

NORTH CAROLINA REGISTER

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September 15, 2014

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NORTH CAROLINA REGISTER
Publication Schedule for January 2014 – December 2014

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

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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 19A – DEPARTMENT OF TRANSPORTATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Transportation intends to adopt the rule cited as 19A NCAC 02E .0612 and amend the rules cited as 19A NCAC 02E .0601-.0604 and .0608-.0611.

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

- ☒ OSBM certified on: April 2, 2014
☐ RRC certified on:
☐ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):
www.ncdot.gov/about/regulations/rules

Proposed Effective Date: January 1, 2015

Public Hearing:

Date: October 16, 2014

Time: 6:00 p.m.

Location: City of Asheboro Public Works Facility Conference Room, 1312 N Fayetteville St., Asheboro, NC

Reason for Proposed Action: The proposed administrative code changes involve vegetation removal by permitted entities along the NC Highway System. New administrative code (NCAC) is proposed to comply with changes as a result of amendments to existing NC General Statute 136-133.1. In addition, other proposed administrative code revisions are necessary to comply with ongoing implementation of NC General Statute 136-93(b) as well as the newly codified NC General Statute 136-93.3. The revisions clarify existing NCAC rule requirements and reorganize existing rules to improve usability. The new code and proposed rule revisions will enable North Carolina Department of Transportation staff to oversee and ensure compliance with statutory allowances for permitted vegetation removal. The applicable statutes allow for permits to remove vegetation by outdoor advertisers and business facilities, including a new sub-category known as agritourism activities.

Comments may be submitted to: Helen Landi, NC Department of Transportation, 1578 Mail Service Center, Raleigh, NC 27699-1578

Comment period ends: November 14, 2014

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed

objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☒ State funds affected - 19A NCAC 02E .0608-.0612
☐ Environmental permitting of DOT affected
☐ Analysis submitted to Board of Transportation
☐ Local funds affected
☐ Substantial economic impact (≥\$1,000,000)
☒ No fiscal note required by G.S. 150B-21.4 – 19A NCAC 02E .0601-.0604 per G.S. 136-93.3

CHAPTER 02 – DIVISION OF HIGHWAYS

SUBCHAPTER 02E – MISCELLANEOUS OPERATIONS

SECTION .0600 - SELECTIVE VEGETATION REMOVAL POLICY

19A NCAC 02E .0601 SELECTIVE VEGETATION REMOVAL PERMIT REQUIRED TO REMOVE VEGETATION FROM STATE HIGHWAY RIGHT OF WAY

~~(a) In recognition of the State of North Carolina's desire to assure that high quality and aesthetically pleasing views are provided highway users, along with recognizing that, within certain specified limitations, business facilities, hereinafter referred to as facilities, defined as office, institutional, commercial, and industrial buildings, and certain outdoor advertising are legitimate commercial uses of property adjacent to the highways and are an integral part of the State's business and marketing economy, selective vegetation removal permits for opening views to facilities and legally erected forms of outdoor advertising, which border State highways, are provided by this Section.~~

~~(b)(a)~~ Selective cutting, thinning, pruning, or removal of vegetation within highway rights of way may be permitted only for opening views to a facility building business facilities and legally erected forms of outdoor advertising as described in G.S. 136-93(b), that which are located directly adjacent to State highway rights of way. For purposes of selective vegetation removal permitting, facilities, permitting "business facilities",

hereinafter referred to as facilities, are defined as office, institutional, commercial, and industrial buildings. In accordance with G.S. 136-93.3, "agritourism activities" as defined in G.S. 99E-30 are considered facilities under this Section. The following requirements apply to facilities under this Section:

- (1) all facilities, except for agritourism activities shall include at least one permanent structural building-building;
- (2) ~~The~~ the building must shall have all required local and State permits, be related to the facility's function, and be open and operational on a year-round ~~basis-basis~~; and
- (3) ~~When such any~~ cutting, thinning, pruning, or removal of vegetation ~~is~~ is allowed pursuant to G.S. 136-93(b), ~~it~~ shall be performed by the permittee or his agent at no cost to the Department of Transportation and shall comply with this Section.

(b) For purposes of this Section, agritourism activities include any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. The following requirements apply to agritourism activities under this Section:

- (1) agritourism activities that qualify for selective cutting, thinning, pruning, or removal of vegetation shall be located directly adjacent to State highway rights of way.
- (2) the requested selective vegetation removal site shall be directly related to agritourism activities.
- (3) the agritourism activities shall be open for business at least four days per week, with a minimum of 32 hours per week, and at least 10 months of the year.
- (4) the applicant for a selective vegetation removal permit shall certify that the activities qualify as an agritourism activity. The Department may require additional documentation from the applicant if the requested site's compliance as eligible agritourism activities remains in question.

Authority G.S. 136-18(5); 136-18(7); 136-18(9); 136-93(b); 136-93.3.

19A NCAC 02E .0602 REQUESTS FOR SELECTIVE VEGETATION REMOVAL PERMITS FOR A FACILITY

(a) Applications for selective vegetation cutting, thinning, pruning, or removal (exclusive of grasses) at a facility shall be made by the owner of the facility to the appropriate Division Engineer of the North Carolina Department of Transportation, Division of Highways. ~~Applications with all required documentation~~ Applications shall be submitted in both printed and electronic form. A non-refundable fee of two hundred dollars (\$200.00) must accompany each application. Applications for selective vegetation removal permits shall include the following information:

- (1) applicant contact information;
- (2) name and location of the facility;
- (3) indication of request being for a business facility or agritourism activity;
- (4) municipal review indication, if applicable;
- (5) requested use of and site access for power-driven equipment in accordance with Rule .0604(22) of this Section;
- (6) performance and indemnity bond or certified check or cashier's check pursuant to G.S. 136-93;
- (7) if using a contractor for vegetation removal work, identify the contractor and their qualifications if contractor is not listed on the Department's website directory of qualified transportation firms;
- (8) payment of non-refundable two hundred dollar (\$200.00) permit fee, pursuant to G.S. 136-18.7;
- (9) certificate of liability and all legally required insurance coverage, including worker's compensation and vehicle liability in the amounts required and according to North Carolina law;
- (10) geographic information system document and property tax identification number to verify location of facility in relation to municipal limits;
- (11) verification of on-site marking and tree-tagging requirements;
- (12) sketch, and if needed, amended sketch of the requested cut zone and information about trees to be cut, thinned, pruned, or removed in accordance with Rule .0604(11) of this Section;
- (13) certification that applicant has permission from the adjoining landowner(s) to access their private property, if applicable, for the purpose of conducting selective vegetation removal permit activities;
- (14) certification that the facility qualifies as an agritourism activity as required pursuant to G.S. 136-93.3; and
- (15) applicant's notarized signature.

(b) Selective vegetation cutting, thinning, pruning, or removal for opening views to facilities shall be permitted only for the permittee's facilities adjacent to highway right of way at locations where such facilities have been ~~constructed~~, constructed or where agritourism activities are carried out as set forth in G.S. 136-93.3 and Rule .0601 of this Section. Complete removal of all trees and other vegetation shall not be permitted. Dogwood trees and redbud trees shall be preserved. Other ~~trees, which trees that~~ are not screening the facility from view and are four caliper inches and greater in diameter, measured six inches from the ground, shall be preserved. Trees, shrubs, and other vegetation less than four caliper inches in diameter may be removed. Trees, shrubs, and other ~~vegetation, which~~ vegetation that are four caliper inches or greater in diameter as measured six inches from the ground and not to be preserved, may be cut,

thinned, pruned, or removed according to approval of Department personnel designated by the Division Engineer. All vegetation cutting, thinning, pruning, or removal shall be in accordance with ~~accepted the current edition and subsequent amendments and editions of the American National Standard for Arboricultural Operations-Safety Requirements ANSI Z133.1, approved by the American National Standards Institute and published by the International Society of Arboriculture. (ISA) standards.~~ Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained from the International Society of Arboriculture (ISA) for a twenty dollar (\$20.00) cost. The ISA may be contacted at P.O. Box 3129 Champaign, Illinois 61826 or by accessing this website: <http://www.isa-arbor.com/>.

~~(e) The provisions in this Rule shall not be used to provide visibility to undeveloped property or to on-premise signs.~~

~~(d)(c)~~ Applications ~~must~~ shall be accompanied by a sketch showing the requested limits of the selective cutting, thinning, pruning, or removal of vegetation. For ~~commercial, industrial, institutional, and office facilities facilities,~~ the limits of selective cutting, thinning, pruning, or removal shall be restricted to ~~the~~ one area of right-of-way immediately adjacent to frontage property of the facility but not to exceed 1,000 contiguous linear feet. Facilities with frontage property on opposite sides of the State highway right-of-way may split the maximum vegetation removal distance between the two sides of the highway, resulting in a total of two contiguous cutting or removal distances along frontage property, with the total of the two sides not exceeding 1,000 linear feet. The permitted limits of the selective vegetation removal permit shall not be altered for subsequent applications. The applicant shall also include on the sketch the location, species, and caliper inches of all trees with a diameter of four caliper inches and greater, as measured six inches above ground level, at the time of the application and desired to be cut, thinned, pruned, or removed.

~~(e) The applicant must certify that permission has been obtained from the adjoining landowner(s) to access their private property, if applicable, for the purpose of conducting activities related to the selective vegetation removal permit application.~~

~~(f)(d)~~ The selective vegetation removal request may be ~~investigated reviewed~~ on site by Department personnel and a representative of the applicant.

~~(g)(e)~~ ~~If~~ In accordance with G.S. 136-93(d), if the application for vegetation cutting is for a site located within the corporate limits of a municipality and ~~if~~ the municipality has previously advised the Division Engineer in writing of its desire to review such applications, the applicant shall deliver the application to the municipality at least 30 days prior to submitting the application to the Department, so ~~the municipality that local officials~~ shall be given the opportunity to review the application. Information regarding whether a municipality desires to review vegetation removal applications may be found on the Department website www.ncdot.gov or by contacting the Division Engineer's office.

Authority G.S. 136-18(5); 136-18(7); 136-18(9); 136-18.7; 136-93; 136-93.3; 136-130.

19A NCAC 02E .0603 ISSUANCE OR DENIAL OF SELECTIVE VEGETATION REMOVAL PERMIT FOR A FACILITY

~~(a) The applicant, as part of the application, shall state in writing the date that he has delivered a copy of the application with required attachments to a municipality which has previously advised the Department in writing that it seeks to review such applications. After the 30-day municipal review period has concluded and all required documentation has been received by the Department, including the fee set out in G.S. 136-18.7, the Division Engineer shall have 30 days to approve or deny the application. If written notice of approval or denial is not given to the applicant within the 30-day Department review period, the application shall be deemed approved. If the application is denied, the Division Engineer shall advise the applicant, in writing, of the reasons for denial.~~

(a) Pursuant to G.S. 136-133.2, within 30 days following receipt of the application for a selective vegetation removal permit for a facility, including the fee set out in G.S. 136-18.7, the Division Engineer shall approve or deny the application. The applicant, as part of the application, shall state in writing the date that he or she has delivered a copy of the application with required attachments to a municipality that has previously advised the Department in writing that it seeks to provide comments regarding such applications. The applicant shall deliver the application to the municipality at least 30 days prior to submitting the application to the Department. The list of municipalities requesting to review applications shall be maintained and updated by the Department on the website www.ncdot.gov. Upon receipt of the completed application, the Division Engineer shall have 30 days to approve or deny the application. If written notice of approval or denial is not given to the applicant within the 30-day Department review period, then the application shall be deemed approved. If the application is denied, the Division Engineer shall advise the applicant, in writing, of the reasons for denial.

(b) The application shall be denied by the Division Engineer if:

- (1) ~~The~~ the application is for the opening of view to a facility that does not meet the requirements of Rule .0601 of the Section; which has been declared illegal or is currently involved in litigation with Local, State, or Federal governments;
- (2) ~~It~~ it is determined by Departmental personnel that the facility is not screened from view;
- (3) ~~The~~ the application is for the opening of view to undeveloped property or to a facility that, due to obstructions off the right of way, is screened from view from the travel way regardless of the presence or absence of trees and other vegetation on the highway right of way;
- (4) ~~Removal~~ it is determined by Department personnel that removal of vegetation will may adversely affect the safety of the traveling public;
- (5) ~~The~~ the application is solely for providing visibility to on-premise signs;

- (6) ~~The~~ the application is for the removal of vegetation planted in accordance with a local, State, or Federal beautification project. However, if a mitigation replanting plan ~~which~~ that is related to the site for which the vegetation permit request is made (as set forth in 19A NCAC 02E .0611 except for the provisions in Paragraph (d) and Subparagraph (g)(11)) is ~~approved~~ agreed upon in writing by the applicant, the Department, and if applicable, the Federal Highway ~~Administration~~ Administration, then this subsection does not apply;
- (7) ~~On~~ on two previous occasions, the applicant has failed to meet the requirements of a selective vegetation removal permit. ~~This is not cause for denial if permit, unless the applicant engages a landscape contractor to perform the current work;~~
- (8) ~~It involves opening of the application is for removal of vegetation that will open views to junkyards;~~
- (9) ~~The~~ the applicant fails to ~~provide complete an application, as described in Rule .0602 of this Section; all documentation required by statute and rule;~~
- (10) ~~If~~ any cutting, thinning, pruning, or removal of vegetation encompassing the entirety of the maximum vegetation cutting or removal zone is prohibited due to conservation easements or conditions affecting the right of way to which the State is subjected or agrees in writing to subject itself and other restrictions agreed upon by the State in writing in the right of way; or State or Federal rules, statutes, or permits; or
- (11) ~~If~~ an unlawful destruction or illegal cutting of vegetation has occurred within the highway right-of-way to create, increase, or improve a view to the facility from the travel way including acceleration and deceleration ~~ramps, ramps, the~~ The Department shall not issue a selective vegetation removal permit at the requested site for a period of ~~five years~~ five years that shall begin on the date the Department resolves the unlawful destruction or illegal cutting incident by settlement agreement with responsible party or the Department administratively closes the case. For the purposes of this Section, unlawful destruction or illegal cutting is defined as the destruction or cutting of trees, shrubs, or other vegetation on the State-owned or State-maintained rights-of-way by anyone other than the Department or its authorized agents, or without written permission of the Department.

19A NCAC 02E .0604 CONDITIONS OF SELECTIVE VEGETATION REMOVAL PERMIT FOR FACILITIES

The following apply to the conditions of selective vegetation removal permit for ~~facilities; facilities or permit requirements:~~

- (1) Selected vegetation, within the approved limits as set forth in Rule .0602(c) of this Section may be cut, thinned, ~~pruned~~ pruned, or removed by the permittee in accordance with the standards set out in G.S. 136-133.4;
- (2) The permittee shall indemnify and hold harmless the North Carolina Department of Transportation, and its employees, attorneys, agents, and contractors against any and all claims or causes of action, and all losses therefrom, arising out of or in any way related to the permittee's operation;
- (3) The permittee shall furnish a ~~Performance and Indemnity Bond or certified check or cashier's check~~ Performance and Indemnity Bond, or certified check or cashier's check made payable to North Carolina Department of Transportation for the minimum sum of two thousand dollars (\$2,000). ~~The bond, certified check or cashier's check~~ Performance and Indemnity Bond, or certified check or cashier's check shall cover all restoration of the right of way to the condition prior to the occurrence of the damage caused by the permittee or the permittee's agent, if damage occurs during the permitted selective vegetation removal. ~~The bond or certified check or cashier's check~~ Performance and Indemnity Bond, or certified check or cashier's check is required before each permit to cut vegetation is issued. ~~The bond~~ Performance and Indemnity Bond, or certified check or cashier's check shall run concurrently with the permit. ~~The bond~~ Performance and Indemnity Bond, or certified check or cashier's check shall be released after a final inspection of the work by ~~NCDOT the Department~~ reveals that all work provided for and specified by the permit is found to be completed and all damages to the right of way, including damage to fencing and other structures within the right-of-way, have been repaired or restored to the condition prior to the occurrence of the damage caused by the permittee or the permittee's agent;
- (4) Companies that plan to apply for two or more permits may provide continuing bonds for a minimum of one hundred thousand dollars (\$100,000) and ~~this~~ that type of bond shall be kept on file by the Utilities Unit of the Department;
- (5) If the work is to be performed by any entity other than the ~~sign owner or~~ permittee, either the permittee or the other entity ~~must~~ shall furnish the ~~required bonding~~ Performance and Indemnity Bond or certified check or cashier's

Authority G.S. 99E-30; 136-18(5); 136-18(7); 136-18(9); 136-93; 136-93.3; 136-130.

- ~~check~~, as described in this ~~Section~~, Rule, for all work provided for and specified by the permit. Required forms for all bonds are available upon request from the ~~Department~~, Department and can be found on the Department's website www.ncdot.gov. Bonds are to be furnished with the selective vegetation removal ~~Selective Vegetation Removal~~ application form to the ~~appropriate~~ official assigned to receive selective vegetation removal applications at the local ~~NC DOT—North Carolina Department of Transportation~~, Division of Highways Office;
- (6) The permittee shall also provide proof of liability insurance of a minimum coverage of five million dollars (\$5,000,000). Whoever performs the work, the permittee, his ~~contractor—contractor~~, or agent, shall maintain all legally required insurance coverage, including ~~worker's compensation—workers' compensation~~ and vehicle liability in the amounts required by ~~and according to~~ North Carolina law. The permittee, his contractor and ~~agent~~, agent are liable for any losses due to the negligence or willful misconduct of his agents, assigns, and employees. The permittee may, in lieu of providing proof of liability insurance as described in this ~~paragraph~~, Item, be shown as an additional insured on the general liability policy of the approved contractor or agent to perform the permitted work on condition that the contractor or agent's policy is for a minimum coverage of five million dollars (\$5,000,000) and the permittee provides proof to the Department of the coverage. The permittee or contractor or agent providing the coverage shall also name the Department as an additional insured on its general liability policy and provide the Department with a copy of the certificate showing the Department named as an additional insured. Regardless of which entity provides the proof of general liability insurance, the required limit of insurance may be obtained by a single general liability policy or the combination of a general liability and excess liability or umbrella policy;
- (7) The permittee shall provide a document verifying the requested selective vegetation removal site location in relationship to corporate limits of a municipality. The document shall be a current geographic information system map of the nearest municipality, with color-coded boundary lines and a corresponding key or legend indicating corporate limit and territorial jurisdiction boundaries and indicating the precise location of the business facility. The permittee shall also provide the property tax identification number for the parcel on which the ~~boundary or~~ facility is located. The Department may require additional information if the boundary or facility location remains in question;
- (8) Access from the highway main travel way shall be allowed only for surveying or delineation work in preparation for and in the processing of an application for a selective vegetation removal permit;
- (9) The permittee shall perform site marking of the maximum vegetation cut or removal zone. The applicant shall mark the permitted cutting distances according to Rule .0602(c) of this Section, ~~19A NCAC 02E .0602(d)~~. The two maximum points along the right-of-way boundary (or fence if there is a control of access fence) shall be marked with visible flagging tape. The two maximum points, corresponding to the ~~actual~~ beginning point and the ~~actual~~ ending point, point along the edge of the pavement of the travel way, perpendicular to the maximum points marked along the right-of-way boundary, shall be marked with spray paint. If the facility is located next to an acceleration or deceleration ramp, the two corresponding maximum points shall be marked along the edge of the pavement of the travel way of the ramp instead of the mainline of the roadway;
- (10) The permittee shall tag, with visible material or flagging, ~~those trees—trees~~, according to Rule .0602(b) of this Section, with a diameter of four caliper inches and larger, as measured six inches above ground ~~level~~, level at the time of the application that are screening the facility from view and are requested to be cut, thinned, pruned, or removed within the maximum vegetation cut or removal zone. Trees tagged for cutting, thinning, pruning, or removal shall match with the trees shown on the required sketch of the requested vegetation cut or removal zone;
- (11) The Department may disapprove the requested cutting, thinning, pruning, or removal of selected trees of four caliper inches or greater in diameter, as measured six inches above ground ~~level~~, which level that are not screening the facility from view from the roadway. The Department ~~will~~ shall make this determination by allowing selective thinning of tree density ~~which—that~~ opens the view to the facility or agritourism activities across the entire length of the maximum cut or removal zone, without complete removal of all trees and other vegetation. The Department shall disapprove cutting, thinning, pruning, or removal of dogwood and redbud trees that may have been tagged in error. If trees are disapproved for cutting, thinning, ~~pruning~~

- pruning, or removal, the Department shall specify those trees to the applicant during the site ~~review~~investigation. The applicant shall remove the tree flagging for the disapproved trees and submit to the Department by electronic means (including electronic mail or facsimile) an amended version of the original sketch of the site by indicating the changes on the sketch and initialing and dating the changes ~~thereon; thereon. Failure to amend the sketch of the site according to this rule shall be considered failure to provide required documentation;~~
- (12) If any cutting, thinning, pruning, or removal of vegetation from any portion of but less than the entirety of the maximum vegetation cutting or removal zone is prohibited due to conservation easements or conditions affecting the right of way to which the State is subjected or agrees in writing to subject itself and other restrictions agreed upon by the State in writing in the right of way or State or Federal rules, statutes, or permits, the permittee shall comply with applicable easements, rules, statutes, or permits for those portions of vegetation.
- (a) If applicable conservation easements, or conditions affecting the right of way to which the State is subjected or agrees in writing to subject itself and other restrictions agreed upon by the State in writing in the right of way, State or Federal rules, statutes, or permits allow certain degrees and methods of cutting, thinning, pruning, or removal for portions of vegetation, the permittee shall comply with applicable easements, State or Federal rules, statutes, or permits including equipment type for those portions of vegetation.
- (b) Portions of the maximum cutting or removal zone not within a conservation easement nor applicable to conditions affecting the right of way to which the State is subjected or agrees in writing to subject itself and other restrictions agreed upon by the State in writing in the right of way, nor regulated by State or Federal rules, statutes, or permits regulating vegetation removal and other activities shall be governed by standards set out in G.S. 136-93;
- (13) The permittee ~~must~~shall adhere to erosion control requirements, according to the North Carolina General Statutes, Article 4, Chapter 113A entitled: Sedimentation Pollution Control Act of 1973;
- (14) A Division of Highways Inspector may be present while work is underway. The presence or absence of a Division of Highways inspector at the work site does not lessen the permittee's responsibility for conformity with the requirements of the permit. ~~and all applicable statutes and rules. Should the inspector fail~~ When a present inspector fails to point out work that does not conform with the requirements, it does not prevent later notification to the permittee that the work is not in compliance with the permit;
- (15) A selective vegetation removal permit ~~must~~ shall be secured for each applicable facility prior to performing any vegetation removal work. The Permittee or its contractor or agent ~~must~~ shall have a copy of the ~~Selective Vegetation Removal Permit~~ selective vegetation removal permit on the work site at all times during any phase of selective vegetation cutting, thinning, trimming, pruning, removal, or planting operations;
- (16) ~~Should~~ When the Division Engineer ("Engineer") or his representative ~~observe~~ observes unsafe operations, ~~activities~~ activities, or conditions, he shall suspend work. Work shall not resume until the unsafe ~~conditions or activities~~ operations, activities, or conditions have been eliminated or corrected. Failure to comply with any of the Federal, State and local laws, ordinances, and regulations governing requirements for safety and traffic control of this permit shall result in suspension of work. The permittee shall adhere to safety requirements, according to the North Carolina General Statutes, Article 16, Chapter 95 entitled: Occupational Safety and Health Act of North Carolina. Traffic control shall be in accordance with G.S. 136-30 and 19A NCAC 02B .0208;
- (17) The permittee or its contractor or agent shall take ~~appropriate~~ measures to locate and protect utilities within the highway right-of-way within the work area of the selective vegetation removal zone. The permittee shall be responsible for restoration of any losses or damages to utilities caused by any actions of the permittee or its contractors or agents to the satisfaction of the utility owner;
- (18) Permits are valid for a period of one year and the permittee may cut, thin, prune, or remove vegetation more than one time during the permit year. If the applicant applies for and is approved for another permit at the same site during an existing permit year, the previous permit shall become null and void at the same time the new permit is issued;
- (19) The permittee shall provide to the ~~appropriate~~ Department ~~official~~ a 48-hour notification

- before entering the right-of-way for any work covered by the conditions of the permit. The permittee shall schedule all work with the ~~Department appropriate Department official~~. The permittee shall notify the Department in advance of work scheduled for nights, weekends, and holidays. The Department ~~reserves the right to~~ may modify the permittee's work schedule for nights, weekends, and holidays. When the Department restricts construction in work zones for the safety of the traveling public, the Department shall deny access to the right-of-way for selective vegetation removal;
- (20) If work is planned in an active work zone, the permittee shall receive written permission from the contractor or the Department (~~if if the Department's employees are performing the work, work~~). The permittee shall provide the Division Engineer with a copy of the written permission;
- (21) Sites with vegetation not presenting a hazard from falling tree parts and follow-up work shall be restricted to individual and manual-operated power equipment and hand-held tools;
- (22) The Department may allow use of power-driven vegetation removal equipment (such as excavator-based land clearing attachments, skid-steer cutters, and bucket trucks) and access from the private property side to the right-of-way. Tree ~~removal removal, which that presents a hazard from falling tree parts, parts~~ shall be performed in accordance with the current edition and subsequent amendments and editions of the American National Standard for Arboricultural Operations-Safety Requirements ANSI Z133.1, approved by the American National Standards Institute and published by the International Society of Arboriculture Standards. Arboriculture. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained from the International Society of Arboriculture (ISA) for a twenty dollar (\$20.00) cost. The ISA can be contacted at P.O. Box 3129 Champaign, Illinois 61826 or by accessing this website: <http://www.isa-arbor.com/>. Written authorization ~~must~~ shall be obtained from the Department for use of power-driven vegetation removal equipment as well as for access to move resources from the private property to the right-of-way. The applicant ~~must~~ shall provide information on the permit application for which type(s) of equipment and access is requested. The applicant shall also provide contractor qualifications to the Department;
- (23) The Department shall determine the traffic control signage that is required. The permittee shall furnish, erect, and maintain the required signs as directed by the ~~Department; Department in accordance with G.S. 136-30;~~
- (24) The height of stumps remaining after tree removal shall not exceed four inches above the surrounding ground level. The work site shall be left in a clean and orderly appearance, leaving no debris at the site as a result of the cutting operation at the end of each workday;
- (25) An applicant for a selective vegetation removal permit for a facility or agritourism activities issued pursuant to Rule .0602 of this Section 19A NCAC 02E .0602 may appeal a decision of the Department pertaining to the denial or conditioning of a permit for selective vegetation removal pursuant to the provisions of this section. Such an appeal shall be in accordance with the provisions of G.S. 136-133.3; and
- (26) Upon completion of all work, the Department shall notify the ~~Division Engineer who shall notify the Permittee permittee~~ in writing of acceptance, terminate the permit, and return the Performance and Indemnity ~~Bond Bond~~, or certified or cashier's check to the permittee. For replanting work, a different release schedule shall be applicable according to Rule .0611 of this Section. The permittee may terminate the permit at any time and request return of the Performance and Indemnity Bond, or certified or cashier's check. The termination and request for return of the Performance and Indemnity Bond, or certified or cashier's check shall be made in writing and sent to the Division Engineer.
- (27) ~~Pursuant to 136-133.4(e), willful failure to substantially comply with all the requirements specified in the permit, unless otherwise mutually resolved, shall result in immediate and summary revocation of the selective vegetation removal permit, and forfeiture of any or all of the Performance and Indemnity Bond or check as determined by the Division Engineer based on conditions stated in this Rule.~~

Authority 136-18(5); 136-18(7); 136-18(9); 136-30; 136-93; 136-93.3; 136-133.4(e).

19A NCAC 02E .0608 REQUESTS FOR SELECTIVE VEGETATION REMOVAL PERMITS FOR OUTDOOR ADVERTISING

(a) Applications for selective vegetation cutting, thinning, pruning, or removal (exclusive of grasses) shall be made by the owner of an outdoor advertising sign permitted under G.S. 136-

129(4) or (5) to the ~~appropriate~~ applicable county's Division Engineer of the North Carolina Department of Transportation, Division of Highways. ~~Applications with all required documentation~~ Applications shall be submitted in both printed and electronic form. For sites within the corporate limits of a municipality ~~which that~~ has previously advised the Department in writing that it seeks to review such applications, the applicant shall deliver the application to the municipality at least 30 days prior to submitting the application to the Department. ~~A non-refundable fee of two hundred dollars (\$200.00) must accompany each application.~~ Applications for selective vegetation removal permits shall include the following information consistent with G.S. 136-133.1:

- (1) applicant contact information;
- (2) outdoor advertising permit tag number and location of the sign;
- (3) for a sign located on a ramp, indication of application being for a modified cut zone or normal cut zone;
- (4) for applications eligible for municipal review, an indication of the year the sign was erected;
- (5) indication of appropriate maximum cutting distance;
- (6) applicant's desire to remove existing trees, if present. If existing trees are to be removed, such trees require compensation by either monetary reimbursement or removal of two nonconforming outdoor advertising signs or a beautification and replanting plan as set out in Rule .0611 of this Section by submitting the Existing Tree Compensation Agreement form found on the Department web site www.ncdot.gov;
- (7) site plan, if existing trees are to be cut, thinned, pruned, or removed;
- (8) if existing trees are to be cut, thinned, pruned, or removed, the additional required form includes applicant contact information, permit tag number, sign location, the number and caliper inches and monetary value of existing trees to be cut, thinned, pruned, or removed, and indication of compensatory choice;
- (9) the additional form for existing tree removal, based on the compensatory choice made, also requires submittal of either a payment check in the amount of the tree loss monetary value, or indication of the two nonconforming outdoor advertising signs to be surrendered, or agreement to submit a beautification replanting plan to the Department. Compliance with the compensatory choice is a requirement before the selective vegetation removal permit can be approved;
- (10) municipal review indication, if applicable;
- (11) requested use of and site access for power-driven equipment in accordance with Rule .0610(24) of this Section;

- (12) performance and indemnity bond or certified check or cashier's check pursuant to G.S. 136-93;
- (13) if using a contractor for vegetation removal work, identify the contractor and their qualifications if contractor is not listed on the Department's website directory of qualified transportation firms;
- (14) payment of non-refundable two hundred dollar (\$200.00) permit fee, pursuant to G.S. 136-18.7;
- (15) certificate of liability and all legally required insurance coverage, including worker's compensation and vehicle liability in the amounts required and according to North Carolina law;
- (16) geographic information system document and property tax identification number to verify location of sign in relation to municipal limits and territorial jurisdiction boundary;
- (17) verification of on-site marking and tree-tagging requirements;
- (18) if cutting request is for a modified cut zone along a highway ramp, a diagram of the cut zone is required unless diagram is included on a site plan and calculations are required comparing the modified cut zone to the normal cut zone;
- (19) if the Department disputes the site plan, the Department may request additional information per G.S. 136-133.1(c);
- (20) certification that applicant has permission from the adjoining landowner(s) to access their private property for the purpose of conducting selective vegetation removal permit activities; and
- (21) applicant's notarized signature.

~~(b) Applications which include existing trees to be cut, thinned, pruned or removed, must be accompanied by a site plan in accordance with G.S. 136-133.1(e).~~

~~(e)(b)~~ For signs eligible for municipal review the applicant ~~must~~ must include on the application and, as a prerequisite to applicable municipal review submittal, the year the outdoor advertising sign was originally erected. Upon request, the Department ~~will shall~~ furnish the year of sign erection to the applicant. The Department ~~reserves the right to~~ may require additional proof if the year of the sign erection remains in question.

~~(d)(c)~~ The selective vegetation removal request may be ~~investigated~~ reviewed on site by Department personnel and a representative of the applicant.

Authority G.S. 136-18(5); 136-18(7); 136-18(9); 136-18.7; 136-93; 136-129(4); 136-129(5); 136-130; 136-133.1; 136-133.2.

19A NCAC 02E .0609 ISSUANCE OR DENIAL OF SELECTIVE VEGETATION REMOVAL PERMIT FOR OUTDOOR ADVERTISING

(a) Within 30 days following receipt of the application for a selective vegetation removal permit for outdoor advertising, including the fee set out in G.S. 136-18.7, ~~G.S. 136-18.7 and all required documentation set out in G.S. 136-133.2 and these rules~~, the Division Engineer shall approve or deny the application. The applicant, as part of the application, shall state in writing the date that he or she has delivered a copy of the application with required attachments to a municipality which has previously advised the Department in writing that it seeks to review such applications. The applicant shall deliver the application to the municipality at least 30 days prior to submitting the application to the Department. Once all required documentation has been received by the Department, the Division Engineer shall have 30 days to approve or deny the application. If written notice of approval or denial is not given to the applicant within the 30-day Department review period, then the application shall be deemed approved. If the application is denied, the Division Engineer shall advise the applicant, in writing, of the reasons for denial.

(b) The application shall be denied by the Division Engineer if:

- (1) ~~The the~~ application is for an outdoor advertising location where the outdoor advertising permit is less than two years old pursuant to G.S. 136-133.2;
- (2) ~~The the~~ application is for the opening of a view to a sign ~~which that~~ has been declared illegal, or whose permit has been revoked or is currently involved in litigation with the Department;
- (3) ~~Removal of vegetation will adversely affect the safety of the traveling public; it is determined by Department personnel that removal of vegetation may adversely affect the safety of the traveling public;~~
- (4) ~~The the~~ application is for the removal of vegetation planted in accordance with a local, state, or Federal beautification project prior to September 1, 2011 or prior to the issuance of an outdoor advertising permit for the erection of the applicable outdoor advertising structure, whichever date is later, unless a mitigating replanting plan related to the site for which the vegetation permit request is made as set forth in 19A NCAC 02E .0611, Rule .0611 of this Section, except for the provisions in Paragraph (d) and Subparagraph (g)(11); and is approved agreed upon in writing by the applicant, the Department, and, if applicable, the Federal Highway Administration;
- (5) ~~On on~~ two previous occasions, the applicant has failed to meet the requirements of a selective vegetation removal permit. ~~This is not cause for denial if the applicant permit, unless the applicant~~ engages a landscape contractor to perform the current work;

- (6) ~~It involves opening of views to junkyards; the application is for removal of vegetation that will open views to junkyards;~~
- (7) ~~The the~~ requested site is subject to a five-year moratorium for willful failure to substantially comply with all requirements specified in a prior selective vegetation removal permit pursuant to G.S. 136-133.4(e);
- (8) ~~The the~~ applicant fails to provide a completed application, as described in Rule .0608 of this Section; all documentation required in applicable General Statutes and rules;
- (9) ~~Any any~~ cutting, thinning, pruning, or removal of vegetation encompassing the entirety of the maximum vegetation cutting or removal zone is prohibited due to conditions affecting the right of way to which the State is subjected or agrees in writing to subject itself, including conservation agreements, prior to September 1, 2011 or prior to the issuance of an outdoor advertising permit for the erection of the applicable outdoor advertising structure, whichever date is later, or due to the application at any time of State statutes or Federal statutes or rules, including any conditions mandated as part of the issuance of a permit to the Department for a construction project by a Federal or State agency with jurisdiction over the construction project. The Department may mitigate within the right of way in the cut zone of a permitted outdoor advertising structure so long as trees and other plant materials for mitigation may not be of a projected mature height to decrease the visibility of a sign face, and such mitigation vegetation may not be cut or removed pursuant to a selective vegetation removal ~~permit~~ permit; or
- (10) a modified vegetation removal zone application request along acceleration or deceleration ramps is not in accordance with G.S. 136-133.1(a1) or Rule .0612 of this Section.

Authority G.S. 136-18(5); 136-18(7); 136-18(9); 136-93; 136-130; 136-133.1(a1); 136-133.2; 136-133.3; 136-133.4.

19A NCAC 02E .0610 CONDITIONS OF SELECTIVE VEGETATION REMOVAL PERMITS FOR OUTDOOR ADVERTISING

The following apply to the conditions of selective vegetation removal ~~permit permits~~ for outdoor ~~advertising; advertising or permit requirements:~~

- (1) Selected vegetation, as defined in G.S. 136-133.1(b), may ~~be allowed to~~ be cut, thinned, pruned or removed in accordance with the standards set out in G.S. 136-133.4;
- (2) The permittee shall indemnify and hold harmless the North Carolina Department of

- Transportation, its employees, attorneys, agents, and contractors against any and all claims or causes of action, and all losses ~~there from, therefrom,~~ arising out of or in any way related to the permittee's operation;
- (3) The permittee shall furnish a Performance and Indemnity ~~Bond-Bond,~~ or certified check or cashier's check made payable to North Carolina Department of Transportation for the minimum sum of two thousand dollars (\$2,000). The ~~bond, certified check or~~ Performance and Indemnity Bond, or certified check or cashier's check shall cover all restoration of the right of way to the condition prior to the occurrence of the damage caused by the permittee or the permittee's agent, if damage occurs during the permitted selective vegetation removal. The Performance and Indemnity Bond, or certified check or cashier's check ~~bond or certified check or cashier's check~~ is required before each permit to cut vegetation is issued. The bond shall run concurrently with the permit. The bond shall be released after a final inspection of the work by ~~NCDOT-the Department~~ reveals that all work provided for and specified by the permit is found to be completed and all damages to the right of way, including damage to fencing and other structures within the right-of-way, have been repaired or restored to the condition prior to the occurrence of the damage caused by the permittee or the permittee's agent;
- (4) Companies that plan to apply for two or more permits may provide continuing bonds for a minimum of one hundred thousand dollars (\$100,000) and ~~this-that~~ type of bond shall be kept on file by the Utilities Unit of the Department;
- (5) If the work is to be performed by any entity other than the sign owner or permittee, either the permittee or the other entity ~~must-shall~~ furnish the Performance and Indemnity Bond or certified check or cashier's check ~~required bonding~~ as described in this ~~Section-Rule,~~ for all work provided for and specified by the permit. Required forms for all bonds are available upon request from the ~~Department-Department,~~ or on the Department's website www.ncdot.gov. Bonds are to be furnished with the ~~Selective Vegetation Removal~~ selective vegetation removal application form to the ~~appropriate~~ official assigned to receive selective vegetation removal applications at the local ~~NCDOT-North Carolina Department of Transportation,~~ Division of Highways Office;
- (6) The permittee shall also provide proof of liability insurance of a minimum coverage of five million dollars (\$5,000,000). Whoever performs the work, the permittee, his ~~contractor or agent, contractor, or agent~~ shall maintain all legally required insurance coverage, including worker's compensation and vehicle liability in the amounts required by and according to North Carolina law. The permittee, his ~~contractor or agent, contractor, or agent,~~ are liable for any losses due to the negligence or willful misconduct of his agents, assigns, and employees. The permittee may, in lieu of providing proof of liability insurance as described in this ~~Paragraph-Item,~~ be shown as an additional insured on the general liability policy of the approved contractor or agent to perform the permitted work on condition that the contractor or agent's policy is for a minimum coverage of five million dollars (\$5,000,000) and the permittee provides proof to the Department of the coverage. The permittee or contractor or agent providing the coverage shall also name the Department as an additional insured on its general liability policy and provide the Department with a copy of the certificate showing the Department named as an additional insured. Regardless of which entity provides the proof of general liability insurance, the required limit of insurance may be obtained by a single general liability policy or the combination of a general liability and excess liability or umbrella policy;
- (7) The permittee shall provide a document verifying the requested selective vegetation removal site location in relationship to corporate limits of a municipality, per G.S. 136-133.1(a)(5). The document shall be a current geographic information system map of the nearest municipality, with color-coded boundary lines and a corresponding key or legend indicating corporate limit and territorial jurisdiction boundaries and indicating the precise location of the outdoor advertising structure. The permittee shall also provide the property tax identification number for the parcel on which the outdoor advertising structure is located. The Department may require additional information if the boundary or sign location remains in question;
- (8) The permittee shall perform site marking of the maximum vegetation cut or removal zone. The applicant shall mark the proper permitted cutting distances according to G.S. 136-133.1(a)(1) – (6). Points A & B along the right-of-way boundary (or fence if there is a control of access fence) ~~are to-shall~~ be marked with visible flagging tape. Points C, D, & E along the edge of the pavement of the travel way ~~are to-shall~~ be marked with spray paint, including the actual distances. If the sign is

- located at an acceleration or deceleration ramp, points C, D, & E shall be marked along the edge of the pavement of the travel way of the ramp instead of the mainline of the roadway;
- (9) The permittee shall perform tagging of trees. The permittee shall tag with a visible material or flagging all trees, including existing trees and other trees that are, at the time of the selective vegetation removal application, greater than four-inches in diameter as measured six inches from the ground and requested to be cut, thinned, pruned, or removed. The applicant shall tag the existing trees (the exact same existing trees as on the site plan) that are desired to be cut, thinned, pruned, or removed with visible material or flagging of a contrasting color. The permittee shall denote on the site plan or on the application the colors of flagging used to mark each category of trees;
- (10) If there are existing trees requested to be removed, before any work can be performed under a selective vegetation removal permit the permittee ~~must~~ shall:
- (A)(a) ~~Submit~~ submit the reimbursement to the Department pursuant to G.S. ~~136-93.2~~ 136-133.1(d) in a cashier's or certified check;
- (B)(b) ~~Fully~~ fully disassemble two non-conforming outdoor advertising signs and their supporting structures and return the outdoor advertising permits tags to the Department pursuant to G.S. 136-133.1(d); or
- (C)(c) ~~Obtain~~ obtain Departmental approval for the replanting plan in accordance with G.S. 136-133.1(e) and 19A NCAC 02E .0611. Rule .0611 of this Section.
- (11) Should the vegetation removal permit be approved and tree removal is scheduled, for all disputed trees the sign owner shall cut such tree stumps in a level, horizontal manner uniformly across the stump at a four inch height, so that tree rings can be counted by the applicant or the Department to determine the age of the tree;
- (12) After a tree is removed and the applicant or the Department discovers, based on the number of rings in the tree stump, an error in the tree survey report or site plan, the Department shall request an amendment to the tree survey report or site plan, and a redetermination pursuant to G.S. 136-133.1(d) and (e) shall be made by the Department and the applicant shall be subject to that redetermination;
- (13) ~~If any cutting, thinning, pruning, or removal of vegetation from any portion but less than the~~
- ~~entirety of the maximum vegetation cutting or removal zone is prohibited due to conditions affecting the right of way to which the State is subjected or agrees in writing to subject itself, including conservation agreements, prior to September 1, 2011, or prior to the issuance of an outdoor advertising permit for the erection of the applicable outdoor advertising structure, whichever date is later, or due to the application at any time of State statutes or Federal statutes or rules, including any conditions mandated as part of the issuance of a permit to the Department for a construction project by a Federal or State agency with jurisdiction over the construction project or due to mitigation within the right of way in the cut zone of a permitted outdoor advertising structure so long as trees and other plant materials for mitigation may not be of a projected mature height to decrease the visibility of a sign face, the permittee shall comply with applicable conditions, mitigation, rules, statutes, or permits for such portion of the cutting or removal zone. If applicable conservation agreements, mitigation or conditions affecting the right of way to which the State is subjected or agrees to in writing to subject itself and other restrictions agreed upon by the State in writing in the right of way, State or Federal rules, statutes, or permits allow certain degrees and methods of cutting, thinning, pruning, or removal for portions of vegetation, the permittee shall comply with applicable conservation agreements, mitigation, conditions, State or Federal rules, statutes or permits including equipment type for those portions of the cutting or removal zone. Portions of the maximum cutting or removal zone not within a conservation or mitigation area nor applicable to conditions affecting the right of way to which the State is subject or agrees in writing to subject itself and other restrictions agreed upon by the State in writing in the right of way, nor regulated by State or Federal rules, statutes, or permits regulating vegetation removal and other activities shall be governed by standards set out in G.S. 136-93.~~
- (13) For purposes of this Rule, portion of the cut or removal zone means less than the entirety of the of cut or removal zone, the permittee shall comply with applicable conditions, mitigation requirements, rules, statutes, or permit requirements related to cutting, thinning, pruning, or removal of vegetation within the right of way, where any portion of the cut or vegetation removal zone is restricted for the following reasons set forth below:

- (a) the State is subjected to or agrees in writing to subject itself to conditions affecting the right of way, including conservation agreements, prior to September 1, 2011, or prior to the issuance of an outdoor advertising permit for the erection of the applicable outdoor advertising structure, whichever date is later; or
- (b) applicable State or Federal statutes or rules, including any conditions mandated as part of the issuance of a permit to the Department for a construction project by a Federal or State agency with jurisdiction over the construction project prohibit vegetation removal; or
- (c) mitigation within the right of way in the cut zone of a permitted outdoor advertising structure prohibits vegetation removal, however, trees and other plant materials for mitigation may not be of a projected mature height to decrease the visibility of a sign face.

If the reasons set forth in Sub-items (a), (b), and (c) of this Item allow certain degrees and methods of cutting, thinning, pruning, or removal for portions of vegetation, the permittee shall comply with the conditions set forth above, including equipment type for those portions of the cutting or removal zone. Vegetation removal for portions of the maximum cutting or removal zone not affected by the reasons set forth in Sub-items (a), (b) and (c) of this Item shall be governed by standards set out in G.S. 136-93.

- (14) The permittee ~~must~~ shall adhere to erosion control requirements, according to North Carolina General Statutes, Article 4, Chapter 113A entitled: Sedimentation Pollution Control Act of 1973;
- (15) A Division of Highways Inspector may be present while work is underway. The presence or absence of a Division of Highways inspector at the work site does not lessen the permittee's responsibility for conformity with the requirements of the permit and all applicable General Statutes and rules. ~~Should the inspector fail~~ When a present inspector fails to point out work that does not conform with the requirements, it does not prevent later notification to the permittee that the work is not in compliance with the permit;
- (16) A selective vegetation removal permit ~~must~~ shall be secured for each applicable outdoor advertising site prior to performing any vegetation removal work;
- (17) ~~Should the Division Engineer or his representative observe unsafe operations, activities or conditions, he shall suspend work.~~

~~Work shall not resume until the unsafe conditions or activities have been eliminated or corrected. Failure to comply with any of the requirements for safety and traffic control of this permit shall result in suspension of work; When the Division Engineer ("Engineer") or his representative observes unsafe operations, activities, or conditions, he shall suspend work. Work shall not resume until the unsafe operations, activities, or conditions have been eliminated or corrected. Failure to comply with any of the Federal, State and local laws, ordinances, and regulations governing safety and traffic control shall result in suspension of work. The permittee shall adhere to safety requirements, according to the North Carolina General Statutes, Article 16, Chapter 95 entitled: Occupational Safety and Health Act of North Carolina. Traffic control shall be in accordance with G.S. 136-30 and 19A NCAC 02B .0208;~~

- (18) The applicant ~~must~~ shall certify that he or she has permission from the adjoining landowner(s) to access their private property for the purpose of conducting activities related to the selective vegetation removal permit application;
- (19) The ~~Permittee~~ permittee or its contractor or agent ~~must~~ shall have a copy of the ~~Selective Vegetation Removal Permit~~ selective vegetation removal permit on the work site at all times during any phase of selective vegetation cutting, thinning, trimming, pruning, removal, or planting operations;
- (20) The permittee or its contractor or agent shall take ~~appropriate~~ measures to locate and protect utilities within the highway right-of-way within the work area of the selective vegetation removal zone. The permittee shall be responsible for restoration of any losses or damages to utilities caused by any actions of the permittee or its contractors or agents to the satisfaction of the utility owner;
- (21) Permits are valid for a period of one year and the permittee may cut, thin, prune, or remove vegetation more than one time during the permit year. If the applicant applies for and is approved for another selective vegetation removal permit at the same site during an existing permit year, the previous permit shall become null and void at the same time the new permit is issued;
- (22) The permittee shall provide to the ~~appropriate~~ Department ~~official~~ a 48-hour notification before entering the right-of-way for any work covered by the conditions of the permit. The permittee shall schedule all work with the Department. ~~appropriate Department official.~~ The permittee shall notify the Department in

- advance of work scheduled for nights, weekends and holidays. The Department ~~reserves the right to~~ may modify the permittee's work schedule for nights, weekends, and holidays. When the Department restricts construction in work zones for the safety of the traveling public, the Department shall deny access to the right-of-way for selective vegetation removal;
- (23) If work is planned in an active work zone, the permittee shall receive written permission from the contractor or the Department ~~(if if the Department's employees are performing the work, work)~~. The permittee shall provide the Division Engineer with a copy of the written permission;
- (24) An applicant shall be allowed to use individual and manual-operated power equipment and hand held tools at any site during initial cutting or removal of vegetation or while maintaining a site during the duration of a selected vegetation removal permit. The Department may allow use of power-driven vegetation removal equipment (such as excavator-based land clearing attachments, skid-steer cutters, and bucket trucks) if the Department determines the permit applicant can demonstrate satisfactorily to the Department with an onsite inspection that the use of such equipment will not cause undue safety hazards, any ~~erosion~~ erosion, or unreasonable damage to the right of way. Access for use of any equipment ~~must~~ shall be gained from the private property side to the right of way for each individual selective removal permit site. Tree removal, which presents a hazard from falling tree parts, shall be performed in accordance with the current edition and subsequent amendments and editions of the American National Standard for Arboricultural Operations-Safety Requirements ANSI Z133.1, approved by the American National Standards Institute and published by the International Society of Arboriculture. Arboriculture Standards. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained from the International Society of Arboriculture (ISA) for a twenty dollar (\$20.00) cost. The ISA can be contacted at P.O. Box 3129 Champaign, Illinois 61826 or by accessing this website: <http://www.isa-arbor.com/>. Written authorization ~~must~~ shall be obtained from the Department for use of power-driven vegetation removal equipment as well as for access to move resources from the private property to the right of way. The applicant ~~must~~ shall
- provide information on the permit application for which type(s) of equipment and access is requested. The applicant shall provide contractor qualifications to the Department.
- (25) The Department shall determine the traffic control signage that is required. The permittee shall furnish, erect, and maintain the required signs as directed by the Department;
- (26) The height of stumps remaining after tree removal shall not exceed four inches above the surrounding ground level. The work site shall be left ~~in a clean and orderly appearance, with no debris at the site as a result of the cutting operation~~ at the end of each workday; and
- (27) Upon completion of all work, the Department shall notify ~~the Division Engineer who shall notify the Permittee~~ permittee in writing of acceptance, terminate the permit, and return the Performance and Indemnity ~~Bond Bond~~, or certified or cashier's check to the permittee. For replanting work, a different bond release schedule shall be applicable according to Rule .0611 of this Section, to 19A NCAC 02E.0611(g)(8); The permittee may terminate the permit at any time and request return of the Performance and Indemnity Bond, or certified or cashier's check. The termination and request for return of the Performance and Indemnity Bond, or certified or cashier's check shall be made in writing and sent to the Division Engineer.
- (28) Pursuant to G.S. 136-133.4(e), willful failure to substantially comply with all the requirements specified in the permit, unless otherwise mutually resolved, shall result in immediate and summary revocation of the selective vegetation removal permit and forfeiture of any or all of the Performance and Indemnity Bond or check as determined by the Division Engineer based on conditions stated in this Rule.

Authority G.S. 136-18(5); 136-18(7); 136-18(9); 136-93; 136-93.2; 136-127; 136-130; 136-133.1; 136-133.1(a1); 136-133.2; 136-133.3; 136-133.4; 136-133.5.

19A NCAC 02E .0611 BEAUTIFICATION AND REPLANTING REQUIREMENTS FOR SELECTIVE VEGETATION REMOVAL PERMITS

- (a) Any site with a valid selective vegetation removal permit issued pursuant to G.S. 136-93(b) qualifies for a beautification and replanting plan plan as set forth in G.S. 136-133.1 (e).
- (b) For future selective vegetation removal applications at replanted sites, replanted materials may be removed only if partially blocking the view to a sign face. In this case, the Department ~~will~~ shall require plant substitutions on a one for one basis. All requests for plant substitutions shall be approved by the Department and installed according to the rules in this Section.

(c) Submittal of a ~~selective vegetation removal application site plan~~ shall be in accordance with G.S. 136.133.1(c).

(d) This Paragraph applies to all replanting plans except mitigating replanting plans as specified in ~~19A NCAC 02E Rules .0603(b)(6) and .0609(b)(4) of this Section. .0609(b)(4).~~ The caliper inches of existing trees to be removed, according to the applicant's site plan shall equal the caliper inches to be replanted by the applicant at the outdoor advertising site from which existing trees are requested to be removed. If the caliper inches of existing trees from the site plan exceed the density of the Department's replanting site design, the excess caliper inches of trees shall be delivered by the applicant to the Department according to the schedule described in Subparagraph (g)(6) of this Rule. If plant material other than trees is proposed, the Department may consider such substitution for the required caliper inches. ~~The excess trees shall be planted and maintained by the Department at sites to be determined by the Department.~~

(e) For sites that qualify according to the replanting criteria described in this Rule, the Department shall consult with the applicant and any local government that has requested to review and provide comments on selective vegetation removal applications pursuant to G.S. 136-93(d) or has notified the Department of its desire to review and provide comments on beautification and replanting plans. The local government shall be given 15 days to review and provide comments on beautification and replanting plans. If the local government does provide comments on a beautification and replanting plan, the Department shall take the comments into consideration. If the local government does not make appropriate request for a review, the criteria stated in the rules in this ~~section~~ Section shall be followed for replanting determination.

(f) In consideration of differences in outdoor advertising sign structure heights, business facilities, or agritourism activities, the Department shall maintain on file regionalized landscape design plans and plant lists as a guide for applicants. The applicant may submit one of the Department's plans or a proposed beautification and replanting plan prepared and sealed by a North Carolina licensed landscape architect. The Department's written approval, based on the current edition and subsequent amendments and editions of the American Standard for Nursery Stock ANSI Z60.1 approved by the American National Standards Institute and published by the American Horticulture Association for a minimum of a 1.5 caliper inch replanted tree, of the beautification, replanting, and maintenance plan shall allow the applicant to proceed with requested vegetation cutting, thinning, pruning or removal at the ~~outdoor advertising site~~. If plant material other than trees is proposed, the Department may consider such substitution for the required caliper inches. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained free of charge from this website of the American Horticulture Association: www.americanhort.org. The mailing address for AmericanHort is 2130 Stella Ct, Columbus, OH 43215.

(g) The approved beautification and replanting plan becomes a part of the selective vegetation removal permit pursuant to G.S. 136-93(b) and 136-133.1(e). All ~~applicable permit requirements of the permit, including the performance bond and insurance,~~ shall continue to apply until all replanting and establishment

requirements are satisfied and accepted in writing by the Department. The Department shall approve the replanting portion of the selective vegetation removal permit in writing ~~detailing and detail~~ the requirements of the beautification and replanting plan. The requirements include the following:

- (1) The work for initial plantings and all future replacements ~~must be adhered to by~~ the permittee or any ~~or~~ of their employees, agents, or assigns ~~according to~~ shall be in accordance with the current edition and subsequent amendments and editions of the American National Standard for Tree Care Operations-Transplanting ANSI A300 (Part 6), approved by the American National Standards Institute and published by the Tree Care Industry Association, Inc., ~~International Society of Arboriculture standards except as stipulated in the rules in this Section. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained from the Tree Care Industry Association, Inc. for a twenty dollar (\$20.00) cost. The Tree Care Industry Association, Inc. (TCIA) can be contacted at 136 Harvey Road, Suite 101 Londonberry, NH 03053 or at this website: www.tcia.org.~~ Initial and replacement planting ~~will may~~ be considered acceptable ~~when if~~ the plants have been placed in the plant hole, backfilled, watered, mulched, staked, and guyed. All plants of one species that species, ~~which~~ are shown on the plans to be planted within a bed, shall be planted concurrently and the entire group shall be completed before any plant therein is considered acceptable. Replacement planting consists of replacing those plants ~~which that~~ are not in a living and healthy condition as defined in these Rules;
- (2) The permittee ~~must~~ shall adhere to erosion control requirements, according to North Carolina General Statutes, Article 4, Chapter 113A entitled: Sedimentation Pollution Control Act of 1973;
- (3) All plant materials shall be approved in writing by the Department prior to arrival at the ~~outdoor advertising site~~ or prior to excess trees being furnished and delivered to the Department. The approval shall be based on the current edition and subsequent amendments and editions of the American Standard for Nursery Stock; Stock ANSI Z60.1 approved by the American National Standards Institute and published by the American Nursery and Landscape Association Horticulture Association. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh,

N.C. Copies of the Standard may be obtained free of charge from this website of the American Horticulture Association: www.americanhort.org. The mailing address for AmericanHort is 2130 Stella Ct, Columbus, OH 43215;

- (4) All work is subject to NCDOT Division of Highways inspection and shall be scheduled with the Department. A minimum 48-hour notification shall be provided to the Department by the permittee before entering the right-of-way for any beautification and replanting plan requirements;
- (5) Grinding or other mechanical removal of all cut stumps (to a minimum depth of four inches below ground level) ~~must~~ shall be completed in the area of replanting during the preparation of the site, prior to initial planting;
- (6) All initial and replacement plantings shall be installed during the first planting season (November 1 to March 15) contemporaneous with or following the selective vegetation removal. If replanting cannot be completed by the March 15 deadline, the replanting shall occur during the next planting season. The same dates (November 1 to March 15) apply when the permittee provides the Department with excess plant material at a site where existing caliper inches exceeds the site design capacity;
- (7) The permittee shall contact the Department to schedule a final replanting acceptance inspection upon completion of any plant material installation. For one year from the date of the initial planting acceptance for the entire replanting plan, the permittee ~~must~~ shall establish all plant materials according to these provisions. Establishment for all initial or replacement plants shall begin ~~immediately~~ after they are planted. The permittee shall be responsible for the area around plantings for a distance of six feet beyond the outside edges of the mulch. Establishment shall include cutting of grass and weeds; watering; replacement of mulch; repair or replacement of guy stakes, guy wires, and water rings; and other work to encourage the survival and growth of plant material. The permittee shall remove and dispose of dead plants from the replanting plan site during the establishment period. Prior to the end of the one-year establishment period, the permittee is responsible for contacting the Department to schedule a site meeting with Departmental officials to identify plants to be replaced that are not in a living and healthy condition. Plants do not meet the living and healthy condition requirement and need replacement if 25 percent or more of the crown is dead, if the

main leader is dead, or if an area of the plant has died leaving the character of its form compromised, lopsided, or disfigured. The permittee shall replace, during the planting period, plant material needed to restore the planting to the original quantity, size, and species of plant material. Any desired changes in plant material proposed by the permittee ~~must~~ shall be requested in writing to the Department. The Department shall notify the permittee in writing of the approved changes to the replacement plantings;

- (8) At the conclusion of the one-year establishment period, the Department shall issue a written acceptance of the permittee's work and release the ~~applicable~~ bond. Then a one-year observation period shall begin in which the permittee ~~or sign owner~~ shall maintain stability of the original and replacement plantings to promote their continued livability and healthy growth. The ~~sign owner~~ permittee is responsible for replacement of plants not meeting the living and healthy condition requirement during the observation ~~period and in period~~. Replacement shall occur in accordance with the dates of planting as stated in the rules in this Section;
- (9) After the one-year observation period concludes, the Department shall notify the ~~sign owner~~ permittee if the permit requirement conditions have been met successfully;
- (10) Replanted materials may be pruned according to the ~~International Society of Arboriculture Standards~~, current edition and subsequent amendments and editions of the American National Standard for Tree Care Operations-Pruning ANSI A300 (Part 1), approved by the American National Standards Institute and published by the Tree Care Industry Association Inc., however, topping of trees or other vegetation is not allowed. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained from the Tree Care Industry Association, Inc. for a twenty dollar (\$20.00) cost. The Tree Care Industry Association, Inc. (TCIA) can be contacted at 136 Harvey Road, Suite 101 Londonberry, NH 03053 or at this website: www.tcia.org;
- (11) This Paragraph applies to all replanting plans except mitigating replanting plans as specified in Rule .0609(b)(4) of this Section. ~~49A NCAC 02E .0609(b)(4)~~. Excess plants or trees furnished and delivered to the Department, shall receive care and handling ~~in accordance with the following~~: In digging, loading, transporting, unloading, planting, or otherwise

handling ~~plants, the plants~~. The permittee shall exercise care to prevent ~~windburn; windburn~~, injury to or drying out of the trunk, branches, or ~~roots; roots~~, and to prevent freezing of the plant roots. The solidity of the plant ball shall be preserved. Delivery of excess plant material shall be scheduled with the Department, allowing a minimum three days notification for each delivery. The permittee's responsibility for the furnished excess plants or trees ends at the time the plant material is delivered to, inspected by, and accepted by the Department;

- (12) For mitigating replanting plans according to ~~19A NCAC 02E .0609(b)(4), Rule .0609(b)(4)~~ of this Section, trees and other plant material for a proposed beautification and replanting plan taken from the Department's landscape design plans and plant lists or prepared and sealed by a North Carolina licensed landscape architect, may be of a projected mature height to reduce visibility limitations to outdoor advertising sign ~~faces--faces~~. As an alternative to replanting, mitigation by pruning for vegetative crown reduction at an existing beautification project may be allowed, if mutually agreed upon in writing by the Department and permittee. All pruning shall be performed by removing the fewest number of branches necessary to accomplish the desired objective but in consideration of normal seasonal regrowth for the type of vegetation. All pruning for purposes of mitigation shall be in accordance with the current edition and subsequent amendments and editions of the American National Standards for Tree Care Operations-Pruning ANSI A300 (Part 1), approved by the American National Standards Institute and published by the Tree Care Industry Association, Inc. Copies of the Standard are available for inspection in the office of the State Roadside Environmental Engineer, Division of Highways, Raleigh, N.C. Copies of the Standard may be obtained from the Tree Care Industry Association, Inc. for a twenty dollar (\$20.00) cost. The Tree Care Industry Association, Inc. (TCIA) can be contacted at 136 Harvey Road, Suite 101 Londonberry, NH 03053 or at this website: www.tcia.org. In the case of vegetation mortality caused by pruning, replacement plantings shall be required according to Rule .0611 of this Section;

- (13) Should the outdoor advertising structure related to the selective vegetation permit be sold or transferred, the new owner or permit holder is subject to the requirements in the General Statutes and rules in this section;

Section, including those regarding planting, establishment, replacement or renovation plantings, minimum living and healthy condition, and observation; and

- (14) Willful failure to substantially comply with the requirements of this ~~Paragraph~~ Rule for the beautification and replanting plan shall subject the permittee to penalties prescribed in G.S. 136-133.4.

Authority G.S. 99E-30; 136-93; 136-93(b); 136-93.3; 136-130; 136-133.4.

19A NCAC 02E .0612 MODIFIED VEGETATION CUT OR REMOVAL ZONE FOR OUTDOOR ADVERTISING

(a) In accordance with G.S. 136-133.1(a1), at the request of an selective vegetation removal permit applicant, the Department may approve plans for the cutting, thinning, pruning, or removal of vegetation outside of the cut or removal zone along acceleration and deceleration ramps. Upon approval of a modified cut zone, the conditions of the initial permit as set forth in Rule .0604 and Rule .0610 of this Section, in addition to the following requirements shall apply:

- (1) the request for a modified vegetation cut or removal zone along acceleration or deceleration ramps shall be noted on the selective vegetation removal application at the time the application is submitted. The same application requirements as set forth in Rule .0608 of this Section shall apply to a modified vegetation cut or removal zone request.
- (2) the application shall include a diagram of the modified cut zone request to clearly indicate the relocated point A to point D line and the relocated point B to point E line. If the request includes removal of existing trees as defined in G.S. 136-133.1(b)-(e), the applicant may indicate the relocated points on the required site plan in lieu of a separate diagram. The applicant shall provide calculations showing that the total aggregate area of cutting or removal equals the maximum allowed in G.S. 136-133.1(a). The applicant shall mark the modified points A, B, D, and E, as applicable, at the site for review by the Department. Modified points A and B along the right-of-way boundary (or fence if there is a control of access fence) are to be marked with visible flagging tape. Modified points C, D, & E along the edge of the pavement of the ramp are to be marked with spray paint, including the actual distances. Such markings for a modified vegetation cut or removal zone under G.S. 136-133.1(a1) shall represent and equal the maximum cut or removal area along the surface of the ground allowed in G.S. 136-133.1(a).
- (3) the Department may authorize a one-time modification of the maximum vegetation cut

or removal zone for each requested sign face when the view to the outdoor advertising sign face will be improved. The modified area of vegetation cutting or removal shall cause the point A to point D line and the point B to point E line as set forth in G.S. 136-133.1(a) to be relocated as long as the total aggregate area of cutting or removal does not exceed the maximum allowed for the defined cut or removal zone in G.S. 136-133.1(a). Points A and B shall always remain on the right-of-way line and points D and E shall always remain on the edge of the pavement of the ramp. G.S. 136-133.1(g) regarding cutting vegetation from the private property side along a controlled access fence shall remain applicable from relocated point A of the modified cut zone to relocated point B of the modified cut zone.

- (4) the Department shall establish and document the modified cut or removal zone as the permanent view zone, which shall not be altered for future selective vegetation removal permits.
- (5) If an outdoor advertising site has previously been cut under a valid selective vegetation removal permit, in accordance with G.S. 136-93(b), to the extent that the requirement of not exceeding the total aggregate area of cutting or removal allowed in G.S. 136-133.1(a) cannot be met, the applicant may apply for a modified cut or removal zone no sooner than one year after the most recent cutting activity at the site. Within the one year period, the applicant may, to the extent that the maximum cut or removal zone defined in G.S. 136-133.1(a) was not previously cut, apply that uncut area towards determining the limits of the one-time modified cut request as defined in G.S. 136-133.1(a1) and the rules of this Subchapter.
- (6) Should the outdoor advertising structure subject to a modified cut or removal zone for a selective vegetation removal permit be sold or transferred, the new owner or outdoor advertising permit holder shall be subject to G.S. 136-133.1(a1), and the rules of this Subchapter and shall not alter the modified cut zone as established and documented for a previous sign owner or permit holder.
- (7) Upon denial or conditioning by the Department of Transportation of a modified vegetative cut or removal zone under G.S. 136-133.1(a1), the applicant may file an appeal pursuant to G.S. 136-133.3.

Authority G.S. 136-18(5); 136-18(7); 136-18(9); 136-93; 136-93.2; 136-127; 136-130; 136-133.1; 136-133.1(a1); 136-133.2; 136-133.3; 136-133.4; 136-133.5.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 22 – HEARING AID DEALERS AND FITTERS BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Hearing Aid Dealers and Fitters Board intends to adopt the rule cited as 21 NCAC 22J .0116 and amend the rule cited as 21 NCAC 22I .0103.

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

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

Link to agency website pursuant to G.S. 150B-19.1(c):
www.nchalb.org/regulatory/rulechange.php

Proposed Effective Date: *January 1, 2015*

Public Hearing:

Date: *October 2, 2014*

Time: *12:45 p.m.*

Location: *Commission Room, Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, NC 27609*

Reason for Proposed Action: *Adopt a temporary rule as a permanent rule to clarify unethical practice. Amend rule regarding visual inspection and hearing tests to allow up to 6 months to fit a hearing aid after the hearing test and to set parameters for cerumen management by licensees.*

Comments may be submitted to: *Catherine Jorgensen, Rulemaking Coordinator, NC State Hearing Aid Dealers and Fitters Board, P.O. Box 97833, Raleigh, NC 27624-7833, phone (919) 834-3661*

Comment period ends: *November 14, 2014*

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SUBCHAPTER 22I – PROFESSIONAL AFFAIRS

21 NCAC 22I .0103 VISUAL INSPECTION AND HEARING TEST

(a) All licensees and registered apprentices shall make a visual inspection of the external auditory canal and the tympanic membrane, using a device having its own light source in order to fulfill the requirements of 21 CFR 801.420 concerning the warning to hearing aid dispensers.

(b) All licensees and registered apprentices shall conduct a hearing test using an audiometer, the calibration for which is on file at the Board office, or equivalent physiologic testing.

(c) A hearing test shall be conducted within 90 days six months prior to the dispensing of a hearing aid and a copy of the hearing test shall be maintained for a period of at least three years.

(d) The hearing test shall be conducted in an environment conducive to obtaining accurate results and shall include the following, unless physiologic testing is utilized:

- (1) live voice or recorded voice speech audiometry, including speech reception threshold testing and speech discrimination testing; and
- (2) pure tone audiometry, including air conduction testing and bone conduction testing as follows:
 - (A) air conduction testing at least at the following frequencies: 500 Hz, 1000 Hz, 2000 Hz, 3000Hz, and 4000 Hz;
 - (B) mid-octave air conduction testing performed when there is a 20 dB or greater difference between any adjacent octaves;
 - (C) bone conduction testing at least at the following frequencies: 500 Hz, 1000 Hz, 2000 Hz, and 4000 Hz; and
 - (D) effective masking, if audiometric testing reveals a difference between the ears at any one frequency equal to or greater than 40 decibels or if there is audiometric air-bone gap of 15 dB or greater.

(e) All licensees and registered apprentices shall evaluate dispensed products to determine effectiveness and shall maintain documentation of the verification for a period of at least three years. Measures of evaluation shall include at least one of the following:

- (1) sound field measurements;
- (2) real ear measurements; or
- (3) client evaluation sheets.

(f) Only licensees may provide cerumen management in the course of an ear inspection and fitting of a hearing aid. Cerumen which is found at the level of the external auditory meatus or

partially occludes the meatus may be addressed during the course of an ear inspection only. Cerumen impactions or cerumen found to be completely occluding the external auditory meatus shall be referred to a medical physician for further treatment.

Authority G.S. 93D-1.1; 93D-3(c).

SUBCHAPTER 22J – CODE OF ETHICS

21 NCAC 22J .0116 SCOPE OF PRACTICE

It shall be unethical for a licensee or apprentice to perform services as set forth in G.S. 93D-1.1 if the licensee or apprentice has not been trained for the specific service.

Authority G.S. 93D-1.1; 93D-3; 93D-9; 93D-13.

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CHAPTER 46 – BOARD OF PHARMACY

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Pharmacy intends to amend the rules cited as 21 NCAC 46 .2401 and .2403.

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

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

Link to agency website pursuant to G.S. 150B-19.1(c):
www.ncbop.org/lawandrules.htm

Proposed Effective Date: *January 1, 2015*

Public Hearing:

Date: *November 18, 2014*

Time: *9:00 a.m.*

Location: *NC Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517*

Reason for Proposed Action: *Revisions required by Section 8.23 of the Current Operations and Capital Improvements Appropriations Act of 2014 (Session Law No. 2014-100), to permit public health department nurses to dispense epinephrine auto-injectors to school personnel.*

Comments may be submitted to: *Jay Campbell, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517, phone (919) 246-1056, email jcampbell@ncbop.org*

Comment period ends: *November 18, 2014, 9:00 a.m.*

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S.

150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SECTION .2400 – DISPENSING IN HEALTH DEPARTMENT

21 NCAC 46 .2401 MEDICATION IN HEALTH DEPARTMENTS

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

- (1) Drugs or devices may be dispensed only to health department patients, with the exception ~~of~~ of:
 - (a) opioid antagonists, which may be dispensed either to health department patients or to others as permitted by G.S. ~~90-106.2; 90-106.2, and~~
 - (b) epinephrine auto-injectors, which may be dispensed either to health department patients or to school personnel as permitted by G.S. 115C-375.2A.
- (2) No drugs or devices may be dispensed except at health department clinics;
- (3) The health department shall secure the services of a pharmacist-manager who shall be responsible for compliance with all statutes, rules, and regulations governing the practice of pharmacy and dispensing of drugs at the health department;
- (4) Only the general categories of drugs or devices listed in Rule .2403 may be dispensed by a health department registered nurse;
- (5) All drugs or devices dispensed pursuant to G.S. 90-85.34A and these rules shall be packaged, labeled, and otherwise dispensed in compliance with state and federal law, and records of dispensing shall be kept in compliance with state and federal law. The pharmacist-manager shall verify the accuracy of the records at least weekly, and where health department personnel dispense to 30 or

more patients in a 24-hour period per dispensing site, the pharmacist-manager shall verify the accuracy of the records within 24 hours after dispensing occurs.

Authority G.S. 90-85.6; 90-85.34A; 90-106.2; 115C-375.2A.

21 NCAC 46 .2403 DRUGS AND DEVICES TO BE DISPENSED

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

- (1) Anti-tuberculosis drugs, as recommended by the North Carolina Department of Health and Human Services in the North Carolina Tuberculosis Policy Manual (available at www.ncdhhs.gov), when used for the treatment and control of tuberculosis;
- (2) Anti-infective agents used in the control of sexually-transmitted diseases as recommended by the United States Centers for Disease Control in the Sexually Transmitted Diseases Treatment Guidelines (available at www.cdc.gov);
- (3) Natural or synthetic hormones and contraceptive devices when used for the prevention of pregnancy;
- (4) Topical preparations for the treatment of lice, scabies, impetigo, diaper rash, vaginitis, and related skin conditions;
- (5) Vitamin and mineral supplements; ~~and~~
- (6) Opioid antagonists prescribed pursuant to G.S. ~~90-106.2; 90-106.2; and~~
- (7) Epinephrine auto-injectors prescribed pursuant to G.S. 115C-375.2A.

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

Authority G.S. 90-85.6; 90-85.34A; 90-106.2; 115C-375.2A.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of Administrative Hearings intends to amend the rule cited as 26 NCAC 03 .0118.

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

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

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

Proposed Effective Date: *January 1, 2015*

Public Hearing:

Date: *November 13, 2014*

Time: *9:00 a.m.*

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

Reason for Proposed Action: *Pursuant to SL 2013-382, s.6.1, OAH must hear and issue a decision on personnel cases within 180 days from the commencement of the contested case. The 180 days can only be exceeded if there is "extraordinary cause" to do so. Consequently, this term clearly needs to be defined for the presiding administrative law judge and parties involved.*

Comments may be submitted to: *Molly Masich, 1711 New Hope Church Rd, Raleigh, NC 27609, email molly.masich@oah.nc.gov*

Comment period ends: *November 14, 2014*

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

CHAPTER 03 - HEARINGS DIVISION

SECTION .0100 – HEARING PROCEDURES

26 NCAC 03 .0118 CONTINUANCES

(a) Requests for a continuance of a hearing shall be granted upon a showing of good cause or extraordinary cause. Unless time does not permit, a request for a continuance of a hearing shall be made in writing to the administrative law judge and shall be served upon all parties of record. In determining whether good cause or extraordinary cause exists, due regard

shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A request for a continuance filed within five days of a hearing shall be denied unless the reason for the request could not have been ascertained earlier.

- (1) "Good cause" includes death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is clearly necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to a new hearing date or the parties have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.
- (2) "Good cause" shall not include: intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness testimony can be taken by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

(b) For the purpose of determining whether "extraordinary cause" exists to allow a final decision to be issued beyond 180 days after the commencement of a personnel case under G.S. 126-34.02(a) the phrase "extraordinary cause" is defined as follows: out of the ordinary; exceeding the usual, average, or normal measure or degree; not usual, regular or of a customary kind. "Extraordinary cause" includes:

- (1) a stay issued by a federal or state trial or appellate judge;
- (2) a stay issued by an administrative law judge under G.S. 150B-33(a); or
- (3) a pending OAH civil rights investigation which addresses the same issues of discrimination as the subject matter of the contested case when the OAH investigation has not been pending in the Civil Rights Division longer than 90 days.

"Extraordinary cause" shall not be granted for any cause listed in Subparagraph (a)(2) of this Rule.

(c) A continuance for good cause shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.

~~(b)(d)~~ During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time

does not remain to conclude the testimony, the administrative law judge shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient.

Authority G.S. 126-34.02; 150B-33(b)(4).

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

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *Commission for Public Health*

Rule Citation: *10A NCAC 41A .0101*

Effective Date: *September 2, 2014*

Findings Reviewed and Approved by the Codifier: *August 22, 2014*

Reason for Action: *Middle East respiratory syndrome (MERS) is an emerging infectious disease first identified in September 2012. It is usually associated with respiratory tract infections and is fatal in approximately 1/3 of cases. This disease can spread rapidly if appropriate control measures are not followed. The first travel-associated MERS cases in the United States were identified in May 2014. Chikungunya virus infection was first characterized in Africa in 1952 and circulated primarily in countries bordering the Indian Ocean for decades. In December 2013 sustained transmission was identified in the Caribbean Islands and travel associated cases were identified in continental US shortly thereafter. In July 2014 local transmission was identified in Florida based on a competent vector present throughout the southeastern US. Rapid application of control measures may help limit spread if cases are reported once identified.*

It is imperative that public health authorities be rapidly notified when these infections are suspected or confirmed so that appropriate control measures can be implemented to prevent further spread. For this reason, the State Health Director issued a temporary order pursuant to G.S. 130A-141.1 requiring immediate reporting of either condition effective June 23, 2014. An emergency rule is needed to replace the temporary order while temporary and eventually permanent rules are pursued.

CHAPTER 41 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL

SECTION .0100 – REPORTING OF COMMUNICABLE DISEASES

10A NCAC 41A .0101 REPORTABLE DISEASES AND CONDITIONS

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

- (1) acquired immune deficiency syndrome (AIDS) - 24 hours;
- (2) anthrax - immediately;
- (3) botulism - immediately;
- (4) brucellosis - 7 days;
- (5) campylobacter infection - 24 hours;
- (6) chancroid - 24 hours;
- (7) chikungunya virus infection - 24 hours;
- ~~(7)~~(8) chlamydial infection (laboratory confirmed) - 7 days;
- ~~(8)~~(9) cholera - 24 hours;
- ~~(9)~~(10) Creutzfeldt-Jakob disease - 7 days;
- ~~(10)~~(11) cryptosporidiosis - 24 hours;
- ~~(11)~~(12) cyclosporiasis - 24 hours;
- ~~(12)~~(13) dengue - 7 days;
- ~~(13)~~(14) diphtheria - 24 hours;
- ~~(14)~~(15) Escherichia coli, shiga toxin-producing - 24 hours;
- ~~(15)~~(16) ehrlichiosis - 7 days;
- ~~(16)~~(17) encephalitis, arboviral - 7 days;
- ~~(17)~~(18) foodborne disease, including Clostridium perfringens, staphylococcal, Bacillus cereus, and other and unknown causes - 24 hours;
- ~~(18)~~(19) gonorrhea - 24 hours;
- ~~(19)~~(20) granuloma inguinale - 24 hours;
- ~~(20)~~(21) Haemophilus influenzae, invasive disease - 24 hours;
- ~~(21)~~(22) Hantavirus infection - 7 days;
- ~~(22)~~(23) Hemolytic-uremic syndrome – 24 hours;
- ~~(23)~~(24) Hemorrhagic fever virus infection - immediately;
- ~~(24)~~(25) hepatitis A - 24 hours;
- ~~(25)~~(26) hepatitis B - 24 hours;
- ~~(26)~~(27) hepatitis B carriage - 7 days;
- ~~(27)~~(28) hepatitis C, acute - 7 days;
- ~~(28)~~(29) human immunodeficiency virus (HIV) infection confirmed - 24 hours;
- ~~(29)~~(30) influenza virus infection causing death - 24 hours;
- ~~(30)~~(31) legionellosis - 7 days;
- ~~(31)~~(32) leprosy - 7 days;
- ~~(32)~~(33) leptospirosis - 7 days;
- ~~(33)~~(34) listeriosis - 24 hours;
- ~~(34)~~(35) Lyme disease - 7 days;
- ~~(35)~~(36) lymphogranuloma venereum - 7 days;
- ~~(36)~~(37) malaria - 7 days;
- ~~(37)~~(38) measles (rubeola) - 24 hours;
- ~~(38)~~(39) meningitis, pneumococcal - 7 days;
- ~~(39)~~(40) meningococcal disease - 24 hours;
- (41) Middle East respiratory syndrome (MERS) - 24 hours;

- ~~(40)~~~~(42)~~ monkeypox - 24 hours;
- ~~(41)~~~~(43)~~ mumps - 7 days;
- ~~(42)~~~~(44)~~ nongonococcal urethritis - 7 days;
- ~~(43)~~~~(45)~~ novel influenza virus infection - immediately;
- ~~(44)~~~~(46)~~ plague - immediately;
- ~~(45)~~~~(47)~~ paralytic poliomyelitis - 24 hours;
- ~~(46)~~~~(48)~~ pelvic inflammatory disease – 7 days;
- ~~(47)~~~~(49)~~ psittacosis - 7 days;
- ~~(48)~~~~(50)~~ Q fever - 7 days;
- ~~(49)~~~~(51)~~ rabies, human - 24 hours;
- ~~(50)~~~~(52)~~ Rocky Mountain spotted fever - 7 days;
- ~~(51)~~~~(53)~~ rubella - 24 hours;
- ~~(52)~~~~(54)~~ rubella congenital syndrome - 7 days;
- ~~(53)~~~~(55)~~ salmonellosis - 24 hours;
- ~~(54)~~~~(56)~~ severe acute respiratory syndrome (SARS) – 24 hours;
- ~~(55)~~~~(57)~~ shigellosis - 24 hours;
- ~~(56)~~~~(58)~~ smallpox - immediately;
- ~~(57)~~~~(59)~~ Staphylococcus aureus with reduced susceptibility to vancomycin - 24 hours;
- ~~(58)~~~~(60)~~ streptococcal infection, Group A, invasive disease - 7 days;
- ~~(59)~~~~(61)~~ syphilis - 24 hours;
- ~~(60)~~~~(62)~~ tetanus - 7 days;
- ~~(61)~~~~(63)~~ toxic shock syndrome - 7 days;
- ~~(62)~~~~(64)~~ trichinosis - 7 days;
- ~~(63)~~~~(65)~~ tuberculosis - 24 hours;
- ~~(64)~~~~(66)~~ tularemia - immediately;
- ~~(65)~~~~(66)~~ typhoid - 24 hours;
- ~~(66)~~~~(67)~~ typhoid carriage (Salmonella typhi) - 7 days;
- ~~(67)~~~~(68)~~ typhus, epidemic (louse-borne) - 7 days;
- ~~(68)~~~~(69)~~ vaccinia - 24 hours;
- ~~(69)~~~~(70)~~ vibrio infection (other than cholera) - 24 hours;
- ~~(70)~~~~(71)~~ whooping cough - 24 hours; and
- ~~(71)~~~~(72)~~ yellow fever - 7 days.

(b) For purposes of reporting, "confirmed human immunodeficiency virus (HIV) infection" is defined as a positive virus culture, repeatedly reactive EIA antibody test confirmed by western blot or indirect immunofluorescent antibody test, positive nucleic acid detection (NAT) test, or other confirmed testing method approved by the Director of the State Public Health Laboratory conducted on or after February 1, 1990. In selecting additional tests for approval, the Director of the State Public Health Laboratory shall consider whether such tests have been approved by the federal Food and Drug Administration, recommended by the federal Centers for Disease Control and Prevention, and endorsed by the Association of Public Health Laboratories.

(c) In addition to the laboratory reports for Mycobacterium tuberculosis, Neisseria gonorrhoeae, and syphilis specified in G.S. 130A-139, laboratories shall report:

- (1) Isolation or other specific identification of the following organisms or their products from human clinical specimens:
 - (A) Any hantavirus or hemorrhagic fever virus.
 - (B) Arthropod-borne virus (any type).

- (C) Bacillus anthracis, the cause of anthrax.
- (D) Bordetella pertussis, the cause of whooping cough (pertussis).
- (E) Borrelia burgdorferi, the cause of Lyme disease (confirmed tests).
- (F) Brucella spp., the causes of brucellosis.
- (G) Campylobacter spp., the causes of campylobacteriosis.
- (H) Chlamydia trachomatis, the cause of genital chlamydial infection, conjunctivitis (adult and newborn) and pneumonia of newborns.
- (I) Clostridium botulinum, a cause of botulism.
- (J) Clostridium tetani, the cause of tetanus.
- (K) Corynebacterium diphtheriae, the cause of diphtheria.
- (L) Coxiella burnetii, the cause of Q fever.
- (M) Cryptosporidium parvum, the cause of human cryptosporidiosis.
- (N) Cyclospora cayetanensis, the cause of cyclosporiasis.
- (O) Ehrlichia spp., the causes of ehrlichiosis.
- (P) Shiga toxin-producing Escherichia coli, a cause of hemorrhagic colitis, hemolytic uremic syndrome, and thrombotic thrombocytopenic purpura.
- (Q) Francisella tularensis, the cause of tularemia.
- (R) Hepatitis B virus or any component thereof, such as hepatitis B surface antigen.
- (S) Human Immunodeficiency Virus, the cause of AIDS.
- (T) Legionella spp., the causes of legionellosis.
- (U) Leptospira spp., the causes of leptospirosis.
- (V) Listeria monocytogenes, the cause of listeriosis.
- (W) Middle East respiratory syndrome virus.
- ~~(W)~~~~(X)~~ Monkeypox.
- ~~(X)~~~~(Y)~~ Mycobacterium leprae, the cause of leprosy.
- ~~(Y)~~~~(Z)~~ Plasmodium falciparum, P. malariae, P. ovale, and P. vivax, the causes of malaria in humans.
- ~~(Z)~~~~(AA)~~ Poliovirus (any), the cause of poliomyelitis.
- ~~(AA)~~~~(BB)~~ Rabies virus.
- ~~(BB)~~~~(CC)~~ Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.

- ~~(CC)~~~~(DD)~~ Rubella virus.
- ~~(DD)~~~~(EE)~~ Salmonella spp., the causes of salmonellosis.
- ~~(EE)~~~~(FF)~~ Shigella spp., the causes of shigellosis.
- ~~(FF)~~~~(GG)~~ Smallpox virus, the cause of smallpox.
- ~~(GG)~~~~(HH)~~ Staphylococcus aureus with reduced susceptibility to vanomycin.
- ~~(HH)~~~~(II)~~ Trichinella spiralis, the cause of trichinosis.
- ~~(H)~~~~(JJ)~~ Vaccinia virus.
- ~~(JJ)~~~~(KK)~~ Vibrio spp., the causes of cholera and other vibrioses.
- ~~(KK)~~~~(LL)~~ Yellow fever virus.
- ~~(LL)~~~~(MM)~~ Yersinia pestis, the cause of plague.
- (2) Isolation or other specific identification of the following organisms from normally sterile human body sites:
 - (A) Group A Streptococcus pyogenes (group A streptococci).
 - (B) Haemophilus influenzae, serotype b.
 - (C) Neisseria meningitidis, the cause of meningococcal disease.
- (3) Positive serologic test results, as specified, for the following infections:
 - (A) Fourfold or greater changes or equivalent changes in serum antibody titers to:
 - (i) Any arthropod-borne viruses associated with meningitis or encephalitis in a human.
 - (ii) Any hantavirus or hemorrhagic fever virus.
 - (iii) Chlamydia psittaci, the cause of psittacosis.
 - (iv) Coxiella burnetii, the cause of Q fever.
 - (v) Dengue virus.
 - (vi) Ehrlichia spp., the causes of ehrlichiosis.
 - (vii) Measles (rubeola) virus.
 - (viii) Mumps virus.

- (ix) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.
- (x) Rubella virus.
- (xi) Yellow fever virus.
- (B) The presence of IgM serum antibodies to:
 - (i) Chlamydia psittaci.
 - (ii) Hepatitis A virus.
 - (iii) Hepatitis B virus core antigen.
 - (iv) Rubella virus.
 - (v) Rubeola (measles) virus.
 - (vi) Yellow fever virus.
- (4) Laboratory results from tests to determine the absolute and relative counts for the T-helper (CD4) subset of lymphocytes and all results from tests to determine HIV viral load.

History Note: Authority G.S. 130A-134; 130A-135; 130A-139; 130A-141;
 Temporary Rule Eff. February 1, 1988, for a period of 180 days to expire on July 29, 1988;
 Eff. March 1, 1988;
 Amended Eff. October 1, 1994; February 1, 1990;
 Temporary Amendment Eff. July 1, 1997;
 Amended Eff. August 1, 1998;
 Temporary Amendment Eff. February 13, 2003; October 1, 2002; February 18, 2002; June 1, 2001;
 Amended Eff. April 1, 2003;
 Temporary Amendment Eff. November 1, 2003; May 16, 2003;
 Amended Eff. January 1, 2005; April 1, 2004;
 Temporary Amendment Eff. June 1, 2006;
 Amended Eff. April 1, 2008; November 1, 2007; October 1, 2006;
 Temporary Amendment Eff. January 1, 2010;
 Temporary Amendment Expired September 11, 2011;
 Amended Eff. July 1, 2013;
Emergency Amendment Eff. September 2, 2014.

This Section contains information for the meeting of the Rules Review Commission on August 21, 2014 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS**Appointed by Senate**

Margaret Currin (Chair)
Jeff Hyde
Jay Hemphill
Faylene Whitaker

Appointed by House

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

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

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

**RULES REVIEW COMMISSION MEETING
MINUTES****August 21, 2014**

The Rules Review Commission met on Thursday, August 21, 2014, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Jeff Hyde, Stephanie Simpson, and Ralph Walker.

Staff members present were: Commission counsels Abigail Hammond, Amber Cronk May, and Amanda Reeder; and Julie Brincefield, Alex Burgos, and Dana Vojtko.

The meeting was called to order at 10:00 a.m. with Chairman Currin presiding.

Chairman Currin read the notice required by NCGS 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts.

Chairman Currin introduced OAH Paralegal Alex Burgos.

APPROVAL OF MINUTES

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the July 17, 2014 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

Commissioner of Agriculture – 02 NCAC 52K .0301, .0401, .0501. All rules were unanimously approved.

Department of Public Safety – 14B NCAC 07A .0116. The Office of State Budget and Management sent a response on August 20, 2014 to the Commission's request made pursuant to G.S. 150B-21.9, and stated that the rule change did not create a substantial economic impact. However, the agency did not respond in accordance with G.S. 150B-21.12. Therefore, there was no action for the Commission to take at the meeting.

Board of Dental Examiners – 21 NCAC 16B .0101, .0201, .0202, .0301, .0303, .0401, .0402, .0403, .0404, .0405, .0406, .0501, .0601, .0701, .0801, .0901, .1002, .1101; 16C .0101, .0202, .0301, .0303, .0311, .0401, .0402, .0403, .0404, .0405, .0501, .0601; 16Q .0303.

Prior to the review of the rules, Commissioner Choi recused herself, and did not participate in any discussion or vote concerning the rules. Commissioner Choi stated the law firm that she is employed with provides legal services for the above referenced Board; therefore, although her firm does not provide counsel on rulemaking for the above referenced Board, in the abundance of caution, she recused herself.

All rules were unanimously approved.

LOG OF FILINGS (PERMANENT RULES)**Pesticide Board**

All rules were withdrawn by the agency. No action was required by the Commission.

Alcoholic Beverage Control Commission

All rules were unanimously approved.

Department of Labor

13 NCAC 13 .0401 was unanimously approved.

Environmental Management Commission

15A NCAC 02B .0306 was unanimously approved.

Dental Examiners, Board of

Prior to the review of the rules, Commissioner Choi recused herself, and did not participate in any discussion or vote concerning the rules. Commissioner Choi stated the law firm that she is employed with provides legal services for the above referenced Board; therefore, although her firm does not provide counsel on rulemaking for the above referenced Board, in the abundance of caution, she recused herself.

21 NCAC 16D .0103 was unanimously approved by the Commission.

The Commission objected to Rule 21 NCAC 16D .0106. The Commission found that the language was ambiguous as written, as it stated the Board will look into any information deemed proper as it relates to the applicants' qualifications or character; however, the rule gives no guidance as to what that will be. Further, the Commission found that the Board did have statutory authority to create a waiver of recovery of damages against the Board, its members or any person who answers a Board inquiry, as proposed in the rule.

In addition, the Commission extended to period of review pursuant to G.S. 150B-21.10 for Rules 16D .0104, 16E .0103 and .0104. The Commission did this in response to a request by the agency to extend the period of review.

Examiners of Electrical Contractors, Board of

All rules were unanimously approved.

Medical Board

Prior to the review of the rules, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning the rules because of a possible conflict with her husband's law firm.

All rules were unanimously approved.

Board of Pharmacy

Prior to the review of the rule, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning the rule because of a possible conflict with her husband's law firm.

Clint Pinyan, the Board's attorney, addressed the Commission.

21 NCAC 46 .2507 was unanimously approved.

Board of Podiatry Examiners

All rules were withdrawn by the agency. No action was required by the Commission.

Appraisal Board

The rule was unanimously approved.

Building Code Council

Prior to the review of the rules, Commissioner Walker recused himself and did not participate in any discussion or vote concerning the rules because his son is an engineer.

Barry Gupton with the agency addressed the Board.

All rules were unanimously approved.

G.S. 150B-19.1(h) RRC CERTIFICATION**Criminal Justice Training and Education Standards Commission**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed Rule 12 NCAC 09G .0412.

Department of State Treasurer

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed Rules 20 NCAC 01G .0101, .0102, .0103, .0104, .0105, .0106, .0107, .0108, .0109, .0201, .0202, .0203, .0204, .0207, .0301, .0302, .0303, .0304, .0305, .0306, .0307, .0401, .0402, .0403, .0404, .0405, .0406, .0407, .0408, .0501, .0502, .0503, .0504, .0505, .0506, .0507, .0508; 01H .0101, .0102, .0104, .0201, .0202, .0203, .0204, .0205, .0301, .0302, .0303, .0304, .0305, .0306, .0307, .0401, .0402.

EXISTING RULES REVIEW**Division of Employment Security**

Prior to the review of the report, Commissioner Doran recused herself and did not participate in any discussion or vote concerning the report because she is employed at DES as Chair of the agency's Board of Review.

The Division requested a waiver of Rule 26 NCAC 05 .0203, as it submitted the report three days after the filing deadline.

The Commission unanimously approved the waiver request.

All agency final determinations were unanimously approved.

Certified Public Accountants

Prior to the review of the report, Commissioner Choi recused herself, and did not participate in any discussion or vote concerning the report. Commissioner Choi stated the law firm that she is employed with provides legal services for the above referenced Board; therefore, although her firm does not provide legal services on rulemaking for the above referenced Board, in the abundance of caution, she recused herself.

Bob Brooks, the agency's director, addressed the Commission.

The Commission unanimously approved the report as submitted by the agency.

Podiatry Examiners

The Commission unanimously approved the report as submitted by the agency.

Commissioner Doran was not present for the vote for this report.

Agricultural Finance Authority

The Board requested a waiver of Rules 26 NCAC 05 .0203 and .0211.

The Commission approved the waiver request, with Vice Chairman Dunklin, and Commissioners Doran and Hyde opposed.

Frank Bordeaux and Stephanie Oxley with the agency addressed the Commission.

The Commission rescheduled the date of review for the report pursuant to Rule 26 NCAC 05 .0204. The Commission will review the Board's report at its February 19, 2015 meeting.

State Human Resources Commission

Prior to the review of the reports, Commissioner Doran recused herself and did not participate in any discussion or vote concerning the reports because she is a State employee.

25 NCAC Subchapter 01A - The Commission unanimously approved the report as submitted by the agency.

25 NCAC Subchapter 01B - The Commission unanimously approved the report as submitted by the agency.

25 NCAC Subchapter 01C - The Commission unanimously approved the report as submitted by the agency, with the following exceptions for rules that received public comment that were deemed to have merit as defined by G.S. 150B-21.3A (c)(2): 01C .0303, .0304, .0902 and .0903. The RRC designated those rules as "necessary with substantive public interest."

Office of Americans with Disabilities Act

The Commission unanimously approved the report as submitted by the agency.

Board of Optometry

As this report was not scheduled for review at the August meeting, it was reviewed at the end of the regularly scheduled business.

The Board requested a waiver of Rules 26 NCAC 05 .0203 and .0211.

The Commission approved the waiver.

Johnny M. Loper, the Board's attorney, addressed the Commission.

The Commission rescheduled the date of review for the report pursuant to Rule 26 NCAC 05 .0204. The Commission will review the Board's report at its March 19, 2015 meeting.

The Commission discussed waivers for the periodic review and expiration of existing rules. Vice Chairman Dunklin voiced concerns about requests to extend deadlines after the filing deadline, and stated that extensions of deadlines should be requested prior to the deadline.

COMMISSION BUSINESS

Staff gave the Commission a brief legislative update.

The meeting adjourned at 1:20 p.m.

The next regularly scheduled meeting of the Commission is Thursday, September 18th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings /Rules Division.

Respectfully Submitted,

Alexander Burgos
Paralegal II

Minutes approved by the Rules Review Commission:

Margaret Currin, Chair

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
BARRY GUPTON	NCDDI - NCBCC
STEVEN WEBB	NCHBA
Bob Hamilton	ABC Commission
Nick Forness	CH
Tim Norman	NCBEEC
KAREN BECK	NCBHC
Jane Gilchrist	NCIDOL
Chris Evers	BCBSC
Stephanie Dyley	Ag Finance Auth.
Frank Bordeaux	"
Kyra Hudgins	"
Shari Howard	OSHR
Kenny Pson	OSHR
Cliff Dauterich	NCDEL/BSB
Don Kinney	NIDA/BSB
Wanda Long	NC MEDICAL BD
Jay Cooke	NC Medical Bld
Grant Bryan	Board of Pharmacy
Roberta Ouellette	NC Appraisal Board
Patrick Balestrieri	NC Medical Bd.
Britne Becker	NC DOL

Rules Review Commission
Meeting
Please Print Legibly

Name	Agency
John Homan	NCDOC
Christine Ryan	NCDOC
Carolyn Bakewell	NCBDSLS
Johnny M. Loper	NC OPTOMETRY BOARD
Elizabeth Kountis	NC DENR
Sheena Cobrand	NCDOC
ANA-LAURA DIAZ	NC DST
Jamie Davidson	NC DOR
Ann Wall	NC SOS
Jeremy Ray	NCBES
Jennifer Everett	DENR
Catherine Lee	
Penney DePas	NC Bd of Podiatry Examiners
Paul Vukobratovich	Allen, Pinnix & Nichols
Bob Brooks	CPA Board
David Nance	CPA Board

**LIST OF APPROVED PERMANENT RULES
August 21, 2014 Meeting**

AGRICULTURE, COMMISSIONER OF

<u>Signage</u>	02	NCAC 52K .0301
<u>Fencing</u>	02	NCAC 52K .0401
<u>Hand Washing Stations</u>	02	NCAC 52K .0501

ALCOHOLIC BEVERAGE CONTROL COMMISSION

<u>Applications for Permits: General Provisions</u>	04	NCAC 02S .0102
<u>Labels to be Submitted to Commission</u>	04	NCAC 02T .0302
<u>Label Contents: Malt Beverages</u>	04	NCAC 02T .0303
<u>Growlers</u>	04	NCAC 02T .0308
<u>Growlers: Cleaning, Sanitizing, Filling and Sealing</u>	04	NCAC 02T .0309

LABOR, DEPARTMENT OF

<u>Design and Construction Standards</u>	13	NCAC 13 .0401
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ENVIRONMENTAL MANAGEMENT COMMISSION

<u>Broad River Basin</u>	15A	NCAC 02B .0306
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DENTAL EXAMINERS, BOARD OF

<u>Examination Required; Exemptions</u>	21	NCAC 16B .0101
<u>In General</u>	21	NCAC 16B .0201
<u>Student May Apply</u>	21	NCAC 16B .0202
<u>Application for Licensure</u>	21	NCAC 16B .0301
<u>Board Approved Examinations</u>	21	NCAC 16B .0303
<u>Application for Board Conducted Examination</u>	21	NCAC 16B .0401
<u>Time for Filing</u>	21	NCAC 16B .0402
<u>Examination Conducted by the Board</u>	21	NCAC 16B .0403
<u>Patients and Supplies for Board Conducted Clinical Examin...</u>	21	NCAC 16B .0404
<u>Scope of Board Conducted Clinical Examination</u>	21	NCAC 16B .0405
<u>Board Conducted Reexamination</u>	21	NCAC 16B .0406
<u>Dental Licensure by Credentials</u>	21	NCAC 16B .0501
<u>Limited Volunteer Dental License</u>	21	NCAC 16B .0601
<u>Instructor's License</u>	21	NCAC 16B .0701
<u>Temporary Volunteer Dental Permit</u>	21	NCAC 16B .0801
<u>Definitions</u>	21	NCAC 16B .0901
<u>Dental Licensure by Endorsement Based on Status as Milita...</u>	21	NCAC 16B .1002
<u>Proof of Competency</u>	21	NCAC 16B .1101
<u>Licensure</u>	21	NCAC 16C .0101
<u>Student May Apply</u>	21	NCAC 16C .0202
<u>Application for Licensure</u>	21	NCAC 16C .0301
<u>Board Approved Examinations</u>	21	NCAC 16C .0303
<u>Reexamination</u>	21	NCAC 16C .0311
<u>Application for Examination Conducted by the Board</u>	21	NCAC 16C .0401

<u>Time for Filing</u>	21	NCAC 16C .0402
<u>Examination Conducted by the Board</u>	21	NCAC 16C .0403
<u>Patients and Supplies for Board Conducted Clinical Examin...</u>	21	NCAC 16C .0404
<u>Board Conducted Reexamination</u>	21	NCAC 16C .0405
<u>Dental Hygiene Licensure by Credentials</u>	21	NCAC 16C .0501
<u>Proof of Competency</u>	21	NCAC 16C .0601
<u>Patient Records</u>	21	NCAC 16D .0103
<u>Temporary Approval Prior to Site Inspection</u>	21	NCAC 16Q .0303

EXAMINERS OF ELECTRICAL CONTRACTORS, BOARD OF

<u>Electrical Installation: Project: Project Value-Limitation</u>	21	NCAC 18B .0303
<u>Annual License Fees</u>	21	NCAC 18B .0404

MEDICAL BOARD

<u>Reinstatement of Physician License</u>	21	NCAC 32B .1350
<u>Reactivation of Physician License</u>	21	NCAC 32B .1360
<u>Application for Resident's Training License</u>	21	NCAC 32B .1402
<u>Administration of Vaccines by Pharmacists</u>	21	NCAC 32U .0101

PHARMACY, BOARD OF

<u>Administration of Vaccines by Pharmacists</u>	21	NCAC 46 .2507
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APPRAISAL BOARD

<u>Expired Registration, License or Certificate</u>	21	NCAC 57A .0206
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BUILDING CODE COUNCIL

<u>2012 NC Building Code/Automatic Sprinkler Systems</u>	901.6.1
<u>2012 NC Building Code/Fixture Calculations</u>	2902.1.1
<u>2012 NC Building Code Council/Mean of Egress Capacity Fa...</u>	3404.6
<u>2012 NC Fuel Gas Code/Pipe Joints</u>	403.10.1
<u>2012 NC Mechanical Code/Makeup Air Required</u>	505.2
<u>2012 NC Plumbing Code/Fixture Calculations</u>	403.1.1
<u>2012 NC Residential Code/Hazardous Locations</u>	R308.4
<u>2012 NC Residential Code/Corrosion Resistance</u>	R4605.5
<u>2012 NC Residential Code/Deck Attachment</u>	Appendix AM104.1

LIST OF CERTIFIED RULES
August 21, 2014 Meeting

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Basic Training for Probation/Parole Officers</u>	12	NCAC 09G .0412
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STATE TREASURER, DEPARTMENT OF

<u>Description of the Program</u>	20	NCAC 01G .0101
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<u>Definitions</u>	20 NCAC 01G .0102
<u>Principles of Accounting and Valuation</u>	20 NCAC 01G .0103
<u>Accounting for Exchanges</u>	20 NCAC 01G .0104
<u>Allocation of Management Costs</u>	20 NCAC 01G .0105
<u>Consolidation of Existing Investments of Participants</u>	20 NCAC 01G .0106
<u>Mergers of Additional Investment Portfolios</u>	20 NCAC 01G .0107
<u>Loans Between Investment Funds</u>	20 NCAC 01G .0108
<u>Delegation of Authority</u>	20 NCAC 01G .0109
<u>General</u>	20 NCAC 01G .0201
<u>Eligible Investments</u>	20 NCAC 01G .0202
<u>Eligible Participants</u>	20 NCAC 01G .0203
<u>Allocation of Income to Participants</u>	20 NCAC 01G .0204
<u>Voluntary Deposits for Investments</u>	20 NCAC 01G .0207
<u>General</u>	20 NCAC 01G .0301
<u>Eligible Investments</u>	20 NCAC 01G .0302
<u>Eligible Participants</u>	20 NCAC 01G .0303
<u>Allocation of Income to Participants</u>	20 NCAC 01G .0304
<u>Valuation of Ownership Units</u>	20 NCAC 01G .0305
<u>Purchase of Ownership Units</u>	20 NCAC 01G .0306
<u>Redemption of Ownership Rights</u>	20 NCAC 01G .0307
<u>General</u>	20 NCAC 01G .0401
<u>Eligible Investments</u>	20 NCAC 01G .0402
<u>Eligible Participants</u>	20 NCAC 01G .0403
<u>Allocation of Income to Participants</u>	20 NCAC 01G .0404
<u>Valuation of Ownership Units</u>	20 NCAC 01G .0405
<u>Purchase of Ownership Units</u>	20 NCAC 01G .0406
<u>Redemption of Ownership Units</u>	20 NCAC 01G .0407
<u>Responsibility of Equity Investment Advisory Committee</u>	20 NCAC 01G .0408
<u>General</u>	20 NCAC 01G .0501
<u>Eligible Investments</u>	20 NCAC 01G .0502
<u>Eligible Participants</u>	20 NCAC 01G .0503
<u>Allocation of Income to Participants</u>	20 NCAC 01G .0504
<u>Valuation of Ownership Units</u>	20 NCAC 01G .0505
<u>Purchase of Ownership Units</u>	20 NCAC 01G .0506
<u>Redemption of Ownership Units</u>	20 NCAC 01G .0507
<u>Rebalancing of Ownership</u>	20 NCAC 01G .0508
<u>General Information</u>	20 NCAC 01H .0101
<u>Definition of Terms</u>	20 NCAC 01H .0102
<u>Delegation of Authority</u>	20 NCAC 01H .0104
<u>Requirements for the RFP</u>	20 NCAC 01H .0201
<u>Issuance of the RFP</u>	20 NCAC 01H .0202
<u>Contract Period: Termination of Trustee</u>	20 NCAC 01H .0203
<u>Termination for Cause</u>	20 NCAC 01H .0204
<u>Availability of Records</u>	20 NCAC 01H .0205
<u>Establishment of Individual Accounts</u>	20 NCAC 01H .0301
<u>Deposit of Cash or Securities</u>	20 NCAC 01H .0302
<u>Deposit of Cash or Securities</u>	20 NCAC 01H .0303

<u>Substitution of Securities</u>	20 NCAC 01H .0304
<u>Required Reporting</u>	20 NCAC 01H .0305
<u>Withdrawal of Cash or Securities</u>	20 NCAC 01H .0306
<u>Fees</u>	20 NCAC 01H .0307
<u>Notification of Default</u>	20 NCAC 01H .0401
<u>Sale of Securities After Default</u>	20 NCAC 01H .0402

RRC DETERMINATION PERIODIC RULE REVIEW
August 21, 2014
Necessary with Substantive Public Interest

Commerce - Employment Security, Division of

04 NCAC 24E .0101
04 NCAC 24E .0102
04 NCAC 24E .0103
04 NCAC 24E .0104

Certified Public Accountant Examiners, Board of

21 NCAC 08A .0301
21 NCAC 08A .0307
21 NCAC 08A .0308
21 NCAC 08A .0309
21 NCAC 08B .0508
21 NCAC 08F .0103
21 NCAC 08F .0105
21 NCAC 08F .0111
21 NCAC 08F .0302
21 NCAC 08F .0401
21 NCAC 08F .0410
21 NCAC 08F .0502
21 NCAC 08G .0401
21 NCAC 08G .0403
21 NCAC 08G .0404
21 NCAC 08G .0406
21 NCAC 08G .0409
21 NCAC 08G .0410
21 NCAC 08I .0104
21 NCAC 08J .0101
21 NCAC 08J .0105
21 NCAC 08J .0107
21 NCAC 08J .0111
21 NCAC 08M .0105
21 NCAC 08M .0106
21 NCAC 08N .0101
21 NCAC 08N .0102
21 NCAC 08N .0103
21 NCAC 08N .0201
21 NCAC 08N .0202
21 NCAC 08N .0203
21 NCAC 08N .0204
21 NCAC 08N .0205
21 NCAC 08N .0206
21 NCAC 08N .0207
21 NCAC 08N .0208
21 NCAC 08N .0209
21 NCAC 08N .0211

21 NCAC 08N .0212
21 NCAC 08N .0213
21 NCAC 08N .0214
21 NCAC 08N .0215
21 NCAC 08N .0301
21 NCAC 08N .0302
21 NCAC 08N .0303
21 NCAC 08N .0304
21 NCAC 08N .0305
21 NCAC 08N .0306
21 NCAC 08N .0307
21 NCAC 08N .0308
21 NCAC 08N .0401
21 NCAC 08N .0402
21 NCAC 08N .0403
21 NCAC 08N .0404
21 NCAC 08N .0405
21 NCAC 08N .0406
21 NCAC 08N .0408
21 NCAC 08N .0409

Podiatry Examiners, Board of

21 NCAC 52 .0201
21 NCAC 52 .0202
21 NCAC 52 .0204
21 NCAC 52 .0205
21 NCAC 52 .0207
21 NCAC 52 .0208
21 NCAC 52 .0209
21 NCAC 52 .0210
21 NCAC 52 .0211
21 NCAC 52 .0212
21 NCAC 52 .0301
21 NCAC 52 .0302
21 NCAC 52 .0303
21 NCAC 52 .0402
21 NCAC 52 .0403
21 NCAC 52 .0404
21 NCAC 52 .0408
21 NCAC 52 .0601
21 NCAC 52 .0610
21 NCAC 52 .0612
21 NCAC 52 .0613
21 NCAC 52 .0701
21 NCAC 52 .0702
21 NCAC 52 .0703
21 NCAC 52 .0804
21 NCAC 52 .1001
21 NCAC 52 .1002
21 NCAC 52 .1003
21 NCAC 52 .1004
21 NCAC 52 .1005
21 NCAC 52 .1202
21 NCAC 52 .1203
21 NCAC 52 .1204
21 NCAC 52 .1301
21 NCAC 52 .1302
21 NCAC 52 .1401

State Human Resources Commission

25 NCAC 01C .0303
25 NCAC 01C .0304
25 NCAC 01C .0405
25 NCAC 01C .0407
25 NCAC 01C .0504
25 NCAC 01C .0902
25 NCAC 01C .0903
25 NCAC 01C .1007

RRC DETERMINATION PERIODIC RULE REVIEW
August 21, 2014
Necessary without Substantive Public Interest

Certified Public Accountant Examiners, Board of

21 NCAC 08A .0101
21 NCAC 08A .0102
21 NCAC 08A .0103
21 NCAC 08A .0201
21 NCAC 08A .0203
21 NCAC 08A .0310
21 NCAC 08B .0101
21 NCAC 08B .0102
21 NCAC 08B .0104
21 NCAC 08B .0105
21 NCAC 08B .0202
21 NCAC 08B .0304
21 NCAC 08B .0307
21 NCAC 08B .0501
21 NCAC 08B .0502
21 NCAC 08B .0503
21 NCAC 08B .0507
21 NCAC 08C .0103
21 NCAC 08C .0104
21 NCAC 08C .0105
21 NCAC 08C .0107
21 NCAC 08C .0108
21 NCAC 08C .0109
21 NCAC 08C .0110
21 NCAC 08C .0111
21 NCAC 08C .0114
21 NCAC 08C .0115
21 NCAC 08C .0116
21 NCAC 08C .0118
21 NCAC 08C .0121
21 NCAC 08C .0122
21 NCAC 08C .0123
21 NCAC 08C .0124
21 NCAC 08C .0125
21 NCAC 08C .0126
21 NCAC 08F .0101
21 NCAC 08F .0102
21 NCAC 08F .0106
21 NCAC 08F .0107
21 NCAC 08F .0113
21 NCAC 08F .0303
21 NCAC 08F .0409
21 NCAC 08F .0504

21 NCAC 08G .0405
21 NCAC 08H .0101
21 NCAC 08H .0102
21 NCAC 08H .0104
21 NCAC 08I .0101
21 NCAC 08I .0102
21 NCAC 08I .0105
21 NCAC 08J .0106
21 NCAC 08J .0108
21 NCAC 08J .0109
21 NCAC 08J .0110
21 NCAC 08K .0104
21 NCAC 08K .0105
21 NCAC 08K .0201
21 NCAC 08K .0301
21 NCAC 08M .0107

Podiatry Examiners, Board of

21 NCAC 52 .0101
21 NCAC 52 .0611

State Human Resources Commission

25 NCAC 01A .0103
25 NCAC 01A .0104
25 NCAC 01A .0106
25 NCAC 01B .0201
25 NCAC 01B .0204
25 NCAC 01B .0205
25 NCAC 01B .0208
25 NCAC 01B .0213
25 NCAC 01B .0214
25 NCAC 01B .0215
25 NCAC 01B .0216
25 NCAC 01B .0217
25 NCAC 01B .0350
25 NCAC 01B .0413
25 NCAC 01C .0215
25 NCAC 01C .0401
25 NCAC 01C .0402
25 NCAC 01C .0501
25 NCAC 01C .0502
25 NCAC 01C .0503
25 NCAC 01C .0507
25 NCAC 01C .0701
25 NCAC 01C .0702
25 NCAC 01C .0703
25 NCAC 01C .0801
25 NCAC 01C .0802
25 NCAC 01C .0813
25 NCAC 01C .0901
25 NCAC 01C .1001
25 NCAC 01C .1002
25 NCAC 01C .1003
25 NCAC 01C .1004
25 NCAC 01C .1005
25 NCAC 01C .1006
25 NCAC 01C .1008
25 NCAC 01C .1009

Americans with Disabilities Act, Office of

25 NCAC 02 .0101

25 NCAC 02 .0201

RRC DETERMINATION PERIODIC RULE REVIEW

August 21, 2014

Unnecessary

Certified Public Accountant Examiners, Board of

21 NCAC 08N .0407

State Human Resources Commission

25 NCAC 01A .0105

25 NCAC 01B .0104

25 NCAC 01B .0414

25 NCAC 01B .0415

25 NCAC 01B .0421

25 NCAC 01B .0422

25 NCAC 01B .0423

25 NCAC 01B .0424

25 NCAC 01B .0425

25 NCAC 01B .0426

25 NCAC 01B .0427

25 NCAC 01B .0428

25 NCAC 01B .0429

25 NCAC 01B .0430

25 NCAC 01B .0431

25 NCAC 01B .0432

25 NCAC 01B .0433

25 NCAC 01B .0434

25 NCAC 01B .0435

25 NCAC 01B .0436

25 NCAC 01B .0437

25 NCAC 01B .0438

25 NCAC 01B .0439

25 NCAC 01C .0201

25 NCAC 01C .0202

25 NCAC 01C .0210

25 NCAC 01C .0301

25 NCAC 01C .0307

25 NCAC 01C .0403

25 NCAC 01C .0404

25 NCAC 01C .0406

25 NCAC 01C .0408

25 NCAC 01C .0409

25 NCAC 01C .0411

25 NCAC 01C .0412

25 NCAC 01C .0509

25 NCAC 01C .0803

25 NCAC 01C .0804

25 NCAC 01C .0805

25 NCAC 01C .0806

25 NCAC 01C .0811

CONTESTED CASE DECISIONS

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Melissa Owens Lassiter
Don Overby
J. Randall May

J. Randolph Ward

A. B. Elkins II
Selina Brooks
Craig Croom

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>			
ABC Commission v. Noble 6 Enterprises LLC, T/A Peppermint Rabbit	13 ABC 20226	08/13/14	
ABC Commission v. Demetrius Earl Smith, T/A Smith's Convenient Store	14 ABC 01354	08/18/14	
Melody Locklear McNair v. ABC Commission	14 ABC 02323	06/25/14	
Marcus L. Bellamy T/A Bellas Grill v. ABC Commission	14 ABC 03485	07/24/14	
<u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u>			
Carl John Perkinson v. Department of Public Safety	14 CPS 02245	06/24/14	
Waheeda Ammeri v. Department of Public Safety	14 CPS 03254	07/21/14	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Senior Home Care Services, Inc. v. DHHS	12 DHR 09750	08/13/14	
AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 00115	01/06/14	29:02 NCR 202
Albert Barron, Sr. v. Eastpointe Human Services Local Management Entity	13 DHR 00784	04/22/14	29:04 NCR 444
AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 08874	01/06/14	29:02 NCR 202
Sheryl A. Lyons v. DHHS	13 DHR 10228	05/12/14	29:05 NCR 559
Kenneth Terrell Ford v. DHHS, Division of Facility Services	13 DHR 10745	02/12/14	29:03 NCR 356
Pamela Byrd v. DHHS	13 DHR 12691	11/05/13	29:06 NCR 685
Tricare Counseling and Consulting, Inc. v. DHHS, Division of Medical Assistance	13 DHR 14221	12/31/13	29:04 NCR 460
J. Mark Oliver DDS, PLLC v. DHHS, Division of Medical Assistance	13 DHR 14369	02/19/14	29:02 NCR 206
Genesis Project 1 Inc. v. DHHS, Division of Medical Assistance and its agent, Mecklink Behavioral Healthcare	13 DHR 17094	12/16/13	29:01 NCR 70
Ervin Smith v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 17560	07/30/14	
Estate of Earlene W. Alston, Lewis E. Alston v. DHHS, DMA	13 DHR 17909	04/08/14	29:02 NCR 211
Lawanda Suggs v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 18454	08/15/14	
Susan Arrowood, OLPC v. DHHS, Division of Medical Assistance and its agent Partners Behavioral Health Management	13 DHR 19981	01/08/14	29:03 NCR 366
Rosemary Nwankwo v. DHHS	13 DHR 20013	08/13/14	
Marilyn Sherrill v. DHHS	13 DHR 20086	08/13/14	
Gregory P. Lathan, President and Registered Agent, The EI Group Inc. v. DHHS	13 DHR 20332	08/20/14	
Jacqueline Marie Jackson v. DHHS, Division of Health Service Regulation, Health Care	14 DHR 00460	07/10/14	

Personnel Registry		
Nadiah Porter v. Durham County Department of Social Services (DSS) (Formerly Durham's Alliance for Child Care Access, DACCA)	14 DHR 01309	06/30/14
Wittner Wright and Lisa Wright v. DHHS	14 DHR 01510	07/21/14
Darrick Pratt v. DHHS, Division of Health Service Regulation	14 DHR 01598	08/26/14
Elizabeth Mitchell v. Durham DSS	14 DHR 01982	06/23/14
Wayne Mitchell v. Durham DSS	14 DHR 02044	06/23/14
Prince Onwuka, Roda V. Onwuka v. Division of Child Development and Early Education	14 DHR 02636	07/24/14
Andrea Cook v. DHHS, Division of Health Service Regulation	14 DHR 02947	07/29/14
Dianne Lucas v. DHHS, Division of Health Service Regulation	14 DHR 03088	08/05/14
Faisal Saed Ismail v. New Hanover County DSS	14 DHR 03089	08/01/14
Peter K. Kagwanja, owner Lighthouse Foodmart v. DHHS, Division of Public Health	14 DHR 03335	07/03/14
Jennifer Lyn McKinney v. DHHS, Division of Health Service Regulation	14 DHR 03521	08/07/14
Juan Wilbornx v. DHHS	14 DHR 03585	08/18/14
Harold Eku John Coker v. Office of Administrative Hearings	14 DHR 03644	08/01/14

DEPARTMENT OF JUSTICE

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STATE OF NORTH CAROLINA

Filed

IN THE OFFICE OF

COUNTY OF GUILFORD

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ADMINISTRATIVE HEARINGS

13DHR12691

Pamela Byrd, Petitioner,	Office of Administrative Hearings	FINAL DECISION
v.		
North Carolina Department Of Health And Human Services, Respondent.		

THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge presiding, on September 23, 2013, in the Martin Courtroom at the Guilford County Courthouse in High Point, North Carolina. The undersigned Administrative Law Judge issues the following Decision, which is a final decision under the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-34:

APPEARANCES

For Petitioner: Maureen Demarest Murray
 Smith Moore Leatherwood LLP
 300 N. Greene Street, Suite 1400
 Greensboro, NC 27401

For Respondent: Josephine N. Tetteh
 Assistant Attorney General
 N.C. Department of Justice
 P. O. Box 629
 Raleigh, NC 27602-0629

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights by failing to act as required by law or rule, exceeding its authority and jurisdiction, acting arbitrarily and capriciously, and failing to use proper procedure when Respondent substantiated the allegation that Petitioner neglected a resident ("C.W.") of RHA Howell/Westminster Group Home, 1111 Westridge Road in Greensboro, North Carolina, by failing to follow the correct method of transferring C.W., which resulted in a cut to C.W.'s head that required staples.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. § 150B-1, *et seq.*
42 CFR § 488.301
10A N.C.A.C. 130.0101

EXHIBITS

Respondent's Exhibits ("R. Exs.") 1-18 were admitted into the record without objection.

WITNESSES

For Petitioner

None

For Respondent

Pamela Tonya Byrd (Petitioner)
Rhonda English, LPN, RHA Howell/Westminster
Deborah Foster, Clinical Coordinator, RHA Howell/Westminster
Kandy John, Administrator, RHA Howell/Westminster
Jennifer Baxter, RN, BSN (Investigator, Health Care Personnel Registry)

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 and conclusions of law. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses; any interests, bias, or prejudice the witnesses may have; the opportunity of the witnesses to see, hear, know, or remember the facts or occurrences about which the witnesses testified; whether the testimony of the witnesses is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of the witnesses, 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. Both parties requested and agreed to recording of the hearing by Mr. William Dobbins, Hearing Assistant.

3. At all times relevant to this matter, Pamela Tonya Byrd ("Petitioner") was employed as a health care personnel, a Developmental Technician at RHA Howell/Westminster, 1111 Westridge Road in Greensboro, North Carolina.
4. RHA Howell/Westminster is a Group Home for developmentally disabled adults operated by RHA and located at 1111 Westridge Road in Greensboro. Six female residents lived in the facility as of February 15, 2013, the time of the events giving rise to this contested case.
5. Petitioner's duties as a Developmental Technician included providing direct care to disabled residents, assisting with personal hygiene, preparing meals, assisting with programming and activities, dealing with residents' behaviors, and interacting with residents. (R. Ex. 1)
6. Petitioner received, and acknowledged having received, training in proper transfers of residents including two-person lifts and use of a Hoyer lift. (R. Ex. 2)
7. Petitioner generally worked the evening shift where she was responsible for preparing and serving meals to residents, assisting with bathing and daily hygiene, evening interaction, provision of medications to residents, and assistance with preparation for bed.
8. On February 15, 2013, Petitioner and Sabrina Jernigan, another Developmental Technician, were working in the facility. Six female residents were present in the facility at the time. No other staff were present in the facility.
9. On February 15, 2013, Petitioner was assigned to provide direct care to C.W. C.W. is a 69-year-old female, 114 pounds, with diagnoses of osteoporosis, kyphosis, cerebral palsy, seizure disorder, and mental retardation. (R. Ex. 6)
10. According to a physical therapy evaluation done on January 4, 2012, C.W. was non-ambulatory, able to self-propel her manual wheelchair, lift herself up to relieve pressure in her wheelchair, feed herself, raise herself from a supine to a sitting position in bed, and scoot herself up in her bed. C.W. also understood and responded to verbal commands. The physical therapy evaluation also stated that C.W. was independent with bed mobility. (R. Ex. 6)
11. Written statements by Petitioner and Sabrina Jernigan describe C.W. as playful. (R. Exs. 3 & 4) Clinical Coordinator Deborah Foster confirmed that C.W. liked to interact and to give staff big hugs.
12. In her written statements, Petitioner described C.W. as able to change her position in bed to lie crossways or horizontally on the bed rather than vertically. (R. Exs. 3 & 4) Petitioner included with her written statement a diagram of C.W.'s position lying horizontally on the bed. During her investigation, Health Care Personnel Registry Investigator Jennifer Baxter observed C.W. in a wheelchair but not in her bed. RHA Howell/Westminster Administrator Kandy John had not seen C.W. in her bed and was

not familiar with her behavior or movements in bed. Rhonda English also was not familiar with C.W.'s movements or behavior in bed. Deborah Foster had observed C.W. in bed but was not familiar with her current movements and behavior in bed around the time of February 15, 2013.

13. C.W. was in a twin bed on February 15, 2013. She previously had been in a different room in a full- or queen-sized bed. (R. Exs. 3 & 4) C.W.'s twin-sized bed was placed in the corner of the room with a window sill at the head and a window sill at the left side of the bed. In her report and at trial, Investigator Baxter stated that the window sill was two inches above the left side rail on the bed and protruded about half an inch over the bed along the left side rail. (R. Ex. 16)
14. On February 15, 2013, Petitioner and Sabrina Jernigan assisted C.W. with her evening shower and hygiene. When assisting C.W. from her shower to bed, Petitioner and Sabrina Jernigan used a two-person lift to transfer C.W. to her bed. (R. Exs. 3-5) C.W.'s life plan at the time specified transfers by a Hoyer lift operated by two staff. (R. Ex. 6) Petitioner and Sabrina Jernigan did not use a Hoyer lift to transfer C.W. on February 15, 2013. After Petitioner and Sabrina Jernigan transferred C.W. to her bed and laid her down vertically on the bed, C.W. was playing around and hit her head on the window sill. C.W. sustained a cut to the left back of her head. (R. Exs. 3-5)
15. Petitioner and Sabrina Jernigan notified staff on call about C.W.'s injury, and LPN Rhonda English came to the facility to assess and treat C.W. Rhonda English and Clinical Coordinator Deborah Foster decided to send C.W. to the hospital for further evaluation and treatment, where she received staples to close her wound. (R. Exs. 3-5, 8, & 9)
16. There were no allegations that Petitioner or Sabrina Jernigan failed to attend to C.W.'s injury or failed to appropriately notify more senior staff associated with the facility. There also was no allegation that Petitioner abused C.W.
17. Deborah Foster conducted an investigation on behalf of RHA. As a result of her investigation, she submitted a 24-hour report and a 5-day report to the Health Care Personnel Registry alleging that Petitioner and Sabrina Jernigan had neglected C.W. by failing to use a Hoyer lift in accordance with her life plan. (R. Exs 10-12)
18. The North Carolina Health Care Personnel Registry ("HCPR") investigates allegations against unlicensed health care personnel working in health care facilities in North Carolina. The allegations investigated by HCPR include, but are not limited to, abuse and neglect. With the exception of a finding of a single instance of neglect, substantiated findings against health care personnel are permanently listed on the HCPR. N.C.G.S. § 131E-256.
19. At all times relevant to this incident, Jennifer Baxter, a Registered Nurse, was employed as an investigator for the HCPR. She is charged with investigating allegations, including abuse and neglect, against unlicensed health care personnel in Guilford County, North

Carolina, among others, and was assigned to conduct the investigation into the allegations against Petitioner. (R. Ex. 16)

20. Upon receipt of the allegations against Petitioner, Investigator Baxter determined that the matter required further investigation. Upon making this determination, Investigator Baxter informed Petitioner by certified letter that an investigation would be conducted regarding the allegations that Petitioner had neglected C.W.
21. Investigator Baxter came to the facility to investigate on March 12, 2013. She did not speak with any staff that usually worked the evening shift where they assisted C.W. with her shower, evening hygiene, and placement in bed. Investigator Baxter attempted to contact Sabrina Jernigan but was unsuccessful. (R. Ex. 16) She spoke with Petitioner by telephone. Petitioner promptly contacted Investigator Baxter the same day that she received a certified letter asking Petitioner to contact Investigator Baxter. Petitioner elected to submit a written statement to Investigator Baxter.
22. As a result of her review of written materials and records obtained from the facility, her interviews and the statements that she obtained or the facility obtained, Investigator Baxter substantiated a finding that Petitioner had neglected C.W. by failing to use a Hoyer lift to transfer C.W. that resulted in an injury to C.W.'s head. (R. Ex. 16)
23. C.W.'s life plan specified use of a Hoyer lift for transfers due to C.W.'s osteoporosis. (R. Ex. 6) C.W.'s life plan previously had provided for use of a two-person lift to assist in transferring C.W. Rhonda English and Clinical Coordinator Foster agreed that a two-person lift can be done safely to transfer C.W.
24. Investigator Baxter did not ask Petitioner whether the injury to C.W.'s head occurred during the two-person lift performed by Petitioner and Sabrina Jernigan or after they had completed the lift and placed C.W. safely in the bed.
25. By certified letter dated April 23, 2013, Investigator Baxter notified Petitioner that the allegations that Petitioner had neglected C.W. had been substantiated and that those findings would be listed against Petitioner on the HCPR. Petitioner was notified of her right to appeal. (R. Ex. 18)
26. Under N.C.G.S. § 131E-256, the North Carolina Department of Health and Human Services ("Department") is required to establish and maintain a health care personnel registry that contains the names of all unlicensed health care personnel working in health care facilities in North Carolina who are subject to a finding by the Department that they abused or neglected a resident in a health care facility, or have been accused of such an act if the Department has screened the allegation and determined that an investigation is warranted.
27. Before presenting any evidence, Petitioner made a motion that the finding of neglect be overturned for lack of evidence of a causal connection between the injury sustained by C.W. and Petitioner's use of a two-person lift rather than a Hoyer lift to assist in

transferring C.W. to her bed. The Undersigned determined that the evidence at trial did not demonstrate neglect by Petitioner and the Health Care Personnel Registry's finding of neglect should be overturned.

28. "Neglect" means the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness. 10A N.C.A.C. 130.0101(10); 42 CFR § 488.301. This definition requires evidence that the services that were not provided by the accused health care personnel were necessary "to avoid physical harm." The evidence at trial did not establish that failure to use a Hoyer lift to transfer C.W. was necessary to avoid physical harm or that the injury sustained by C.W. was caused by Petitioner's failure to use a Hoyer lift rather than C.W.'s own actions.
29. Petitioner did not present any evidence.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under Chapters 131E and 150B of the North Carolina General Statutes.
2. All parties correctly have been designated, and there is no question as to misjoinder or nonjoinder.
3. As a health care personnel working in a residential facility, Petitioner is subject to the provisions of N.C.G.S. § 131E-256.
4. RHA Howell/Westminster Group Home, 1111 Westridge Road in Greensboro, North Carolina is a group home for developmentally disabled adults and is therefore subject to N.C.G.S. § 131E-256.
5. The preponderance of the evidence in this case shows that on February 15, 2013, Petitioner did not fail to provide goods or services to C.W. that were necessary to avoid physical harm. The preponderance of the evidence does not show that Petitioner's actions or failure to act resulted in physical injury to C.W. or that Petitioner's actions or failure to act created an increased probability of physical harm to C.W. The evidence in this case is that C.W.'s injury occurred after she was placed in bed and released by her caregivers, not during the transfer. The preponderance of the evidence shows that Petitioner did not neglect C.W.
6. Respondent's substantiation of the allegations of neglect against Petitioner is not supported by a preponderance of the evidence.
7. Petitioner satisfied her burden of proving that Respondent substantially prejudiced Petitioner's rights, failed to act as required by law or rule, exceeded its authority and failed to use proper procedure when Respondent substantiated the allegations that Petitioner neglected C.W. at RHA Howell/Westminster, 1111 Westridge Road in

Greensboro, North Carolina, North Carolina, and entered said findings against Petitioner on the North Carolina Health Care Personnel Registry.

8. The Undersigned directs that the Health Care Personnel Registry remove from Petitioner's name any reference to a pending allegation against her on the Health Care Personnel Registry and that the records of the Health Care Personnel Registry reflect that the finding of neglect was not established.

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

FINAL DECISION

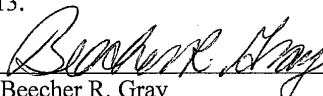
Respondent's decision to place a finding of neglect of a resident by Petitioner's name in the Health Care Personnel Registry is not supported by a preponderance of evidence and is REVERSED. Respondent shall note that the finding of neglect by Petitioner was reversed and shall delete any finding from the Registry concerning Petitioner related to this incident. Each party shall pay its own costs.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 05 day of November, 2013.


Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA

Filed

COUNTY OF WAKE

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**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DOJ 14220**

BENJAMIN LEE TORAIN,

*Office of
Administrative Hearings*

Petitioner,

v.

N.C. PRIVATE PROTECTIVE
SERVICES BOARD,

Respondent.

PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. This case was heard pursuant to N.C.G.S. § 150B-40, designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals.

The Respondent submitted proposals and argument on September 25, 2013 which was received by the Undersigned on October 7, 2013. The record was held open for submission by Petitioner, and receiving no further proposal or other materials the record was closed on October 25, 2013.

APPEARANCES

Petitioner: Benjamin L. Torain
1024 Cain Road, Apt. D
Fayetteville, NC 28303

Respondent: Jeffrey P. Gray, Esq.
Bailey & Dixon, LLP
P.O. Box 1351
Raleigh, North Carolina 27602

ISSUE

Whether Petitioner should be denied an armed guard registration based on Petitioner's lack of good moral character and temperate habits as evidenced by a conviction of felony Aggravated Assault in Philadelphia, PA.

APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case:
N.C.G.S. §§ 74C-3(a)(6); 74C-8; 74C-9; 74C-12; 74C-13; 12 NCAC 7D § .0800.

EXHIBITS

Respondent's Exhibits 1 and 2 were introduced and admitted.

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

FINDINGS OF FACT

1. Respondent Board is established pursuant to N.C. Gen. Stat. §74C-1, *et seq.*, and is charged with the duty of licensing and registering individuals engaged in the armed and unarmed security guard and patrol business.
2. Petitioner applied to Respondent Board for an armed guard registration.
3. Respondent denied the armed guard registration due to Petitioner's criminal record which showed the following: a conviction in Philadelphia, State of Pennsylvania, on February 7, 1986 for felony Aggravated Assault.
4. Petitioner requested a hearing on Respondent's denial of the armed guard registration.
5. By Notice of Hearing dated July 24, 2013, and mailed via certified mail, Respondent advised Petitioner that a hearing on the denial of his unarmed guard registration would be held at the Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, North Carolina 27609 on August 27, 2013. Petitioner appeared at the hearing.
6. Petitioner testified that in 1985 he was living in Trenton, New Jersey and had been a member of the United States Army. He had gotten out in 1980 and moved to Trenton.

7. Petitioner was dating a girl who was seeing him and another guy at the same time. He and the guy each knew about the other and tempers began to flare. One day he was walking down the street in his neighborhood and the girl he was seeing and the other guy were walking down the other side of the street. The guy approached him and accused him of seeing his woman. The guy tried to punch him and a fight ensued. He got the better of the guy during the street fight and the guy pressed charges against him about three days later.
8. Petitioner was outside a nightclub in Trenton when the police stopped him and ran his information. The police notified him that a warrant was out for his arrest. He was transported to Trenton's lockup on Broad Street. He stayed overnight and was then released.
9. Petitioner went to court but the complainant did not show. The court issued another court appearance. Petitioner moved to Philadelphia, PA, and failed to show for the second hearing and the New Jersey court issued a bench warrant for his arrest.
10. One day Petitioner was walking home in Philadelphia and the Philadelphia police stopped him. They ran his information and saw a warrant had been issued in New Jersey for his arrest. He was arrested and stayed in jail for 89 days. He was released and assigned a public defender. He went back to court in New Jersey and entered a guilty plea. The court found him guilty of felony Aggravated Assault. He was ordered to complete a 9 month drug and alcohol rehabilitation program.
11. Petitioner is married and has a 21 year old daughter. His wife of 23 years, Renita Kay Torain, testified on his behalf. She knows him to be honest and has never seen him fight. He supports his family, is active in his community, his church and with youth sports at a charter school in Kinston.
12. Petitioner has held an unarmed guard registration since 2008. Because of the age of this felony offense, he was eligible for his unarmed; since it is a felony he was denied for his armed registration.

BASED UPON the foregoing FINDINGS OF FACT and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

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

labels. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

2. Under G.S. §74C-12(a)(25), Respondent Board may refuse to grant a registration if it is determined that the applicant has demonstrated intemperate habits or lacks good moral character.
3. Under G.S. §74C-8(d)(2), conviction of any crime involving an act of assault is *prima facie* evidence that the applicant does not have good moral character or temperate habits.
4. Respondent Board presented evidence that Petitioner had demonstrated intemperate habits and lacked good moral character through conviction in Philadelphia, Pennsylvania for felony Aggravated Assault.
5. Petitioner presented evidence sufficient to explain the factual basis for the charge and has rebutted the presumption.
6. Further, although its effective date July 1, 2013 was prior to the denial, Session Law 2013-24, recently enacted by the General Assembly, requires occupational licensing boards to consider certain factors—including the date of the crime and the circumstances surrounding the commission of the crime – prior to denying an application for a criminal record. This felony was 27 years ago, involved two men dating the same woman and Petitioner was not the aggressor in the altercation.

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

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby proposes that Petitioner be issued an armed guard registration.

NOTICE

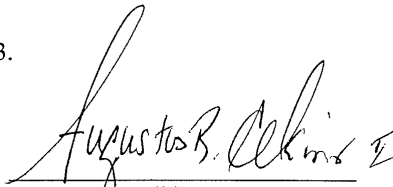
The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed findings of fact,

and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e). The agency that will make the final decision in this contested case is the North Carolina Private Protective Services Board.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 10th day of December, 2013.


Augustus B. Elkins II
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF

2013 OCT 30 PM 2:22

ADMINISTRATIVE HEARINGS

COUNTY OF GUILFORD

13OSP11087

Office of
Administrative Hearings

Thomas Carl Bland,
Petitioner,

v.

North Carolina Agricultural & Technical State
University,
Respondent.

FINAL DECISION

The above-captioned case was heard before the Honorable Beecher Gray, Administrative Law Judge, on September 25, 2013 in High Point, North Carolina. Respondent filed a proposed decision on October 8, 2013.

APPEARANCES

FOR PETITIONER: Dow M. Spaulding
ATTORNEY AT LAW
P.O. Box 1417
Greensboro, NC 27402

FOR RESPONDENT: Stephanie A. Brennan
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Description
1	Photograph
2	Photograph
3	Photograph

Admitted for Respondent:

Exhibit Number	Description
1	General Orders re Off-campus Jurisdiction & Agency Jurisdiction
2	10/16/09 MOU re Police Cooperation and Jurisdiction

3	11/12/09 Memorandum re Off-campus Patrolling
4	2/17/10 letter re counseling
5	6/3/10 letter re counseling
6	6/22/10 letter re written warning
7	9/24/10 letter re written warning
8	10/6/10 letter re early warning system
9	10/15/10 letter re demotion
11	7/25/11 letter re written warning
12	6/7/12 Performance Review
13	7/31/12 Counseling letter
14	September 2012 NCA&T Patrol Operations Work Schedule
15	9/7/12 Communications Log
16	9/25/12 Letter re Pre-disciplinary Conference
17	10/1/12 Letter re Demotion
19	2/12/13 Letter from Chancellor Martin (Final Agency Decision)
20	10/1/12 Detailed Salary Analysis

WITNESSES

Called by Petitioner: Thomas Bland
 Lt. Garfield Whitaker

Called by Respondent: Sylvia Anderson
 Linc Butler
 Thomas LeGrand
 Lt. Garfield Whitaker
 Major Kelly White

ISSUE

The sole issue for consideration is whether Respondent had just cause to demote Petitioner for unacceptable personal conduct.

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. The parties received notice of hearing more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. Respondent, North Carolina A&T University ("NC A&T"), is subject to Chapter 126 of the North Carolina General Statutes, and is Petitioner's employer.
3. Petitioner is employed by Respondent as a police officer with the NC A&T University Police Department ("UPD").
4. The NC A&T UPD entered a Memorandum of Understanding for Police Cooperation and Jurisdiction with the City of Greensboro Police Department ("GPD") providing for extended jurisdiction for the UPD off-campus within the city of Greensboro. Resp. Ex. 2. The UPD's General Orders set forth the UPD's policy of "Off-campus Jurisdiction" and "Agency Jurisdiction." Resp. Ex. 1. These policies set forth areas of primary jurisdiction for the UPD whereby the UPD will exercise its full police powers on NC A&T property. The policies also set forth areas of extended jurisdiction where "the [UPD] will not routinely exercise the full degree of powers granted." Resp. Ex. 1. The "Off-campus Jurisdiction" policy provides that UPD may exercise its extended jurisdiction upon request of a sworn officer and that when acting upon the request of the GPD in the extended jurisdiction area, UPD officers have the same territorial and subject matter jurisdiction as a GPD officer. Resp. Ex. 1.
5. Under the Memorandum of Understanding and these written policies, UPD's protocol was that UPD officers were not to respond to GPD calls for off-campus locations without a specific request for assistance. Requests from GPD for assistance were to come in either (1) through UPD dispatch; or (2) via a direct request from a GPD officer for UPD assistance.
6. These policies and procedures were communicated repeatedly and directly to all supervisors and officers, including Petitioner. It was a known rule within the UPD that UPD officers were not to respond to incidents off-campus absent a specific request for assistance to UPD from GPD. Major White, Lieutenant Whitaker, and Officer LeGrand each testified that these protocols for off-campus policing were well known within the UPD and that they were directly communicated to Officer Bland on multiple occasions prior to September 7, 2012.
7. Major White and Lieutenant Whitaker each testified to the importance of following the UPD's protocol for assisting the GPD. Among other things, UPD officers responding to offsite incidents would divert resources away from the UPD's primary duties of policing the campus and keeping its constituents safe, create legal liability for the UPD, risk interfering with GPD's incident response, and potentially create problems for the UPD's relationship with the GPD.

8. Petitioner had a history of performance problems and disciplinary issues prior to the incident in question. On February 17, 2010 he received a constructive counseling letter for errors in documentation. Resp. Ex. 4. On June 3, 2010, he received a constructive counseling letter for arriving late to a special event that he was scheduled to work. Resp. Ex. 5. On June 22, 2010, he received a written warning for submitting a report that was incomplete (including failure to document that money was seized during the arrest process) and contained errors. Resp. Ex. 6. On September 24, 2010, Petitioner received a written warning for violating protocol concerning off-campus policing. Resp. Ex. 7. On October 6, 2010, Petitioner was placed in the UPD's Early Warning System, from which he later was removed. Resp. Ex. 8. On October 15, 2010, Petitioner was demoted from Lieutenant to Sergeant for unacceptable job performance after he disciplined an employee without documenting his actions prior to ending his shift. Resp. Ex. 9. On July 25, 2011, Petitioner received a written warning for failure to review documentation completed by his officers and failure to properly document an off-campus incident being investigated by GPD that involved his officers. Resp. Ex. 11. In his June 2012 review of Petitioner's performance, Major White noted complaints and concerns about Petitioner's performance as a supervisor. Resp. Ex. 12. On July 31, 2012, Petitioner received a constructive counseling letter for failure to notify his supervisor that he would not appear in court as scheduled. Resp. Ex. 13.

9. Petitioner's written warning on September 24, 2010 stated:

On Saturday, September 18, 2010, you violated protocol as it pertains to the off-campus patrolling memorandum dated November 12, 2009. You responded to a [GPD] call for service which was off-campus, without authorization or a request from their agency. This action was clearly outside of the guidelines established by our department as it pertains to off-campus patrolling. Taking it upon yourself to investigate this call for service without the authorization or a request from [GPD] placed our University Community in a vulnerable position by pulling additional [UPD] resources away from campus . . . [T]he above actions lacked sound judgment, showed poor leadership, and demonstrated a lack of understanding of your responsibilities and duties. Your decision to respond to an off-campus call for service, that was directed to [GPD] concerns me due to your knowledge of our primary focus, which is first, the safety of our campus and all within. While in conference with you, I made reference to this information as I reviewed, explained and discussed with you, your job description and the expectations of you in your current position. . . . You may correct this deficiency by adhering to all departmental policies and memorandums. Please be informed that any continuation of this practice and failure to improve your performance may result in further disciplinary actions, up to and including dismissal.

Resp. Ex. 7.

10. Major White personally spoke with Petitioner on several occasions prior to September 7, 2012, about the off-campus policing protocol. On May 2, 2012, Lieutenant Whitaker reminded Petitioner of the protocol yet again.
11. On September 7, 2012, Petitioner was working the night shift at NC A&T. He was the supervisor on duty working with three officers who reported to him. *See* Resp. Ex. 15. During the shift, Petitioner and two of his officers (Officers Cox and LeGrand) responded to a call reporting a domestic situation on Market Street; while there, they became concerned about a female driver who appeared to be under the influence. While Petitioner, Officer LeGrand, and Officer Cox were attending to this situation, several GPD vehicles drove by with their lights flashing. The GPD vehicles were heading to a pool hall that is across the street from campus on private property that is not part of the UPD's primary jurisdiction. Petitioner went to his vehicle, turned on his scanner, and overheard the GPD officers state over the scanner that they needed a vehicle with a cage. Petitioner's vehicle did not have a cage, but Officer LeGrand's did. Before closing out the call concerning the domestic incident and suspected DUI, Petitioner instructed Officer LeGrand to go over to the pool hall, and both Petitioner and Officer LeGrand left in their vehicles and drove to the pool hall. Petitioner did not communicate his location to UPD dispatch. Petitioner's actions left Officer Cox as the sole officer with the female DUI suspect, which is not standard procedure. Petitioner's actions also left only one officer (Officer Golbourne) to patrol the campus.
12. When Petitioner and Officer LeGrand each arrived at the pool hall, several GPD vehicles and officers were on the scene, GPD had the situation under control, and GPD did not need either a vehicle with a cage nor any other assistance from UPD. Nonetheless, Petitioner exited his vehicle and had a conversation in the pool hall parking lot with a GPD officer (or officers).
13. On the night of September 7, 2012, GPD made no request for assistance from UPD through UPD dispatch. No GPD officer directly requested any assistance from UPD.
14. A pre-disciplinary conference was held on September 26, 2012. At the conference, Petitioner acknowledged that he had violated UPD protocol and stated that he knew a response to an off-campus incident is dispatched through the UPD telecommunications center.
15. Effective October 2, 2012, NC A&T demoted Petitioner from Sergeant to Officer. As a result, his position title changed from Public Safety Supervisor to Public Safety Officer, and his salary was reduced from \$48,576 to \$44,225. Resp. Ex. 17.
16. Petitioner appealed his demotion through NC A&T University's grievance process. The Chancellor affirmed the demotion. Resp. Ex. 19.
17. Petitioner contends that he properly was responding to a request from the GPD, because the GPD officer stated over the radio net that they had a need for a vehicle with a cage. GPD was making a request of its own officers, however, and this request could not

reasonably be interpreted as a request for assistance from UPD. Furthermore, Petitioner's testimony was not credible in light of the following: (1) overwhelming testimony concerning the repeated communications to UPD officers generally--and to Petitioner specifically--concerning the proper protocol for assisting the GPD; (2) Petitioner's written warning specifically for violating the off-campus policing protocol in 2010; (3) the fact that Petitioner's vehicle did not have a cage, yet he responded to the pool hall; and (4) Petitioner's changing story about whether he was aware that he had violated protocol.

18. Sylvia Anderson, Linc Butler, Thomas LeGrand, Lt. Garfield Whitaker, and Major Kelly White were credible witnesses. Furthermore, parts of their testimony were supported by documentation.
19. Petitioner was not under any duress or coercion that may have contributed to his conduct.
20. To demonstrate just cause, a State employer may show "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b)(2). Unacceptable personal conduct includes "insubordination," "conduct for which no reasonable person should expect to receive prior warning"; and "the willful violation of known or written work rules." 15 NCAÇ 1J.0614(7); 25 N.C.A.C. 1J.0614(8)(a) & (d). The State employer may discharge an employee for unacceptable personal conduct without any prior warning or disciplinary action. 25 N.C.A.C. 1J.0608(a).
21. A sole instance of unacceptable personal conduct, by itself, constitutes just cause for discharge. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case under Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. On the sole issue to be heard, Respondent met its burden of proof by a preponderance of evidence to show that it had just cause to demote Petitioner. Petitioner's arguments to the contrary are without merit.
3. At the time of his demotion, Petitioner was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act). A career State employee may be demoted only for just cause. N.C.G.S. § 126-35(a). The State employer bears the burden of demonstrating just cause. N.C.G.S. § 126-35(d).
4. Here, Petitioner's actions on September 7, 2012, detailed in the above Findings of Fact, constituted unacceptable personal conduct.

5. Petitioner's conduct is a "willful violation of known or written work rules" for officers employed at NC A&T. 25 N.C.A.C. 1J.0614(8). Petitioner's conduct also is "conduct for which no reasonable person should expect to receive prior warning." 25 N.C.A.C. 1J.0614(8). Finally, Petitioner was instructed by UPD management on multiple occasions to follow the protocol for off-campus policing, including through a written warning, and his failure to do so constitutes "insubordination." 25 N.C.A.C. 1J.0614(7).
6. Respondent demonstrated with credible and substantial evidence that Petitioner's conduct was conduct for which no reasonable person should expect to receive a prior warning, that it willfully violated known or written work rules, and that it constituted insubordination.
7. NC A&T demonstrated that Petitioner violated known UPD protocols for off-campus policing.
8. Respondent followed all of the required procedures to demote Petitioner for unacceptable personal conduct.
9. Respondent had no improper motivation for demoting Petitioner and did not make any improper considerations.
10. Petitioner's demotion was reasonably related to the seriousness of the offense and the record of Petitioner in his service with the Department.
11. Based on all foregoing Findings of Fact and Conclusions of Law, Petitioner's actions constituted unacceptable personal conduct. Considering the totality of the circumstances and utilizing guiding principles of equity and fairness, Respondent NC A&T University had just cause to demote Petitioner.

On the basis of the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

FINAL DECISION

Respondent's decision to demote Petitioner for unacceptable personal conduct is supported by a preponderance of the evidence and is AFFIRMED.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity

with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 30 day of OCTOBER, 2013.



Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

Filed

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 14365

CLEVELAND DUNSTON,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT of
 HEALTH and HUMAN SERVICES,

Respondent.

Office of
 Administrative Hearings

FINAL DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals.

Both Petitioner and Respondent submitted proposals and argument. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until June 23, 2014 to file the decision in this case.

APPEARANCES

For Petitioner: Michael C. Byrne, Esq.
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 Raleigh, NC 27601

For Respondent: Joseph E. Elder
 Assistant Attorney General
 N.C. Department of Justice
 P.O. Box 629
 Raleigh, North Carolina 27602

ISSUE

Did Respondent have just cause to dismiss Petitioner from his State employment for unacceptable personal conduct?

WITNESSES

For Petitioner: Bernell Terry
Cleveland Otis Dunston

For Respondent: Kassandra Morris
Leann Rollins
Jerry Williams
Anthony Ogbenna
Rera Edina Mhembere
Margaret Ruth Slade
Heather Morris
Amanda Dorgan

EXHIBITS

The following exhibits were accepted and admitted into evidence in this matter.

For Petitioner: Exhibits 1, 3, 4 and 22. Petitioner's Exhibit 17 was admitted at the direction of the Undersigned. (Tr. 468-9)

For Respondent: Exhibits 1-19 (Exhibit 11 was admitted for demonstrative purposes)

PRELIMINARY MATTERS

1. Petitioner made a motion to exclude witnesses from the hearing room, which the Undersigned granted.

2. Petitioner made a prehearing motion to exclude from evidence all evidence supporting any alleged ground for dismissal which was not cited in the demotion letter given to Petitioner as required by law. The Undersigned took the motion under advisement to rule on such issues as appropriate during the course of the hearing.

3. Petitioner stipulated that he had been offered the required internal procedural protections relating to the disciplinary action challenged, that he was given a pre-disciplinary conference, and that he was delivered and received a dismissal letter.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following FINDINGS OF FACT. In making the FINDINGS OF FACT, the undersigned Administrative Law Judge 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.

FINDINGS OF FACT

1. In addition to any other stipulations contained herein, the parties stipulated and agreed with respect to the following undisputed facts:

(a) Respondent, North Carolina Department of Health and Human Services is an agency of the State of North Carolina, and the Division of State Operated Health Facilities (DSOHF), is an operational division within the Department of Health and Human Services. Central Regional Hospital is a facility operated under the DSOHF;

(b) Petitioner, at all times relevant to this matter, was a "career state employee" within the meaning of N.C. Gen. Stat. § 126-1.1;

(c) Petitioner was dismissed on March 4, 2013;

(d) Petitioner received all notice required to be given regarding his rights to challenge his dismissal and proceeded through the DHHS grievance procedure pursuant to DHHS Directive III-8. Petitioner appealed through and including a Step 3 hearing.

2. Petitioner Cleveland Dunston was employed as a Technical Support Specialist (TSS) II at Respondent's Central Regional Hospital (CRH) in Butner, North Carolina. No previous disciplinary history on the part of Petitioner was offered in evidence at the hearing. Petitioner began employment in August of 2000, and thus had approximately 13 years of service. He initially worked at Dorothea Dix Hospital.

3. Petitioner worked on unit A2 at CRH, which is an adult admissions unit. Patients are at times taken into this unit "off the street," sometimes by police officers. These patients have various mental and psychiatric or psychological disabilities as well as behavior related issues. They have been admitted to CRH because they are either a danger to themselves or to others. Petitioner was the senior TSS on the A2 unit at the time of the January 28, 2013 incident.

4. A TSS I is responsible for daily activities of patients at CRH as well as monitoring the patients and unit to maintain safety. The TSS I would report to the TSS II on the

unit and to the charge nurse on duty. TSS collect observational data on patients in terms of their safety and where they're located at any given time. TSS ensure patient safety by checking on them at certain intervals, and collecting observational data such as aggression level or functional assessments.

5. TSS II staff members mentor TSS I staff members. Petitioner was a TSS II and had mentoring responsibilities. TSS II mentoring responsibilities include providing support to nursing staff and the TSS I staff on the unit. This includes keeping patients on schedule, running patient programs properly, assisting TSS I staff in collecting patient data. TSS II also observe TSS I staff interactions with patients, reporting circumstances where staff may be stressed and ensuring that delegated tasks are being completed.

6. Nursing staff members, including TSS, receive annual training on a number of topics including Non-violent Crisis Intervention (NVCi). They learn about the different behaviors they may experience from the patient population and how to deal with situations that may arise from those behaviors. As part of the NVCi training, CRH staff members are taught to use the least restrictive intervention with a patient. NVCi techniques teach that a staff person should disengage or "tag out" when a patient interaction is not going well. This may be when a patient begins to escalate or exhibit behaviors that are violent. Tagging out involves a staff member removing themselves from interaction with a patient and allowing another staff member to take over.

7. The incidents giving rise to this case took place in the evening of January 28, 2013.

8. Jerry Williams worked as a therapeutic support specialist I (TSS I) at Central Regional Hospital at all times relevant to this matter. He had worked in this position since 2010 and previously as a TSS I at Dorothea Dix Hospital. At the time of the hearing, he was a TSS II. He had been trained on NVCi techniques.

9. Anthony Ogbenna worked at CRH as a certified nurse's assistant (CNA) on the A2 unit. He worked directly with patients and assisted with their general care. He had been trained in NVCi techniques.

10. Edina Mhembere was employed at CRH as a TSS I. She was working on the A2 unit on January 28, 2013 at the time of the incident between Petitioner and Patient JD. As a TSS she had received NVCi training.

11. Margaret Ruth Slade worked as a registered nurse at CRH since 2009. She works as a charge nurse and works directly with patients. As a registered nurse she received NVCi training. She worked with Petitioner on the A2 unit on January 28, 2013 at the time of the incident between Petitioner and JD.

12. Among the patients on the unit the evening of January 28, 2013 was a patient known as JD. Petitioner testified that he and JD were approximately the same size. JD had been

at CRH for approximately two months. JD was brought to and admitted to CRH following his assaults on staff and residents at a group home where he was previously placed. Petitioner testified that prior to JD's admission to CRH, he had spent about 57 days in jail for an assault on one of the people at the group home.

13. Patient JD had been admitted to CRH on prior occasions. He could become agitated and was at times hard to redirect. He had been known to become physically aggressive. He was known to have physically attacked CRH staff members. Each of the physical assaults by JD on staff was, per policy, reported to management and to JD's medical treatment team, including JD's assigned physician. Following his physical assaults on the staff member, JD often accused the staff member of hitting him. One witness, Anthony Ogbenna, testified that he refused a "one on one" assignment with JD because he was afraid of him.

14. Petitioner knew JD well. Petitioner had worked with JD at Dorothea Dix Hospital since JD was approximately six years old. Petitioner had a good relationship with JD such that JD would request him as his "one on one" staff person. Petitioner was aware of instances when JD assaulted others. Petitioner also acknowledged being attacked many times by patients other than JD.

15. Patient JD was placed on "one on one" assignment more than once, but was not in a "one on one" assignment on the night of the incidents at issue. Petitioner felt that JD belonged on the "high management" or "high intensity" unit rather than the admissions unit. Witnesses for Respondent conceded that there was discussion about placing JD on the high management unit but that JD was never placed there.

16. JD was on unit A2 on January 28. As the video produced by Respondent demonstrates, the central area of A2 is an intersection of hallways. At the center of the intersection is a raised counter known as the "horseshoe". The horseshoe is surrounded by an area of flooring on which patients are not supposed to walk.

17. Respondent's documentation showing an order for camera footage confirms that there are four cameras in the area where the incident took place. Respondent ordered footage from one camera. It shows some of the center hall, the area in front of the horseshoe, and the door to the seclusion room. While there is also apparently a camera installed inside the seclusion room itself, which is separated from the hallway by two doors, no video of the seclusion room was ordered or produced. Petitioner testified that he had never seen the video presented at this hearing but that he recalled being shown a different video prior to his dismissal.

18. Jerry Williams was working on A2 on January 28, 2013. He was present for an incident that occurred between Petitioner and Patient JD. At the time of the incident, Williams was located at the horseshoe. Petitioner was behind the horseshoe counter with Williams. Patient JD was on the outside of the horseshoe but in the general vicinity.

19. Petitioner testified that earlier in the afternoon JD was going down the hall trying to knock down exit signs. Petitioner spoke with him about destruction of property. Petitioner

stated that JD came over to the horseshoe and tried to swing and hit him. Petitioner said he told JD he was on a red card for assault of a staff. Petitioner testified that CRH used a “red card” or points system where patients gained or lost points for good or bad behavior. A red card meant loss of all points and restricted to the unit.

20. On January 28, 2013 at 6:00 pm, Williams was sitting behind the horseshoe at the right side near the opening to the horseshoe and just in front of one of the doors leading to the nurses’ station. Someone was to sit at the horseshoe to monitor the patient hallways. Williams was working on paperwork. Petitioner was sitting to Williams left.

21. JD had been hanging around the horseshoe area intermittently with going to his room and the day room area. At the time, JD was laughing and joking. He did not exhibit signs of agitation. JD approached the horseshoe and walked onto the dark forbidden area, leaning over the counter and speaking to Petitioner.

22. Petitioner said that he redirected JD from the front of the horseshoe into the opposite corner from the hallway, adjacent to the seclusion room. While the video does not have sound, it does show JD backing away from the horseshoe into the opposite corner. Petitioner testified that JD said he was going to hit him as soon as he came from around the horseshoe.

23. Petitioner left the horseshoe to go down the hallway to the left. Petitioner went in front of the horseshoe between the horseshoe and JD. The video shows Petitioner passing JD without initially looking at him. As Petitioner passed JD, JD began to approach Petitioner. JD moved to the front of the horseshoe. Both Petitioner and JD were standing at the horseshoe counter in front of where Williams was sitting on the inside of the horseshoe.

24. Williams stated that JD began “shadowboxing” at Petitioner and indeed, the video shows JD approaching Petitioner throwing punches. Williams had seen Petitioner interact with Patient JD on a number of occasions. Their relationship appeared to be a good one. They interacted regularly and would often laugh and joke together.

25. JD continued punching in the direction of Petitioner in a “shadowboxing” manner as if to hit Petitioner. One punch came near Petitioner’s face, at which point Petitioner quickly advanced toward JD and began backing him toward the opposite wall. JD backed away toward the wall and punched Petitioner in the face as Petitioner advanced; hitting Petitioner in the eye. Williams, who was working behind the horseshoe, did not immediately act to intervene; though it is noted that the incident unfolded in a matter of seconds.

26. Williams testified he believed that JD was joking around with Petitioner and engaging in “horseplay”. However, his written statement at the time of the incident states that the situation quickly became aggravated.

27. After being struck, Petitioner quickly grabbed JD around the head and shoulders. Petitioner took JD to the floor and leaned over him with his knee in JD’s back. Petitioner then swung three to four rapid times with his left hand – raising his arm into the air and swinging

down in a punching motion in the area of JD's head. The last blow can be seen to strike JD in the head as JD attempts to cover his face and head with his hand.

28. When Williams noticed Petitioner move toward JD and then JD go down to the floor, he immediately moved from behind the horseshoe to assist. As he did, he saw Petitioner swing at and hit Patient JD one time. Williams moved to intervene between Petitioner and JD. Williams and Petitioner then escorted JD to the seclusion room. All witnesses queried on the subject agreed that Williams and Petitioner used a proper two-man technique to move JD to the seclusion room. Williams did not see any marks or bruises on JD's face.

29. Williams recalled that the times he had seen Patient JD become aggressive with staff, the staff were able to remove themselves from the situation and allowed other staff to handle the matter, or Patient JD would leave the area. Williams testified that Petitioner could have left the area. The entire incident unfolded, per the video, in a very short amount of time.

30. Petitioner testified that he was temporarily blinded in one eye and that both eyes were watery and blurring.

31. Petitioner contended that he was attempting to swat JD's hands from his groin area. According to Petitioner, JD would routinely fall to the ground and grab at the staff member's groin area when staff attempted to place JD in a therapeutic hold. No other witnesses were aware of this behavior and had never seen JD fall to the ground and grab at the groin area of staff.

32. Petitioner's contention that he was attempting to move JD's hand from grabbing at the area of his groin is not consistent with the video footage or witness account. The video shows Petitioner engage in distinct repeated punching motions. Each time he raised his arm into the air and away from the area he claims he was protecting.

33. The video shows Petitioner repeatedly swinging what appears to be a fist at JD. Petitioner testified that he was unable to make a fist with the hand in question due to a previous work related injury.

34. Petitioner testified that he was struck twice by JD, the first during the shadowboxing. The video does not reveal Petitioner being struck more than one time. While JD did throw air punches, one close to Petitioner's face, only one punch appears to strike Petitioner as JD backs away from him. Petitioner's own statements written after the incident do not reveal that he was struck more than a single time.

35. Petitioner testified that he was attempting to avoid further attack from JD. The video does not confirm this. Instead it shows Petitioner quickly advanced toward JD before JD punched Petitioner. He pursued JD, grabbed JD about the head and shoulders at which point JD falls to the ground. Petitioner acknowledged receiving NVCI training and that disengaging was proper technique. Rather than disengaging when JD fell to the ground, he leaned onto JD and swung his raised fist or certainly at least his hand toward JD's head. Petitioner knew JD to be

unpredictable yet engaged him when JD exhibited escalating behaviors including telling Petitioner that he would punch him in his face.

36. Anthony Ogbenna was on the A2 unit at the time of the incident between Petitioner and JD on January 28, 2013. He was at the other end of the horseshoe from where the incident occurred. He became alerted to a noise at the other side of the horseshoe and moved toward the noise. As he approached he saw JD on the floor and Petitioner punch JD twice. He yelled for Petitioner to stop.

37. Rerai Edina Mhembe was at the opposite end of the horseshoe from where the incident between Petitioner and JD occurred. She moved toward the other end of the horseshoe and saw JD on the floor. Petitioner was bending down near JD closer to the wall. She observed Petitioner hitting JD in the area of his head. She yelled for Petitioner to stop hitting JD.

38. Both Ogbenna and Mhembe wrote statements about the incident as part of a hospital investigation. Their statements were consistent with their testimony as well as the video of the incident. Neither Ogbenna nor Mhembe had seen the video of the incident prior to writing their statements. When asked to name the people in the video, Ogbenna was unable to identify any of the individuals present in the video of the incident, including himself.

39. At the time of the altercation between Petitioner and JD, Margaret Ruth Slade was sitting at the nurse's station located on the other side of the wall from the horseshoe. She heard something like a scuffle and went out to the horseshoe. Slade did not observe the incident, but arrived to see JD being escorted to the seclusion room. Slade assessed JD while he was in the seclusion room multiple times over the course of an hour. Slade's records of the assessments do not show any complaints or symptoms of distress by JD. While being removed from seclusion, JD reported to her that Petitioner hit him which is consistent with the video.

40. After the incident, JD reported that he wanted to harm himself and also that he would get Petitioner. The progress notes from January 28, 2013 confirm that JD was agitated and remained agitated for several hours.

41. As a result of his agitation, JD was prescribed doses of Ativan and Haldol. Ativan is used to treat anxiety and Haldol is an antipsychotic drug. The instructions from the prescribing psychiatrist were for these medications to be given as soon as possible.

42. Evidence of a contusion on JD's scalp was noted by a CRH psychiatrist later in the evening of January 28, 2013. However, doctor's notes presented at the hearing (the doctor himself did not testify) state that JD claimed he was hit on the head while he was in the seclusion room. (Respondent's Exhibit 9).

43. Heather Morris works at CRH as a clinical nurse manager on the A2 unit. She was working in this position at all times relevant to this matter. As clinical nurse manager her duties include scheduling for all three shifts, ensuring that new hires receive proper orientation, as well as ensuring staff members receive yearly training like NVC and CPR. She also oversees

patient care on the A2 unit. Morris is also involved in recruitment, hiring and discipline of staff members. TSS staff report to her and she reports directly to Angela Boss, the A unit nurse director.

44. Heather Morris was informed by Ruth Slade of the incident between Petitioner and JD. On the morning of January 29, 2013, Slade informed Morris that JD said he was hit by Petitioner. Morris informed her supervisor of JD's allegation.

45. Ms. Morris participated in a co-investigation conducted by herself as supervisor and by the CRH patient advocacy unit. She was present for interviews of witnesses to the incident including Williams, Ogbenna, Mhembere, Slade and Petitioner. She also reviewed the video of the January 28, 2013 incident. Based on witness statements and the video, Morris determined that Petitioner had violated CRH's abuse policy and that dismissal was appropriate.

46. Petitioner was placed on investigatory leave on February 4, 2013.

47. Amanda Dorgan is the chief nursing officer at CRH and served in that position at all times relevant to this matter. As CNO, Dorgan provides oversight and direction to the entire hospital nursing department. Dorgan is NVCi trained and has received advanced applied technique training. She serves on the CRH therapeutic response team which responds to escalating or dangerous behaviors of patients in an attempt to assist and manage the patient. The TRT can be activated by any CRH staff. Dorgan sits on the hospital executive team and directs policy, procedure, strategic planning, training in the nursing department, and has responsibility for the quality of patient care and the safety of patients and staff members. She reports directly to CRH Chief Executive Officer J. Michael Hennike.

48. Dorgan reviews findings from investigations into matters requiring nursing staff discipline, including TSS staff. In the present matter, Dorgan reviewed the witness statements, including Petitioner's, and reviewed the video surveillance.

49. On February 4, 2013, Dorgan met with Petitioner along with Boss and employee relations specialist Ken Thomas. During this meeting, Petitioner was allowed to view the video and to describe what occurred. Dorgan found Petitioner's account to be inconsistent with the other witness's statements and the video footage. Dorgan agreed that dismissal was appropriate.

50. Petitioner received notice of a pre-disciplinary conference dated March 1, 2013. This conference was held with Morris and Angie Boss, Unit Nurse Director. On March 4, 2013, Petitioner was dismissed from employment with CRH.

51. Petitioner called Bernell Terry to testify. Terry worked at CRH as a TSS I on the A2 unit during this time. He has worked at CRH since 2008. He was not a witness to the incidents that are the subject of this case. Terry is a member of Union 150. He testified that he has known Petitioner for a few years and decided to conduct his own personal inquiry into Petitioner's dismissal. Terry testified that he believed the statements of others were coerced and were not accurate. He created a report nearly two months after the January 28, 2013, though he

was not an investigator and was not asked by anyone to conduct an investigation into Petitioner's altercation with JD or Petitioner's dismissal. (Petitioner's Exhibit 1) The information included in Terry's report is not determinative of the issues involved in the incident between Petitioner and JD and Petitioner's dismissal.

BASED UPON the foregoing FINDINGS OF FACT and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

2. 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 and has the authority to issue a Final Decision.

3. At the time of his dismissal, Petitioner was a career State employee subject to all provisions, protections and appeal rights contained in N.C.G.S. § 126-35 and the State Personnel Manual. Respondent complied with, as stipulated to by Petitioner, all of the pre-dismissal requirements.

4. N.C.G.S. 126-35 (a) has been interpreted to require that the acts or omissions be described "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. ... An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." *Employment Security Commission v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981).

5. Petitioner was given proper statutory notice of the reasons for his dismissal and the dismissal letter met the requirements of the law. There is nothing ambiguous in the dismissal letter concerning the specific acts committed by Petitioner which led to his dismissal. Petitioner was clearly notified of the specific acts which led to his dismissal allowing him to respond to the charges and prepare an effective representation, which he did. The dismissal letter was sufficiently specific.

6. "Disciplinary actions . . . are those actions taken in accordance with the disciplinary procedures adopted by the State Personnel Commission and specifically based on

unsatisfactory job performance, unacceptable personal conduct or a combination of the two.” N.C.G.S. § 126-35(b) (2012).

7. Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to dismiss Petitioner for unacceptable personal conduct. This burden is satisfied if the evidence shows that Petitioner engaged in unacceptable personal conduct, where no prior disciplinary action is required. When there has been unacceptable personal conduct, it is up to management to determine the severity of the action to be issued.

8. An employer may discipline or dismiss an employee for just cause based upon unacceptable personal conduct or unsatisfactory job performance. 25 NCAC 1J .0604. Pursuant to 25 NCAC 1J .0608, an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

9. In pertinent part unacceptable personal conduct is defined by 25 NCAC 1J.0614 as “conduct for which no reasonable person should expect to receive prior warning; or the willful violation of known or written work rules; or conduct unbecoming a state employee that is detrimental to state service.”

10. Cases involving unacceptable personal conduct require a three-step analysis. This first inquiry is whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee’s conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for discipline. If the employee’s act qualifies as a type of unacceptable personal conduct, the tribunal proceeds to the third inquiry of whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based “upon an examination of the facts and circumstances of each individual case.” *Warren v. N.C. Dep’t. of Crime Control & Pub. Safety*, __ N.C. App. __, 726 S.E.2d 920, 925 (2012), review dismissed as moot, 734 S.E.2d 867, 2012 N.C.LEXIS 1064 (2012).

11. Respondent dismissed Petitioner for unacceptable personal conduct for his behavior during the January 28, 2013 incident with JD. The dismissal letter included as reasons for dismissal that Petitioner’s conduct was unbecoming a State employee that is detrimental to State service, conduct for which no reasonable person should expect to receive prior warning, and the willful violation of a known or written work rule.

12. The specific rule at issue was Central Regional Hospital policy CPM-A.0005 Abuse, Neglect, Exploitation or Other Rights Infringement of Patients, Events Occuring After Admission. This policy states in relevant part:

Each patient of Central Regional Hospital is treated with dignity and respect and shall not be subjected to abuse, neglect or exploitation in any manner. ‘Abuse’ means the infliction of physical or mental pain or injury by other than accidental means; or the unreasonable confinement; or the deprivation by an employee of services which are necessary to the mental and physical health of the individual

served or using restraint, seclusion or isolation as retribution. Confinement that protects and individual served from immediate harm is not considered unreasonable confinement. Physical abuse – means the infliction of physical discomfort, injury or pain through the use of physical force by other than accidental means. Physical abuse includes but is not limited to the following examples: hitting, kicking, pushing or biting.

13. Petitioner acted deliberately and purposefully when engaging and reacting to JD. He failed to avoid the confrontation with JD despite signs that JD was becoming more agitated and threatened to hit Petitioner in the face.

14. Petitioner did not use proper techniques as he had been trained under NVCI. He did not remove himself from the situation with JD although there were no obvious reasons as to why he could not remove himself. He knew JD to become physically aggressive, yet engaged JD even after JD threatened to hit him in the face.

15. When JD attempted to strike Petitioner, Petitioner advanced on JD contrary to his training. As he purposefully advanced on JD, he was struck once in the face by JD. Petitioner then deliberately grabbed JD, took JD to the ground, and intentionally hit JD. At least one hit is seen to strike JD. He did not use proper techniques for restraining a patient and failed to disengage when JD was taken to the ground. This was contrary to the training he had received.

16. Petitioner's behavior constitutes abuse of a patient and violates CRH's policy CPM-A.0005. This is a violation of a known and written work rule. Specifically, Petitioner hitting JD intentionally inflicted physical discomfort and pain on JD as well as mental pain or injury.

17. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v N.C. Dept. of Correction*, 177 N.C. App. 215, 222, 628 S.E.2d 395, 400 (2006) citing *Hilliard v. N.C. Dept. of Correction*, 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

18. Petitioner's failure to follow NVCI training and striking JD was unprofessional conduct for the workplace such that Petitioner should not expect any prior warning before discipline. Petitioner, as a TSS II, was responsible for the care of patients on the A2 unit. Acting contrary to his training and striking a patient is so contrary to patient care that Petitioner should not expect any warning before being disciplined for such behavior.

19. In addition to his patient care duties, Petitioner, as a TSS II, had mentoring responsibilities with TSS I staff members. The behavior Petitioner exhibited on January 28, 2013 was inconsistent with his professional duties and thus was conduct unbecoming a state employee that is detrimental to state service.

20. There is substantial, credible evidence, most notably the video recording, in the record showing that Petitioner's actions during the incident with JD on January 28, 2013 constituted conduct for which no reasonable person should expect to receive prior warning, was a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

21. Based on the preponderance of the evidence, Respondent met its burden of proof that it had just cause to dismiss Petitioner for unacceptable personal conduct without prior warning or disciplinary action.

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

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency as required by N.C. Gen. Stat. § 150B.

Based on those conclusions and the facts in this case, the Undersigned holds that the Respondent has carried its burden of proof by a greater weight of the evidence that the Petitioner's dismissal from employment with Respondent based on unacceptable personal conduct was not erroneous, was not arbitrary or capricious, and was in accordance with applicable laws, rules and State standards.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.


Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 21st day of June, 2014.

A handwritten signature in cursive script, reading "Augustus B. Elkins II", written over a horizontal line.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA

RICHMOND COUNTY

MEG DEMAY,

Petitioner,

-VS-

RICHMOND COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Respondent.

FILED

2014 JUL -2 PM 12:45

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 18084

OFFICE OF
ADMINISTRATIVE HEARINGS

FINAL DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge on May 16, 2014, at the Richmond County Judicial Center in Rockingham, N.C.

APPEARANCES

For Petitioner: Evelyn Savage
Van Camp, Meacham & Newman, PLLC
PO Box 1389
Pinehurst, NC 28370

For Respondent: Stephan R. Futrell
Kitchin Neal Webb Webb & Futrell, P.A.
PO Box 1657
Rockingham, NC 28380

ISSUE

Whether Respondent had just cause to demote the Petitioner from a Social Worker Supervisor III position to a Social Worker Position for unacceptable personal conduct?

WITNESSES

For Petitioner: Margaret DeMay, Petitioner

For Respondent: Farron Askins
Lillie C. Davis
Sharon Lindsey
Bernice ("Bunny") Critcher
David Richmond
Tammy Schrenker

EXHIBITS

For Petitioner: None.

For Respondent: Exhibits 1 - 14 were admitted; Ex. 7 was admitted for the limited purpose of corroborating the testimony of Director Schrenker about her investigation.

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

FINDINGS OF FACT

1. Petitioner has been continuously employed by Respondent ("DSS") since November 2000. She was promoted to the position of Social Worker Supervisor III in 2007.
2. Petitioner acknowledged her receipt of DSS's written policies on "Unlawful Workplace Harassment" and "Employee Integrity and Responsibility" on September 16, 2008, and on September 28, 2001, respectively.
3. The Policy Concerning Unlawful Workplace Harassment provides in pertinent part:

The policy of [DSS] is that no employee may engage in conduct that falls under the definition of unlawful workplace harassment. All employees are guaranteed the right to work in an environment free from unlawful workplace harassment and retaliation. The [DSS] will thoroughly investigate all complaints made by employees and will take appropriate remedial or disciplinary action up to and including dismissal.

Definitions are:

1. **Unlawful Workplace Harassment** is unwelcome or unsolicited speech or conduct based upon race, sex, creed, religion, nation [sic] origin, age, color, or handicapping condition as defined by G.S. 168A-3 that creates a hostile work environment or circumstances involving quid pro quo.

2. **Hostile Work Environment** is one that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive. Hostile work environment is determined by looking at all of the circumstance [sic], including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

R. Ex. 2

4. The policy on "Employee Integrity and Responsibility" provides in part:

It is each employee's responsibility to work constructively toward developing and sustaining effective working relationships with fellow employees, clients, other agencies and the general public.

R. Ex. 3

5. On Thursday, July 18, 2013, Petitioner attended a mandatory staff meeting of the Children's Protection Services ("CPS") Unit which consisted of approximately 27 employees. At such staff meetings, Bunny Critcher, the Program Manager for CPS, typically reviewed new policies and notices, and employees engaged in reinforcing "thank you's" to fellow employees for assistance or work on various cases.
6. At a momentary pause between topics discussed at the meeting, Petitioner announced that she had a FaceBook post that she wanted to read. The entire post is as follows:

Ed Wilson

You won't recognize me. My name was Antonio West and I was the 13-month old child who was shot at point blank range by two teens who were attempting to rob my mother, who was also shot. A Grand Jury of my mommy's peers from Brunswick GA determined the teens who murdered me will not face the death penalty...too bad I was given a death sentence for being innocent and defenseless.

My family made the mistake of being white in a 73% non-white neighborhood, but my murder was not ruled a Hate Crime. Nor did President Obama take so much as a single moment to acknowledge my murder.

I am one of the youngest murder victims in our Nation's history, but the media doesn't care to cover the story of my tragic demise, President Obama has no children who could possibly look like me - so he doesn't care and the media doesn't care because my story is not interesting enough to bring them ratings so they can sell commercial time slots.

There is not a white equivalent of Al Sharpton because if there was he would be declared racist, so there is no one rushing to Brunswick GA to demand justice for

me. There is no White Panther party to put a bounty on the lives of those who murdered me. I have no voice, I have no representation and unlike those who shot me in the face while I sat innocently in my stroller, I no longer have my life.

So while you are seeking justice for Trayvon, please remember to seek justice for me too. Tell your friends about me, tell you [sic] families, get tee shirts with my face on them and make the world pay attention, just like you did with Trayvon.

Thank you.

R. Ex. 1

7. Of the four employees that Petitioner supervised at the time, three were African-American and one was Caucasian. The Caucasian employee was dating or married to an African-American male, and she is the mother of three mixed-race children.
8. While the Petitioner read the above post, several African-American employees left the meeting room and later returned. Other employees put their heads down on the conference room table.
9. When the Petitioner completed her reading of the post, Program Manager Critcher sensed that the post had caused much discomfort among the employees. She attempted to connect the post to the other items on the agenda, then called an end to the meeting. As the employees left the meeting, Petitioner attempted to apologize, but most employees had already left or did not hear her.
10. Because of the Petitioner's reading of the post, racial divides formed in the unit. At least two African-American employees spoke that day with Program Manager Critcher, who recommended that they address their objections to DSS Director Tammy Schrenker.
11. On the following day, Director Schrenker received four written complaints from African-American employees Farron Askins, Lillie Davis, Sharon Lindsey, and Jesuite Ellerbe. R. Exs. 4, 5, 6 & 7
12. Following receipt of those complaints, Director Schrenker spoke with every employee who attended the meeting. Every employee other than Petitioner said that reading the post was inappropriate. Director Schrenker found a divide among those employees as to the discipline that should be imposed for Petitioner's reading the post. One group felt that the political and racial content of the post was so egregious that Petitioner's leadership would thereafter be questioned and the reading could constitute Unlawful Workplace Harassment that had created a Hostile Work Environment. Another group felt that the reading, while troubling, warranted a low-level discipline. The last group seemed to believe that while the post was objectionable, no discipline was needed.

13. When Director Schrenker spoke with Petitioner about the post, Petitioner said that she read it "because it was about a child dying." Petitioner was surprised to hear that other employees had taken offense. Director Schrenker did not get the sense that Petitioner understood why her action was objectionable.
14. Petitioner offered to apologize, but was advised by Director Schrenker not to discuss the matter with any of her co-workers.
15. On July 31, 2013, Director Schrenker notified Petitioner in writing that she was considering severe disciplinary action because of Petitioner's Unacceptable Personal Conduct in reading that post during the mandatory staff meeting. R. Ex. 9
16. At the Pre-Disciplinary Conference on August 1, 2013, Petitioner provided a typed statement. She explained that during the staff meeting, she received notice of the FaceBook post and it indicated it was about a child's death. Because some discussion at the meeting related to child tragedies, she read the post. She said that before she read it aloud, she could only see the first paragraph and she had not read the entire post beforehand. When she completed the post, no one said anything, and the discussion moved to other topics; then the meeting concluded without any complaints or comments about the post. She admitted that she had violated known DSS policies against reading her cell phone for personal purposes during work hours and reading FaceBook for non-work purposes during work hours. She apologized for "any hardship or confusion the mis-interpretation of the words that [she] read but were not her own." R. Ex. 9 att. 3
17. On August 2, 2013, Director Schrenker notified Petitioner in writing that while she believed that there were sufficient grounds to terminate Petitioner, due to Petitioner's lengthy employment with Respondent, she elected to demote Petitioner to Social Worker in Investigative/Assessment and Treatment. Director Schrenker hand-delivered that written notice to Petitioner on that day. R. Ex. 10
18. Until the demotion Petitioner received in August 2013, Petitioner had never received a verbal or written warning, or any other disciplinary action. Petitioner got along well with her co-workers, and no one had ever heard her make an offensive or derogatory comment.
19. Petitioner appealed her demotion. At a hearing before Director Schrenker on August 21, 2013, Petitioner complained that the discipline was too severe, that she had adequately performed her duties during the investigation, that "harassment" requires more than one incident, and the majority of attendees at the meeting were not offended by the post. Director Schrenker affirmed the demotion. Petitioner appealed that decision to the DSS Board. R. Exs. 11 & 12
20. On appeal to the DSS Board on August 26, 2013, Petitioner repeated the arguments she had made to Director Schrenker. The Board affirmed Director Schrenker's decision. R. Ex. 13 On September 25, 2013, the Petitioner appealed this decision by

filing a Petition For A Contested Case Hearing with the Office of Administrative Hearings.

21. At the hearing held before the Undersigned, three African-American employees, Farron Askins, Lillie Davis and Sharon Lindsey, testified in accordance with their written complaints that they were shocked and offended by Petitioner's reading the post. The staff meeting occurred very soon after the announcement of the verdict in the trial of George Zimmerman for shooting Trayvon Martin, and feelings about the outcome of that case were very strong. As Petitioner was reading that post, Lillie Davis and Sharon Lindsey left the meeting room in order to compose themselves, but they returned because attendance at staff meetings was mandatory.
22. All three employees said that the article was racially insensitive and inappropriate for the workplace. They felt attacked because of their race and believed that they would thereafter question Petitioner's ability to make decisions in cases involving African-American clients or co-workers. They said that the Petitioner's reading of that post altered the spirit and mood of the unit from one of open doors and friendly chatter to closed doors and grim silence.
23. All three employees stated that Petitioner had never made racist statements before or since the staff meeting.
24. The Undersigned finds as fact that all three employees felt humiliated by Petitioner's conduct at the staff meeting and on the day of the contested case hearing remained distressed by it.
25. The Undersigned finds the testimony of Farron Askins, Lillie Davis and Sharon Lindsey to be credible.
26. Another supervisor, David Richmond, a Caucasian male, testified that he was shocked by Petitioner's reading of the post. He agreed that a racial divide formed in the unit because of the incident and that the tension had finally subsided as a result of time, staff attrition and re-assignments.
27. Program Manager Critcher testified that after Petitioner read the post, the other employees were effectively dumbstruck into silence. Critcher attempted to smooth over the silence by drawing some conclusions about tragedies involving children, but her perception was that the employees simply wanted to leave the room.
28. According to Director Schrenker, relations between African-American employees and Caucasian employees changed noticeably because of Petitioner's action. The atmosphere in the unit remained tense for several months. Gradually, tensions eased as distance from the incident cooled emotions among those employees who were present, and turnover and re-assignments among staff members introduced individuals who had not been at that staff meeting.

29. The Undersigned finds the testimony of David Richmond, Bernice Critcher and Tammy Schrenker to be credible.
30. Petitioner testified that she knows Respondent's policies about harassment and integrity, and against the use of Facebook at work. She acknowledged that as a supervisor she set a bad example at the staff meeting.
31. Petitioner testified that the article was "ridiculous" and she read it out loud to the end of the article so that she "could explain the ridiculousness of it."
32. Petitioner testified that she was not shocked that people were offended by the article but she was shocked because of what others thought about her after she read it out loud.
33. Petitioner has maintained since the staff meeting that she does not agree with the sentiments in the Facebook post and that she has no animosity toward her African-American co-workers or President Obama.
34. Petitioner testified that after she realized that others were offended by her actions, she wanted to apologize to her co-workers.
35. Petitioner agreed that she should be disciplined for the use of her personal cellphone at work and for reading Facebook during the staff meeting.
36. Petitioner did not agree that she should be disciplined for reading the article out loud.
37. The Undersigned finds as fact that Petitioner does not fully appreciate the wrongfulness of her conduct in reading out loud an article that is racially insensitive or how her insensitivity has caused harm.

Based upon the foregoing **Findings of Fact**, and upon the preponderance or greater weight of the evidence, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case regarding the discipline of DSS employees pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. 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.

3. At the time of the demotion, Petitioner was subject to and entitled to the protections of the State Personnel Act in accordance with North Carolina General Statute § 126-5(a).
4. In this matter, the burden of showing Petitioner was demoted for just cause rests with the Respondent. N. C. Gen. Stat. § 126-34.02.
5. “Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether the conduct constitutes just cause for the discipline imposed. “[N.C. Dept of Env’t & Natural Resources vs. Carroll, 358 N.C. 649, 665, 599 S.E.2d 895, 898 (2004)](citations omitted). “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.* at 669, 599 S.E.2d at 900](internal citations and quotation marks omitted)].
6. One of the two bases for “just cause” is “unacceptable personal conduct.” 25 N.C.A.C. 01J.0604(b)(2).
7. Unacceptable personal conduct is: (1) conduct for which no reasonable person should expect to receive prior warning; or ... (4) the willful violation of known or written work rules; or (5) conduct unbecoming an employee that is detrimental to the agency’s service....” [25 N.C.A.C. 01J.2304(b)]
8. In the absence of evidence to the contrary, it is to be presumed that “public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intentment will be made in support of the presumption.” [*Painter vs. Wake County Board of Education*, 217 S.E.2d 650, 288 S.E.2d 165 (1975)] The burden is on the party asserting to the contrary to overcome the presumption by competent and substantial evidence. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” [*Rusher vs. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E.2d 285, 289 (1995), *aff’d*, 343 N.C. 119, 468 S.E.2d 57 (1996)] “If, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand.” [*Little vs. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted)]
9. The testimony and evidence at the hearing showed that the Petitioner engaged in Unacceptable Personal Conduct by:
 - (1) Reading her personal telephone during a staff meeting attended by everyone in her unit. The Petitioner’s Program Manager had repeatedly told staff in the CPS that using phones for personal matters during work hours is not allowed;

- (2) Reading FaceBook for non-investigative purposes during work hours. DSS Director Schrenker had, on multiple occasions, told DSS staff that being on FaceBook for non-investigative purposes during work hours is not allowed; and
 - (3) Reading out loud a FaceBook post with inflammatory racial and political content at a mandatory CPS staff meeting.
- 10. Reading the FaceBook post out loud constituted Unlawful Workplace Harassment. It was unsolicited, not on the agenda for the staff meeting, was unwelcome by other employees at the meeting, and was racially and politically provocative.
 - 11. Even as the inflammatory nature of the post became (or should have become) apparent, Petitioner continued to read the post past the point where a reasonable person would have known that the post was inappropriate and controversial.
 - 12. Petitioner's reading of this FaceBook post contributed to the creation of a Hostile Work Environment. A "single incident might well [be] sufficient to establish a hostile work environment." [*Ayissi N. Etoh vs. Fannie Mae*, 712 F.3d 572 (D.C.Cir.2013)] Employees under Petitioner's supervision felt personally attacked and humiliated because of their race. The incident interfered with normal relations in the unit and the effects continued to be felt through the time of the hearing on May 16, 2014.
 - 13. The Petitioner's reading of the racially inflammatory post was detrimental to the unit's performance of its regular service. Petitioner's insensitivity raises doubts about Petitioner's ability to be racially objective in cases involving African-Americans.
 - 14. Petitioner's Unacceptable Personal Conduct was just cause for the discipline imposed. Other possible disciplines were considered but found to be inappropriate for the level of personal conduct at issue. Director Schrenker believed that the conduct was sufficiently egregious to justify termination, but she allowed consideration for Petitioner's years of satisfactory performance without unacceptable personal conduct.
 - 15. Petitioner did engage in the conduct alleged by her employer, and her conduct does fall within a category of Unacceptable Personal Conduct violating the Respondent's policy on Unlawful Workplace Harassment and Hostile Work Environment and those relating to cell phone and FaceBook use.
 - 16. Therefore, Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to demote the Petitioner for unacceptable personal conduct.

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

DECISION

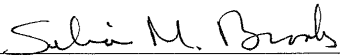
The Undersigned finds and holds that there is sufficient evidence in the record to uphold Respondent's demotion of Petitioner from Social Worker Supervisor III to Social Worker in Investigative/Assessment and Treatment.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

IT IS SO ORDERED.

This 2nd day of July, 2014.


Selina M. Brooks
Administrative Law Judge