inadvertently give inconsistent answers. Please let me know what you think.” [emphasis added] [Exhibit G]

45. Mr. Boulden testified that as a result of the email chain contained in Exhibit G, it was “crystal clear” that Mr. Boulden was the only person at HRC who was to speak with Ms. Radcliffe and that Mr. Boulden was to be the only point of contact with Ms. Radcliffe. Mr. Boulden also testified that his email of January 3, 2008, was confirming an understanding from a prior meeting between Mr. Allison, Ms. Hershner and himself. There is no reference in the emails themselves that refers to any meeting or the substance of such meeting. The email very clearly states that Mr. Boulden is merely asking for permission and stating his opinion that he should be the only person to respond to the inquiries (plural). There had already been a statement that it should be expected that others would inquire about this matter including the Governor and Sec. Cobb. Mr. Boulden contends that the email means only one person was to talk to Ms. Radcliffe, but the plain meaning of this email correspondence does not support his contention. The more obvious meaning of this email is that Mr. Boulden is not asking to be the only person to speak to Ms. Radcliffe, but more broadly to respond to the people who inquire about the complaints she had made to them. In any event, this email string is hardly crystal clear and unambiguous as to what it meant. [T-263, 270, Exhibit G]

46. Ms. Hershner’s recollection of the meeting on January 3, 2008 differs from Mr. Boulden in that she contends that there was no conversation about only one person talking with Ms. Radcliffe or that Ms. Hershner was to have no contact. Ms. Hershner’s contention is more credible in light of the string of emails.

47. Mr. Boulden further testified that when he was leaving the office on that same day, January 3, 2008, he overheard a conversation Ms. Hershner was having on the telephone which he assumed was with Ms. Radcliffe, although he did not know to whom she was talking. Mr. Boulden contends that this conversation by Ms. Hershner was in direct violation of the agreement of earlier that very day, that agreement being that only he should talk to Ms. Radcliffe. This contention by Mr. Boulden, however, is not supported by what is contained in his email of that same day which he says confirms the agreement. It does not confirm any agreement, it simply asks for permission to respond to inquiries. Even Mr. Allison’s email does not specifically state in any manner of absolute terms that Mr. Boulden should be the only person responding—more that it is a good idea for only one person to respond.

48. Mr. Boulden admits he did not stop and address the matter with Ms. Hershner even after overhearing a conversation that he believed was violating his direct order or that of Mr. Allison. He simply let Ms. Hershner continue to talk. Although the conversation was on January 3, no issue was raised until six months later on June 9, 2008, [T-268]

49. On June the 9, 2008, Ms. Hershner received a notification of a pre-disciplinary conference to be held at 10:00 am the next morning in the office of Mr. Allison. This

notification from Mr. Boulden states that the reason for the meeting is to review Ms. Hershner's insubordination and states that in a meeting of January 3rd, "Allison indicated that I, as Agency Counsel, should be the only point of contact to communicate with Ms. Radcliffe on behalf of NCHRC. I confirmed my understanding of his instruction in writing later that day in an email from me to Mr. Allison and you. On Friday, January 4, 2008, Mr. Allison replied to my email acknowledging his agreement with my understanding of his instruction." [Exhibit H. T-220, 263, 382]

50. Ms. Hershner's version of these communications, that she did not understand that string of emails to be an absolute prohibition to speak with Ms. Radcliffe, is reasonable and plausible. Mr. Boulden's belief that his interpretation of the emails is reasonable is not compelling. While the emails seem very clear to this finder of fact, the emails of January 3rd and 4th, between Mr. Boulden, Mr. Allison and Ms. Hershner may be seen as unclear and ambiguous. [T-379-81] The emails simply do not convey the message Mr. Boulden contends that he intended to convey.

51. On June 11, 2008, a final written warning was issued to Ms. Hershner. At the end of the Final Written Warning, Ms. Hershner was given five numbered rules to follow, the last of which was that she may not communicate with Ms. Virginia Radcliffe, "...in any manner, directly or indirectly, without the written permission of the Agency Counsel or the Executive Director. If Ms. Radcliffe contacts you, you shall immediately refer the contact to the Agency Counsel or the Executive Director." [Respondent's Exhibit 1, Petitioner's Exhibit J]

52. There is no evidence that Ms. Hershner ever violated any of these five directives and, in particular, that she ever contacted Ms. Radcliffe again while employed by HRC.

53. Mr. Boulden admitted that Ms. Hershner never violated any of these rules contained in the "Final Written Warning" and Ms. Hershner testified that she never did violate one of these rules and this court specifically finds that she did not. [T-293, 382-85]

54. Ms. Hershner filed a written response to the Final Written Warning on June 18, 2008. [Exhibit I] As she states therein, the directive of January 3rd and 4th was hardly clear. Further, if Mr. Boulden believed she was violating the order on January 3rd when he was listening in on Ms. Hershner's telephone calls, he clearly should have addressed the situation then rather than waiting to review her call log at a later date to try and build a case against Ms. Hershner for violating his order that she not speak to Ms. Radcliffe.

55. It is notable that Ms. Hershner received a "Final" written warning, when prior to that time, she had never received a prior warning on this subject, neither verbal nor written, even though Mr. Boulden had ostensibly caught her in violation.

56. Exactly one week after the issuance of the "Final Written Warning" to Ms. Hershner, on June 18, 2008, Ms. Hershner's year end cycle Performance Management review was conducted by Mr. Boulden and Mr. Allison. [Exhibit L] In this review, Ms. Hershner received a "G" or "VG" in every category, except two. In "Judgment" she was issued a "U" because of the "Final Written Warning" and in "Determinations", she was designated "O", for

outstanding. Her overall grade was only “G”, despite many complementary portions of the review, however.

57. Before signing her Performance Review, Ms. Hershner wrote on the evaluation that she believed Mr. Boulden graded with a more difficult scale than other managers and that her overall grade should be higher than a “G” and again reiterated that she did not believe she deserved to receive a “Final Written Warning” because of her “good-faith misinterpretation of a communication from [Boulden].” [T-385-86]

58. Considering the working history of Mr. Boulden and Ms. Hershner, it is remarkable that no evidence was produced by either party of any problems between them or in the work of Ms. Hershner at the HRC all the way through at least May 4, 2009, when Ms. Hershner’s year end cycle PMS review was conducted by Mr. Boulden alone. [Mr. Allison was no longer the Executive Director of HRC and his replacement, Mr. Campbell, did not start at HRC until June 1, 2009.] [Exhibit M]

59. In the May 4, 2009 review of Ms. Hershner’s performance in thirty-four categories, Mr. Boulden graded her as “G” in only three categories, “VG” in thirty categories and “O” in one. Ms. Hershner’s overall assessment was “VG”, which assessment Ms. Hershner signed on May 4, 2009 without comment.

60. The Interim review of Exhibit M, dated November 2008, was written and signed by Mr. Boulden and stated that Ms. Hershner had “...worked particularly hard to get determinations drafted.” It also noted that although she had difficulty with the Sarmie trial [held in September 2008], it was “...not because of lack of effort” and also acknowledged that it was her first jury trial which she had to conduct alone and without the help of more experienced counsel, which was not the customary way of doing things. [Exhibit M]

61. It is also notable that in this 2009 review, her rating in “judgment” was “VG”, where she had been rated “U” in the 2008 annual review (because of the “Final Written Warning”).

62. On June 1, 2009, Mr. John Campbell became the new Executive Director of the HRC. On the 15th day of that same month, the HRC was notified that it was going to have to relocate the physical site of its offices on July 1, 2009. [T-13, 392, 395-96]

63. On June 18, 2009, Executive Director of HRC, John Campbell, sent a Memorandum to Ms. Hershner requesting information about how certain documents from Ms. Hershner came into the possession of Ms. Virginia Radcliffe who had attached the two documents to a motion she had filed in her case in U.S. District Court. The documents at issue at Petitioner’s Exhibits B1 and B2 in this hearing. Mr. Campbell’s memorandum identifies these documents as confidential; the question is to whom. In that memorandum, Mr. Campbell writes that his “office is trying to determine how these confidential documents . . . came into Ms. Radcliffe’s possession. . . . [i]n order to determine whether State and DOA confidentiality laws and policies, and [Ms. Hershner’s] privacy were breached.” [Exhibit N1]

64. Ms. Hershner admitted that she had provided these documents to Ms. Radcliffe when she was defending against the negative Performance evaluation in 2007, which was reversed by the order of Deputy Secretary Wooten as discussed above. To the extent the documents are confidential to Ms. Hershner, there is no prohibition of Ms. Hershner revealing information which would be confidential to her, if she so chooses. No evidence at this hearing established or was even offered to show how these documents may have otherwise been confidential. [Exhibit Q2] No statute, rule or policy has been offered defining "confidential" for HRC.

65. The Sarmie case, referred to above, was dismissed by the Superior Court Judge presiding during the course of the trial because the HRC Investigator for the Sarmie case, now Agency Counsel Mr. Boulden, had failed to comply with required procedural notices. That dismissal was appealed to the N.C. Court of Appeals by Ms. Hershner on behalf of the HRC. Ms. Hershner alone compiled the Record on Appeal and drafted all assignments of error. The Record was mailed by the Court of Appeals on July 7, 2009 and received by HRC on July 9 2009, at a time when all the HRC and its staff were in the midst of unpacking boxes from the physical move. The brief was therefore due on or before August 6, 2009. [T-391-93; Respondent's Exhibit 17]

66. Ms. Hershner had the responsibility of writing the brief, and she did not believe she would have any trouble timely completing the task despite being in the midst of the physical move and having all her cases in boxes. At this point in her legal career, she had never missed a filing deadline. [T-394]

67. On July 21, 2009 at 7:45 pm, Ms. Hershner sent the following email to Mr. Boulden and the Supervisor HRC Investigator Maggie Faulcon: "I have sent out some additional interrogatories in the Amini case because there were large discrepancies in the date [sic "data"] from the counsel for the respondents and from the HOA fiscal statement. I have given them 10 days to respond. Millie."

68. On July 22, 2009 at 8:08 am, Mr. Boulden sent the following email to Ms. Hershner, "Thanks Millie, What is the status of the Sarmie brief? What date is it due and when will you have a draft of the argument for review? If you need help with the research or anything else, let me know. That brief is your top priority." The Brief was due, if no extensions were granted, on August 6, 2009. [Exhibit O and Q2 and Respondent's 13, 2 and 17]

69. Ms. Hershner admits that at some point Mr. Boulden did tell her that he wanted her to work only the Sarmie Brief; however, he had told her that the Sarmie brief was her "top priority" just as with this email of July 22. [T-394-95] His communications concerning the Sarmie brief were inconsistent and ambiguous.

70. On that very same evening of July 22, 2009, Ms. Hershner was called into the office of Director Campbell and placed on Administrative leave, instructed to speak to no one at the HRC, that she could take nothing from her office with her and that she'd receive a letter in about thirty days. [T-400]

71. On August 20, 2009, a Memorandum was written to Ms. Hershner by Mr. Boulden informing her that she needed to be present the next morning at 10:00 am for a pre-disciplinary conference in the office of HRC Executive Director, John Campbell, to 1) address the publication of confidential information by Ms. Virginia Radcliffe that was negative about Mr. Boulden, 2) to address her violation of known or written work rules regarding informing a complainant of a determination prior to the issuance of the determination, 3) and to address her insubordination for not dropping everything and working on the Sarmie brief and nothing else. [Exhibit Q2 and State Exhibit 2]

72. The next day Ms. Hershner was dismissed from her employment by the HRC for the reasons stated in the dismissal letter of that same date, August 21, 2009. [T-349]

73. Executive Director John Campbell testified in this contested case hearing. He had only been on the job for a little more than two months when Ms. Hershner was terminated.

74. Mr. Campbell agreed and admitted that Ms. Hershner was not fired because her performance as an Attorney I failed to meet expectations, that Ms. Hershner was not fired because she was not doing her job at the level expected of her, and that she was not fired because of unsuccessful job performance due to her lack of skill or effort. [T-55-56]

75. While testifying and on the stand, Mr. Campbell reviewed for the very first time Ms. Hershner's Performance Management documents. Mr. Campbell agreed and admitted that in reviewing her Performance Review documents from 2006 through 2008 none contained a development plan or an interim plan.

76. Mr. Campbell likewise agreed and admitted that the responsibility for ensuring that they were completed belonged to Mr. Boulden.

77. Mr. Campbell further agreed and admitted that the failure of Mr. Boulden to do so was not fair to the employee, Ms. Hershner.

78. Mr. Campbell also agreed that the amount of time, less than 24 hours, given to Ms. Hershner to address these claims of serious employment issues was not reasonable.

79. Mr. Campbell further agreed and acknowledged that Mr. Boulden's filling out of Ms. Hershner's review forms and his other supervisory management of Ms. Hershner, including yelling at her, was "questionable". [For Mr. Campbell's testimony in paragraphs 73-77, above see T-60-67]

80. Mr. Campbell agreed and admitted that Mr. Boulden's lack of attention to supervisory work over Ms. Hershner as identified by Mr. McKinley Wooten was "inexcusable" and not fair to her. [T-70-72]

81. Mr. Campbell agreed and admitted that receiving a "Final Written Warning without ever having had a prior warning", as happened to Ms. Hershner, is not appropriate. [T102-04]

82. Mr. Campbell further agreed and admitted that Mr. Boulden never gave Ms. Hershner constructive criticism like Mr. Allison had done for Ms. Hershner in her initial annual cycle review. [T-147]

83. Finally, Mr. Campbell agreed and admitted that he never looked at the Employment file of Ms. Hershner to discover any history, negative or otherwise, between Mr. Boulden and her, but rather relied upon what Mr. Boulden represented to him, even after Mr. Campbell knew he was going to decide whether or not to fire her. [T-49-51]

84. Mr. McKinley Wooten testified on behalf of Respondent. According to Mr. Wooten, the rationale and purpose behind the Performance Management review is to give State employees notice of any work deficiencies and to also provide them with an opportunity to “reflect and correct”. [T- 189]

85. Mr. Wooten was in attendance at the hearing of this contested case for all the testimony of Mr. Campbell, which confirmed that Ms. Hershner was not provided with any documented warning of any deficiencies nor any documented opportunity to correct them. [T 190]

86. Mr. Wooten also stated that he would not read Exhibit G, the email chain that was the genesis of Ms. Hershner’s “Final Written Warning”, as a “directive”, a violation of which would be sufficient to warrant discharge of an employee. [T 194]

87. It also made no sense to secretary Wooten why Mr. Boulden in his email would be asking for permission to be the only person to speak with Ms. Radcliffe if he had already been given that permission the day before in a meeting. [T 197]

88. Mr. Wooten also opined that if Mr. Boulden had intended for the Sarmie Brief to have been Ms. Hershner’s only priority, he should have said so rather than calling the completion of the brief only a “top priority” in his email to Ms. Hershner. [T 198]

89. According to Mr. Wooten, the practice of the Department of Administration was contrary to the way Ms. Hershner was treated with her “Final Written Warning.” He explained that the “Final Written Warning” of Ms. Hershner and her rating of “U” on the category of “judgment” in the Performance Management annual cycle ending in 2008, shortly after the Final Warning had been issued, would have no longer been in effect against Ms. Hershner after her next review cycle. This was evident to Mr. Wooten when comparing the 2008 annual review to the Performance Review at the end of the next cycle a year later in 2009. [Exhibit L] The 2009 annual review showed that the problem, if indeed it ever even existed, was cured by 2009. Since “judgment” on the 2009 Review had improved to “VG”, she would not still be on “Final Written Warning” after her appraisal in 2009, which was “event specific” for Ms. Hershner.

90. According to Mr. Wooten, the final written warning then, cannot be a part of the reason to terminate Ms. Hershner.

Violation of Known or Written Work Rules

91. Mr. Boulden and Mr. Campbell both state that Respondent's Exhibit 7 is their written authority which prohibits Ms. Hershner from discussing whether a determination will be "cause" or "no cause" before a decision is actually made despite the fact that Exhibit 7 clearly states that it applies to Investigators and not Attorneys. There was no such written rule pertaining to attorneys produced at the hearing. There is no evidence before this Tribunal that any such rule exists that is applicable to attorneys at HRC.

92. Mr. Boulden testified that he told Ms. Hershner of the rule repeatedly, but none of the PMS annual review documents of Ms. Hershner for 2006, 2007, 2008 or 2009 show that Ms. Hershner was ever counseled on this issue or for violating it at any time.

93. The first time any written evidence of this claim of an agency rule appears is in the Pre-disciplinary Conference Memorandum authored by Richard Boulden on August 20, 2009.

94. Ms. Hershner denies that she told Ms. Williams what the outcome of her case's determination was going to be, but only that there appeared to be sufficient evidence to establish a "prima facie" case, but reminded Ms. Williams that the Agency Counsel and the Executive Director would have to make the final decision.

95. There is no competent evidence that contradicts what Ms. Hershner admits she told Ms. Williams.

96. Mr. Boulden testified he told Ms. Hershner many times about the purported policy of HRC, but admits that he did not, at least "not explicitly," tell Ms. Hershner that violation of that policy was grounds for dismissal. [T-271]

97. Mr. Boulden testified both that Ms. Hershner should have "drawn conclusions" that the policy existed without being told [T 271] and that he "...would expect an attorney for an investigative agency to understand on her own [without being told]." [T 229-30]

98. If such a policy did in fact exist, Mr. Boulden violated the policy himself when he admitted in cross examination that he told Ms. Robinson that first it was one way and then it was the other way and "back and forth", admitting that back and forth meant "cause" or "no cause." [T 259]

99. Maggie Faulcon testified in the contested case hearing. Ms. Faulcon began work as an Investigator at HRC in 1985, became the Supervisor of the Investigators at the HRC and worked there until a short time after Ms. Hershner was fired. Ms. Falcon testified that if such a policy ever existed, it did not apply to attorneys and she had never heard of even an investigator being disciplined for discussing potential determinations with a party based on how the evidence appeared in the investigative stages. [T 312-15]

100. Ms. Falcon never heard of anyone ever even being disciplined for discussing the likelihood of the determination with a party, and for certain, never heard of anyone losing their job over such a thing. [T 323]

101. The state has not met its burden or in any way established that a known or written work rule or policy for attorneys to not discuss determinations with complainants even existed, much less that a violation of such policy was grounds for dismissal since the competent evidence was that others had discussed potential determinations without any discipline and especially with no one being dismissed from employment. If such a rule did exist it had not been enforced and to use as grounds for termination of Ms. Hershner would be arbitrary and/or capricious.

Insubordination

102. The issue of Ms. Hershner's handling of the Sarmi brief is discussed above. It is specifically found that Mr. Boulden did not give Ms. Hershner a clear and consistent directive to work only on the Sarmi brief as he contends. The credible evidence is that it was a top priority but not the only priority.

103. Mr. Donald R. Teeter, Special Deputy from the Attorney General's Office was brought in to pursue the appeal since Ms. Hershner had been sent out on administrative leave and Mr. Boulden had been a witness in the trial. Mr. Teeter assessed the likelihood of success on appeal as being very poor. (Respondent Exhibit 23).

104. Mr. Boulden agreed with the letter of Don Teeter, dated December 2, 2009, that the case was a weak one to appeal. Mr. Boulden's agreement with Mr. Teeter that the appeal was weak is not consistent with Mr. Boulden's insistence that the brief was so important that it should be the only thing Ms. Hershner was to work on. Mr. Boulden had already staked himself out to a position that Ms. Hershner should not be at fault for any short-comings in the trial of the Sarmi matter since it was her first jury trial and she was not given any assistance as was customary. (See Finding of Fact # 60 above) Further, the basis for the case being dismissed was Mr. Boulden's purported failure to comply with required procedural deadlines. There was still more than two weeks before the brief was due when Ms. Hershner was sent home on administrative leave, presumably sufficient time to do the brief.

105. If writing the Sarmie brief was the only thing that Mr. Boulden was going to direct Ms. Hershner to work on during this time period, he could have very easily said so, but instead he told Ms. Hershner even up to the day she was sent on administrative leave, that the brief was not her only priority. He instead told her it was her "top priority".

106. There was no evidence that she had never missed a deadline or that she had difficulty in balancing her work load.

107. In an email Executive Director Mr. Allison commended Ms. Hershner for delaying her vacation to make sure her job was performed first, before she enjoyed her own

personal time off, indicative of an employee who is unwilling to make personal sacrifices to make sure her job is completed. [Exhibit C4]

108. The Sarmie Appeal was ultimately withdrawn and the brief never written and never filed.

109. Under the facts and circumstances of this case, the Respondent has failed in its burden of proof to establish that Ms. Hershner was insubordinate and that grounds existed to terminate an employee for not working on the brief.

Conduct unbecoming a state employee that is detrimental to state service

110. Ms. Hershner shared with Virginia Radcliffe two letters she had written as part of her appeal of the work evaluation by Mr. Boulden in 2007. She contends that she did so in order to defend herself from the poor work evaluation by Mr. Boulden. She contends that the two letters perhaps should have been a part of her personnel file with the Department of Administration but were not.

111. Ms. Hershner's contention that the letters should have been in her personnel file and that she could disseminate such information to defend herself is not dispositive and not completely on point.

112. The essential question that must be answered is what information is considered confidential in the context of Ms. Hershner's employment with the Commission. Alternatively, when is information gathered by the Commission considered public information?

113. Neither party presented any policy, rule or statute which establishes what constitutes "confidential" information nor under what circumstances could such confidential information be shared with others.

114. The rules of the Commission do not address confidentiality.

115. N. C. Gen. Stat. Chap. § 41A is the State Fair Housing Act. The Act does not address confidentiality other than to state that the terms of a conciliation agreement shall be made public with some exceptions; thereby implying perhaps that matters are not public before the conciliation agreement is reached. N. C. G. S. § 41A-7. N. C. G. S. § 41A-8 addresses investigations and subpoenas and sets forth the various forms of data to which the Commission has access during an investigation; however, "confidentiality" is not mentioned in that section.

116. It is not known whether or not the Federal Fair Housing Act establishes any rules of confidentiality which would be applicable to the State investigations and neither party made any representation of the applicability of the Federal Fair Housing Act in this matter. The Act was not tendered into evidence or otherwise referenced.

117. Assuming *arguendo* that confidentiality does apply, then the question to be answered is to what degree could Ms. Hershner share information.

118. The North Carolina State Bar Rules of Professional Conduct addresses confidentiality of information in Rule 1.6 which states that “(b) [A] lawyer may reveal (confidential) information protected from disclosure . . . to the extent the lawyer reasonably believes necessary: (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; . . .” (Emphasis added) Therefore, it is the lawyer’s perception of when it is necessary to release such information, but that belief must be a reasonable one.

119. The Notes to Rule 1.6 state that the lawyer “must act competently to safeguard information” and that the lawyer “must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.” The method of communication should afford a “reasonable expectation of privacy.”

120. Ms. Hershner’s communications were initially addressed to Mr. Wooten in order to defend against what she felt was an unwarranted evaluation. In those letters she specifically mentioned by name and in varying detail the Robinson, Seelig, Radcliffe, Stavaredes and Thompson cases.

121. In sending those letters to Mr. Wooten, she was defending herself in a fashion as envisioned by the State Bar Rules. The communications were in a manner with reasonable expectation of privacy.

122. In giving Ms. Radcliffe those very same letters there was no expectation of privacy and in fact they were used in a manner that demonstrated no expectation of privacy and that no confidences were to be protected.

123. It was not necessary to provide Ms. Radcliffe those letters for Ms. Hershner’s defense. She had asked others to write on her behalf as well but did not provide them with the letters. Even if she reasonably wanted to give Ms. Radcliffe more information, it was not necessary to divulge the information to the degree in the two letters. She and Ms. Radcliffe were not personal friends and the information concerning the specifics of the other cases was not necessary in order for Ms. Radcliffe to write on behalf of Ms. Hershner.

124. The tenor of the notes to the Bar Rules is such that the divulgence of any confidential information would be to the third party raising the issue concerning the lawyer. In this instance that would properly be addressed to Mr. Wooten’s review, and not by divulging to Ms. Radcliffe.

125. Ms. Faulcon’s blanket statement that there is nothing wrong with disclosing one’s personnel file to whomever one wishes does not seem credible, especially as in this case. In the first instance, the letters were not in Ms. Hershner’s personnel file—rightly or wrongly. Secondly, even if information is in one’s own personnel file, any otherwise confidential information would be prohibited from being divulged.

126. Although the Respondent offered no evidence whatsoever which made the letters sent to Ms. Radcliffe confidential, or in any manner established what was confidential, it was at the very least poor judgment and improvident of Ms. Hershner to send the letter's with such information about cases within the Commission to Ms. Radcliffe.

127. Ms. Hershner was never warned, counseled or corrected on this issue.

128. The Commission's contention that her divulging the letter's opened the agency to lawsuits is without merit and is not justification for her termination.

129. An important portion of the complaint against Ms. Hershner, as evidenced by Mr. Boulden in the August 20, 2009 Pre-Disciplinary conference Notification Memorandum, is that the letters were considered by Mr. Boulden, the author of the Memorandum, to be "...personal and professional attacks on me." Ms. Hershner's letters were in deed unflattering to Mr. Boulden in particular and the agency in general.

130. Ms. Hershner's contention that her positive evaluation of May 4, 2009 should have been included in her review before the Final Agency Decision is of no consequence. While such may or may not have made a difference with the reviewer, this contested case hearing is a new start and dependent upon the evidence offered in this hearing, not what the previous reviewer may have considered. It is recognized that she was only given twenty four hours or less to prepare for her pre-disciplinary conference and, considering the length, depth and breadth of the allegations, twenty four hours was not sufficient time for her to prepare any defense, as acknowledged by Mr. Campbell.

131. There is no evidence that Ms. Hershner ever disobeyed a reasonable, clear and unambiguous directive of a superior.

132. Although it has not been articulated by either party, it seems that dissension and acrimony existed between Mr. Boulden and Ms. Hershner which stemmed from a series of events which created this "perfect storm." It began with Ms. Hershner being hired as an attorney when Mr. Boulden was already at the agency and with more years of experience as an attorney. Her hire made her Mr. Boulden's supervisor. The situation was compounded in a few months with Mr. Boulden being hired into the attorney position which then supervised Ms. Hershner. The situation was made worse still because of the disagreement between Mr. Boulden and Ms. Hershner over the "cause" or "no cause" of the Robinson case. Mr. Boulden began that case as the investigator. It was sent to Ms. Hershner as attorney for review, and before it was finalized Mr. Boulden was promoted to the superior position that had the final say on the matter. It would have probably been more appropriate for Mr. Boulden to have not signed off on the Robinson case since he had been the investigator. In spite of all of that, at times they seemed to work well together.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 126 and 150B of the N.C. General Statutes and all parties properly had notice of the hearing.

2. At the time of her dismissal, Petitioner was a career State employee subject to the State Personnel Act, N.C.G.S. § 126-1 *et seq.* Petitioner, therefore, could only be warned, demoted, suspended or dismissed by Respondent for “just cause”. N.C.G.S. § 126-35(A): 25 N.C.A.C. 01J .0604(a).

3. Pursuant to N.C.G.S. § 126-35(d), the burden of proof in on Respondent to show it had “just cause” to dismiss Petitioner for unacceptable personal conduct.

4. “Just Cause” is a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstance of each individual case. NCDENR v. Carroll, 358 N.C. 649, 669 (2004).

5. An employee may be dismissed for unacceptable personal conduct without any prior disciplinary actions. (Respondent’s Exhibit 4, p. 7). Therefore, the prior “final written warning” would not necessarily apply. According to Mr. Wooten, the conditions of the final written warning should not have been considered anyway, since it was fact specific and the condition precedent had been satisfied. The evidence also showed that a “final” written warning was not appropriate since there had been no prior warnings. For the other reasons set forth in the findings of fact, the final written warning should not have been considered in making the decision to terminate.

6. NCDOA, “Disciplinary Action and Dismissal Policy”, p. 10, and State Personnel Manual, “Disciplinary Action, Suspension and Dismissal” provides: Unacceptable Personal Conduct - An act that is:

(d) the willful violation of known or written work rules; or

(e) conduct unbecoming a State employee that is detrimental to State service; or

(f) willful failure or refusal to carry out a reasonable order from an authorized supervisor is insubordination for which any level of discipline, including dismissal, may be imposed without prior warning.

(Respondent’s Exhibits 4 and 5, and 25 N.C.A.C. 1J.0614(h), (i)(4), and (i)(5)).

7. Petitioner was dismissed in part for the willful violation of a known work rule, based on Petitioner informing Ms. Williams that she thought Williams’ case was “cause” before a final determination had been made. (T pp. 40, 155, 229, Respondent’s Exhibit 2).

8. The state has not met its burden or in any way established that a known or written work rule or policy for attorneys to not discuss determinations with complainants even existed, much less that a violation of such policy was grounds for dismissal since the competent evidence was that others (investigators) had discussed potential determinations without any discipline and especially with no one being dismissed from employment. The only work rule introduced applies to non-attorney Investigators. If such a rule did exist it had not been enforced and to use as grounds for termination of Ms. Hershner would be arbitrary and/or capricious.

9. Petitioner was dismissed for conduct unbecoming a State employee that is detrimental to State service. Petitioner provided Ms. Radcliffe with two letters she had written to NCDOA, HR, in appealing a poor performance evaluation written by Mr. Boulden. The Commission contends that the letters contained confidential information about cases and derogatory comments about her supervisor and HRC, which subjected HRC to potential lawsuits (T pp. 375, 433, Respondent's Exhibits 10 and 11)

10. No evidence was produced to define what constitutes confidential information and/ or when such information may become public. The Commission offered no policy, rule or statute to establish confidentiality. Mere averments that matters are confidential are not controlling.

11. The Respondent failed to meet its burden to establish that any information released by the Petitioner in defending herself against a poor performance review conducted by Mr. Boulden was confidential.

12. The Respondent failed to meet its burden to establish that the release of information by Ms. Hershner was detrimental to state service simply because it may have been negative regarding her Supervisor. While certainly not condoning such practice, it should be noted that if every State employee was terminated who had made unkind and negative comments about their supervisors and/or agency, it would create wholesale unemployment and massive turn-over. In this case in particular, Ms. Hershner's comments may have been poor judgment and improvident but she was somewhat vindicated by Deputy Secretary McKinnley Wooten reversing the evaluation.

13. Respondent's contention that the release of information to Ms. Radcliffe and the derogatory comments contained therein would subject the Commission to potential lawsuits is without merit. Certainly no more so than the findings of fact contained in this Decision. Assuming *arguendo* that such would be actionable, termination would not be appropriate under the facts and circumstances of this case.

14. Under the facts and circumstances of this case and the evidence produced in this contested case hearing, Ms. Hershner providing the letters to Ms. Radcliffe does that bring such disrepute to State government that it rises to the level of "conduct unbecoming a State employee that is detrimental to State service" such that she should be terminated.

15. Petitioner was dismissed in part for insubordination for failure to follow her supervisor's instructions. Respondent contends that Mr. Boulden told her to drop everything and work only on the Sarmie brief.

16. Petitioner admitted that on at least one occasion Mr. Boulden told her to drop everything and work on the Sarmie brief, but in light of the other instructions, particularly those in writing, the Sarmie brief was to be a top priority—not her only priority. Even the very day the Petitioner was placed on administrative leave, she was told by the Agency Counsel that the brief was only a “top priority,” not her only priority. The instructions concerning the Sarmie brief were ambiguous.

17. The Respondent failed to carry its burden that the Petitioner was insubordinate in her handling of the writing of the Appellate Brief. Petitioner had never missed a filing deadline in her work at the HRC, and she still had fifteen days remaining within which to finish the brief before its due date when she was placed on administrative leave by the Mr. Boulden. In light of the facts and circumstances surrounding the Sarmie case in total, it would be anything but “just” to terminate Petitioner for not having completed the brief in the time demanded when she had ample time remaining to finish the brief. The appeal was ultimately abandoned at the suggestion and advice of the Attorney General's Office, without ever having filed the brief.

18. “‘Just cause,’ like justice itself, is not susceptible of precise definition. It is a “flexible concept, embodying notions of equity and fairness,” that can only be determined upon an examination of the facts and circumstances of each individual case. N. Carolina Dept. of Env't & Natural Res. v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)

19. The Respondent lacked just cause to dismiss the Petitioner.

DECISION

The undersigned Administrative Law Judge finds that the Respondent's dismissal of Petitioner for just cause is unwarranted and must be REVERSED. The Respondent is ordered to reinstate Petitioner to the same or similar position, provide her back pay and benefits from the date of the dismissal until the date of reinstatement as provided by law and pay Petitioner's reasonable attorney's fees.

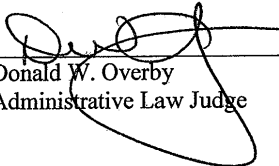
ORDER AND NOTICE

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 3rd day of February, 2012.



Donald W. Overby
Administrative Law Judge

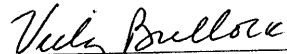
A copy of the foregoing was mailed to:

John W. Bryant
J. W. Bryant Law Firm, PLLC
PO Drawer 909
Raleigh, NC 27602
ATTORNEY FOR PETITIONER

Amber I Hayles
J. W. Bryant Law Firm, PLLC
P O Drawer 909
Raleigh, NC 27602
ATTORNEY FOR PETITIONER

Ann Stone
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 6th day of February, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA

2012 JAN 18 AM 9:02

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 07416

COUNTY OF BUNCOMBE

Office of
Administrative Hearings

Tiffany Ann Benson,
Petitioner,

vs.

Debbie Hughes, North Carolina Department
of Correction,
Respondent.

DECISION

This contested case was heard before Beecher R. Gray, Administrative Law Judge, in the Henderson County Courthouse, in Hendersonville, North Carolina, on October 18 and 19, 2011. Petitioner submitted a proposed decision on December 15, 2011. Respondent filed exceptions to Petitioner's proposed decision on December 22, 2011.

APPEARANCES

Petitioner: Linda Vespereny, Esq.
Law Offices of Glen C. Shults
959 Merrimon Avenue, Suite 204
Asheville, North Carolina 28804

Respondent: Oliver G. Wheeler, IV
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

ISSUE

Whether Respondent North Carolina Department of Correction ("DOC") met its burden under N.C.G.S. § 126-35 to show "just cause" to terminate Petitioner's employment in light of the totality of the facts and circumstances surrounding Petitioner's conduct.

EXHIBITS

For Respondent:

- R. Ex. 1. NC Dept. of Correction Policy-Conduct of Employees, Issue Date 1/28/08
- R. Ex. 2. NC DOC Policy – Failure to Cooperate or Hindering and Investigation, Revision May 1, 2006

- R. Ex. 3. NC DOC Policy – Personal Dealings with Offenders of the Dept. of Correction, Effective 12/1/1997
- R. Ex. 4. June 29, 2010 Dismissal letter; June 10, 2010 Memo to Reggie Weisner, Acting Western Region Director from Debbie M. Hughes, Superintendent; June 5, 2010 Notification of Pre-Disciplinary Conference; June 7, 2010 Memo to Tiffany Benson from Debbie Hughes RE: Recommendation for Disciplinary Action; Pre-Disciplinary Conference Acknowledgement Form; NC Dept. of Correction, DOC Policy & Benefits, New Employee Statement of Understanding; Acknowledgment of Receipt of Personal Dealings with Offenders Policy; Acknowledgment of Receipt of Personal Relationships between Division Staff Memorandum and Personal Relationships between Division Staff Guidelines; Acknowledgment of Violence in the Workplace Guidelines; Acknowledgment of Conditions of Continued Employment; February 17, 2010 Temporary Reassignment of Tiffany Benson
- R. Ex. 7. NC DOC Internal Investigation, Employee/Witness Statements signed by Benson on Sept. 3, 2009; February 13, 2010 (two statements signed); March 4, 2010; and June 7, 2010
- R. Ex. 8. NC DOC Internal Investigation, Employee/Witness Statement signed by Mike Ball on March 4, 2010
- R. Ex. 10. NC DOC Statement by Witness, Benson, statement signed on 7/23/09
- R. Ex. 11. NC DOC Statement by Witness, Benson, statement signed on 7/23/09
- R. Ex. 12. NC DOC Statement by Witness Benson, Statement signed 7/22/09
- R. Ex. 13. EEO Complaint from Tiffany Benson, 3/17/2010
- R. Ex. 14. Written Warning dated October 16, 2008; Two Memos to Roger Moon from Debbie M. Hughes dated September 8, 2008 RE: Unacceptable Personal Conduct
- R. Ex. 16. NC DOC Disciplinary Policy and Procedures, Revised November 1, 2001
- R. Ex. 17. NC DOC Offender Information for inmate Kelly P. – Offender's Disciplinary Infractions History

For Petitioner:

- P. Ex. 1. NC DOC Policy – New Hire Orientation Manual, Revised 5/1/06- re How long Disciplinary Actions are Active; How are Disciplinary Actions Resolved; Removal of Disciplinary Documentation from Employee Personnel File
- P. Ex. 3. NC DOC Policy and Procedure Development, Issued 1/16/08
- P. Ex. 4. NC DOC Appendix to Disciplinary Policy, Investigative Process, Appendix E, Effective October 1, 1995
- P. Ex. 6. DOC Personnel Manual, Appendix C, Personal Conduct, effective 10/1/1995;
- P. Ex. 7. NC DOC New Hire Orientation Manual, Special Provisions – Conditions of Employment, Revision May 1, 2006, Relationships between Employees; E-mail Acceptable Use Policy; NC DOC New Hire Orientation Manual, Unlawful Workplace Harassment & Professional Conduct Policy; Human Relations in the Workplace, Revision 5/1/06
- P. Ex. 8. NC DOC Information Security Policies Acknowledgement Form
- P. Ex. 9. NC DOC The Appraisal Process (TAP) for Benson, Appraisal Period 7/1/08-5/31/09; Final Evaluation, Section D, dated 6/10/10; Gate Log, List of

- Movements, 2/1/09-7/31/09 for Benson; Employee Time Report for period ending 6/20/09 and 6/27/09
- P. Ex. 12. E-mail from T. Benson to K. Burress, 8/6/09
- P. Ex. 15. Memo to Hughes from Mills, dated 9/12/09; Letter to T. Benson from Hughes dated 9/23/09; Request for Reasonable Accommodation
- P. Ex. 17. NC DOC Internal Investigation, Employee/Witness Forms signed by Benson on 9/3/09, 2/13/10 (total of three statements signed on 2/13/10); 3/4/10 (total of two statements signed on 3/4/10), 6/7/10 and 4/21/10
- P. Ex. 18. Fax Cover Sheet to Roger Moon dated 9/11/09, Redacted Statements by Inmate Witnesses Tanna S. (9/3/09); Tenshia S. (9/3/09); Tina R. (9/3/09); Kelly P. (9/4/09); Bethany N. (undated); Redacted Statement of staff member Jesse C. (8/30/09)
- P. Ex. 19. P. Ex. 19. Memo to Steve Bailey, Western Region Director, from Hughes, 2/17/10
- P. Ex. 24. P. Ex. 24. Copies of photographs and backs of photographs; Memo from Burress to Moon, 12/15/09; Memo from Sisk to Moon, 12/17/09; Memo to Bailey from Moon, 12/28/09; Letter to Burress from Moon and Bailey, 1/6/10
- P. Ex. 32. Application for Employment, Debbie Hughes, 1/9/93; Personnel Report for Hughes, 1/19/93; Application for Employment, Debbie Hughes, 9/29/94; Personnel Action Report for Hughes 12/1/94; Personnel Action Report for Hughes, 7/16/99; Personnel Action Report for Hughes, 12/4/03; Personnel Action Report for Hughes, 5/23/06; Personnel Action Report for Hughes, 5/2/08; Performance Log for Hughes; NC DOC The Appraisal Process (TAP) for Hughes, 6/1/10-5/31/11
- P. Ex. 33. NC DOC Internal Investigation Employee/Witness form Signed by Mike Ball, 3/4/10; NC DOC Employee Performance Review Form; Application for Employment, Coy Michael Ball, 4/3/87; Written Warning to Ball, 11/20/92; NC DOC Personnel Report, 11/16/92; Letter to Mark Hughes from Ball, 9/15/93; Memo to Spicer from M.B. Hughes, 11/22/93; Personnel Report for Ball, 11/22/93; Memo from Bailey to Bennett, 3/14/06; Personnel Action Report, 3/13/06
- P. Ex. 37. Written warning to Jesse C, 5/3/2010
- P. Ex. 38. Written Warning to Joice B., 6/17/11; Written Warning to Cynthia S., 10/13/08; Written Warning to Gennea S., 9/18/06; Letters to Billy B., dated 7/9/10 and 6/10/10
- P. Ex. 39. Statements by Jeremy C., 5/19/09, 6/1/09 (with letter from inmates), 6/10/09, 6/22/09; Letter to Patterson and Moon from Jeremy C.; E-mail from Jeremy C. to Bartlett and Pless, 6/1/09; E-mail from Jeremy C. to Bartlett, 6/9/09; E-mail from Sgt. Curtis R. to Burress, 5/27/09; E-mail from Sgt. Curtis R. to Jeremy C., 5/28/09; E-mail from McGeary to Sgt. Curtis R., 5/31/09; NC DOC Disciplinary Review, re inmate Kelly P.; Memo to Moon from Hughes, 7/17/09
- P. Ex. 41. Memo from Burress to Hughes, 7/7/09; Temporary Duty Reassignment, Sgt. Curtis R., 8/11/09; Notification of Pre-Disciplinary Conf., Sgt. Curtis R., 8/11/09; Recommendation to Demote, Sgt. Curtis R., 8/13/09; Personnel Action, Sgt. Curtis R., 8/20/09; Written Warning Sgt. Curtis R., 9/28/09; Reassignment Sgt. Curtis R., 9/28/09

- P. Ex. 42. Employee/Witness Statement Form, Curtis R., 9/1/09
- P. Ex. 43. NC DOC Offender Information, Inmate Tanna S.; NC DOC Inmate Infractions, Inmate Tanna S.; NC DOC Offender's External Movements, Inmate Tanna S.; Inmate Infraction/Classification/Control Summary, Inmate Tanna S.; Housing Assignments, Inmate Tanna S.; Visitation History, Inmate Tanna S.; Offender Arrest History, Inmate Tanna S.; Inmate Infraction Information, Inmate Tanna S.; Inmate Summary Record, Inmate Tanna S.; Offender Sentence Information, Inmate Tanna S.; Inmate Release Plan, Inmate Tanna S.; Case Management Notes, Inmate Tanna S.
- P. Ex. 44. NC DOC Offender Information, Inmate Tenshia S.; Offender's External Movements, Inmate Tenshia S.; Housing Assignments, Inmate Tenshia S.; Inmate Release Plan, Inmate Tenshia S.; Case Management Notes, Inmate Tenshia S.; DOC Community Risk Assessment, Inmate Tenshia S.
- P. Ex. 48. Dismissal Letter to Keshia R., 6/7/10

WITNESSES

For Respondent: Debbie Hughes, Coy Michael Ball, Tiffany Benson

For Petitioner: Dickie Bryson, Jeremy Canipe

FINDINGS OF FACT

In making Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses, taking into account factors for judging credibility of witnesses, including, but not limited to, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, the demeanor of the witness, the witness' interests, bias, candor, and any prejudice the witness may have, as well as whether the testimony of the witness is reasonable and consistent with 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. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. Petitioner Tiffany Ann Benson ("Petitioner") is a former employee of Respondent North Carolina Department of Correction ("Respondent"). Beginning in February 2007, Petitioner was employed as a correctional officer at Respondent's Black Mountain facility for women and, later, at the Swannanoa Correctional Center for Women. While still employed at the Swannanoa Correctional Center for Women, Petitioner was reassigned to Craggy Correctional Center. (Transcript ("Tr.") pp. 7, 16, 258)

3. By letter dated June 29, 2010, Petitioner was terminated for unacceptable personal conduct. Specifically, the termination letter charged her with using profanity in the presence of inmates (but not at them), as well as insubordinate conduct by refusing to make a written statement during a March 4, 2010 meeting. (Tr. pp. 8, 297, 302, R. Ex. 4)
4. The centerpiece of this case is Petitioner's alleged conduct at a meeting with her supervisor on March 4, 2010. At that meeting, Superintendent Debbie Hughes attempted to pursue further questioning of Petitioner regarding inmate allegations against Petitioner. At an earlier meeting, Petitioner had admitted that on one occasion she had used the term "bullshit" within hearing distance of inmates. (Tr. pp. 8, 297) In order to appreciate the totality of the facts and circumstances of this case, certain background information was admitted into evidence, beginning with several issues that arose in the preceding year.

Background: Petitioner's Involvement with the Investigation and Reassignment of Sgt. Curtis R.

5. In May 2009, case manager Jeremy C. observed what he believed to be various rule violations by inmate Kelly P. Each time he attempted to have inmate Kelly P. written up for these violations, Sgt. Curtis R. (Petitioner's supervisor at the time) chose to "counsel" inmate Kelly P. rather than issue a written infraction. Counseling an inmate rather than issuing an infraction results in less severe repercussions to the inmate. For instance, the accumulation of infractions by an inmate can result in an increase in the time the inmate would be required to serve before being paroled, segregation of the inmate, and/or denial of certain privileges. (Tr. pp. 157-160, 166-67, 385-389, P. Ex. 39)
6. In addition, Jeremy C. received information that inmates Tanna S. and Tenshia S. were involved in bringing contraband from Manna Food Bank into the prison unit and he reported this to management. Jeremy C.'s supervisor, Dana Bartlett, later sent an e-mail to Assistant Superintendent Burress on June 9, 2009 reporting that Jeremy C. notified her that various inmates, including Kelly P. and "the ex-Manna girls," "were in and out of Sgt. Curtis R.'s office from 6:30 a.m. until a quarter to three" on the preceding Sunday. Additionally, the email reported that Jeremy C. notified her that e-mails from Assistant Superintendent Burress to Sgt. Curtis R. were made available to those inmates to read and that "four and five inmates at a time were standing behind Sgt. Curtis R. as he pulled up information on OPUS [Respondent's Management Information System]." Further, Ms. Bartlett stated in her e-mail that Correctional Officer Rutledge "was frustrated by the fact that . . . Tenshia S. was in Tanna S.'s room almost all day" and that it is reported that the email Jeremy C. sent to Assistant Superintendent Burress "regarding the info on Tenshia S., [etc.] was made available for inmates to read, and that is being talked about amongst the inmates." (Tr. pp. 387-388, P. Ex. 39)
7. During a June 16, 2009 staff meeting, Petitioner questioned Sgt. Curtis R. about his dismissal of inmates' rule violations, particularly those of inmate Kelly P., who was often seen in Sgt. Curtis R.'s office. Inmate Kelly P. was known by the correctional officers and other staff to be a ringleader and was called "mom" by the inmates. During the course of the staff meeting, the name of case manager Jeremy C. came up, who, as

mentioned earlier, recently had cited inmate Kelly P. for various violations which later were dismissed by Sgt. Curtis R. Sgt. Curtis R. made several derogatory remarks regarding Jeremy C. in the meeting, the most noteworthy of which was that Jeremy C. had been known as the “assassin” in facilities where previously he had worked. (Tr. pp. 47, 135-136, 360-362, 393-394, 398-399, P. Exs. 39 and 41)

8. Thereafter, Petitioner notified Jeremy C. about what Sgt. Curtis R. had said about him in the June 16, 2009 staff meeting. Jeremy C. complained that Sgt. Curtis R. was creating a “hostile environment” for him and an investigation ensued. Petitioner and other staff present at the June 16, 2009 staff meeting were asked to provide written statements. Four (4) staff members confirmed that Sgt. Curtis R. referred to Jeremy C. as an “assassin” in the June 16, 2009 staff meeting. (Tr. pp. 131-132, 138-139, 361, 391, 397-398, P. Ex. 41)
9. Staff members later learned that Petitioner was responsible for notifying Jeremy C. of Sgt. Curtis R.’s remarks. (Tr. pp. 315-316)
10. Sgt. Curtis R. was very popular with both the inmates and the staff members as he was easier on inmates and staff than was Sgt. Mills. Sgt. Mills was a relatively new sergeant who had served as a “floating sergeant” and ran the shift much differently than did Sgt. Curtis R. Sgt. Mills was not popular with staff or inmates because she disciplined employees for “time management” issues, made sure inmates were given correct bed assignments according to their jobs, worked on inmate idleness issues, was more rigid and blunt than Sgt. Curtis R., and sometimes “talked down” to the officers. (Tr. pp. 43, 139-143, 305, 323-325, 341, 349-351, 362-363, 365-366, 382, 397, 405)
11. Sgt. Curtis R. was known to have inmates in his office and to dismiss write-ups on inmates. According to Jeremy C., Sgt. Curtis R. protected troublemakers, shared confidential information with inmates, and made changes to bed assignments so that lesbian inmate couples could be together. (Tr. pp. 158-161, 302-303, 362-363, 323, 385, 389-390, 392-396, P. Ex. 39)
12. On August 11, 2009, Sgt. Curtis R. was reassigned to Craggy Correctional Center as a direct consequence of Jeremy C.’s complaint. (Tr. pp. 13, 48, 398, P. Ex. 41) Some of the staff and several of the inmates were unhappy that Sgt. Curtis R. was transferred (Tr. pp. 366, 398) and a number of inmates wrote statements of support for Sgt. Curtis R., which were sent to department officials in Raleigh. (Tr. pp. 46-49, P. Ex. 18)

Ensuing Staff and Inmate Allegations Involving Petitioner

13. In July 2009, after staff learned that Petitioner was responsible for notifying Jeremy C. of Sgt. Curtis R.’s “assassin” statements, staff ceased speaking to Petitioner because they blamed her for the investigation of Sgt. Curtis R. and the inevitability that Sgt. Mills would replace him full-time. In addition, numerous degrading complaints were made against Petitioner. (Tr. pp. 313-318, 320, 323-324)

14. Indeed, even Petitioner's own witness, former Correctional Officer Dickie Bryson, testified that he did not think disciplinary action should have been taken against Sgt. Curtis R. (Tr. p. 365-366)
15. Prior to July 2009, Petitioner had good relationships with staff members who made the July 2009 complaints. Everyone on Petitioner's rotation signed birthday cards for her on June 1, 2009. A performance evaluation for the July 1, 2008 and May 31, 2009 period, signed by her superiors, Sgt. Curtis R. and Assistant Superintendent Kevin Burress on June 7 and 8, 2009, respectively, gave Petitioner either "good," "very good," or "outstanding" ratings on each of the entries and contained numerous positive narratives regarding such things as Petitioner's willingness to volunteer for extra duties, to be a team player, to focus on running the unit efficiently and smoothly, and to provide steady support for the shift/facility. Sgt. Curtis R. also encouraged Petitioner to attend "Disciplinary Officer Training" and to take the sergeant's exam because she was ready for more responsibilities. (Tr. pp. 305-307, 309, 311-312, 322-325, P. Ex. 9)
16. After being notified of the July 2009 allegations against her, Petitioner fully cooperated with the investigation and provided a number of written statements. On or about August 6, 2009, the investigation was resolved in Petitioner's favor. (Tr. pp. 288-290, 305-306, 320-322, 332, R. Exs. 10-12, P. Ex. 12)
17. On August 30, 2009, after initial reluctance, Correctional Officer Jesse C. made a written statement against Petitioner for allegedly making an inappropriate comment of a sexual nature to him during the night of a shakedown in June 2009. (Tr. pp. 60, 62-63, 71-72, 325-326, 332)
18. Thereafter, a new investigation of Petitioner was undertaken. On or about September 3, 2009, Petitioner was confronted with Correctional Officer Jesse C's allegations, which made her feel humiliated and degraded. Nonetheless, Petitioner again fully cooperated and provided a written statement denying the allegations. (Tr. pp. 204-205, 215-216, 262-264, 325-328, 332, R. Ex. 7)
19. During the night of the June 2009 shakedown, Correctional Officer Jesse C. was training two new officers. Superintendent Hughes did not, however, talk to those two officers as part of her investigation to verify Correctional Officer Jesse C.'s allegations against Petitioner. (Tr. pp.73-74) Further, Superintendent Hughes did not make any notes or tape recordings of her interview with Correctional Officer Jesse C., who had, in the past, been given "guidance" regarding his interactions with female inmates.¹

¹ In February 2009, Correctional Officer Jesse C. was given "guidance" in working with the female inmate population to ensure dealings with inmates are consistent with DOC policy. (Tr. pp. 72-73) In December 2009, correctional officer Jesse C. shared confidential inmate information with his former mother-in-law (which had security implications). Later, when questioned about this, correctional officer Jesse C. lied during an internal investigation in April 2010. He was finally given a written warning in May 2010 for these violations. (Tr. p. 63, P. Ex. 37) More recently, on April 8, 2011, Jesse C. was "counseled," but not disciplined, for unprofessional behavior due to a complaint for having an inmate within a secure area and having inappropriate communications with the inmate. (Tr. pp. 69-71) Sometime prior to Petitioner's October 2011 hearing, correctional officer Jesse C. resigned while under investigation for fraternizing with a former inmate. (Tr. pp. 61-67)

20. On September 1, 2009, Superintendent Hughes went to Craggy Correctional Center to meet with Sgt. Curtis R., at which time Sgt. Curtis R. made a written statement against Petitioner. Superintendent Hughes and Sgt. Curtis R. met in Assistant Superintendent Coy Michael Ball's office for this meeting. (Tr. p. 97) Assistant Superintendent Ball remembered meeting with Sgt. Curtis R. (Tr. p. 233)
21. On September 11, 2009, Superintendent Hughes faxed to her superior, Roger Moon of the Western Region, written statements from five inmates, including Kelly P., Tanna S., Tenshea S., Tina R., and Bethany N. Superintendent Hughes noted on the fax cover sheet that three of the inmates had not written supporting letters for Sgt. Curtis R. but two of the inmates had. (Tr. pp. 78-79, P. Ex. 18)
22. Petitioner was not questioned about any of these inmate allegations until February 13, 2010. (Tr. p. 329)

Petitioner on Medical Leave; Accommodation Request Denied

23. On September 12, 2009, Petitioner learned that she was scheduled for training, which was to begin the following Monday. At that time, Petitioner reported to her supervisor, Sgt. Mills, that she had been placed on a doctor's restrictions on September 10, 2009. Sgt. Mills placed Petitioner on medical leave and directed that she go home. (Tr. pp. 264, 332, P. Ex. 15)
24. Petitioner was scheduled to have knee surgery in October 2009, but wished to continue working until the date of the surgery as she was the sole supporter of her three children and needed the money. On or about September 21, 2009, Petitioner requested light duty accommodation² which was denied by Superintendent Hughes on September 23, 2009. (Tr. pp. 329-330, P. Ex. 15)

Concerns Regarding Possible Romantic Relationship Between Assistant Superintendent and Sergeant; Petitioner Responsible for Providing Pictures

25. Sometime in the fall of 2009, correctional officers received word from inmates that Assistant Superintendent Burress (mistakenly referred to as "Burrows" in transcript) had been seen embracing a female subordinate employee, Sgt. Sisk, at the prison. This was reported to Superintendent Hughes. (Tr. pp. 81-82, 92-93, 165, 367-371, 373, P. Ex. 24)
26. Department of Correction policy entitled "Relationships Between Employees" strongly discourages supervisory employees from dating or engaging in romantic, intimate relationships with subordinate employees as such relationships have the potential for disrupting the workplace. The policy further states that management may transfer or make other work assignment changes to minimize potential workplace disruption or liability. (Tr. pp. 86-87, 375, P. Ex. 7)

² Petitioner was aware that other officers had been granted light-duty posts by being reassigned to other facilities with control rooms, wherein the officer is only required to sit in the control room, open doors, and watch cameras. (Tr. pp. 357-358)

27. Despite the reports of the relationship, Superintendent Hughes felt she could not investigate as the inmate who observed the two individuals kissing had since been released. (Tr. p. 83)
28. On two occasions in November 2009, while visiting a friend who happened to live near Sgt. Sisk, Petitioner noticed Assistant Superintendent Burress' truck parked in front of Sgt. Sisk's house. On one of these occasions, Petitioner saw Assistant Superintendent Burress give Sgt. Sisk a kiss. Petitioner was with a friend on both of these occasions. Petitioner's friend took a number of pictures, one of which showed Assistant Superintendent Burress leaving Sgt. Sisk's house. (Tr. pp. 88-90, 292-294, 303-305, 330-331, 333, P. Ex. 24)
29. Petitioner spoke to Correctional Officer Dickie Bryson and mentioned the photographs her friend had taken. Officer Bryson, who was concerned that nothing was being done about the Burress/Sisk situation, obtained the photographs from Petitioner and took them to Superintendent Hughes. Superintendent Hughes did not ask Officer Bryson to write a statement regarding the source of these photographs. (Tr. pp. 82, 294, 331-332, 373-375, 378-380)
30. After receiving the photographs, Superintendent Hughes spoke to her superior, Roger Moon. Roger Moon then undertook an investigation which consisted solely of asking Assistant Superintendent Burress and Sgt. Sisk about their relationship. After each denied any romantic relationship, Roger Moon concluded his investigation and found that there was no inappropriate relationship. (Tr. pp. 82, 90-92, P. Ex. 24)

Petitioner Returns From Medical Leave; Superintendent's Investigation Continues

31. On February 13, 2010, Petitioner returned to work from medical leave. Immediately, she was questioned by Superintendent Hughes about allegations from three of the five inmates whose statements earlier had been faxed by Superintendent Hughes to Roger Moon on September 11, 2009. Two of the inmates (Tanna S. and Tenshia S.) made embarrassing allegations regarding sexual information Petitioner had supposedly shared with them and the third inmate, Tina R., alleged that Petitioner revealed to her the contents of a letter that Petitioner had intercepted in August 2009. Only one of the inmates, Tina R., was identified to Petitioner during the questioning. (Tr. pp. 43-46, 124-135, 264-267, 333-335, R. Ex. 7, P. Ex. 17)
32. The Department of Correction's Investigative Policy provides direction regarding the interviewing of employees. When an employee denies wrongdoing, managers should, according to the policy, ask the employee why s/he thinks a particular witness would lie. (Tr. pp. 43-44, P. Ex. 4)
33. Superintendent Hughes admitted that, while questioning Petitioner, she did not provide Petitioner with the names of the two inmates who had accused Petitioner of making comments of a sexual nature even though, at the time, there were approximately 200 inmates at the prison. (Tr. pp. 44-46)

34. Superintendent Hughes, who personally talked to only a couple of the inmates, could not remember which of the inmates she talked to or when she talked to those inmates (Tr. p. 40). Contrary to the Department of Correction's policy, Superintendent Hughes did not document any interviews she had with these inmates and chose not to audiotape these interviews. Superintendent Hughes did not prepare any questions of any sort for these interviews, but rather relied exclusively upon the written statements which previously had been prepared by the inmates. (Tr. pp. 40-43, P. Ex. 4)
35. None of the signed inmate witness statements relied on by Superintendent Hughes were witnessed by staff. Further, the inmate witness statements do not contain the name of the person who obtained the statements, nor the date and time the statements were obtained. Superintendent Hughes had no idea when the inmates actually had written these statements, other than the inmates' own written indications on the statements. (Tr. pp. 59-60; P. Ex. 18)
36. The witness statement allegedly signed by inmate Tanna S. is dated 9/3/09 at 9:00 p.m.; the statement by inmate Tenshia S. is dated 9/3/09 at 8:37; the statement by inmate Tina R. is dated 9/3/09 at 11:13; the statement from inmate Kelly P. is dated 9/4/09 at 1:47 a.m.; and the statement by Bethany N. has no date. (Tr. pp. 58-59, P. Ex. 18)
37. The two inmates with whom Petitioner was alleged to have shared personal sexual information (Tanna S. and Tenshia S.) were known by department staff to be in a lesbian relationship, had moved from facility to facility within close proximity of the time of transfer of each other, and had been placed in the same dorm facilities while housed at Swannanoa Correctional Center. In addition, inmate records show that a family member of one of the inmates deposited money in accounts for both inmates. As indicated in paragraph 5, those two inmates specifically were mentioned in information provided by case manager Jeremy C. to management officials in June 2009 as inmates who were involved in the smuggling of contraband from Manna Food Bank and spending time with each other in each other's room. (Tr. pp. 179-186, 191-192, 389, 396, P. Exs. 39, 43, and 44)
38. With respect to the letter addressed to inmate Tina R., the evidence shows that Petitioner intercepted the letter in August 2009, at which time she called Sgt. Curtis R. to report the contents of the letter. Sgt. Curtis R. directed her to give the letter to Assistant Superintendent Burress. Petitioner turned the letter over to Yard Officer Bressler, who took it to Assistant Superintendent Burress. Upon receiving it, Assistant Superintendent Burress discussed the letter with Sgt. Faye, and then turned the letter over to Sgt. Mills, who told inmate Tina R. that she couldn't have the letter. There is no evidence that Petitioner revealed the contents of the letter to inmate Tina R. (Tr. pp. 125-127, 266, R. Ex. 7)

Petitioner Cooperates With Investigation; Requests Polygraph

39. At the February 13, 2010 investigative meeting, Petitioner again fully cooperated, made written responses, and volunteered to take a polygraph at her expense to stop any further

inmate accusations against her. During that meeting, Petitioner admitted that she had at one time cursed in front of inmates (i.e., she was overheard using the term “bullshit”), but not at inmates. Also, during the course of this meeting, Petitioner stated, both verbally and in writing, that she had witnessed Assistant Superintendent Burress and Sgt. Sisk kissing and that she was responsible for pictures which had been presented to the department by Correctional Officer Dickie Bryson. (Tr. pp. 81-82; 264-267, 291-292, 297, 301-302, R. Exs.7 and 13, P. Ex. 17)

40. Although Petitioner requested the opportunity to take a polygraph at her expense, Respondent never provided Petitioner with the opportunity to take a polygraph or any other type of lie detector test. Ironically, failing to submit to a polygraph examination when directed to do so by a Department Official constitutes violation of the department’s “Failure to Cooperate During or Hindering an Investigation” policy. (Tr. pp. 80, 341-342, R. Ex. 2)
41. Superintendent Hughes had authorization to ask Petitioner to take a polygraph on February 13, 2010 (though Petitioner actually offered to take a polygraph). When Superintendent Hughes later asked up the chain of command to provide Petitioner with the opportunity to take a polygraph exam, however, this was refused and no reason for this refusal ever was provided to Superintendent Hughes. Petitioner never was given a polygraph examination, despite Petitioner’s and Superintendent Hughes’ request for one. (Tr. pp. 80-81, 268)
42. In a February 17, 2010 memo to Western Region Director Steve Bailey, Superintendent Hughes voiced her opinion that she believed Petitioner shared personal information about herself with inmates, that she shared the contents of a letter that she intercepted with inmate Tina R., that these incidents were considered undue familiarity with inmates, and that Petitioner should be given corrective action. Finally, Superintendent Hughes stated (incorrectly) in this memo that Petitioner had an “active” written warning for insubordination and the use of profanity.” (P. Ex. 19) Contrary to Superintendent Hughes’ statement in the memo, this written warning had been “inactive” since February 2009. (Tr. p. 36, P. Ex. 9)

Petitioner Reassigned to All-Male Facility

43. On February 17, 2010, Petitioner was reassigned, pending investigation, to Craggy Correctional Center, an all-male facility. Prior to September 2009, Petitioner had requested a transfer to the Buncombe County unit or to Craggy Correctional Center. At the time, Petitioner was a young woman who never had worked with an all-male population and doing pat-downs of male inmates made her very uncomfortable. In addition, at the time, Petitioner was the sole supporter of three young children, one of whom had special needs. (Tr. pp. 268, 281, 340-42, R. Ex. 7)
44. When Petitioner arrived at Craggy Correctional Center in February 2010, she immediately was made to feel uncomfortable by other staff members and inmates. There were rumors about why Petitioner was at Craggy and staff members were told to stay

away from Petitioner because she was “bad news.” Further, the inmates subjected Petitioner to sexual harassment. (Tr. pp. 335-336)

March 4, 2010 Interrogation

45. On March 4, 2010, Petitioner was called into the office of Coy Michael Ball, Assistant Superintendent at Craggy Correctional Center, for further questioning regarding inmate allegations. Superintendent Hughes of Swannanoa Correctional Center also was present at this meeting. (Tr. pp. 222, 268)
46. Assistant Superintendent Ball had spent twenty-three (23) years at Craggy Correctional Center, working his way up from correctional officer to assistant superintendent. (Tr. p. 220) Several personal relationships existed between Assistant Superintendent Ball and various individuals involved in this case. For instance, Assistant Superintendent Ball has known Sgt. Curtis R. for years, having been a life-long friend of Sgt. Curtis R.’s brother, Keith, with whom Assistant Superintendent Ball went to high school. Keith was working at Craggy Correctional Center prior to Assistant Superintendent Ball’s employment there and Assistant Superintendent Ball listed him on his 1987 application as his “referral source” when he first applied for his job at Craggy Correctional Center. (Tr. pp. 237-238, 246, P. Ex. 33)
47. As noted earlier, Sgt. Curtis R. temporarily had been reassigned to Craggy Correctional Center in August 2009 pending an investigation. He remained at Craggy Correctional Center until October 2009, when he was transferred to another facility. (P. Ex. 41) While Sgt. Curtis R. was at Craggy Correctional Center, Assistant Superintendent Ball met with him to discuss what was going on and, at one point, Assistant Superintendent Ball sat down with him to discuss his investigation. (Tr. p. 233) Assistant Superintendent Ball testified that he wouldn’t want anything bad to happen to Sgt. Curtis R. (Tr. pp. 247-248)
48. Assistant Superintendent Ball has had important connections with Superintendent Hughes’ father, Marcus Hughes. On November 20, 1992, Sam Reed, the Superintendent of Craggy Correctional Center, disciplined Assistant Superintendent Ball for engaging in personal misconduct. Assistant Superintendent Ball was given a written warning and disciplinary transfer to Haywood Correctional Center. In September 1993, Assistant Superintendent Ball, after being reassigned to Haywood Correctional Center (which was a further distance from his home than Craggy Correctional Center), applied for a promotion to the position of lieutenant at Craggy Correctional Center. Marcus Hughes recently had become the new superintendent of Craggy Correctional Center. On November 22, 1993, Superintendent Marcus Hughes offered Assistant Superintendent Ball the opportunity to return to Craggy Correctional Center, along with the promotion to lieutenant. (Tr. 239-242, P. Ex. 33)
49. Finally, Assistant Superintendent Ball has close ties to Assistant Superintendent Burress. Assistant Superintendent Ball worked with Assistant Superintendent Burress for years and had been his supervisor at Craggy Correctional Center, prior to Assistant

Superintendent Burress' promotion in June 2007. In fact, Assistant Superintendent Ball supported Assistant Superintendent Burress' June 2007 promotion and testified that he liked Assistant Superintendent Burress, that he recommended that Assistant Superintendent Burress be promoted to captain for the Alexander facility, and that he wouldn't want anything bad to happen to Assistant Superintendent Burress. (Tr. pp. 228-230, 242, 248)

50. At the March 4, 2010 meeting, contrary to the Department of Correction's investigation policy (P. Ex. 4), Superintendent Hughes did not put Petitioner at ease. Rather, Superintendent Hughes made it clear that she already had reached a conclusion. Superintendent Hughes accused Petitioner of going out on medical leave early because she had gotten "wind" of the investigation (Tr. pp. 52-54, 336-337) (even though Petitioner wanted to continue working, as evidenced by her delay in notifying management of her doctor's restrictions (Tr. p. 52) and her subsequent request for light duty, which had been denied by Superintendent Hughes. (Tr. pp. 56-58, 336-337, P. Ex. 15)). Superintendent Hughes also commented that Petitioner's defensive demeanor "showed guilt." (Tr. p. 337) Indeed, Superintendent Hughes' February 17, 2010 memo to Western Region Director Bailey confirms that her mind already was made up when Superintendent Hughes explicitly stated that she believed Petitioner "shared personal information about herself with inmates [and] shared the contents of a letter that she intercepted with inmate Tina R." and that Petitioner's conduct warranted corrective action. (Tr. p. 153, P. Ex. 19)
51. Petitioner testified that, during the March 4, 2010 meeting, she felt that she didn't stand a chance, that her word didn't mean anything to the Department of Correction, especially since she had been willing to cooperate at the other investigative meetings, as well as to take a polygraph exam, and that it appeared as though Superintendent Hughes was trying to provoke her with various unjustified comments. (Tr. pp. 268, 279, 336-337)
52. Not knowing what type of degrading inmate accusations Petitioner would be asked to respond to, Petitioner stated that she would not answer any questions unless her lawyer were present. When this request was denied, Petitioner asked to see in a written policy whether she could have a lawyer present. (Tr. pp. 269, 337-338) Petitioner also told Superintendent Hughes that if Superintendent Hughes had not done a "half-assed" investigation, she wouldn't need to be continuing the investigation at that time. Petitioner questioned why she never was given a lie detector test. (Tr. p. 275)
53. Assistant Superintendent Ball made Petitioner feel uncomfortable when he stated that she could "play the lawyer card" all day, but that he would write her up for not cooperating. (Tr. p. 338)
54. Petitioner continued to refuse to answer questions during this meeting because she was not allowed to have a lawyer present and because she was not shown in any written policy why this request was not allowed. Petitioner provided a written statement to this effect and testified at the hearing that she believed that because of the seriousness of the matter, she felt that she should have been shown the policy which prevented her from

having a lawyer with her during the questioning. (Tr. pp. 32, 228, 269-275, 356, P. Ex. 17)

55. Department of Correction Policy provides in its policy entitled "Policy and Procedure Development" at .0605(g)(4) that "Facility heads will be responsible for ensuring that policy and procedure manuals are located in areas that are generally accessible to staff. At a minimum, facility heads will ensure that at least one (1) printed copy of the policy and procedure manual is located in an area accessible to staff on a 24-hour, 7 day per week basis." (Tr. pp. 39-40, P. Ex. 3)
56. Petitioner was not given access to departmental policy after she was reassigned to Craggy Correctional Center in February 2010. She was not provided a copy of the department's policy regarding any entitlement to or lack of entitlement to legal representation during investigative meetings. Petitioner also did not have a computer at her post or internet access at her home on which to access this information. (Tr. pp. 270, 273, 339)
57. The Department of Correction written policy document was readily accessible in Assistant Superintendent Ball's office. Despite Petitioner's request, neither Assistant Superintendent Ball nor Superintendent Hughes allowed Petitioner to see or be shown any written policy that would preclude her from having a lawyer present during the meeting. Petitioner stated at this meeting that she would answer all questions if the written policy supported the denial of her access to legal counsel by Assistant Superintendent Ball and Superintendent Hughes. (Tr. p. 228, 271-274)
58. Petitioner provided credible testimony that, aside from referring to Superintendent Hughes' investigation as being "half-assed" and her refusal to answer degrading questions in the presence of Superintendent Hughes and Assistant Superintendent Ball without an attorney present or without first seeing in a written policy that she was not entitled to an attorney, she did not engage in any insubordinate or disrespectful conduct during the March 4, 2010 meeting. Petitioner's testimony that she was crying and looking at a blank wall is credible. (Tr. pp. 275-276, 338-339)
59. In a written statement signed by Petitioner on June 7, 2010, Petitioner apologized for the "half-assed investigation" comment. She explained that she felt frustrated with the physical and mental stress the investigation had imposed on her. Petitioner also explained that being reassigned to a male facility had also been very stressful as she had been harassed on a daily basis by inmates, that she felt like her life was endangered, and that she felt that inmates' words were believed over her word. She further stated that she felt that her integrity as a person, as well as a correctional officer, was under attack and that she was being made to feel like she was the inmate, rather than the correctional officer. (Tr. pp. 281-284, R. Ex. 7)

Disciplinary Conference; Recommendation

60. On June 5 and 7, 2010, Superintendent Hughes sent Petitioner a "Notification of Pre-Disciplinary Conference" and a "Recommendation for Disciplinary Action," respectively.

In both notices, Superintendent Hughes stated that it was her intention to recommend disciplinary action up to and including dismissal based on Petitioner's unacceptable personal conduct. Superintendent Hughes made specific references to a prior written warning issued to Petitioner on October 16, 2008. (R. Ex. 4)

61. Department of Correction Policy provides that "disciplinary actions shall be considered active until a manager or supervisor notes in the employee's personnel file that the reason for the disciplinary action has been resolved OR the employee receives a Good or better in the key responsibility/result (KRR) that is related to the performance issue for which the employee was disciplined on the most recent performance evaluation." Further, the policy states that "Once a disciplinary action has been deemed inactive, it has no value and shall not be used as supporting documentation for other disciplinary action" (emphasis added). (P. Ex. 1) As of February 15, 2009, the October 16, 2008 written warning had been deemed "inactive" per Sgt. Curtis R. and approved by Assistant Superintendent Burress, as indicated on the Employee Action Plan Form. Superintendent Hughes admitted that as of February 15, 2009, Petitioner did not have an active warning. (Tr. p. 36) Further, as of June 7, 2009, Petitioner had received a rating of "VG" (very good) on each of the KRRs included on her final evaluation. (Tr. pp. 307-312, P. Ex. 9)
62. Superintendent Hughes testified that she believed that it was important to reference the previous inactive warning in Petitioner's June 2010 dismissal letter and that she believed termination was justified based on everything that had happened, including Petitioner's previous written warning. (Tr. pp. 33-34)
63. Despite departmental policy, Superintendent Hughes persisted in including specific references to Petitioner's October 2008 written warning in a June 10, 2010 memo to Acting Western Region Director Reggie Weisner recommending that Petitioner be given disciplinary action up to and including dismissal as a result of her unacceptable personal conduct. Superintendent Hughes wrote, "Officer Benson has an active written warning in place for insubordination with a supervisor. She also used profanity during that encounter. It is common knowledge that she uses profanity in front of the inmates." On cross-examination, Superintendent Hughes admitted that she was incorrect in referring to the warning as "active" but that she felt it was important to include reference to the warning because "it shows a pattern of her behavior throughout her career." (Tr. pp. 216-218, R. Ex. 4)
64. The June 29, 2010 termination letter cited Petitioner for admitting to using profanity in the presence of inmates and for exhibiting disrespect during the March 4, 2010 meeting with Superintendent Hughes and Assistant Superintendent Ball, wherein Petitioner accused Superintendent Hughes of conducting a "half-assed" investigation and hindering the internal investigation by refusing to provide complete information at the March 4, 2010 meeting. Again, Superintendent Hughes referred to a written warning issued to Petitioner on October 16, 2008 (which became inactive in February 2009, as indicated in Petitioner's action plan) as supporting documentation for the termination, even though this is specifically prohibited by Department of Correction policy. (R. Ex. 4, P. Ex. 1)

65. It is clear from Superintendent Hughes' repeated reference to this previous written warning, as well as her reference to unsubstantiated matters (i.e., "it is common knowledge that that she uses profanity in front of the inmates")³, that the previous written warning, and other unsubstantiated matters, were considered in the recommendation to dismiss.

Treatment of Other Employees f or Similar Offenses

66. Although complaints had been received that two individuals, Assistant Superintendent Burress and Sgt. Sisk, were engaged in a romantic relationship which had the potential for disrupting the workplace, Respondent showed little interest in conducting a proper investigation so that this matter could be dealt with appropriately. (Tr. pp. 82, 90-92, P. Ex. 24)
67. Further, when other employees have been disciplined for multiple violations of unacceptable personal conduct, including "hindering of investigations," each of these employees received only a written warning.
68. For instance, it was determined that Sgt. Curtis R. was not truthful during an internal investigation when he denied referring to Jeremy C. as the "assassin." Despite the fact that he had, according to the Department's policy, "hindered" the investigation by providing false information, he only was given a written warning for unacceptable personal conduct. There was no mention in the disciplinary letter that he had "hindered" the investigation. (P. Ex. 41)
69. Similarly, former Correctional Officer Jesse C. was charged with accessing NCDOC offender information on his departmental computer, printing the information, and giving it to his ex-mother-in-law. While being interviewed during an internal investigation on March 18, 2010, he provided a verbal and written statement professing that he did not provide this offender information to his ex mother-in-law. Later, during a follow-up interview on April 1, 2010, he admitted giving the printouts to his ex-mother-in-law. Correctional Officer Jesse C. was given only a written warning for these multiple violations, which included providing false information during the internal investigation. (Tr. pp. 64-68, P. Ex. 37) Prior to this, Correctional Officer Jesse C. had been given "guidance" in working with the female inmate population to ensure that dealing with inmates is consistent with Department policy. (Tr. pp. 72-73) On April 8, 2011, Correctional Officer Jesse C. was "counseled," but not disciplined, for unprofessional behavior relating to a complaint of having an inmate within a secure area and having inappropriate communications with the inmate. (Tr. p. 69)

³ Benson admitted that she had used the term "bullshit" within hearing distance of inmates on one occasion. (Tr. p. 297) Former Correctional Officer Dickie Bryson stated the following upon questioning about Petitioner's use of profanity in the workplace:

Q: Did you ever hear her curse in the workplace?

A: Just in general talking with me, pretty much, everybody might say a word here and there. But as far as that being an issue, no, I never heard her do that. (Tr. p. 405)

70. Another employee, Correctional Officer Cynthia S., lied during an investigation about inappropriate alcohol consumption by staff while attending correctional officer basic training. Three months later, when interviewed again about the same issue, this employee changed her story and provided the names of persons that consumed alcohol at the training program and the name of the person who mixed the drinks. This employee was given a written warning for providing false or purposefully misleading information during an internal investigation. (P. Ex. 38)
71. Finally, Correctional Officer Gennea S., who engaged in security violations by leaving an inmate unattended at a medical provider's facility and also engaged in two instances of unprofessional interactions with medical staff, was given a written warning. (P. Ex. 38)

Related Findings

72. Petitioner admitted during the February 13, 2010 questioning that she had used the term "bullshit" in front of an inmate once, but did not realize that the inmate had heard her. Petitioner denied ever cursing at an inmate. Other officers, as well as sergeants, have been known to curse and/or use curse words in front of inmates. (Tr. pp. 278, 299, 300-302, 349, 376, 405)
73. The undersigned takes judicial notice of the proposition that correctional officers serving Respondent have challenging, difficult, stressful, and dangerous jobs and that they are subjected to profanity on a weekly basis. These officers occasionally may say things that they should not, however, this does not necessarily warrant formal discipline.
74. The undersigned also takes judicial notice of the proposition that correctional officers who take a firm approach with inmates may become unpopular with inmates and that inmates have ample time to sit and discuss their displeasure with a particular staff member.
75. Petitioner did not willfully hinder the investigation during the March 4, 2010 meeting as it was not unreasonable, under the circumstances, for Petitioner to request to be shown the written policy prohibiting the presence of a lawyer at the meeting, especially when, as in this instance, the written policy was in close proximity in an adjacent room and readily retrievable.
76. Petitioner, through her behavior during the March 4, 2010 meeting, did not intend to harm, and did not harm Respondent or Superintendent Hughes. Petitioner's professionalism was exhibited in her June 7, 2010 written statement wherein she apologized for appearing to be disrespectful. Petitioner did not intend to violate any Department policy. Petitioner testified that, at the time she made the comment regarding Superintendent Hughes' "half-assed" investigation, she felt that she was being provoked and retaliated against by Superintendent Hughes and that she used the term because she didn't feel like the investigation was being conducted in a fair manner. (Tr. pp. 275-276, 279, R. Ex. 7)

77. Petitioner's comment was an isolated incident that did not include any vulgarity, other than a single reference to the term "half-assed."
78. Upon internal appeal, a hearing for Petitioner was conducted, Petitioner's disciplinary action was affirmed, and Petitioner timely filed her petition for a contested case hearing with the Office of Administrative Hearings.

Based upon the Findings of Fact I make the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. This office has personal and subject matter jurisdiction to hear this contested case.
2. At the time of her dismissal, Petitioner was a career state employee subject to the provisions of North Carolina General Statutes Chapter 126, The State Personnel Act.
3. This case is based upon North Carolina General Statute § 126-35 and addresses whether Petitioner was disciplined by termination for "just cause" and whether Respondent properly considered and applied the necessary factors and facts in its decision to terminate Petitioner's employment.
4. Case law indicates that unacceptable personal conduct is misconduct of a serious nature. *N.C. Dept. of Environment and Natural Resources, Division of Parks and Recreation v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)
5. Respondent has the burden of proof by a preponderance of the evidence that it had just cause to terminate Petitioner's employment.
6. N.C.G.S. § 126-35 does not define just cause. "The fundamental question . . . is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *N.C. Dept. of Environment and Natural Resources, Division of Parks and Recreation v. Clifton Carroll*, 358 N.C. 649, 669; 599 S.E. 2d 888, 900 (2004) "'Just cause,'" like justice itself, is not susceptible of precise definition...It is a 'flexible concept, embodying notions of equity and fairness,' that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* Just cause requires "misconduct of a substantial nature" and does not encompass "technical violations of statute or official duty without a wrongful intention."
7. Just cause terminations are reserved for substantial violations of work rules which are unjustified under the totality of the facts and circumstances after the application of mitigation principles and balancing. *Dietrich v. N.C. Highway Patrol*, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.H August 13, 2001); *Carroll*, 599 S.E.2d at 900. When an agency seeks to establish just cause, "it cannot rest solely on the grounds that a

supervisor's directives were not carried out to their fullest extent." *Walker v. N.C. Dept of Human Res.*, 397 S.E. 2d 350 (N.C. Ct. App. 1990)

8. The standard used to determine just cause for termination is a different standard than that used for lesser discipline. (See *Gooch v. Cent. Reg'l Hosp.*, 09 O.S.P. 2398 (October 27, 2010) (finding sufficient evidence for a written warning, but no just cause for termination); *Raynor v. N.C. Dept. of Health and Human Servs.*, 09 O.S.P. 4648 (July 26, 2010) (finding penalty of dismissal did not match the deed done); *Ramsey v. N.C. Div. Motor Vehicles*, 02 O.S.P. 1623 (April 26, 2004), aff'd 647 S.E.2d 125 (N.C. Ct. App. 2007) (holding that written warning, rather than termination, was appropriate penalty for violation of general order), disc rev. denied, 659 S.E.2d 739 (N.C. 2008); *Warren v. N.C. Dept. of Crime Control*, 08 O.S.P. 212 (April 17, 2009) (no just cause for termination found, but commensurate discipline less than termination may be imposed)
9. In determining whether just cause exists, "all relevant factors and considerations" must be weighed, including factors of mitigation. Title 25 N.C.A.C. 1B.0413. Consistent with this, a broad review of a number of subfactors including, but not limited to, an evaluation of the following, is necessitated: (i) whether the conduct is isolated or part of a pattern; (ii) the motivation of the employer in taking adverse action and whether there were any improper considerations; (iii) whether the employee intentionally violated clear agency policy and whether the violation was substantial; (iv) whether the employee was acting under any duress or injury that may have contributed to his/her conduct; (v) whether the employee was acting consistently with departmental practice and custom; (vi) the employee's performance history; and (vii) any other significant mitigating factors. *Hill v. NC Dept. of Crime Control & Highway Patrol*, 04 OSP 1538
10. The Department of Correction's own policy states that both the victim and accused should be given digital voice stress analysis tests to add validity to examination results. (Tr. pp. 38) Further, the policy states that objective and thorough investigations should be conducted in accordance with departmental policy to ensure the integrity of the disciplinary process and to minimize the risk that employees are disciplined without cause. (P. Ex. 4) Deviations from accepted policy present dangerous opportunities for managers to retaliate against employees who are perceived as disloyal. Respondent failed to follow the intent of its own rules when it refused to give Petitioner a polygraph examination at her request and expense and when it failed to conduct an objective investigation leading up to its March 4, 2010 meeting with Petitioner. Superintendent Hughes failed to engage in policy-recommended techniques for effective questioning of the complaining inmates and did not evaluate the complaining witnesses for such things as impartiality and bias. Superintendent Hughes did not ask Petitioner why Petitioner thought the persons making the allegations would lie (in fact, Petitioner was not even given the names of two of the three complaining inmates, so she was not given an opportunity to explain why they may be likely to lie). Additionally, Superintendent Hughes did not put Petitioner at ease during the March 4, 2010 interview or stress that no conclusion had been reached, but rather told Petitioner that her demeanor indicated guilt. Further, Superintendent Hughes failed to document meetings or interviews she had with witnesses, relying instead, on the inmate's own handwritten statements, which were

prepared by the inmates in advance, in close proximity of time of each other, and none of which were witnessed by staff. Superintendent Hughes did not and could not prepare an investigative summary, as required by policy, because much of the above information was missing. Had Superintendent Hughes followed proper investigative procedures, she would have ensured the integrity of the disciplinary process and the March 4, 2010 meeting with Petitioner.

11. Further, Respondent failed to follow its own rules when it built upon an earlier “inactive” warning (from October 2008) to arrive at its decision to terminate Petitioner. Department policy specifically provides that, once a disciplinary action has been deemed inactive, it has no value and shall not be used as supporting documentation for other disciplinary action. (P. Ex. 1) Superintendent Hughes repeatedly violated this policy throughout the disciplinary procedure. Respondent’s failure to follow this established rule is evidence that improper considerations went into the decision to terminate.
12. Given the nature of the inmate allegations previously submitted to Petitioner (i.e. allegations that Petitioner had discussed issues of a sexual nature with inmates), as well as the current climate of prosecutions of public employees for engaging in inappropriate sexual conduct with inmates, it was not entirely surprising that Petitioner felt the need to consult with legal counsel before continuing to answer embarrassing inmate allegations. Where a state employee has a “reasonable belief” that his conduct was appropriate or necessary, it will ordinarily not constitute just cause for discipline. *Carroll*, 599 S.E.2d at 900-02
13. Petitioner never intended to violate any agency policy, she did not willfully violate the Department’s personal misconduct policy, and there is no evidence that Petitioner’s action adversely affected or could have adversely affected the mission or legitimate interests of the state.
14. In addition, the evidence demonstrates that Respondent failed to consider and credit substantial and appropriate mitigation evidence in Petitioner’s favor. Petitioner’s cooperation during the preceding months, in the midst of the inevitable stress imposed upon Petitioner in having to respond to numerous embarrassing and degrading allegations by inmates and staff (many of whom were of questionable character and motives) (Tr. pp. 46-52, 62-68, 93-96, 161-162, 176-193, P. Exs. 18, 37, 39, 43-44, 48, R. Ex. 7, 10-12); Petitioner’s willingness to take a polygraph or other such lie detector test; Petitioner’s truthfulness and candor in admitting that she did at one time use profanity within hearing distance of an inmate and that she did refer to Superintendent Hughes’ investigation as “half-assed;” the stresses of being the sole support of three young children and being reassigned to an all-male facility, in the midst of an ongoing and humiliating investigation, all mitigate in Petitioner’s favor.
15. Other employees at Swannanoa Correctional Center engaged in conduct which was much more serious than the conduct attributed to Petitioner and were only issued a written warning. Selective enforcement of agency policy should be considered under State Personnel policy. See N.C. State Personnel Manual, Section 7, page 11: The employer

“should examine a number of factors...[including]...The disciplinary actions received by other employees within the agency/work unit for comparable performance or behaviors.” The considerable disparate treatment in this case speaks against finding that Respondent had just cause to terminate Petitioner from employment. It would be unreasonable and unjust for Respondent to be able to strictly enforce rules prohibiting unacceptable personal conduct as against this Petitioner, under the evidence in this case, in view of Respondent’s history of inconsistency in enforcement at this Correctional Center.

16. The totality of the speech and conduct of Petitioner (i.e. her admission that she had used profanity within hearing distance of an inmate, as well as her conduct during the March 4, 2010 meeting), under the particular circumstances then existing, were not sufficient to warrant termination. The March 4, 2010 incident was an extremely limited and isolated event that was certainly foreseeable, given the offensive nature of the inmate allegations presented to Petitioner, Petitioner’s reassignment to an all-male facility, management’s sloppy investigative process and failure to identify two of the complaining witnesses to Petitioner, management’s refusal to allow Petitioner to take a lie detector test, management’s hostility towards Petitioner and apparent provocation of Petitioner during the meeting (wherein Superintendent Hughes made various unjustified remarks, such as accusing Petitioner of going out early on medical leave because she got “wind” of the investigation or telling Petitioner her defensive demeanor was evidence of guilt), and management’s refusal to show Petitioner in the written policy why she could not have a lawyer present during the March 4, 2010 meeting.

17. In light of the totality of the evidence—including, but not limited to: the ongoing and embarrassing inmate allegations against Petitioner; the refusal to allow Petitioner to take a lie detector test as she had requested; management’s failure to notify Petitioner of the identity of two of the three inmates who provided the complaints against her and which led to the investigation of Petitioner; management’s failure to follow its own rules regarding investigations and the use of inactive disciplinary actions as supporting documentation for the termination; the disparate treatment of employees for the same or similar misconduct; management’s hostility towards Petitioner during the March 4, 2010 meeting; management’s refusal to show Petitioner the policy which prohibited her from having legal counsel present during the meeting; the reasonableness of Petitioner’s request to see policy regarding her right to counsel in the midst of an embarrassing, ongoing, and possibly incriminating interrogation; Petitioner’s cooperation during the preceding months of investigation, Petitioner’s candor and honesty regarding her admission of having used profanity in front of inmates as well as her admission of referring to Superintendent Hughes’ investigation as being “half-assed;” and the stress Petitioner was under at the time of the March 4, 2010 meeting—it is concluded that there is no sufficient justifiable basis in law, fact, or reason, for the termination of Petitioner under these facts and circumstances.

18. Further, Respondent’s handling of this case, as well as Respondent’s choice of punishment (i.e. termination) which was outside the range of punishment imposed for similar acts of misconduct by other employees, compels the fact-finder to question whether Respondent’s motivations were retaliatory in nature. Based on a review of the

facts, including, but not limited to, Petitioner's involvement with the investigation of Sgt. Curtis R. and Assistant Superintendent Burrell, it is concluded that Respondent took improper considerations into account in arriving at its decision to terminate.

19. Respondent's termination of Petitioner was neither just nor equitable and, therefore, was in violation of the letter and spirit of the State Personnel Act, Carroll, and its progeny.
20. The foregoing Findings of Fact and Conclusions of Law require Petitioner to be disciplined at a level less than termination, such as suspension for three (3) days without pay, in order to be consistent with Respondent's practices at the time Petitioner was discharged.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent has not carried its burden of proof that Petitioner's conduct rises to the level of "just cause" for termination. Rather, the undersigned determines that Respondent should discipline Petitioner at a level other than by termination, as it has done with other employees who have engaged in similar conduct, and recommends that Petitioner be suspended for three (3) days without pay. Accordingly, Respondent's termination of Petitioner from employment is vacated and Petitioner shall be afforded the following remedies:

1. Petitioner shall be reinstated to her former position, with all credit for State service for all purposes being retroactive to the date of dismissal.
2. Petitioner shall be awarded, from the date of dismissal until her reinstatement (minus the three day suspension), back pay and benefits, including sick and vacation leave, and with all bonuses and increases she would have been eligible for had she not been dismissed.
3. Petitioner is awarded reasonable attorney's fees and costs under the provisions of G.S. 150B-(b)(11).
4. Respondent should correct portions of the information in Petitioner's personnel file to contain only true and accurate information in compliance with N.C. Gen. Stat. §126-25, as stated herein.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision. N.C. Gen. Stat. §150-B-36(a).

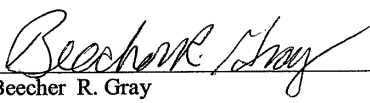
In accordance with N.C.Gen. Stat. §150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency,

the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency that will make the final decision in this case is the North Carolina State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the commission are in accordance with Appeal to Commission, section 0.0400 *et seq.* of Title 25, Chapter 1, Subchapter B of the North Carolina Administrative Code (25 NCAC 01B.0400 *et seq.*).

IT IS SO ORDERED.

This the 18 day of January, 2012.



Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Linda Vespereny
Law Offices of Glen Shults
PO Box 18687
Asheville, NC 28814
ATTORNEY FOR PETITIONER

Oliver G Wheeler
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 18th day of January, 2012.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

STATE OF NORTH CAROLINA
COUNTY OF SCOTLAND

FILED
2012 JAN 25 PM 6:07
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11-OSP-2720

CHERYL SIMMONS,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT
OF CORRECTION,

Respondent.

OFFICE OF
ADMINISTRATIVE HEARINGS

DECISION

This contested case was heard before Administrative Law Judge Joe L. Webster on
October 10, 2011 at the Office of Administrative Hearings ("OAH") in Raleigh, North Carolina.

APPEARANCES

Petitioner: Kirk J. Angel, ESQ. – Attorney for Petitioner
The Angel Law Firm, PLLC
PO Box 692
Harrisburg NC 28075
Telephone: 704.455.3311
Facsimile: 704.973.7859

Respondent: Oliver G. Wheeler, ESQ. – Attorney for Respondent
Assistant Attorney General
North Carolina Department of Justice
PO Box 629
Raleigh NC 27602
Telephone: 919.716.6535
Facsimile: 919.716.6761

WITNESSES

For Petitioner: Ella Simmonds

For Respondent: Gary Crutchfield
Joel Herron
Cheryl Simmons

EXHIBITS

Respondent's Exhibit 1 – Letter to Cheryl Simmons dated September 29, 2010 – Pre-Disciplinary Conference

Respondent's Exhibit 2 – Letter to Cheryl Simmons dated October 4, 2010 – Recommendation to Dismiss

Respondent's Exhibit 3 – Letter to Cheryl Simmons dated November 3, 2010 - Dismissal

Respondent's Exhibit 4 – Disciplinary Policy and Procedures

Respondent's Exhibit 5 – Scotland Correctional Institution Standard Operating Procedures

Respondent's Exhibit 6 – State of NC – Department of Correction Division of Prisons Policy and Procedures

Respondent's Exhibit 7 – Position Description Form

Respondent's Exhibit 8 – Letter to Cheryl Simmons from Joel N. Herron – Written Warning Unsatisfactory Job Performance dated July 26, 2010

Respondent's Exhibit 9 – Respondent's Internal Investigation (as limited)

ISSUE

Did Respondent have just cause to terminate Petitioner?

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented

at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner began working for Respondent in October 1997 as a Correctional Officer and was employed at the Southern Correctional Facility until her discharge. (Tr. pg. 92)
2. Petitioner was promoted to Correctional Sergeant in 2004. (Tr. pg. 92)
3. As a Sergeant, Petitioner held supervisory duties including supervising officers, making sure policies and procedures were followed, and interpreting policy and procedures. (Tr. pg. 27 and 92-93)
4. On July 20, 2010, Petitioner was contacted several times via telephone by Correctional Officer Willie Chavis. (Tr. pg. 99 -100)
5. Both Petitioner and Officer Chavis were off duty at the time of the telephone calls. (Tr. pg. 100-102)
6. In the evening of July 20, 2010 at or about 9:00 pm, Officer Chavis advised Petitioner that he had previously brought cell phones into Scotland Correctional facility and given them to inmates. (Tr. pg. 78 and 87)
7. Neither Petitioner nor Officer Chavis were scheduled for duty until July 21, 2010 and

Petitioner did not report Officer Chavis' statement to anyone at Scotland prior to returning to duty on July 21, 2010. (Tr. pg. 104) Petitioner thought Respondent already knew about the incident.

8. Petitioner first reported Officer Chavis' statement regarding the cell telephones to her supervisor, Lieutenant Simmonds the Officer in Charge, when she returned to work on July 21, 2010 at approximately 6:00 pm. (Tr. pg. 72 and 104)

9. Lieutenant Simmonds forwarded Petitioner's report of Officer Chavis' statement through her chain of command that same evening. (Tr. pg. 125-128)

10. At approximately 8:00 pm, Assistant Superintendent Gary Crutchfield arrived at Scotland Correctional facility to investigate the report. (Tr. pg. 128-129)

11. Mr. Crutchfield removed Officer Chavis from his duty station in the facility after 8:00 pm. (Tr. pg. 85-87)

12. For two (2) months prior to July 20, 2010, an anonymous caller had made multiple calls reporting that a Correctional Officer was supplying cell phones to inmates at Scotland Correctional facility. (Tr. pg. 121-123)

13. Approximately three (3) weeks prior to July 20, 2010, the anonymous caller identified Officer Willie Chavis as the Officer who was supplying cell phones to inmates. (Tr. pg.123)

14. These anonymous reports were received by Lieutenant Simmonds and reported through the chain of command. (Tr. pg 121-124)

15. At no time prior to July 20, 2010, did anyone remove Officer Chavis from duty despite Lieutenant Simmonds requests that he be reassigned. (Tr. pg. 124)

16. Respondent provided Petitioner with a Notice of Pre-Disciplinary Conference dated September 29, 2010. (Ex. 1)

17. The Pre-Disciplinary Notice stated that Respondent had “completed [its] investigation” and that dismissal was recommended due to unacceptable personal conduct. (Ex. 1)
18. The Pre-Disciplinary Conference letter indicated that Petitioner was being recommended for dismissal because she failed to report Officer Chavis’ statement regarding the cell phones until July 21, 2010. (Ex. 1)
19. Respondent later sent Petitioner a dismissal letter dated November 3, 2010, which stated that Petitioner was recommended for dismissal due to unacceptable personal conduct and grossly inefficient job performance. (Ex. 3)
20. The basis of the dismissal letter was that Petitioner failed to report Officer Chavis’ statement. (Ex. 3)
21. Joel Herron, Corrections Administrator, testified that he recommended Petitioner be dismissed due to her failure to immediately report the statement made by Officer Chavis. (Tr. pg. 6, 12-14)
22. Joel Herron testified that Petitioner engaged in Unacceptable Personal Conduct and Grossly Inefficient Job Performance by failing to carry out her duty to report Chavis immediately. (Tr. pg. 20-21)
23. Respondent did not produce any written policy that required Petitioner to immediately report the statement by Officer Chavis that he had previously provided cell phones to inmates.
24. Petitioner and Lieutenant Simmonds testified that they believed the policy required reporting with twenty-four (24) hours. (Tr. pg. 98, and 126-1)
25. Lieutenant Simmonds was Petitioner’s supervisor for almost two years. (Tr. pg. 120-121) Lieutenant Simmonds performed appraisals or TAPS on Petitioner and gave her very good ratings. (Tr. pg. 121).

26. Lieutenant Simmonds disagreed with Petitioner's punishment and felt it was too harsh. She has seen disparate treatment of employee offenders at Scotland since the date it opened. (Tr. pg 135-136) One such instance is when Sergeant Eric Jones brought a loaded weapon into the dining hall. He was not relocated; he was not fired. Lieutenant Simmonds does
27. not feel Petitioner was treated fair compared to other employees at Scotland. Sergeant Jones
28. received an 18-month written warning. The incident occurred a few months before the cell phone
29. incident. (Tr. pg. 135-137)
30. Lieutenant Simmonds would have felt differently about Petitioner's punishment if
31. he had been at work when the telephone conversation occurred with Officer Chavis. (Tr. pg.
32. 138). Petitioner reported the incident soon after his arrival at work.
33. Petitioner had a written warning dated July 26, 2010, that was issued due to her
34. failure to ensure a maximum control inmate was properly restrained before opening his cell. (R.
35. Ex. 8; Tr. 28, 93). This written warning was active at the time of Petitioner's dismissal. (Tr. 28.)

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

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.
2. When Respondent dismissed her, Petitioner was a career State employee entitled to the protections of the North Carolina State Personnel Act, including the just cause provision of N.C. Gen. Stat. § 126-35.
3. The State Personnel Act permits disciplinary action against career state employees for "just cause." N.C. Gen. Stat. § 126-35. Although "just cause" is not defined in the statute, the words are to be

accorded their ordinary meaning. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason). "The fundamental question... is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *N.C. Dept. of Environment and Natural Resources, Division of Parks and Recreation v. L. Clifton Carroll*, 358 N.C. 649, 669; 599 S.E. 2d 888, 900 (2004).

4. Just cause' like justice itself, is not susceptible of precise definition.... It is a 'flexible concept, embodying notions of equity and fairness,' that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* [cites omitted.] "Just cause requires 'misconduct of a substantial nature' and does not encompass 'technical violations of statute or official duty without a wrongful intention'" (emphasis added). *Id.* At 669, 901.

5. Respondent has the burden of proof in this contested case hearing to show that it had just cause to dismiss Petitioner in accordance with N.C. Gen. Stat. § 126-35(d). See also *Teague v. N.C. Dep't of Transportation*, 177 N.C. App. 215, 628 S.E.2d 395, *disc. rev. denied*, 360 N.C. 581 (2006).

6. Administrative regulations provide two grounds for discipline or dismissal based on just cause: Unsatisfactory job performance and unacceptable personal conduct. N.C. Admin. Code tit. 25 r. U.0604(b).

7. Unacceptable personal conduct includes: (1) conduct for which no reasonable person should expect to receive prior warning and; ... or the willful violation of known or written codes. N.C. Admin. Code tit. 25 r. 1 J.0614(i); see also *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. 594, 620 S.E.2d 14 (2005).

8. Unacceptable personal conduct is misconduct of a serious nature. *N.C. Dep't of Env't and Natural Resources v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). One act of unacceptable personal conduct presents just cause for any discipline, up to and including dismissal. *Hilliard*, 173 N.C. App. at 597, 6 Reviewing whether disciplinary action is supported by just cause generally requires a two-part

inquiry: (1) “whether the employee engaged in the alleged conduct,” and (2) “whether that conduct constitutes just cause for the disciplinary action taken.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 599 S.E.2d 888, 898 (N.C. 2004) (quoting *Sanders v. Parker Drilling*, 911 F.2d 191, 194 (9th Cir. 1990)) (internal quotation marks omitted).

20 S.E. 2d at 17.

9. 25 NCAC 1J .0604(c) provides that an employer may discipline or dismiss an employee for just cause based upon grossly inefficient job performance as defined in 25 NCAC 1J.0614. Grossly inefficient job performance may result in dismissal without any prior disciplinary action as provided in 25 NCAC 1J .0606.

10. “Grossly Inefficient Job Performance” is defined as “a type of unsatisfactory job performance that occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in . . . the creation of the potential for death or serious bodily injury to . . . a person(s) over whom the employee has responsibility.” 25 N.C. Admin. Code 1J .0614(5).

11. Respondent dismissed Petitioner for unacceptable personal conduct and grossly inefficient job performance. The undersigned finds as a matter of law that Respondent’s failure to include “grossly inefficient job performance” in the Pre-Disciplinary Notice or the Pre-Disciplinary Conference letter was of no consequence because grossly inefficient job performance is a form of unacceptable personal conduct and the Dismissal letter’s inclusion of both unacceptable job performance and grossly inefficient job performance did not include any new acts or omissions set forth as reasons for the termination pursuant to NCGS 126-35(a). Moreover, Respondents failure to include “grossly inefficient job performance” in the pre-

termination letters are also of no consequence since the undersigned finds as a matter of law that Respondent did not have just cause to terminate Petitioner for the reasons given.

12. As established by the foregoing Findings of Fact, the evidence fails to demonstrate that Petitioner engaged in unacceptable personal conduct or that Petitioner engaged in grossly ineffective job performance. Respondent failed to show any policy that Petitioner violated. Additionally, any argument Respondent raised that Petitioner's actions created a safety issue are belied by its own conduct in refusing to remove Chavis for three (3) weeks.

13. Therefore, based on the foregoing, Respondent did not have just cause to dismiss Petitioner as it did not prove her actions amounted to unacceptable personal conduct or grossly ineffective job performance in accordance with N.C.G.S. 126-35 and the relevant provisions of the State Personnel Manual of the North Carolina Office of State Personnel.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, I make the following:

DECISION

Respondent did not meet its burden of showing, by a preponderance of the evidence, that it had just cause to dismiss Petitioner. Respondent's decision to dismiss Petitioner from her position as a Correctional Sergeant is **REVERSED**. Petitioner shall be reinstated to her position with Respondent with all back pay and other benefits retroactively, as if she never had been discharged. Petitioner shall also be reimbursed her reasonable attorney's fees.

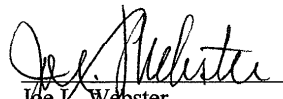
ORDER AND NOTICE

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-26(b).

The decision of the Administrative Law Judge in this contested case will be reviewed by

the agency making the final decision according to the standards found in G.S. 150B-36(b). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a). The agency making the final decision is the North Carolina State Personnel Commission.

This the 25th day of January, 2011.



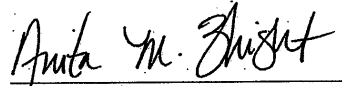
Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

Kirk I Angel
The Angel Law Firm PLLC
PO Box 692
Harrisburg, NC 28075
ATTORNEY FOR PETITIONER

Oliver G Wheeler
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 26th day of January, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA
COUNTY OF SCOTLAND

2012 FEB 15 PM 12:34

IN THE OFFICE OF
Office of ADMINISTRATIVE HEARINGS
Administrative Hearings 11 OSP 02720

Cheryl Simmons
Petitioner

vs.

North Carolina Department of Correction
Respondent

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ORDER AMENDING DECISION

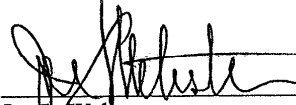
Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on January 25, 2012, is amended as follows:

26. Lieutenant Simmonds disagreed with Petitioner's punishment and felt it was too harsh. She has seen disparate treatment of employee offenders at Scotland since the date it opened. (Tr. pg 135-136) One such instance is when Sergeant Eric Jones brought a loaded weapon into the dining hall. He was not relocated; he was not fired. Lieutenant Simmonds does not feel Petitioner was treated fair compared to other employees at Scotland. Sergeant Jones received an 18-month written warning. The incident occurred a few months before the cell phone incident. (Tr. pg. 135-137) Lieutenant Simmonds would have felt differently about Petitioner's punishment if he had been at work when the telephone conversation occurred with Officer Chavis. (Tr. pg. 138).

27. Petitioner reported the incident soon after his arrival at work.

28. Petitioner had a written warning dated July 26, 2010, that was issued due to her failure to ensure a maximum control inmate was properly restrained before opening his cell. (R. Ex. 8; Tr. 28, 93). This written warning was active at the time of Petitioner's dismissal. (Tr. 28.)

This the 10th day of February, 2012.



Joe V. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

Kirk I Angel
The Angel Law Firm PLLC
PO Box 692
Harrisburg, NC 28075
ATTORNEY FOR PETITIONER

Oliver G Wheeler
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 15th day of February, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 8, 10-17, 24-29

For Respondent: 1 - Investigative Report pages 1-9 and written statements of Barfield, Morabito, Condrey, Petitioner, Dance, Bonner, Casey-Littlefield, Vick allowed for substantive reasons;

- Written Statements of Neal, Sawyer, Mikus, Beale, Mosley, Pippin, Maledda, Hudson, Spence allowed to show what information was before Respondent when it made its decision.

2 -5, 7-9

OFFER OR PROOF

For Respondent: 5

FINDINGS OF FACTS

Procedural Background

1. By letter dated December 1, 2010, Respondent advised Petitioner that it was terminating Petitioner's employment for unacceptable personal conduct and grossly inefficient job performance due to Petitioner's actions on September 23, 2010.

2. On March 9, 2011, an employee relations committee conducted an internal grievance hearing on Petitioner's appeal of his dismissal from employment. The employee relations committee recommended that Mr. Keller uphold Respondent's decision to dismiss Petitioner from employment.

3. By letter dated March 15, 2011, Respondent issued a Final Agency Decision upholding Respondent's decision to terminate Petitioner's employment.

4. On April 15, 2011, Petitioner appealed Respondent's decision by filing a contested case petition with the Office of Administrative Hearings. In that petition, Petitioner alleged that Respondent had discharged him from employment without just cause. Petitioner stated:

The agency failed to conduct a full and fair investigation of an incident involving inmate violence and stated that Petitioner's use of pepper spray in an emergency situation where inmates had refused to obey a lawful order, were behaving aggressively toward Petitioner and other staff, and where there was insufficient staff available at the time of the unexpected

show of aggression[,] constituted unacceptable personal conduct and/or grossly negligent job performance. Petitioner's response to the unexpected display of inmate aggression was wholly consistent with Respondent's policies regarding the use of force, in general, and the use of pepper spray, in particular. In addition, Respondent failed to provide Petitioner with a meaningful opportunity to be heard as to the allegations made against him before terminating Petitioner's employment.

(Petition)

Petitioner David Hill

5. On April 6, 2004, Petitioner began his employment with Respondent at the Pasquotank Correctional Institution ("Pasquotank Correctional") in Elizabeth City, North Carolina. (Petitioner's Exhibit "Pet. Ex." 1, Tr p 316)

6. Before his employment with Respondent, Petitioner served in the United States Navy for twenty years, with top security clearance throughout his military career. (Tr pp 361-62).

7. Following his initial probationary year with Respondent, Petitioner successfully completed the sergeant's exam. (Tr p 316)

8. During Petitioner's employment with Respondent, Petitioner's supervisors rated Petitioner as follows:

a. In the 2007-2008, 2008-2009, and, 2009-2010 evaluation cycles, Petitioner's supervisors rated Petitioner's overall performance rating as "very good." (Pet. Exs. 1, 2, 3; Tr pp 363, 366, 371)

b. In the 2008-2009 evaluation cycle, Petitioner's supervisor rated Petitioner "very good" in the areas of security, supervision, and communication for the interim and final/annual ratings. Petitioner's supervisor commented that Petitioner had shown strength in leadership with staff and inmates. (Tr pp 366, 369)

c. In 2010, Petitioner's supervisor rated Petitioner as "very good" in the areas of safety and security, leadership, and communication. (Pet. Ex. 3; Tr pp 371-372)

d. Respondent did not complete a performance appraisal for Petitioner for 2010-2011. (Pet. Ex. 4; Tr 373)

9. During his employment with Respondent, Petitioner never received a written warning or any other type of disciplinary action. (Tr pp 293, 316-17). In particular, Petitioner was never disciplined for failure to follow Department of Corrections policy. (Tr p 317)

Respondent's Relevant Policies

10. In its December 1, 2010 dismissal letter to Petitioner, Respondent cited three policies that Petitioner allegedly violated to warrant Petitioner's dismissal from employment. First, Respondent cited the Division of Prison's ("DOP") "Use of Force Policy." (Pet Ex 8, Chap F, Sect .1500) The purpose of that policy is to provide personnel direction in using non-deadly and deadly force, along with documentation requirements, and reporting procedures for use of force incidents. (Pet Ex 8)

11. Sect.1503 of that policy states, "The use of force shall be permissible only to the extent reasonably necessary for a proper correctional objective. Excessive force is prohibited."

12. Sect. 1504 of that policy provides:

Procedures for the use of force restrict the use of physical force to instances of justifiable self defense, protection of others, protections of state property, prevention of escapes, and to maintain or regain control, and then only as a last resort and in accordance with appropriate statutory authority. . . . Efforts at control through communication should be attempted if feasible prior to any use any use of force. Pepper spray or other techniques that reduce the risk of injury to staff and inmates should be used as the first response to an aggressive inmate, if feasible under the circumstances.

(b) Pepper spray, if feasible, should be used as the first level of response.

(Pet Ex 8; Tr p 383)

13. Respondent DOC's general policy on "Use Of Force" defines an officer's use of force as physical touching, but does not specifically include the shaking of a can of pepper spray. (Pet. Ex. 8; Tr p 281). That policy states that it is not necessary for an inmate's aggression to be physical before use of force is justified. (Pet. Ex. 8; Tr p 280) Respondent's policy permits the use of force to achieve a correctional objective, which would include getting an inmate to comply with a lawful order, to prevent an assault, or to maintain or regain control of a situation. (Tr pp 345, 383).

14. At hearing, Respondent's Prison Superintendent Robert G. Jones opined that as long as communication is working, there is no need to use force (Tr p 311). Whether or not communication is working in a situation depends on the judgment of the officer involved in the situation (Tr p 312). As long as an officer perceives communication has a chance of working, he would not be anticipating the use of force (Tr p 312).

15. The second policy cited in Respondent's dismissal letter of Petitioner was the Division of Prison's "Cell Extraction/ Anticipated Use of Force" policy (cited as No. .8000, Pet Ex 7) Section .0802(b) of that policy defines "Anticipated Use of Force" as:

[A]ny situation in which it appears that significant force may be necessary to restrain, remove, or control one or more inmate(s) or effect compliance with a lawful order. This definition does not include spontaneous events.

(Pet. Ex. 7)

16. The "Anticipated Use of Force" policy (Policy .0805) provides:

(a) [E]fforts to control the inmate through verbal communication, should be attempted, if feasible, prior to any use of force. If verbal communication attempts fail, Hands on Physical Force, including approved unarmed self-defense techniques, may be used to gain compliance and control if appropriate under the circumstances.

(b) Pepper Spray, if feasible, should be used as the first level of response to control or deter a violent, threatening, assaultive, aggressive or noncomplying inmate. If feasible, verbal communication will be used to gain control of the inmate prior to the use of pepper spray.

(Pet. Ex. 7; Tr pp 111, 311, 380)

17. A preponderance of the evidence at hearing established that it takes approximately thirty minutes to put an anticipated use of force team together at Pasquotank Correctional. (Tr pp 113-114). A video camera operator is part of the anticipated force team. If the time required to secure a camera for the anticipated use of force team would cause additional risks to staff members or inmates, the use of the camera is not required. (Pet Ex 7; Tr pp 154-156).

18. Respondent's training materials do not identify the difference between a "spontaneous event" and an event that is "not spontaneous." (Tr pp 112; 151-152). Determining what is, and what is not, a spontaneous event is left to the person who is actually present in a room when that event is unfolding. (Tr p 112)

19. As a part of his training, Petitioner received instruction that a staff member must exercise his or her judgment as to when he or she feels the need for additional staff assistance, or doesn't need any assistance. "My threat level may not be your threat level." (Tr p 376)

20. The third policy cited in Respondent's dismissal of Petitioner was Pasquotank Correctional Standard Operating Procedure (SOP), "Custody & Operations" (Ch. II, Sect. .0400), "Use of Force," policy. Specifically, the "Audio/Video Taping Use of Force" describes the actual filming procedure to be used where correctional staff anticipates the use of physical force. (Resp Ex 7) That policy describes "use of force"

as "any physical touching of an inmate by any physical force means to cause compliance with staff directives." ("I. Objective" of that policy, Resp Ex 7)

21. Although Respondent did not cite Pasquotank Correctional "Emergency Response Procedures" (Chapter V, Section III, .0900 "Code 4 Procedure") in its dismissal letter to Petitioner, that policy is also relevant to the issues in this contested case. That policy provides staff with a "clear and concise procedure" for responding to emergencies or disturbances in Pasquotank Correctional that require additional correctional staff. Section V, A. of that policy provides that:

[W]hen any staff member witnesses or has a reason to believe that an emergency or disturbance is occurring which would require more correctional staff than is readily available, that staff person shall by the most expedient means available announce over a PA system a Code.

(Pet. Ex. 6, Tr p 376).

22. Specifically, the "Code 4 Procedure" requires that, *inter alia*:

- a. The initial response to an emergency situation will be paged by Master Control that a situation requiring additional staff is occurring;
- b. All non-emergency communication cease and that staff refrain from using phones, radios, etc. and stand by for further instructions;
- c. As the designated staff respond to the Code 4 Level 1, they should stop at the secure area closest to the scene of the actual disturbance. Responding staff should assess the situation prior to engaging in it until the other members of the initial response team arrive;
- d. The Control Room operator will close all sliders and only open doors for staff response. This will only be done when it is secured to do so. Control Room operators must never open doors that could permit a disturbance to spread unless order [sic] by the OIC. All Control Rooms will be secured and not opened until Code 4 is secured; (Pet. Ex. 6; Tr pp 51-52).
- e. The Officer in Charge ("OIC") shall report to Master Control upon hearing a Code 4 Level 1. (Pet. Ex. 6, Sec V, M.; Tr pp 108-109, 377)

(Pet. Ex. 6)

Application Of Relevant Policies

23. Before September 23, 2010, Petitioner witnessed numerous times when a "Code 4" had been called at Pasquotank Correctional (Tr p 378). Petitioner had also previously responded to Code 4 calls that had been resolved without use of force. (Tr pp 378-79) In Petitioner's previous experience, a Code 4, which resulted in officers

responding to an inmate disturbance, had caused the inmates to quiet down and submit to cuffs without further incident. (Tr p 379)

24. Based on Officer Jordan Barfield's experience and training, an inmate's refusal to comply with an order does not necessarily suggest an anticipated use of force situation. (Tr p 49) In Petitioner's experience, force has been used [at Pasquotank Correctional] without the "Anticipated Use of Force" policy being used, including times when inmates have suddenly lunged at an officer, or refused an order. (Tr pp 380-81).

25. The only time that Petitioner had observed the use of Respondent's "Anticipated Use of Force" policy at Pasquotank Correctional was in reference to a cell extraction. (Tr p 379) In those instances, most often, an inmate threatens harm before the "Anticipated Use of Force" policy is used. (Tr p 380)

26. Respondent's training did not include specific definitions or examples of what constituted aggressive conduct by inmates. (Tr p 384) Whether verbal or nonphysical conduct by an inmate constitutes aggression is subject to the understanding of individuals who are involved in the incident. (Tr p 280)

27. Petitioner has never seen any officer at [Pasquotank Correctional] disciplined for using pepper spray when an inmate has refused an order. (Tr p 381)

28. On September 23, 2010, Correctional Lt. Thomas Condrey was the Officer in Charge at Pasquotank Correctional. Lt. Condrey was unaware of any policy, other than Respondent's Emergency "Code 4 Procedure" (Pet Ex 6), which describes how the Officer In Charge should respond to a Code 4. (Tr p 108)

29. Lt. Condrey was unaware of any written policy or procedure that instructed correctional staff when they should notify an Officer In Charge when an inmate is refusing to comply with an order. (Tr p 110) According to Lt. Condrey, correctional staff is trained to use their judgment as to whether or not the Officer In Charge should be called prior to calling a code. (Tr p 100)

30. Petitioner has participated in random lockdowns, or lockdowns in response to missing office items. (Tr p 411) Correctional staff does not explain to the inmates why the lockdown order is given. (Tr p 411)

31. Petitioner has experience with Security Threat Group inmates (STG) at Pasquotank Correctional, but did not anticipate the use of force every time he encountered STG inmates. (Tr 415) He has successfully resolved conflicts involving STG inmates without the use of force. It would not be appropriate to anticipate force, simply because an inmate was identified as an STG inmate. (Tr p 415) Petitioner opined that, "all gang members are not specifically bad. Some of them just join to be a part of a group, so they can feel safe in a prison environment." (Tr p 330)

32. There are no guidelines [at Pasquotank Correctional] advising officers when it is appropriate or inappropriate to order a "lockdown" of the facility. (Tr p 411)

September 23, 2010 Incident

33. Dorms 2A, 2B, and 2C compose Unit IV at Pasquotank Correctional. Dorm 2A is a 2 story area consisting of cells on each floor, with a large open area located on the first floor, in the middle of the dorm. Witnesses and staff refer to the large open area interchangeably as the "day room," "block area," or "dorm area."

34. On September 23, 2010, the incident at issue occurred only in Dorm 2A, and its adjacent core area. The "core area" is an area located just outside the sliding door that locks Dorm 2A.

35. On September 23, 2010, Petitioner worked the night shift in Unit IV, Dormitory 2A. As the sergeant, Petitioner was the supervisor for Unit IV, Dorm 2A over five correctional officers, including Sgt. Jordan Barfield, and Officer Michael Morabito. That night, Petitioner was involved in a "use of force" incident (Tr p 318).

36. On September 23, 2010, Sergeant Jordan Barfield worked in the control room covering Unit IV, Dorm 2A from 6:00 p.m. until 8:00 p.m. Barfield had been a correctional officer for approximately three years, and had worked on Unit IV, Dormitory 2A for approximately four months. (Tr pp 9-10, 12)

37. On September 23, 2010, Correctional Officer Michael Morabito worked in Unit IV, Dorm 2A. Morabito had worked in that capacity for approximately four months. (Tr p 63) Before accepting employment with Respondent in June 2010, Officer Morabito was a truck driver, and had also worked shore patrol with the U.S. Navy. (Tr pp 87-88). On September 23, 2010, Officer Morabito had received training on the "Use of Force" policy, but had not been trained in the "use of anticipated force." (Tr p 88)

38. Correctional Lieutenant Thomas Condrey was the Officer in Charge of Pasquotank Correctional on September 23, 2010. (Tr pp 92-93).

39. There were two video surveillance cameras recording the events in the core area of dormitory 2A. (Pet. Ex. 29)

40. At approximately 6:45 pm, Correctional Officer Carla Vick was called to Unit IV, Dorm 2A by inmates Terry Thorne, and Michael Green. Thorne and Green complained that inmate Matthew Davis was looking at them while they were taking showers and they wanted Davis removed from Dorm 2A. Officer Vick explained to inmates Thorne and Green that there are inmates watching inmates in every block[;] that is something you can't avoid, but she would notify Petitioner.

41. Officer Vick left Dorm 2A, walked to the Sergeant's office, and explained the situation to Petitioner. Vick told Petitioner that the inmates had requested to speak with him. Per Petitioner's approval, Vick escorted inmates Thorne and Green to the Sgt.'s office.

42. At approximately 7:20 pm, Inmates Thorne, Cherry, and Green came to speak with Petitioner in the sergeant's office. (Tr pp 16-17) The inmates advised Petitioner that they wanted a homosexual inmate moved, because he was watching them as they exited the shower. (Resp. Ex. 1, Petitioner's statement; Tr p 386) Petitioner asked the inmates whether or not they had asked Ms. Moore-Hoskins, the unit manager or Mr. Shaw, the assistant unit manager, about moving inmate Davis. The inmates reported that they had asked for inmate Davis to be moved, but Ms. Moore-Hoskins and Shaw had denied their request. (Tr pp 322; 387-388)

43. Petitioner told inmates Thorne, Green, and Cherry that he could not override the authority of the unit manager by moving inmate Davis [out of the unit]. Instead, Petitioner indicated that he could move Thorne, Cherry and Green out of the dorm to resolve the issue, and then give them the opportunity to speak with Moore-Hoskins and Shaw in the morning. (Tr p 388)

44. Petitioner assured the inmates that he would address the issue with Moore-Hoskins in the following morning, since Moore-Hoskins was not on the unit that evening. (Tr p 388) Petitioner also told the inmates that he could not move inmate Davis simply because these inmates wanted him moved. (Tr 323)

45. Petitioner believed that the inmates agreed to pack up and move for the night. (Tr pp 323; 324; 388)

46. At that time, Officers Pickell and Vick were the floor officers. Officers Pickell and Vick were also in the office when the inmates were in Petitioner's office. Officer Morabito was standing on the outside of the door to the office. (Tr p 389)

47. At 8:00 pm, the correctional officers changed rotation, so Officers Pickell and Vick went to work the control booth, while Officers Barfield and Morabito became the floor officers.

48. After the 8:00 pm shift change, Petitioner instructed Officer Barfield to take shipping bags to the three inmates, and see if the inmates had finished packing their belongings. (Tr pp 326; 390) Officer Barfield took the bags to the three inmates in the dorm, but the inmates refused to pack and move. At 8:17:26 pm, Officer Barfield exited the dorm, and informed Petitioner the inmates had refused to move. (Tr. 18-19)

49. At this point, Inmate Michael Green was walking the perimeter of the day room, Terry Thorne was walking behind Michael Green, and Tayon Cherry was on the mezzanine level behind a post. (Pet. Ex. 29; Tr p 386).

50. Petitioner, Morabito, and Barfield walked back into the cell block or door area. Petitioner tells the three inmates that they are moving, but the three inmates still refuse to pack and move. (Pet. Ex 29; Tr. pp 19-20, 91, 327)

51. Petitioner calls and waves to the inmates, and orders them to meet him in the core area. (Pet. Ex. 29; Tr pp 20-21, 328, 391, 392) Petitioner intended to speak

with the inmates to see why the inmates had changed their mind about moving for the night. (Tr p 391)

52. Inmate Green walks right by Petitioner, and ignores Petitioner. (Pet. Ex. 29; Tr p 392). The three inmates move closer to the dormitory [slider] door. Petitioner steps out into the core area, assuming the inmates would follow him. When they do not, Petitioner steps back into the dorm, and gives all of the inmates an order to lockdown the dorm. (Pet. Ex. 29; Tr pp 329; 332; 392) Petitioner ordered the lockdown in order to isolate the inmates, so that he could talk with them. (Tr p 393) According to Officer Barfield, the lockdown was a safety measure to isolate the noncompliant inmates from others. (Tr p 47)

53. After Petitioner's order to lockdown, some inmates began to go to their cells. (Pet. Ex. 29; Tr p 394). Officer Morabito observes a majority of the inmates comply with the order to lockdown (Tr p 71). Petitioner calls the control booth to those officers know that he had ordered the dorm to lockdown. (Pet. Ex. 29; Tr p 394).

54. After that, Petitioner begins walking around the dorm area to make sure that all the doors were secure. (Pet. Ex. 29; Tr p 394). Officer Morabito and Officer Barfield also walk around the first floor of the dormitory area, locking doors, and checking to see if closed doors were locked. (Pet. Ex. 29; Tr p 395)

55. Petitioner gives three orders to lockdown. Each time, approximately ten inmates refuse to comply. (Tr p 335) These inmates circled, paced, and walked around the bottom floor of the dorm. A couple of inmates hang out by the door, one inmate walk back to get hot water, and a couple just mill around a bit. (Pet. Ex. 29; Tr pp 74, 395)

56. Petitioner circles the first floor. As he reached the bottom step of the stairs leading to the second floor, he sees inmates forming into a group, talking, and waving their hands. Petitioner calls a "Code 4," because several inmates had not complied with the order to lockdown. (Pet. Ex. 29; Tr pp 334, 336, 395-96)

57. Based on his knowledge of the Code 4 policy, Petitioner believes Officer in Charge, Lt. Condrey, will report to Master Control. (Tr p 377) At this time, Lt. Condrey was at the gym assisting with an inmate disturbance. (Tr pp 95-96). Lt. Condrey escorted the inmate, who had been placed in handcuffs, back to Unit III before responding to the Code 4. (Tr p 96) As an Officer in Charge, Lt. Condrey had been trained what to do when a Code 4 was called. (Tr p 106)

58. After calling the Code 4, Petitioner continues walking to the second floor of the dormitory to continue locking down individual cells. (Pet. Ex. 29; Tr p 396) After checking the cells on the second floor, Petitioner returned to the first floor of the dorm area, and began talking to the inmates. Petitioner ordered the inmates to submit to cuffs. The inmates refuse to submit to cuffs, and tell Petitioner they were not going to comply. (Pet. Ex. 29; Tr p 397-398)

59. Sergeant Casey Littlefield is the first officer to respond to the Code Four. (Pet. Ex. 29; Tr p 397) Sergeant Dance, Officer Mosley, Officer Mikus and Officer McHale respond to the Code Four about that time. (Pet. Ex. 29; Tr p 397) Petitioner informed the arriving officers that he had ordered the inmates to lockdown, and submit to cuffs. (Pet. Ex. 29; Tr p 398).

60. Officers begin to shout to the inmates to turn around and submit to cuffs. Sergeant Dance gives the order more than once. (Pet. Ex. 29; Tr p 398). The order to submit to cuffs was a direct order that was given more than once. (Tr pp 53, 73) The inmates state that they were not going to comply with the order to submit to cuffs. (Pet. Ex. 29; Tr p 398) The prisoners' direct refusal of the order to submit to cuffs is a violation of prison procedure for which the inmates could be disciplined. (Tr p 53)

61. Before this, none of the inmates have told Petitioner directly that they wanted to speak with the [Officer in Charge]. (Tr p 398)

62. Petitioner was familiar with the practice where an officer of equal rank could intervene if he or she believed that the first officer was not properly responding to an inmate situation. (Tr pp 400, 401) At this point, Sgt. Dance and Sgt. Littlefield were also in the dorm area. Those sergeants were authorized to direct Petitioner to refrain from further engagement with the inmates. (Pet. Ex. 29; Tr pp 397, 400). If Dance and Littlefield believed that Petitioner was not handling the situation correctly, they had the authority to intervene. (Tr p 400) However, neither Sergeant Littlefield nor Sergeant Dance indicated to Petitioner that he needed to do something other than what he was doing to respond to the inmate situation. (Pet. Ex. 29; Tr p 401)

63. Petitioner takes out his baton, and places it in the "low ready" position. "Low ready" position means the baton was placed behind Petitioner's leg so the inmates could not see the baton. (Pet. Ex. 29; Tr p 402) There was no evidence on the video surveillance tape that any inmate acted as if they had seen Petitioner put his baton in the low ready position. Less than two seconds later, Petitioner returns his baton to his holster. (Pet. Ex. 29)

64. More officers arrive in response to the Code Four, including Officers Maleda, Bond, Mikus, Neal, Sawyer, Bonner, Mosley, Pippin, Pickell, Hudson, and Spence. (Pet. Exs. 1, 29; Tr p 403) Petitioner advises the inmates that officers will use pepper spray if the inmates refused to comply with the order to submit to handcuffs. (Pet. Ex. 29; Tr p 403)

65. Inmates state that if the officers sprayed the pepper spray, the inmates would respond by fighting. The inmates start yelling "ya'll ain't cuffing us, we want to speak to the Captain." (Pet. Ex. 29, Casey-Littlefield statement; Tr pp 344, 347, 403, 412) An inmate in front starts waving his hands, and some talk about fighting. (Tr p 403) The video surveillance tape shows a couple of inmates waving their hands in the background in an aggressive manner. (Pet. Ex. 29; Tr pp 403; 404)

66. According to Capt. Taylor's report, when Officer Neal arrives at Unit IV, Neal observes, "a group of inmates appeared to be in a protective formation." (Resp Ex 1, p 4) Neal tells Capt. Taylor that:

the inmates appeared to be bracing for a confrontation standing their ground, refusing to comply to the orders to lockdown that were given to them by the officers. The officers had them surrounded with pepper spray pulled. . . . all of the inmates appeared to be irritated.

(Resp Exh 1, p 4) Capt. Taylor's report also notes Officer Bonner's description of his observations when he arrived onto Unit IV, Dorm 2A. Bonner observes approximately 11 inmates standing in a "V" formation on the left-hand side of Dorm 2A in front of cells 8 and 10. Bonner hears Petitioner order the inmates to "lockdown," and hears the inmates refused. Bonner hears staff tell inmates to submit to cuffs. He also hears inmates refuse to comply with staff's order to submit to cuffs again. (Resp Ex 1, p 6)

67. Several officers reached for their pepper spray. (Pet. Ex. 29; Tr p 403) Petitioner may have shaken his pepper spray, but he was unaware of any instruction not to shake his pepper spray can. (Tr p 346)

68. Petitioner orders the inmates to submit to cuffs three times, and each time the inmates refuse to comply with Petitioner's order. After the inmates refuse to comply with the order to submit to cuffs, Petitioner and other officers spray the inmates with pepper spray. (Pet. Ex. 29; Tr pp 345, 403). Video surveillance tapes do not clearly show whether Petitioner sprayed his pepper spray first. However, based on officers' statements to Taylor and the videotape, several officers, namely Officers Pippin and Maledda spray their pepper spray at inmates, simultaneously with Petitioner. (Pet. Exs. 1, 29; Tr p 348)

69. Once the officers released their pepper spray, some inmates submit to cuffs. Other inmates turn away from the spray, and push against the officers surrounding them. (Pet Ex 29; Tr p 404) Inmates who have not submitted to hand cuffs, begin fighting the officers surrounding them, and begin scattering and running along the wall. Some inmates begin to run through toward the open [slider] doors of the dorm. (Pet. Ex. 29; Tr p 349).

70. Sgt. Casey Littlefield is positioned near the dorm's slider door. When an inmate passed directly in front of Sgt. Littlefield, Littlefield makes no attempt to grab the inmate. (Pet. Ex. 29; Tr pp 406, 407) Sgt. Littlefield's response is inconsistent with her training as an officer. (Tr p 410)

71. Officer Sawyer runs from the inmates, and then retreats. (Pet. Ex. 29; Tr pp 407, 409) Officer Sawyer's response is inconsistent with his training. (Tr p 410) Officer Bond remains stationary. (Pet. Ex. 29; Tr p 408)

72. Officer Pippins retreats to the side, and remains disengaged. Officer Pippins' response is inconsistent with her training. (Pet Ex 29; Tr p 410)

73. Petitioner observes, the inmate who had evaded Sgt. Littlefield, running up the stairs to the second floor. Petitioner sprays him to prevent the inmate from potentially escalating the fight by, for instance, retrieving a weapon. (Pet. Ex. 29; Tr pp 350, 408)

74. Inmates spill out the door of the day or dorm room. Officers, including Petitioner, follow the inmates, attempting to restrain inmates and regain control of the situation. (Resp. Ex. 1, Petitioner's Statement)

75. When Lt. Condrey approaches Unit IV, he sees Petitioner and inmate Green wrestling over Petitioner's baton. Condrey pulls his baton, and strikes inmate Green on the upper left thigh. (Tr. p. 97) Inmate Green uses a baton to strike Condrey across the bridge of his nose, and Condrey is knocked unconscious. (Tr p 97) Lt.

76. Eighteen staff members respond to the Code 4. Eight staff members receive injuries, and seven are taken to Albemarle Hospital Emergency for treatment. (Resp. Ex. 1, Capt. Taylor's Report). Lt. Condrey sustained a broken nose, and suffered nerve damage to the side of his face that affects his left pupil. Due to this injury, Condrey has greater sensitivity to light, and suffers from migraine headaches a couple of times a month. (Tr p 98)

Respondent's Internal Investigation

77. Around 8:30 or 8:40 pm, Superintendent Jones arrives at Pasquotank Correctional. (Tr p 176) At 9:00 pm on September 23, 2010, Capt. Felix Taylor reports to work. After talking with Petitioner, and other officers, Superintendent Jones instructs Captain Taylor to conduct an internal investigation into the Unit IV, Dorm 2A incident. (Tr pp 118-119)

78. Captain Taylor has conducted approximately fifty internal investigations. (Tr 120) In conducting internal investigations, Capt. Taylor asks staff to give him a brief verbal description of what happened from start to finish. Next, Taylor has the interviewed person submit a written statement to Taylor. (Tr. 122) Taylor also reviews anything such as videotapes, and then puts an actual investigative packet together by summarizing each individual's statement and noting any type of policy violation.

79. Captain Taylor takes notes while conducting interviews for internal investigations. It would be normal procedure for Taylor to preserve his written notes of interviews in a situation that might involve a contested case. However, in this case, Taylor did not preserve his written notes of the interviews taken about the September 23, 2010 incident. (Tr p 130)

80. Capt. Taylor interviewed most of the staff on the night of September 23, 2010, and into the morning of September 24, 2010. After talking with Capt. Taylor, officers sat together and wrote their statements. As officers wrote their statements, they talked with other officers about what had happened. Officers compare notes on the

incident while writing their statements. (Tr p 59) Officer Barfield does not recall Captain Taylor being present while the officers were preparing their written statements. (Tr p 59)

81. After informing Mr. Jones about what happened in Unit IV, Dorm 2A, and why, Petitioner is instructed to go to master control the remainder of the evening, and write a statement for the internal investigation. Petitioner completed his statement the morning of September 24, 2010, and gave it to Mr. Jones before he left the facility around 8:00 or 9:00 a.m. (Tr pp 416-418). No one spoke with or interviewed Petitioner about the incident, even after Petitioner provided his written statement. (Tr pp 418-419; 419-420; 431)

82. In his initial statement, Petitioner explains that how the "three inmates" (Thorne, Green, and Cherry) had requested Moore-Hoskins move inmate Davis, earlier on September 23, 2010, but Moore-Hoskins turned down such request. (Resp. Ex. 1)

83. On October 10, 2010, Petitioner amended his initial statement after recalling additional details of the incident.

a. In this statement, Petitioner explains that he drew his baton in the dorm area after the inmates refused to be cuffed.

b. Petitioner explains that on September 9, 2010, he sent an email to his unit manager, Ms. Moore-Hoskins and the asst. unit manager, Mr. Shaw concerning STG inmates interfering with his officers when the officers were trying to talk to one of the STGs. Petitioner suggested that they spread the STG inmates from Dorm 2A to other dorms to address this situation. (Pet. Ex. 28) On the top right hand corner of the amended statement, Petitioner writes, "Email is attached to this statement," and attaches a copy of the email to his amended statement. (Pet. Exs. 16, 28)

c. Petitioner did not receive a reply to such email from Moore-Hoskins or Shaw. (Tr p 423).

84. After Capt. Taylor received Petitioner's Amended Statement, he interviewed Cindy Moore-Hoskins, the Unit IV manager, and Clifford Shaw, the Unit IV assistant unit manager on October 11, 2010. Taylor summarized their statements, and attached such statements to the investigative report. (Resp Exh 1)

85. On October 12, 2010, Mr. Taylor completed his internal investigation, and submitted his investigative report to Mr. Jones. While Capt. Taylor did not make any recommendations or cite any policy violations as part of an internal investigation, he did write a conclusion at the end of his investigative report, summarizing what he discovered. (Tr. pp 122, 123, 131, 143) Taylor concluded, in part, that Petitioner spoke to the inmates about their complaint at 7:20 pm. (Tr. pp 123-124) Petitioner entered the dormitory at approximately 8:18 pm to lockdown Unit IV, Dorm 2A, and several inmates refused to lockdown. (Tr. p 123). The incident did not escalate until approximately 8:22

pm, and at no time, did Petitioner advise the OIC that he had a problem in Dorm 2A. (Tr. p 124) These times were taken from dormitory surveillance cameras. (Tr. p 124).

86. In his report, Taylor identified the following individual statements and interviews as those upon which he based his investigative report:

Lt. Thomas Condrey, Sergeant Terrance Dance, Sergeant David Hill, Correctional Officer Theodore Hudson, Correctional Officer Bridget Maledda, Correctional Officer Robert Mikas, Correctional Officer Calvin Mosley, Correctional Officer Todd Neal, Correctional Officer Norman Pickell, Correctional Officer David Sawyer, and Correctional Officer Carla Vick.

(Resp Ex 1, p 1) Taylor was unaware of any oral statements made to him that were not included in the individuals' written statements. (Resp. Ex 1; Tr 129, 170)

87. Capt. Taylor completed his investigative report with all the individuals' statements and all his interview notes in front of him. (Tr pp 140-141) Yet, a preponderance of the evidence at hearing proved that Capt. Taylor's investigative report was not thorough or complete.

a. First, Capt. Taylor failed to list, at the beginning of his report all the persons he interviewed and obtained statement from during the investigation. Most notably, Taylor failed to list Cindy Moore-Hoskins, Clifford Shaw, along with eight other officers, as persons he had interviewed during the investigation. (Tr pp 140-142)

b. Second, while Capt. Taylor claimed he summarized Ms. Moore-Hoskins and Mr. Shaw's statements, Taylor failed to include his summaries of Moore-Hoskins and Shaw's statements in his investigative report. At hearing, Capt Taylor could not explain why he omitted those two summaries in his internal investigation packet, but claimed that he "accidentally made a mistake and didn't include" those summaries of Moore-Hoskins and Shaw in that investigative report. (Tr p 141)

c. Third, Capt. Taylor's investigative report did not contain Petitioner's September 5, 2010 email attachment to Petitioner's amended statement. (Tr pp 420-21) At hearing, Capt. Taylor claimed that Petitioner never gave him a copy of his September 5, 2010 email to Ms. Moore-Hoskins, asserting that the contested case hearing was the first time he saw that email. (Tr pp 147- 149, 420-424)

d. Fourth, Taylor incorrectly summarized the statements of Officers Vick, and Casey-Littlefield. In his report, Taylor wrote that Vick stated:

[S]he observed the Officers attempting to gain control by handcuffing and using unarmed self-defense tactics to gain control of the situation.

(Resp Ex 1) However, Officer Vick actually wrote:

I seen [sic] forceful movement from inmates that allowed officers to fear for their life cause officer to use unarmed self-defense tactics to gain control of the situation.

(Resp Ex 1, report vs. Vick's written statement) By incorrectly summarizing this statement, Taylor omitted Vick's comment on the aggressiveness of the inmates.

e. Taylor indicated that Officer Casey-Littlefield wrote:

Sergeant Hill stated that all inmates needed to be cuffed and taken to Unit I, there were approximately 10-14 inmates. Sergeant Casey stated that the inmates started yelling, 'ya'll ain't cuffing us we want to talk to the Captain.

However, Taylor omitted the following statement as the second sentence of that paragraph:

All responding staff started telling the inmates to turn around and put there [sic] hands behind there [sic] back.

(Resp Ex 1, report vs. Casey-Littlefield's statement) By omitting this sentence, Taylor omitted the fact that the inmates refused to comply with all responding staff's orders to submit to cuffs, not just Petitioner's order.

88. In contrast to Taylor's reporting errors, Petitioner attached his September 5, 2010 email to Ms. Moore-Hoskins to his October 12, 2010 amended statement, and placed his Amended Statement in Capt. Taylor's box. In top right hand corner of his Amended Statement and his attached email, Petitioner numbered the pages of his Amended Statement as "Page 1," "Page 2," and such email being "Page 3." By numbering his Amended Statement in that manner, Petitioner showed that the subject email was part of his Amended Statement, and pointed out how Taylor's report was incomplete in another way. (Pet. Ex. 16; Resp Ex 1; Tr p 423)

89. Respondent's investigation, and thus, the investigative report was deficient, because Capt. Taylor did not elicit any information about what happened on September 23, 2010 in Unit IV, Dorm 2A before 8:10 pm. 8:10 pm was when Officer Barfield brought the bags into the dorm for the inmates to pack and move. (Tr pp 135-136) At hearing, Officer Barfield confirmed that, "I was instructed to start" his written statement at the point where he brought in the bags. "That is where everybody, I believe, started at." (Tr. p 35)

- a. Capt Taylor did not ask Officer Vick to describe any events that occurred before 6:45 p.m. on the evening of September 23, 2010. (Tr p 135)
- b. Taylor did not elicit any information from Officer Morabito about events that had allegedly transpired at Pasquotank Correctional before 8:00 p.m. on September 23, 2010. (Tr p 136).
- c. Officer Pickell was in the control room before 8:00 p.m on September 23, 2010, and could have seen what the inmates were doing before Officers Barfield and Morabito arrived on the floor. However, Captain Taylor did not ask Officer Pickell to describe what he observed in the dorm area before 8:00 p.m. (Tr p 137)
- d. Petitioner's statement to Capt. Taylor was the only information included in the internal investigation that described what transpired before 8:00 p.m. in Unit IV, Dorm 2A on September 23, 2010. (Resp. Ex. 1)
- e. By failing to elicit what occurred before 8:10 pm, Capt. Taylor failed to accurately place the incident in Dorm 2A in the proper context of the events occurring on September 23, 2010 in Dorm 2A. In other words, Taylor failed to provide the "big picture" or "full picture" of the events in Dorm 2A on September 23, 2010.

The Disciplinary Procedure

- 90. On September 23, 2010, Robert Jones was the Superintendent of Pasquotank Correctional. (a.k.a. Administrator) (Tr p 174)
- 91. By letter dated November 3, 2010, Mr. Jones notified Petitioner that based on their investigation, Respondent intended to recommend that Petitioner be dismissed for grossly inefficient job performance. Jones also informed Petitioner that Jones would conduct a pre-dismissal conference on November 5, 2010. (Resp. Ex. 2; Tr p 183)
- 92. In preparation for this conference, Petitioner made notes on his November 3, 2010 letter, and on a separate note pad, regarding questions he had about inaccuracies of some statements in the November 3, 2010 letter. (Pet. Exs. 26, 27; Resp Ex 2; Tr pp 432-33)
- 93. During the conference, Superintendent Jones advised Petitioner that he may be dismissed for grossly inefficient job performance. However, Jones never notified Petitioner that he might be dismissed for unacceptable personal conduct. (Tr pp 250; 434).
- 94. During the predisciplinary conference, Petitioner used these notes to ask Superintendent Jones his prewritten questions, *inter alia* (Pet Exs 26, 27):

a. In responding to these questions, Mr. Jones advised Petitioner that the investigation was based on statements from individuals, other than Petitioner, who had been involved in the incident. (Pet. Ex. 26; Tr p 434)

b. Mr. Jones informed Petitioner that he was being charged with grossly inefficient performance, because "staff were hurt" during the September 23, 2010 incident. (Pet Ex 26, Tr p 434)

95. During the conference, Petitioner informed Superintendent Jones that the November 3, 2010 letter contained inaccuracies, and half-truths, *inter alia*:

a. First, the inmates did not request to see the Officer in Charge until after they refused to be [hand] cuffed. (Tr p 439)

b. Second, there were 10, not 8 inmates, who refused the order to lock down.

c. Third, Petitioner did not instruct the inmates to lockdown when he and Officers Barfield and Morabito entered the dorm. Instead, Petitioner called the three inmates out to the core area, but they refused. After the inmates refused, Petitioner ordered the lockdown. The inmates started asking why, and he repeated the order to lockdown again. After Petitioner began locking down Dorm 2A, he repeated his order to lockdown again. (Tr pp 437-439)

d. Fourth, Petitioner asked Jones what policy requires a unit sergeant, to contact the Officer in Charge (OIC) when trying to resolve a problem with inmates on the block. Jones replied, "You don't." In addition, Petitioner advised Mr. Jones that the Standard Operating Procedure states that during a Code 4, the OIC should report to Master Control, not the dorm or block. (Tr p 440)

96. Petitioner told Jones there was no time to call the OIC, and leave two officers with ten inmates who refused to lockdown. (Tr p 441) Petitioner also advised Jones that Capt. Taylor never interviewed Petitioner during the investigation. (Tr p 434)

97. Before the predisciplinary conference, Respondent did not afford Petitioner an opportunity to view the videotape surveillance of the September 23, 2010 incident. (Tr p 442)

98. Jones' alleged that he prepared his November 5, 2010 recommendation for Petitioner's dismissal after he met with Petitioner during the predisciplinary conference on November 5, 2010. (Resp. Ex 3; Tr p 183) Yet, a comparison of the November 5, 2010 letter (Resp Ex 3) and the November 3, 2010 notice of predisciplinary conference (Resp Ex 2) were virtually identical documents. (Resp. Exs 2, 3; Tr pp 251-253).

99. At hearing, Jones admitted that nothing which had occurred prior to 8:00 p.m. on the evening of September 23, 2010, other than the statements provided by Petitioner and Officer Vick, were included in the investigative report. (Tr p 259)

100. On November 24, 2010, Superintendent Jones sent an email to Mr. Glenn Perry, who "works with personnel" in Raleigh, stating:

I reviewed the recording [of the September 23, 2010] incident and the following took place. Sgt Hill sent a C/O into the Block to have the inmates (3) to pack there [sic] property. They stated they were not going to pack and they wanted to see the OIC.

(Emphasis added, Pet Ex. 17; Tr pp 244 – 248)

101. At hearing, Superintendent Jones admitted that there was not anything anywhere on the videotape of the incident, the written documents included in the internal investigation, in his interviews, or in his discussions with Petitioner to support Jones' email statement that the inmates said "they were not going to pack and wanted to see the Officer in Charge." (Tr p 249)

102. Jones also conceded that no witness statements indicated the inmates asked to see the Officer in Charge at any time prior to refusing Petitioner's lawful order. (Tr p 263)

103. Jones acknowledged that Sergeant Dance, who equaled Petitioner in rank, had the ability to use his radio to call the Officer in Charge once he entered the day room. Yet, Sergeant Dance did not call the Officer in Charge. Instead, he told the inmates that they could see the Officer in Charge only after they had complied with the order to submit to cuffs. (Tr p 264) Sergeant Casey Littlefield was also of equal rank to Petitioner, and could have called the Officer in Charge after she entered the day room. (Tr pp 264-65). Nonetheless, Sgt. Littlefield did not call the Officer in Charge. (Tr 265)

104. At hearing, Jones explained that based on the investigation, he concluded Petitioner neglected his job duty by failing to notify the Officer in Charge. He also based that conclusion on Petitioner's "prior knowledge of the events prior to sending the officer [Barfield] into the block, [Petitioner's knowledge] that they [the inmates] were already going to be noncompliant to the directive." (Resp Ex 3, 4; Tr p 188)

a. Although later, Jones conceded that the only information he knew about Petitioner's "prior knowledge," that the inmates were not going to comply with his directive to pack and move, was contained in Petitioner's own statements and in Officer Vick's statement (Tr p 282).

b. However, Petitioner's statement actually indicated that Petitioner did not know the inmates were threatening any violence. (Resp. Ex 1) Similarly, in her statement, Vick's statement contained no information that inmates were threatening violent or aggressive action. (Resp. Ex 1)

105. Petitioner provided information, contained in Petitioner's Exhibits 10, 12, 14, to Superintendent Jones indicating that while the inmates had been observed displaying hostile behavior before Petitioner arrived in Dorm 2A on September 23, 2010,

Petitioner had not been informed of their hostile behavior. (Pet. Ex. 10, 12, 14; Tr p 442) In contemplating disciplinary action, Jones did not consider the fact that Petitioner might not have been informed of what the inmates were saying outside of his presence. (Tr p 294)

106. In Petitioner's September 5, 2010 email to his supervisor, unit manager Moore-Hoskins, Petitioner informed Moore-Hoskins that the disproportionate number of STG inmates in Dorm 2A was interfering with officers' abilities to properly execute their duties. (Pet. Ex. 26; Tr pp 445-46). At hearing, Mr. Jones acknowledged that he had not read Petitioner's September 5, 2010 email that Petitioner had attached to Petitioner's Amended Statement.

107. During cross-examination, Mr. Jones was asked if he directed staff, particularly Asst. Unit Manager Shaw, to do something about the STG inmates in Unit IV, Dorm 2A after the September 23, 2010 incident. Jones responded:

I probably told them to go through and show what kind of population is in that specific unit at that time. I don't recall exactly anything that I did specifically.

(Tr. p. 295)

108. When asked if Jones instructed Asst. Unit Manager Shaw to move any inmates, specifically inmate Davis, out of Unit [4, Dorm] 2A, after the September 23, 2010 incident. Mr. Jones replied:

I have staff that were probably segregating the different inmates to ensure that everything was isolated involving anyone in this incident and appropriate housing be recommended beyond that stage.

Q: Well, was that on your order or not?

A: It could have been on a directive for me to insure all inmates involved in this incident be removed from the area until we could sort out the information.

(Tr. p. 294-295) Jones indicated that he "may have" instructed Asst. Unit Manager Shaw to move any of the inmates out of Unit [sic] 2A. (Tr p 295) Nevertheless, Mr. Jones did not include any of that information in the disciplinary package that was sent to his superiors in Raleigh. (Tr p 295)

Alleged Policy Violations

109. In his November 3, 2010 predisciplinary conference notice, Superintendent Jones alleged that Petitioner had engaged in "grossly inefficient job performance" and violated Respondent's policy on use of force by using excessive

force. Respondent contended that Petitioner's use of pepper spray was excessive force because "[t]he inmates were not aggressive prior to your introduction of OC Pepper Spray." (Pet. Ex. 27) Respondent also alleged that Petitioner had violated Respondent's Anticipated Use of Force Policy. Finally, Respondent alleged that Petitioner's grossly inefficient job performance was also based upon Petitioner's alleged failure to notify the Officer in Charge "of any problems on Unit IV" prior to announcing the Code 4. (Pet. Ex. 27)

110. In his November 5, 2010 Recommendation for Disciplinary Action, Prison Superintendent Jones made precisely the same allegations as in the November 3, 2010 predisciplinary conference notice. (Resp. Ex. 3)

111. In his December 1, 2010 letter to Petitioner regarding "Dismissal," Superintendent Jones alleged that Petitioner should be dismissed both for "unacceptable personal conduct" and for "grossly inefficient job performance." (Resp. Ex. 4)

112. Specifically, Jones first found that:

[A]s evidenced by Institution surveillance video and your own admission, the inmates who refused to comply with the 'lockdown' order were sitting at a table and you retrieved your baton and also your O.C. pepper spray and began to shake the can of spray. After a few minutes of talking with the inmates you sprayed your O.C. pepper spray across all the inmates . . . The use of force was not reasonably necessary to achieve a proper correctional objective;"

(Resp. Ex. 4) A preponderance of the evidence proved that allegation was not supported by substantial evidence on the record.

a. At hearing, Jones' acknowledged that Sgt. Casey Littlefield's description, in the written statement, of inmates yelling, "ya'll ain't cuffing us. He acknowledged Sergeant Casey Littlefield's description of inmates reacting to Petitioner, Officer Maledda and Officer Pippin showing pepper spray by saying, "ya'll better not spray us" (Tr p 265). Jones conceded that officers' statements included in the investigation, contained information that the inmates had threatened violence in retaliation for the use of pepper spray. (Tr p 291). Jones also admitted that he had no reason to discount the accuracy of those statements and that those statements were part of the investigative record. (Tr p 291)

b. At the hearing, Jones acknowledged Officer Vick's statement that the use of force by officers in Dorm 2A appeared to be done to gain control of the situation. (Tr p 268);

c. Jones further conceded that Unit Director Moore-Hoskins viewed the video-surveillance tape, including that portion of the tape showing the inmates' conduct before Petitioner's arrival on Unit IV, Dorm 2A on September 23, 2010.

Jones admitted that Moore-Hoskins concluded, as part of her investigation into disciplinary actions against the inmates, that the inmates were acting aggressively during the September 23, 2010 incident. (Tr pp 271; 273-74)

d. Jones agreed that, before the officers introduced pepper spray, the inmates formed into a "V" formation, rather than being seated at the table as he stated in his December 1, 2010 correspondence. (Tr p 267). Jones also agreed that a "V" formation could be "misconstrued" as an aggressive stance. (Tr p 267)

113. When asked whether certain inmate conduct during the event was aggressive, Jones' refused to consider the acts of the inmates as aggressive. His refusal was shown not to be credible by the following:

a. In his hearing testimony, Jones agreed that a legitimate correctional objective is to control inmates and that one purpose of using force, as stated in Respondent's policy, is to regain control of an inmate situation. (Tr p 266). Yet, Jones did not agree that an inmate stating "you better not discipline us" and an officer acquiescing to that statement would give the inmates control of the situation. (Tr p 265)

b. In the predisciplinary conference, Jones told Petitioner that he did not consider the inmates' conduct, before Petitioner's arrival, to be hostile and in his testimony Jones stated that he did not consider the inmates' conduct, prior to the introduction of pepper spray, to be aggressive. (Tr pp 196-97; 443);

c. Yet, Jones opined that Petitioner should have *anticipated the use of force based on the conduct of the inmates*:

[Based on] what you reviewed prior to making your disciplinary decision that the anticipated use of force policy was violated[,] [w]hat pieces of evidence did you have before you that led you to conclude that the anticipated use of force policy was violated?

I would say the statements [of the officers] and the disc [video] in front of me.

(Tr p 285)

114. There is no dispute that inmates are required to follow lawful orders at all times. They are not permitted to bargain with correctional staff when staff have made decisions regarding, for instance, whether an inmate is to be moved from the dormitory. (Tr p 83) When the inmates threatened the officers in response to the threat of pepper spray, it would have been inappropriate for the officers to holster their pepper spray as it would have required the officers to use hands in order to gain compliance. (Tr p 412)

115. Jones' second finding was that:

... based on findings of the investigation, the inmates in Unit IV, Dorm 2A did not comply with multiple directives to 'Lockdown' and a situation involving inmates developed where the use of force was anticipated. . . . You did not notify the Officer in Charge of any potential problems with the inmates in Unit IV, Dorm 2A prior to the before mentioned incident on September 23, 2010 and you did not make a determination to implement the use of the audio/video camera procedures for the incident" was also not supported by substantial evidence on the record.

However, such finding was not supported by a preponderance of the evidence. First, Jones could not cite a specific policy that requires a correctional officer to notify the Officer-in-Charge that the officer is locking down the unit. (Tr p 289) Neither does Respondent's policies require an Officer in Charge be called because an inmate has refused an order. (Tr p 101) Second, as described above, Jones repeatedly stated that the inmates conduct during the encounter was not aggressive and did not justify the use of force. (Tr p 288) But Jones' statement was contrary to the various officers' written statements in the investigation.

116. After inmates disobeyed the orders to lockdown and submit to cuffs, it would not have been appropriate for Petitioner to allow the inmates to speak with the Captain, as it would have undermined the correctional objective. (Tr p 399) Once an inmate has refused to comply with a lawful order, the officer needs to achieve compliance with the order, or the officer will lose credibility and will be less effective when future orders are given. (Tr p 399) This is a widely held principle among trained law enforcement officers, and widely accepted in the prison. (Tr pp 399 – 400)

117. There was no reason why the inmates could not have seen the Officer in Charge after they had submitted to cuffs as ordered. (Tr p 54)

118. At hearing, Superintendent Jones admitted that he was neither privy to the conversation that took place between the inmates and Petitioner in the Dorm as there was no audio recording of that conversation. Nor could Jones make a judgment as to whether the inmates were aggressive. (Tr p 280) Since Jones was not actually present when the Dorm 2A incident occurred, his decision was based solely on the documents submitted to him during the investigation.

119. Petitioner had a reasonable belief that the use of force would not be necessary. When the inmates threatened the officers, he believed that the use of pepper spray would "take the fight out of them." (Tr p 413) Petitioner initially did not believe that he would have to use pepper spray. (Tr p 414) In fact, the incident of September 23, 2010 was the first incident where Petitioner had encountered inmates who did not comply with the orders that were given. (Tr p 414);

120. When Petitioner called the Code 4, he did not anticipate the use of force would be required. Based on his knowledge of the Code 4 policy, he expected the

Officer in Charge, Lt. Condrey, would proceed to Master Control in compliance with that policy. (Tr pp 338; 339) The officers should not have left the dormitory area when the inmates threatened them, as the situation was still under the officers' control. (Tr p 412) The disciplinary or objective to control the situation would have been lost. (Tr p 347)

121. At hearing Jones agreed that, in order to sustain a claim of "grossly inefficient job performance" resulting in potential for death or serious bodily injury, he was required to show both that (1) Petitioner's conduct did not comport with Petitioner's job description and that (2) Petitioner's alleged failure to perform in compliance with his job description was the causal factor creating potential for death or serious bodily injury. (Tr pp 296-298).

122. Jones acknowledged that Lt. Condrey failed to follow procedure by failing to report to Master Control as required by policy, and that Officer Vick failed to secure the slider doors to the day room of the dormitory. (Tr pp 299-300). Both of those factors put Lt. Condrey in harm's way by putting him in the presence of aggressive inmates who were spilling out of the day room while fighting with staff. In addition, there was no evidence in the record that Lt. Condrey followed Code 4 procedure by stopping at the closest secure area to the disturbance in order to assess the situation prior to becoming engaged. (Pet. Ex. 6)

123. Respondent did not discipline either Officer Vick or Lt. Condrey for failing to follow policy. (Tr p 300) Respondent did not discipline any of the correctional officers, who used pepper spray on the inmates simultaneously with Petitioner, for not anticipating use of force by the inmates, or for using excessive force. Respondent did not discipline either Sergeants Barfield or Casey-Littlefield, who responded to the incident, for failing to contact the Officer in Charge. (Tr p 310)

124. If the inmates had complied with the lawful order and submitted to cuffs, then they would have had the opportunity to speak with the Officer in Charge. (Tr pp 412-413; 414).

125. When Petitioner called a Code 4, he had reason to believe that an emergency or disturbance was occurring that would require more correctional staff than was readily available. (Tr p 376)

126. Petitioner was never advised, before the incident on September 23, 2010, of the inmates' potentially aggressive conduct before he entered the cell block. (Tr p 385) Petitioner was not advised, before the incident on September 23, 2010, that there had been problems with inmate Davis on other units. (Tr p 424) After the incident, Petitioner learned that inmate Davis had been moved at least four times before September 24, 2010, which was an unusual number of times to be moved. (Pet. Ex. 25; Tr pp 424-25; 429)

127. Although Respondent alleged that the inmates had requested to speak with the Officer In Charge before Petitioner issued the order to lockdown, and/or before

Petitioner ordered the inmates to submit to cuffs, Officer Barfield did not include any statement to that effect in his written statement regarding the incident. (Tr p. 51)

128. Although Respondent alleged that the inmates had requested to speak with the Officer In Charge before Petitioner ordered the lockdown and/or before Petitioner ordered the inmates to submit to cuffs, Officer Morabito did not include any statement to that effect in his written statement regarding the incident. (Tr p 86) Officer Morabito could only recall the prisoners asking to see the Officer in Charge after the inmates had refused to comply with direct orders. He could not recall the inmates requesting to see the Officer in Charge prior to their refusing to comply with a direct order. (Tr p. 87)

129. In the hearing, Respondent's witnesses Barfield and Morabito claimed that the inmates had made threats of aggression, by saying they would cause "a code," i.e. "beat the guy up basically," (Tr. p 66), if Petitioner moved them instead of moving inmate Davis. (Tr pp 16; 67). Barfield did not recall telling Petitioner that the inmates had threatened "a code." (Tr pp 33; 37-38). However, Barfield may have made the statement to Officer Morabito or Officer Vick. (Tr p 38)

130. Officer Barfield did not include any information, in his written statement, regarding the inmates' alleged threat to start a fight if inmate Davis was not moved. (Resp. Ex 1; Tr pp 34-35) Barfield was not in the Sgt.'s office when Petitioner spoke with the three inmates. At hearing, Barfield admitted that he did not hear any of the conversation that took place in the Sgt.'s office in Dorm 2A. (Tr pp 32-33).

131. Officer Morabito heard the inmates threaten "a code" if inmate Davis was not moved. (Tr p 67) Officer Morabito admitted that if the inmates had made the threat to Petitioner, it could have been an "idle threat," and that he did not know whether the inmates were serious. (Tr p 84)

132. At hearing, Petitioner opined that the inmates could not have vocalized any threat toward inmate Davis while in Petitioner's office. Had they made any threat at that time, Petitioner would have had grounds to take them into custody, would have taken them into custody at that time, and would have removed them from the unit for making threats. (Tr pp 324; 390)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

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

3. "No career employee may be discharged, suspended, or demoted for disciplinary reasons except for just cause." N.C. Gen. Stat. §126-35 (2011).

4. "Just Cause" is not defined in the pertinent sections of the State Personnel Act or accompanying regulations. *N.C. Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004). See also, N.C. Gen. Stat. §126-35 (2011); 25 NCAC 01J.0604 (2011).

5. "Just Cause," . . . "is a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." *N.C. Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004) (internal citations omitted).

6. Determining whether Respondent had just cause to terminate the Petitioner requires two separate inquiries: first, "whether the employee engaged in the conduct the employer alleges, and second whether that conduct constitutes just cause" for the termination. *N.C. Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (internal citations and quotations omitted).

7. Where the employee has a reasonable belief that his or her conduct was appropriate or necessary, the conduct would not constitute just cause for discipline. *N.C. Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 672, 599 S.E.2d 888, 902-903 (2004); *Urback v. East Carolina University*, 105 N.C. App. 695, 608, 414 S.E.2d 100, 102, disc. rev. denied 331 N.C. 291, 417 S.E.2d 70 (1992); *Mendenhall v. N.C. Department of Human Resources*, 119 N.C. App. 644, 652, 459 S.E.2d 820, 825 (1995).

8. Just cause requires that an employer's decision be based on substantial evidence, which is "more than a scintilla or a permissible inference" and cannot be established by "cherry picking" the facts upon which the employer relies without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 322, 283 S.E.2d 495, 501 (1981); *Kandler v. Department of Correction*, 80 N.C. App. 444, 451, 342 S.E.2d 910, 914 (1986); *Thompson v. Wake County Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (citations omitted); *Wiggins v. North Carolina Department of Human Resources*, 106 N.C. App. 302, 306-07, 413 S.E.2d 3, 5-6 (1992).

9. A career state employee may be dismissed, without prior warning, for grossly inefficient job performance, which is defined as "a type of unsatisfactory job performance that occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by management of the work unit or agency; and, that failure results in (a) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility; or (b) the loss of or damage to state property or funds that result in a serious impact on the State or work unit." 25 NCAC 01J.0606; 25 NCAC 01J.0614(5)

10. A career state employee may be dismissed without prior warning for unacceptable personal conduct, which is defined as:

- (a) conduct for which no reasonable person should expect to receive prior warning;
- (b) job-related conduct which constitutes a violation of state or federal law;
- (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
- (d) the willful violation of known or written work rules;
- (e) conduct unbecoming a state employee that is detrimental to state service;
- (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
- (g) absence from work after all authorized leave credits and benefits have been exhausted; or
- (h) falsification of a state application or in other employment documentation.

25 NCAC 01J.0606 (2011). 25 NCAC 01J.0614(8) (2011).

11. In considering whether to take disciplinary action, a state employer is required to review "all relevant factors and considerations" and to weigh "factors of mitigation" as well. 25 NCAC 01B.0413.

12. The following factors have been widely used to determine whether there is just cause of discipline (See, e.g., Abrams and Noland, Toward a Theory of Just Cause in Employee Discipline Cases, 85 Duke Law Journal 594 (1985), cited in *N.C. Dep't of Env. and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004);

- a. Did the employer provide the employee forewarning or foreknowledge of possible or probable disciplinary consequences of the employee's conduct?
- b. Was the employer's rule or managerial order reasonably related to the orderly, efficient and safe operation of the employer's business and the performance that the company might properly expect of the employee?

- c. Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of the employer?
- d. Was the employer's investigation conducted fairly and objectively?
- e. At the investigation, did the decision maker obtain substantial evidence or proof that the employee was guilty as charged?
- f. Did the employer apply its rules, orders and penalties even-handedly and without discrimination to all employees?
- g. Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee's proven offense and the record of the employee in his service with the employer?

13. The preponderance of the evidence established that Respondent did not have just cause to terminate Petitioner from employment. Petitioner had a reasonable belief that the use of force would not be necessary, and, therefore, did not violate Respondent's policy on "anticipated use of force." Petitioner had a reasonable belief that the presence of additional officers would assist in gaining inmate compliance and would allow for the resolution of the situation without resort to force. Once inmates began threatening officers with noncompliance and "fighting," Petitioner had a reasonable belief that the use of pepper spray would subdue the inmates without resort to hands-on physical force, and, therefore, did not violate Respondent's policy on the "excessive use of force."

14. Respondent did not prove by a preponderance of the evidence that Petitioner failed to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by management of the work unit or agency. Respondent did not show that Petitioner had prior knowledge or grounds for anticipating the use of force. Neither did Respondent prove that Petitioner's use of Code 4 procedures, without also invoking the anticipated use of force procedure, was a violation of policy, institutional practice, or was otherwise an unreasonable response to the inmate situation, which Petitioner confronted.

15. Respondent did not show by a preponderance of the evidence that Petitioner failed to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by management of the work unit or agency. Respondent did not show that Petitioner's use of force, in using pepper spray on the inmates, violated policy, institutional practices, or was otherwise, an unreasonable response to the inmate situation with which Petitioner was confronted.

16. Even if Respondent had shown that Petitioner failed to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by management of the work unit or agency, Respondent failed to meet its burden of showing a causal connection existed between Petitioner's conduct and the potential for bodily injury.

17. There were three significant intervening variables, without the presence of which, a potential for injury beyond that which would normally be expected in a prison setting, would not have existed.

a. First, the officers in the control booth did not follow the "Code 4" policy (Pet Ex 6), and secure the dormitory area by locking the slider doors to the dorm. As a result of that failure, the inmates were allowed to move outside the boundaries of the dormitory during the incident, thus, making it more difficult for officers to contain and restrain the inmates.

b. Second, Lt. Condrey, as the "Officer in Charge" failed to report to Master Control, as required by "Code 4" policy. (Pet Ex 6, Sec V, M). Once Lt. Condrey had foregone that procedure, and did not stop at a secure location to assess the situation before becoming involved, he created the potential for injury to himself and those who were involved in assisting him.

c. Third, Officers Barfield and other officers who saw or heard inmates exhibit threatening or aggressive conduct did not follow policy and report such threatening or aggressive conduct to Petitioner. By failing to provide Petitioner with that information, those officers created the potential for injury by depriving Petitioner of information, which might have assisted him in more accurately predicting outcomes of the event.

d. Finally, the inmates' conduct was outside the usual response which Petitioner had received in similar circumstances, thereby making it difficult for Petitioner to reliably predict outcomes of the event.

18. The preponderance of evidence established that Respondent did not discipline Officer Vick for failing to close the unit slider door, did not discipline Lt. Condrey for failing to follow policy and report to Master Control, and did not discipline any other officer involved in the September 23, 2010.

19. The preponderance of the evidence showed that Respondent's dismissal of Petitioner was not commensurate with Petitioner's conduct, especially considering that other officers were not similarly disciplined for acknowledged violations of policy, and given Petitioner had no prior disciplinary infractions;

20. Respondent lacked substantial evidence to support its allegations that Petitioner had violated the anticipated use of force policy or the use of force policy, in that Respondent failed to consider contradictory evidence or evidence from which conflicting inferences could be drawn.

21. Respondent failed to conduct a fair investigation. It failed to gather information about significant events that transpired prior to Petitioner's encounter with the inmates, failed to interview Petitioner after he had submitted his written statement, failed to include all of the information that Petitioner had submitted to Capt. Taylor and

Mr. Jones, and, failed to include information that it learned for the first time during Petitioner's predisciplinary conference.

22. Furthermore, Respondent was aware that Petitioner intended to appeal Petitioner's termination. Yet, Respondent failed to preserve, and produce Taylor's interview notes, and Jones' secretary's notes from Petitioner's predisciplinary conference, thus, failing to provide any reviewing entity with an accurate and complete account of what occurred during the September 23, 2010 incident in Dorm 2A.

23. Where a party fails to introduce in evidence documents relevant to the matter in question and within his control, there is a presumption that the evidence withheld, if forthcoming, would injure his case. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527, 613 S.E.2d 274, 281 (2005).

24. Based upon the foregoing, Respondent's decision to terminate Petitioner was made upon unlawful procedure, in violation of 25 NCAC 01J.0613(4)(d). Respondent failed to conduct the employee's predissmissal conference with the express purpose "to listen and to consider any information put forth by the employee, in order to insure that a dismissal decision is sound and not based on misinformation or mistake."

25. Based upon the foregoing, the preponderance of the evidence proved that Respondent's decision to terminate Petitioner from employment was made by an unlawful procedure, in violation of 25 NCAC 01B.0413, which requires Respondent to weigh "factors of mitigation."

26. Pursuant to N.C. Gen. Stat. § 126 and the administrative rules in 25 NCAC 01B .0421, 25 NCAC 01B .0423, 25 NCAC 01B .0424 , 25 NCAC 01B .0428, Respondent shall reinstate Petitioner to his position or a similar position, and give Petitioner the applicable remedies that a prevailing party is entitled to such as backpay, and reimbursement for attorneys' fees and legal expenses as a prevailing party.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge determines that Respondent's termination of the Petitioner was without just cause, based upon unlawful procedure, and therefore, should be **REVERSED**. Pursuant to N.C. Gen. Stat. § 126 and 25 NCAC 01B .0400, Petitioner is entitled to reinstatement, back pay, attorney's fees, and other all remedies to which a prevailing party is entitled.

ORDER AND NOTICE

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 3rd day of February, 2012.



Melissa Owens Lassiter
Administrative Law Judge

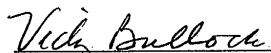
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Mary-Ann Leon
NC BAR NO. 26476
P.O. Box 20338
704 Cromwell Drive, Suite E
Greenville, NC 27858
ATTORNEY FOR PETITIONER

Oliver G. Wheeler, IV
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 6th day of February, 2012.



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