NORTH CAROLINA REGISTER

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Contact List for Rulemaking Questions or Concerns

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

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

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Rules Division
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Rule Review and Legal Issues

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

contact:	Abigail Hammond, Commission Counsel	abigail.hammond@oah.nc.gov	(919) 431-3076
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	Julie Brincefield, Administrative Assistant	julie.brincefield@oah.nc.gov	(919) 431-3073
	Alexander Burgos, Paralegal	alexander.burgos@oah.nc.gov	(919) 431-3080

Fiscal Notes & Economic Analysis and Governor's Review

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

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

NC League of Municipalities — (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Sarah Collins — scollins@nclm.org

Legislative Process Concerning Rule-making

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

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

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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:	270th 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
29:04	08/15/14	07/25/14	08/30/14	10/14/14	10/20/14	12/01/14	01/2015	05/12/15
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

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EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

(1) temporary rules;
(2) 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.

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PUBLIC NOTICE
STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION

The Division of Energy, Mineral, and Land Resources (DEMLR) invites public comment on, or objections to, the permitting actions listed below. Persons wishing to comment or object may submit written comments to the address below by the due dates indicated. All comments received prior to the dates will be considered in the final determinations regarding permit issuance. Public comments may result in changes to the proposed permitting actions. All comments should reference the specific permitting actions listed below and the permit number. DEMLR intends to re-issue the following NPDES industrial General Permits. Please note that for some permits below multiple actions are proposed for the same permit over two separate comment periods.

NCG020000 for mining stormwater and wastewater: to be re-issued for a short term with no changes, proposed re-issuance date - 2/2/15; public comment period ends 1/15/2015. To be revised and re-issued with proposed re-issuance date - 6/1/15; public comment period ends 5/15/15.
NCG190000 for marinas and ship building stormwater: to be re-issued for a short term with no changes, proposed re-issuance date - 2/15/15; public comment period ends 1/15/2015. To be revised and re-issued with proposed re-issuance date - 6/1/15; public comment period ends 5/15/15.
NCG200000 for scrap metal recycling stormwater: to be revised and re-issued with proposed re-issuance date - 2/2/15; public comment period ends 1/15/15.

The General Permits and Fact Sheets may be viewed 45 days in advance of the scheduled re-issuance dates noted above at: http://portal.ncdenr.org/web/lr/public-notices

Please direct comments or objections to:
Stormwater Permitting Program
NC Division of Energy, Mineral, and Land Resources
1612 Mail Service Center
Raleigh, NC 27699-1612
Telephone Number: (919) 807-6376
ken.pickle@ncdenr.gov

Notice of Application for Innovative Approval of a Wastewater System for On-site Subsurface Use

Pursuant to NCGS 130A-343(g), the North Carolina Department of Health and Human Services (DHHS) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following applications have been submitted to DHHS:

Application by: Carl Perry
E-Z Treat Company
PO Box 176
Haymarket, NC 20168

For: Innovative Approval of E-Z Treat Model #600

DHHS Contact: Nancy Deal
1-919-707-5875
Fax: 919-845-3973
Nancy.Deal@dhhs.nc.gov

These applications may be reviewed by contacting Nancy Deal, Branch Head at 5605 Six Forks Rd., Raleigh, NC, On-Site Water Protection Branch, Environmental Health Section, Division of Public Health. Draft proposed innovative approvals and proposed final action on the application by DHHS can be viewed on the On-Site Water Protection Branch web site: http://ehs.ncpublichealth.com/oswp/approvedproducts.htm.

Written public comments may be submitted to DHHS within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Nancy Deal, Branch Head, On-site Water Protection Branch, 1642 Mail Service Center, Raleigh, NC 27699-1642, or Nancy.Deal@dhhs.nc.gov, or fax 919-845-3973. Written comments received by DHHS in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

North Carolina Department of Labor
Division of Occupational Safety and Health
1101 Mail Service Center
Raleigh, NC 27699-1101

(919) 807-2875

NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS

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

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC 07F .0201, to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Part 1926 promulgated as of September 24, 2014; and Part 1926 promulgated as of September 26, 2014, except as specifically described, and

- the North Carolina Administrative Code at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the Code of Federal Regulations, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses the following recent verbatim adoptions:

- Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment; Corrections (79 FR 56955, September 24, 2014)
- Cranes and Derricks in Construction: Operator Certification (79 FR 57785, September 26, 2014)

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

For additional information, please contact:

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

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:
Karissa B. Sluss, Assistant Agency Rulemaking Coordinator
North Carolina Department of Labor
Legal Affairs Division
1101 Mail Service Center
Raleigh, NC 27699-1101

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 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Well Contractors Certification Commission intends to amend the rules cited as 15A NCAC 27 .0801, .0810, .0820 and repeal the rule cited as 15A NCAC 27 .0840.*

Link to agency website pursuant to G.S. 150B-19.1(c): *www.wellcontractors.nc.gov, http://portal.ncdenr.org/web/eh/rules*

Proposed Effective Date: *July 1, 2015*

Public Hearing:
Date: *January 7, 2015*
Time: *10:00 a.m.*
Location: *Cardinal Conference Room, 5605 Six Forks Road ("Bldg. 3"), Raleigh, NC 27609*

Reason for Proposed Action: *To align with General Statute change (G.S. 87-98.12), Session Law 2014-2, which took effect May 29, 2014.*

Comments may be submitted to: *Joanne Rutkofske, 1653 Mail Service Center, Raleigh, NC 27699-1653; phone (919) 707-5881; fax (919) 845-3973; email Joanne.Rutkofske@dhhs.nc.gov*

Comment period ends: *February 13, 2015*

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)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 27 – WELL CONTRACTOR CERTIFICATION RULES

SECTION .0800 – CONTINUING EDUCATION REQUIREMENTS

15A NCAC 27 .0801 REQUIREMENTS

(a) Every certified well contractor ~~is required to~~ shall obtain ~~six~~ two Continuing Education Units (CEU) ~~during the renewal period.~~ each year for the first three years of the contractor's certification. CEU shall be earned during the renewal period. The renewal period is July 1 through June 30.

~~(b) If a certified well contractor exceeds the annual requirement in any renewal period, a maximum of six CEU may be carried forward into the subsequent renewal period.~~

(b) If subject to disciplinary action, the certified well contractor shall complete continuing education as required by the Commission per G.S. 87-98.12.

(c) Selection of courses and activities ~~which~~ that meet the requirements of Rule .0820 of this Chapter is the responsibility of the certified well contractor.

(d) CEU may be earned as follows:

(1) ~~Completion~~ completion of college courses or community college courses;

(2) ~~Completion~~ completion of continuing education courses (including, but not limited to correspondence, televised, videotaped, audiotapes, webinars and other courses/tutorials) that provide a completion certificate;

(3) ~~Teaching~~ teaching or instructing a course described in Subparagraph (1) or (2) of this Paragraph;

(4) ~~Attending~~ attending or making presentations at professional or technical events (including ~~but not limited to~~ seminars, in-house courses, workshops, meetings, conventions, or conferences);

(5) ~~Authoring~~ authoring published papers, articles, or ~~books; and~~ books.

~~(6) Active participation in professional or technical societies as defined in Rule .0820 of this Chapter.~~

Authority G.S. 87-98.12; 143B-301.11.

15A NCAC 27 .0810 APPROVAL OF CONTINUING EDUCATION COURSES

(a) Courses ~~must~~ shall be preapproved by a representative(s) of the Commission no less than 30 days prior to the course date.

(b) Course approvals shall expire June 30 of each certification period for which they have been approved.

(c) Representatives of the Commission ~~must~~ shall be allowed to attend any approved course for the purpose of auditing without fee or advanced notice.

~~(d) First Aid, CPR, OSHA Mine Safety, and HAZWOPER Refresher classes may only be approved for CEU credit every odd numbered certification period.~~

~~(e)~~(d) The Commission shall approve courses that instruct on well contractor activities and the use of well contractor equipment, products, and materials. To be approved, courses and activities ~~must~~ shall contain a clear purpose and objective and result in the maintenance, improvement, or expansion of skills and knowledge related to the practice of well contractor activities. Additionally, ~~to be approved,~~ requests for approval of courses or activities shall include the following information:

(1) course or activity content;
(2) timed agenda for the course;
(3) all course or activity dates and locations;
(4) qualifications of instructors (including both education and experience); and
(5) sample of completion certificate or other forms provided by or to be preapproved by the Commission for use in documenting attendance.

~~(f)~~(e) CEU credit shall not be awarded for courses involving direct sales of products to course attendees.

Authority G.S. 87-98.12; 143B-301.11.

15A NCAC 27 .0820 DETERMINATION OF CREDIT

(a) The Commission has final authority with respect to approval of courses or activities, CEU values, and methods of earning credit. Courses or activities ~~must~~ shall maintain, ~~improve~~ improve, or expand the skills and knowledge related to the practice of well contractor activities in order for a well contractor to receive credit. The Commission shall award the stated hours of credit (CEU) for any ~~acceptable~~ approved and ~~successfully~~ completed course or activity in each of the following categories:

(1) ~~Credit~~ credit for college or community college courses shall be 45 CEU for receipt of a passing grade in the course, regardless of the number of credits awarded by the college or community college;
(2) ~~Credit~~ credit for continuing education courses (including, but not limited to, correspondence, televised, videotaped, audiotapes, webinars and other courses/tutorials) that provide a completion certificate shall be one CEU for each hour of attendance or contact time;
(3) ~~Credit~~ credit for published papers, articles and books is 10 CEUs; or
~~(4) Credit for active participation in professional and technical societies is limited to two CEU per organization. "Active participation" requires that the well contractor attend at least 75 percent of the regularly scheduled meetings. CEU credits for this type of activity are not earned until the end of each calendar year of membership in the organization. A minimum of three (3) meetings held in a year is required to qualify for CEU credit; and~~
~~(5)~~(4) ~~Credit~~ credit for teaching or presenting in ~~Items~~ Subparagraphs (1) and (2) of this Rule are double the stated credits. Credit for teaching or presenting is available only for the first time that a well contractor teaches such a course or makes such a presentation.

(b) CEU credit shall not be awarded to an individual certified well contractor for scheduled portions of a program where the individual did not ~~actually~~ attend, was not ~~awake~~ awake, or in which the individual certified well contractor did not personally participate.

Authority G.S. 87-98.12; 143B-301.11.

15A NCAC 27 .0840 SPECIAL PROVISIONS FOR CONTINUING EDUCATION

~~(a) Given the intrinsic educational value of preparing for and successfully passing the North Carolina well contractors certification examination, a well contractor certified by way of examination shall not be required to obtain any CEU prior to their first renewal of certification.~~

~~(b) A well contractor serving on temporary active duty in the uniformed services of the United States for a period of time exceeding 80 consecutive days in a certification period shall have the continuing education requirement waived for that certification period. Requests must be received by the Commission at least 30 days prior to the June 30 renewal deadline, or within 30 days of completion of orders.~~

~~(c) If certified by a physician, a well contractor experiencing physical disability, illness, or other incapacitating medical condition such that the well contractor is incapable of attending continuing education courses or activities during a given renewal period shall be granted an extension of time in which to obtain CEU required during that renewal period. Requests for extension must be received by the Commission at least 30 days prior to the June 30 renewal deadline. The extension shall allow the requesting well contractor 12 months from the date the extension is granted to correct the deficiency in CEU for the renewal period in issue.~~

Authority G.S. 87-98.12; 143B-301.11.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Transportation/Division of Motor*

Vehicles intends to amend the rule cited as 19A NCAC 03B .0201.

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

Proposed Effective Date: *April 1, 2015*

Public Hearing:
Date: *January 27, 2015*
Time: *7:00 p.m.*
Location: *Wake County Commons Building, Conference Room 100C, 4011 Carya Drive, Raleigh, NC 27610*

Reason for Proposed Action: *Pursuant to G.S. 20-7(f)(6)d, as ratified by the NC General Assembly in Senate Bill 744, the Division may implement an electronic remote driver license renewal system. The Division has chosen to implement this service in an effort to reduce customer wait times and provide customers with more convenient alternatives to in-office services. Pursuant to G.S. 20-7(f)(6)d, the Division is required to adopt rules.*

Comments may be submitted to: *Helen Landi, 1578 Mail Service Center, Raleigh, NC 27699-1578; email hlandi@ncdot.gov*

Comment period ends: *February 13, 2015*

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)**
☒ **Approved by OSBM**
☐ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 03 – DIVISION OF MOTOR VEHICLES

SUBCHAPTER 03B – DRIVER LICENSE SECTION

SECTION .0200 – DRIVER'S LICENSE ISSUANCE

19A NCAC 03B .0201 DRIVER'S LICENSE EXAMINATION AND ONLINE RENEWAL

(a) The Division shall issue a driver's license to any person who passes the tests and meets the requirements listed below ~~the driver license examination~~ and is otherwise eligible under G.S. 20 to hold a license. Applicants for a driver's license are subject to the following tests and requirements:

(1) Knowledge Examination. This is an automated computer test on knowledge of rules of the road. An audio component allows ~~customers~~ applicants with reading comprehension difficulties to listen to the test questions by use of earphones. Eighty percent of the questions shall be answered correctly in order to pass the knowledge examination. For the issuance of a remote renewal, the requirement of a knowledge examination shall be waived.

(2) Road Signs. This is a test on knowledge of highway signs and their meanings. Applicants for a regular Class "C" license shall correctly identify nine of twelve road signs. Applicants for "A" or "B" licenses shall correctly identify all road signs. For the issuance of a remote renewal, the requirement of the road signs test shall be waived.

(3) Visual ~~Acuity.~~ Acuity Test. ~~Applicant's~~ The Applicant's visual acuity shall be 20/40 or better in either eye or both eyes together to receive an unrestricted license. License is restricted to require corrective lenses if acuity is less than 20/40 in either eye or both eyes together.

(4) Road Test. The road test measures the applicant's ability to operate a motor vehicle safely in actual traffic situations. The required maneuvers are: quick stop, turnabout, backing, approach corner, right turns, left turns, traffic lights, use of controls, starts, use of lanes, use of brakes, ~~following~~ following, and attention. Approval or disapproval is determined by the driver license examiner based upon the applicant's ability to execute the required maneuvers. For the issuance of a remote renewal, the requirement of a road test shall be waived.

(5) Remote Renewal. The renewal of a driver's license by mail, telephone, or electronic device. Applicants will find instructions for remote renewal on the Division of Motor Vehicles' Website at http://www.ncdot.gov/dmv. A driver's license issued by remote renewal expires in accordance with G.S. 20-7(f)(6).

(6) Attestation. An applicant eligible to make application for a remote renewal must

truthfully attest to the following as part of the application for a remote renewal:

(A) The applicant is a resident of North Carolina and currently resides at the address on the license to be renewed;

(B) The license holder's name as it appears on the license to be renewed has not changed;

(C) All information provided during the application for a remote renewal has been provided truthfully;

(D) That no change in vision has occurred since the last successful visual acuity test examination completed by DMV to safely operate a motor vehicle; and

(E) That no change in physical or mental abilities has occurred since the last issuance.

(7) Photo Requirement. The requirement of a newly captured photo in G.S. 20-7(n)(4) shall be waived for an applicant eligible to make application for a remote renewal providing the applicant has an existing DMV photo on file.

(8) Upon completion of the remote renewal process the license shall be renewed if all criteria in G.S. 20-7 are met. The current license may be used for all legitimate driver license purposes until the license becomes invalid for some other reason, or receipt of the new license card.

(b) The tests contained in Paragraph (a) ~~will~~ shall be administered as follows:

(1) First time applicants. Applicants applying for a driver's license for the first time shall complete the full examination, to include the knowledge examination, road signs test, visual acuity test, and road test. First time applicants are not eligible for remote renewal.

(2) Renewals and licenses expired less than two years. Applicants seeking to renew a valid, unexpired North Carolina driver's license shall complete the road signs test and visual acuity test. Applicants possessing a previously issued North Carolina driver's license, expired less than two years, shall complete the road signs test and visual acuity test. An applicant shall attest during the application process for a remote driver license renewal that no change in vision has occurred in the past six months that may impair their ability to safely operate a motor vehicle.

(3) Applicants possessing a previously issued North Carolina driver's license expired greater than two years. Applicants shall complete the full examination, to include the knowledge examination, road signs test, visual acuity test, and road test. Applicants whose driver licenses have expired greater than two years are not eligible to make application for a remote renewal.

(4) Applicants with a driver's license issued by another State, which is valid and ~~current~~ current, or expired less than two years. Applicants seeking to transfer their current driver's license from another state or ~~shall complete the road signs test and visual acuity test. Applicants~~ applicants possessing a driver's license issued by another state which is expired less than two years shall complete the road signs test and visual acuity test. Applicants in this section are not eligible to make an application for a remote renewal.

(5) Applicants with a driver's license issued by another state, expired more than two years. Applicants shall complete the full examination, to include the knowledge examination, road signs test, visual acuity test, and road test. Applicants in this section are not eligible to make an application for a remote renewal.

Authority G.S. 20-2; 20-7(a) through (f); 20-39; S.L. 2014-100, s.34.8(a),(b).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 58 – NORTH CAROLINA REAL ESTATE COMMISSION

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Real Estate Commission intends to adopt the rule cited as 21 NCAC 58A .0119 and amend the rules cited as 21 NCAC 58A .0104, .0105, .0116, .0402, .0502, .1711; 58C .0605; 58E .0203, .0204, .0303, .0308, .0408, .0409, .0412, and .0505.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ncrec.gov*

Proposed Effective Date: *July 1, 2015*

Public Hearing:
Date: *January 14, 2015*
Time: *9:00 a.m.*
Location: *North Carolina Real Estate Commission, 1313 Navaho Drive, Raleigh, NC 27609*

Reason for Proposed Action:
Real Estate Brokers – General Brokerage:
21 NCAC 58A .0104 *– To amend Paragraph (a) of the rule governing agency agreements to provide that early termination penalties included in property management agreements shall be prominently and conspicuously displayed. The amendment is needed to ensure that landlord clients are fully apprised of the*

penalties imposed for early termination. To also amend Paragraph (o) to provide that a broker selling property in which he has less than a 10% ownership interest may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest. The amendment is needed to permit brokers having an insignificant ownership interest in a property offered for sale to represent a buyer of that property so long as full disclosure is made and the buyer's consent is obtained.

21 NCAC 58A .0105 *– To amend the rule governing advertising to omit the term "provisional" from Paragraph (a)(1). The amendment is needed to extend to all brokers the requirement that advertisements for brokerage services or the sale, purchase or lease of property for another must have the consent of the broker's broker-in-charge and that all such advertisements must contain the name of the broker or firm with whom the broker is associated.*

21 NCAC 58A .0116 *– To amend Paragraph (b) of the rule governing the handling of trust money to allow a broker to accept custody of a check made payable to the designated escrow agent in a sales transaction, but only for the purpose of delivering the instrument to the designated escrow agent. The amendment is needed to clarify the circumstances in which a broker may deliver a check directly to a designated payee.*

21 NCAC 58A .0119 *– To adopt a permanent rule providing for mineral and oil and gas disclosures required by recent amendments to G.S. Chapter 47E. The permanent rule will replace the temporary rule currently undergoing rulemaking.*

Real Estate Brokers - Examinations:

21 NCAC 58A .0402 *– To amend the rule governing examinations to incorporate minor technical changes. The reference in Paragraph (b) to the "letter contemplated in 21NCAC 58A .0616(b)" should instead refer to subsection (c) of the same rule. To further reorganize the rule by breaking up paragraph (b) into multiple paragraphs. The amendment is needed to update the reference to Rule 58A .0616 to reflect recent amendments to the Rule.*

21 NCAC 58A .0502 *– To amend the rule governing the licensing of business entities to require LLC applicants to identify member managers down to the individual. The proposed amendment would also add Subparagraph (d)(9) requiring licensed entities to certify that they are in good standing with the NC Secretary of State at the time their licenses are renewed annually and to promptly notify the Commission regarding any revenue suspension or administrative dissolution imposed. The amendment is needed to ensure that licensed entities continue to maintain their authority to conduct business in this State. The amendment would also compel disclosure of each natural person acting as a partner, officer, or manager of an entity identified as the partner, officer, or manager of an entity applying for licensure, and thereby subject him or her to a character review.*

Real Estate Brokers - Mandatory Continuing Education:

21 NCAC 58A .1711 *– To amend the rule governing CE requirements for non-resident brokers to require non-resident brokers to promptly notify the Commission upon establishing a North Carolina business, mailing, or residence address, and to further notify the Commission of any change in the status of his or her out-of-state license. The amendment is needed to eliminate a loophole in Paragraph (a)(1) whereby a non-resident broker can be on active status in another state and submit the required certification at the time of renewal, subsequently establish a North Carolina address, and then abandon the North Carolina address just prior to the next renewal, thereby allowing the broker to conduct brokerage in North Carolina without taking the CE required of resident brokers. Also, brokers should be required to promptly notify the Commission if the status of their out-of-state license changes from active to inactive to enable the Commission to properly enforce its CE requirements.*

Real Estate Prelicensing Education – Prelicensing and Postlicensing Instructors:

21 NCAC 58C .0605 *– To amend the rule governing requests for examinations and video recordings to provide that video recordings requested by the Commission shall be submitted on a DVD, USB drive or similar medium. The amendment is needed to update the media upon which video recordings are to be submitted to the Commission.*

Real Estate Continuing Education – Update Course Instructors:

21 NCAC 58E .0203 *– To amend the rule governing applications and criteria for original approval of update course instructors to set forth the information required of an applicant seeking original approval as an update course instructor and to provide that video recordings required by Paragraph (d) shall be submitted on a DVD, USB drive or similar medium. The amendment is needed to clarify the information required by the application for original approval and to update the media upon which video recordings are to be submitted to the Commission.*

21 NCAC 58E .0204 *– To amend the rule governing the renewal and reinstatement of instructor approval to set forth the information to be provided by an applicant seeking renewal of approval and to add the requirement that an instructor seeking renewal or reinstatement must have completed at least three separate real estate instructor educational programs of at least six hours each during the preceding approval period. The amendment is needed to clarify the information required by the application for renewal, to establish the same educational requirements for update course instructors as those mandated for prelicensing and postlicensing instructors pursuant to Rule 21 NCAC 58C .0607, and to update the media upon which video recordings are to be submitted to the Commission.*

Real Estate Continuing Education – Elective Courses:

21 NCAC 58E .0303 *– To amend the rule governing applications for original approval to describe the information to be requested in the application form. The amendment is needed to comply with the RRC's request that the information to be included in the application form as prescribed by the Commission be specifically described in the rule.*

21 NCAC 58E .0308 *– To amend the rule governing requests for video recordings to provide that video recordings requested by the Commission shall be submitted on a DVD, USB drive or similar medium. The amendment is needed to update the media*

upon which video recordings are to be submitted to the Commission.

Real Estate Continuing Education – General Sponsor Requirements:
21 NCAC 58E .0408 *– To amend the rule governing a change in course sponsor ownership to provide that if, at any time after the original approval, an aggregate of fifty-percent (50%) or more of the sponsor's ownership interest is transferred to natural persons or entities other than those having an ownership interest at the time of the original application, the sponsor approval shall terminate. To further provide that the new sponsor owners must obtain an original course sponsor approval prior to advertising courses, accepting tuition, conducting courses or engaging in any sponsor activity. The amendment is needed to require sponsors that have changed majority ownership to undergo the application and review process required for new sponsors.*
21 NCAC 58E .0409 *– To amend the rule governing changes in sponsor ownership to add a change in sponsor ownership to the list of items about which sponsors are required to notify the Commission during the approval period. The amendment is needed to keep the Commission informed regarding changes in sponsor ownership.*
21 NCAC 58E .0412 *– To amend the rule to add a CE sponsor's failure to submit rosters and pay required fees in a timely manner as an additional ground for denying or withdrawing approval of the course or sponsor. The amendment is needed to correct a situation whereby sponsors fail to submit rosters and fees on a timely basis, resulting in the students not receiving credit unless and until the student notifies the Commission. If the staff does not receive notification prior to renewal, such a student would be renewed on inactive status even though he or she had completed the required CE.*

Real Estate Continuing Education – Course Operational Requirements:
21 NCAC 58E .0505 *– To amend the rule governing advertising by CE course sponsors to prohibit the use of endorsements or recommendations of any person or organization, by way of advertising or otherwise, unless the person or organization has consented in writing to the use of the endorsement or recommendation and is not compensated for such use. The amendment incorporates a provision similar to that found in 21 NCAC 58C .0214(c) governing advertising by schools and is needed to prevent the unauthorized and misleading use of purported "endorsements."*

Comments may be submitted to: *Curtis Aldendifer, Associate Legal Counsel, North Carolina Real Estate Commission, P.O. Box 17100, Raleigh, NC 27619-7100, phone (919) 875-3700 Ext. 133, fax (919) 582-9640, email legal@ncrec.gov.*

Comment period ends: *February 27, 2015*

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)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

SUBCHAPTER 58A – REAL ESTATE BROKERS

SECTION .0100 – GENERAL BROKERAGE

21 NCAC 58A .0104 AGENCY AGREEMENTS AND DISCLOSURE

(a) Every agreement for brokerage services in a real estate transaction and every agreement for services connected with the management of a property owners association shall be in writing and signed by the parties thereto. Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction shall be in writing and signed by the parties at the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be in writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant which seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing and signed by the parties thereto from its formation. A broker shall not continue to represent a buyer or tenant without a written, signed agreement when such agreement is required by this Rule. Every written agreement for brokerage services of any kind in a real estate transaction shall be for a definite period of time, shall include the broker's license number, and shall provide for its termination without prior notice at the expiration of that period, except that an agency agreement between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals. Every written agreement for brokerage services that includes a penalty for early termination shall set forth such a provision in a clear and conspicuous manner which shall distinguish it from other provisions of the agreement. For the purposes of this Rule, an agreement between brokers to

cooperate or share compensation shall not be considered an agreement for brokerage services and, except as required by Rule .1807 of this Subchapter, need not be memorialized in writing.

(b) Every listing agreement, written buyer agency agreement or other written agreement for brokerage services in a real estate transaction shall contain the following provision: "The broker shall conduct all brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap or familial status of any party or prospective party." The provision shall be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the agreement. For the purposes of this Rule, the term, "familial status" shall be defined as it is in G.S. 41A-3(1b).

(c) In every real estate sales transaction, a broker shall, at first substantial contact with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," set forth the broker's name and license number thereon, review the publication with the buyer or seller, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the prospective buyer or seller and review it with him or her at the earliest practicable opportunity thereafter. For the purposes of this Rule, "first substantial contact" shall include contacts between a broker and a consumer where the consumer or broker begins to act as though an agency relationship exists and the consumer begins to disclose to the broker personal or confidential information. The "Working with Real Estate Agents" publication can be obtained on the Commission's website at www.ncrec.gov or upon request to the Commission.

(d) A real estate broker representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party. The written authority must be obtained upon the formation of the relationship except when a buyer or tenant is represented by a broker without a written agreement in conformity with the requirements of Paragraph (a) of this Rule. Under such circumstances, the written authority for dual agency must be reduced to writing not later than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

(e) In every real estate sales transaction, a broker working directly with a prospective buyer as a seller's agent or subagent shall disclose in writing to the prospective buyer at the first substantial contact with the prospective buyer that the broker represents the interests of the seller. The written disclosure shall include the broker's license number. If the first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the broker shall immediately disclose by similar means whom he represents and shall immediately mail or otherwise transmit a copy of the written disclosure to the buyer. In no event shall the broker mail or transmit a copy of the written disclosure to the buyer later than three days from the date of first substantial contact with the buyer.

(f) In every real estate sales transaction, a broker representing a buyer shall, at the initial contact with the seller or seller's agent, disclose to the seller or seller's agent that the broker represents the buyer's interests. In addition, in every real estate sales transaction other than auctions, the broker shall, no later than the time of delivery of an offer to the seller or seller's agent, provide the seller or seller's agent with a written confirmation disclosing that he or she represents the interests of the buyer. The written confirmation may be made in the buyer's offer to purchase and shall include the broker's license number.

(g) The provisions of Paragraphs (c), (d) and (e) of this Rule do not apply to real estate brokers representing sellers in auction sales transactions.

(h) A broker representing a buyer in an auction sale transaction shall, no later than the time of execution of a written agreement memorializing the buyer's contract to purchase, provide the seller or seller's agent with a written confirmation disclosing that he or she represents the interests of the buyer. The written confirmation may be made in the written agreement.

(i) A firm that represents more than one party in the same real estate transaction is a dual agent and, through the brokers associated with the firm, shall disclose its dual agency to the parties.

(j) When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior express approval of its buyer and seller clients, designate one or more individual brokers associated with the firm to represent only the interests of the seller and one or more other individual brokers associated with the firm to represent only the interests of the buyer in the transaction. The authority for designated agency must be reduced to writing not later than the time that the parties are required to reduce their dual agency agreement to writing in accordance with Paragraph (d) of this Rule. An individual broker shall not be so designated and shall not undertake to represent only the interests of one party if the broker has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated broker for a party in a real estate sales transaction when a provisional broker under his or her supervision will act as a designated broker for another party with a competing interest.

(k) When a firm acting as a dual agent designates an individual broker to represent the seller, the broker so designated shall represent only the interest of the seller and shall not, without the seller's permission, disclose to the buyer or a broker designated to represent the buyer:

(1) that the seller may agree to a price, terms, or any conditions of sale other than those established by the seller;

(2) the seller's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and

(3) any information about the seller that the seller has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(l) When a firm acting as a dual agent designates an individual broker to represent the buyer, the broker so designated shall represent only the interest of the buyer and shall not, without the buyer's permission, disclose to the seller or a broker designated to represent the seller:

(1) that the buyer may agree to a price, terms, or any conditions of sale other than those established by the seller;

(2) the buyer's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and

(3) any information about the buyer that the buyer has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(m) A broker designated to represent a buyer or seller in accordance with Paragraph (j) of this Rule shall disclose the identity of all of the brokers so designated to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.

(n) When an individual broker represents both the buyer and seller in the same real estate sales transaction pursuant to a written agreement authorizing dual agency, the parties may provide in the written agreement that the broker shall not disclose the following information about one party to the other without permission from the party about whom the information pertains:

(1) that a party may agree to a price, terms or any conditions of sale other than those offered;

(2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and

(3) any information about a party that the party has identified as confidential, unless disclosure is otherwise required by statute or rule.

(o) A broker who is selling property in which the broker has an ownership interest shall not undertake to represent a buyer of that property except that a broker who is selling property in which the broker has less than 10 percent ownership interest may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest. A firm listing a property owned by a broker affiliated with the firm may represent a buyer of that property so long as any individual broker representing the buyer on behalf of the firm does not have an ownership interest in the property and the buyer consents to the representation after full written disclosure of the broker's ownership interest.

(p) A broker or firm with an existing listing agreement for a property shall not enter into a contract to purchase that property unless, prior to entering into the contract, the listing broker or firm first discloses in writing to their seller-client that the listing broker or firm may have a conflict of interest in the transaction and that the seller-client may want to seek independent counsel of an attorney or another licensed broker. Prior to the listing broker entering into a contract to purchase the listed property, the listing broker and firm shall either terminate the listing agreement or transfer the listing to another broker affiliated with the firm. Prior to the listing firm entering into a contract to purchase the listed property, the listing broker and firm shall disclose to the seller-client in writing that the seller-client has the right to terminate the listing and the listing broker and firm shall terminate the listing upon the request of the seller-client.

Authority G.S. 41A-3(1b); 41A-4(a); 93A-3(c); 93A-6(a).

21 NCAC 58A .0105 ADVERTISING

(a) Authority to Advertise.

(1) A ~~provisional~~ broker shall not advertise any brokerage service or the sale, purchase, exchange, rent or lease of real estate for another or others without the consent of his or her broker-in-charge and without including in the advertisement the name of the broker or firm with whom the ~~provisional~~ broker is associated.

(2) A broker shall not advertise or display a "for sale" or "for rent" sign on any real estate without the written consent of the owner or the owner's authorized agent.

(b) Blind Ads. A broker shall not advertise the sale, purchase, exchange, rent or lease of real ~~estate,~~ estate for ~~another or others,~~ others in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the broker's principal only. Every such advertisement shall conspicuously indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, street address, internet web address, or e-mail address.

(c) A person licensed as a limited nonresident commercial broker shall comply with the provisions of Rule .1809 of this Subchapter in connection with all advertising concerning or relating to his or her status as a North Carolina broker.

Authority G.S. 93A-2(a1); 93A-2(a2); 93A-3(c); 93A-9.

21 NCAC 58A .0116 HANDLING OF TRUST MONEY

(a) Except as provided in Paragraph (b) of this Rule, all monies received by a broker acting in his or her fiduciary capacity (hereinafter "trust money") shall be deposited in a trust or escrow account as defined in Rule .0117(b) of this Section no later than three banking days following the broker's receipt of such monies.

(b) Exceptions to the requirements of Paragraph (a):

(1) All monies received by a provisional broker shall be delivered upon receipt to the broker with whom he or she is affiliated.

(2) All monies received by a non-resident commercial broker shall be delivered as required by Rule .1808 of this Subchapter.

(3) Earnest money or tenant security deposits paid by means other than currency and received by a broker in connection with a pending offer to purchase or lease shall be deposited in a trust or escrow account no later than three days following acceptance of such offer to purchase or lease; the date of such acceptance of such offer or lease shall be set forth in the purchase or lease agreement.

(4) A broker may accept custody of a check or other negotiable instrument made payable to the seller of real property as payment for an option or due diligence fee, or to the designated escrow agent in a sales transaction, but only for the purpose of delivering the instrument to the ~~seller.~~seller or designated escrow agent. While the instrument is in the custody of the broker, the broker shall, according to the instructions of the buyer, either deliver it to the ~~seller~~ named payee or return it to the buyer. The broker shall safeguard the instrument and be responsible to the parties on the instrument for its safe delivery as required by this Rule. A broker shall not retain such an instrument for more than three business days after the acceptance of the option or other sales contract.

(c) Prior to depositing trust money into a trust or escrow account that bears interest, the broker having custody over such money shall first secure written authorization from all parties having an interest in the money. Such authorization shall specify and set forth in a conspicuous manner how and to whom the interest shall be disbursed.

(d) In the event of a dispute between buyer and seller or landlord and tenant over the return or forfeiture of any deposit other than a residential tenant security deposit held by the broker, the broker shall retain the deposit in a trust or escrow account until the broker has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction. Alternatively, the broker may deposit the disputed monies with the appropriate Clerk of Superior Court in accordance with the provisions of G.S. 93A-12. If it appears that one of the parties has abandoned his or her claim to the funds, the broker may disburse the money to the other claimant according to the written agreement. Before doing so, however, the broker must first make a reasonable effort to notify the absent party and provide that party with an opportunity to renew his or her claim to the funds. Tenant security deposits shall be disposed of in accordance with G.S. 42-50 through 56 and G.S. 42A-18.

(e) A broker may transfer an earnest money deposit from his or her trust or escrow account to the closing attorney or other settlement agent no more than 10 days prior to the anticipated settlement date. A broker shall not disburse prior to settlement any earnest money in his or her possession for any other purpose without the written consent of the parties.

(f) A broker shall not disburse trust money to or on behalf of a client in an amount exceeding the balance of trust money belonging to the client and held in the trust account.

(g) Every broker shall safeguard any money or property of others which comes into the broker's possession in a manner consistent with the Real Estate License Law and Commission Rules. A broker shall not convert the money or property of others to his or her own use, apply such money or property to a purpose other than for which it was intended or permit or assist any other person in the conversion or misapplication of such money or property.

Authority G.S. 93A-3(c); 93A-6.

21 NCAC 58A .0119 MINERAL AND OIL AND GAS RIGHTS MANDATORY DISCLOSURE STATEMENT

(a) Every owner of real property subject to a transfer of the type governed by G.S. 47E-1 and G.S. 47E-2(b) shall complete a disclosure statement form prescribed by the Commission and designated "Mineral and Oil and Gas Rights Mandatory Disclosure Statement," and shall furnish a copy of the completed form to a purchaser as required by G.S. 47E-4.1. The form shall bear the seal of the North Carolina Real Estate Commission and shall include the following:

(1) instructions to property owners regarding transactions in which the disclosure statement is required;
(2) the text and format of the disclosure statement form as required by G.S. 47E-4.1(a);
(3) a note to purchasers regarding their rights under G.S. 47E-5 in the event they are not provided with a disclosure statement as required by G.S. 47E-4.1;
(4) the identification of the subject property and the parties to the transaction;
(5) an acknowledgment by the owner(s) that the disclosure statement is true and correct as of the date signed; and
(6) an acknowledgment by the buyer(s) of the receipt of a copy of the disclosure statement.

(b) The disclosure statement form described in Paragraph (a) of this Rule shall be available on the Commission's website at www.ncrec.gov or upon request to the Commission.

(c) The disclosure statement form described in Paragraph (a) of this Rule may be reproduced, but the text of the form shall not be altered or amended in any way.

(d) Every broker representing a party in a real estate transaction governed by G.S. 47E-1 and G.S. 47E-2(b) shall inform each client of the client's rights and obligations under G.S. Chapter 47E.

(e) The disclosure statement form described in Paragraph (a) of this Rule applies to all contracts executed on or after January 1, 2015.

Authority G.S. 47E-4.1; 47E-4.1(b); 47E-5; 47E-8; 93A-3(c); 93A-6.

SECTION .0400 - EXAMINATIONS

21 NCAC 58A .0402 EXAMINATION SUBJECT MATTER, FORMAT, AND PASSING SCORES

(a) The real estate licensing examination shall test applicants on the following general subject areas:

(1) real estate law;
(2) real estate brokerage law and practices;
(3) the Real Estate License Law, rules of the Commission, and the Commission's trust account guidelines;
(4) real estate finance;
(5) real estate valuation (appraisal);
(6) real estate mathematics; and

(7) related subject areas.

(b) The real estate licensing examination shall consist of two sections, a "national" section on general real estate law, principles and practices and a "state" section on North Carolina real estate law, principles and practices. Unless the "national" section is waived by the Commission for an applicant based on its authority under G.S. 93A-9, an applicant must pass both sections of the examination in order to pass the examination.

(c) In order to pass the real estate licensing examination, an applicant ~~must~~ shall attain a score for each required section of the examination that is at least equal to the passing score established by the Commission for each section of the examination in compliance with psychometric standards for establishing passing scores for occupational licensing examinations as set forth in the "Standards for Educational and Psychological Testing" jointly promulgated by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education.

(d) An applicant who passes one or both sections of the examination will receive only a score of "pass" for the section(s) passed; however, an applicant who fails one or both sections of the examination shall be informed of their actual score for the section(s) failed. An applicant who is required to pass both sections of the examination ~~must~~ shall do so within his or her 180-day examination eligibility period, and if the applicant passes only one section during his or her 180-day examination eligibility period, then that passing score shall not be recognized if the applicant subsequently re-applies to the Commission for a license.

(e) A passing examination score obtained by a license applicant for both sections of the examination, or for the "state" section if that is the only section an applicant is required to pass, shall be recognized as valid for a period of one year from the date the examination was passed, during which time the applicant ~~must~~ shall satisfy any remaining requirements for licensure that were pending at the time of examination; provided that the running of the one-year period shall be tolled upon mailing the applicant the letter contemplated in 21 NCAC 58A ~~.0616(b)~~ .0616(c) informing the applicant that his or her moral character is in question, and shall resume running when the applicant's application is either approved for license issuance, denied or withdrawn. The application of an applicant with a passing examination score who fails to satisfy all remaining requirements for licensure within one year shall be canceled and the applicant shall be required to reapply and satisfy all requirements for licensure, including retaking and passing the license examination, in order to be eligible for licensure.

Authority G.S. 93A-3(c); 93A-4(b),(d).

SECTION .0500 - LICENSING

21 NCAC 58A .0502 BUSINESS ENTITIES

(a) Every business entity other than a sole proprietorship shall apply for and obtain from the Commission a firm license prior to engaging in business as a real estate broker. An entity that changes its business form other than by conversion shall submit a new license application upon making the change and obtain a new firm license. An entity which converts to a different business entity in conformity with and pursuant to applicable North Carolina General Statutes is not required to apply for a new license. However, such converted entity shall provide the information required by this Paragraph in writing to the Commission within 10 days of the conversion and shall include the duplicate license fee prescribed in Rule .0509 of this Section to have the firm license reissued in the legal name of the converted entity. Incomplete applications shall not be acted upon by the Commission. Application forms for partnerships, corporations, limited liability companies, associations and other business entities required to be licensed as brokers shall be available on the Commission's website at www.ncrec.gov or upon request to the Commission and shall require the applicant to set forth:

(1) the name of the entity;

(2) the name under which the entity will do business;

(3) the type of business entity;

(4) the address of its principal office;

(5) the entity's NC Secretary of State Identification Number if it is required to be registered with the Office of the NC Secretary of State;

(6) the name, real estate license number and signature of the proposed qualifying broker for the proposed firm;

(7) the address of and name of the proposed broker-in-charge for each office as defined in Rule .0110(a) of this Subchapter, along with a completed broker-in-charge declaration form for each proposed broker-in-charge;

(8) any past criminal conviction of and any pending criminal charge against any principal in the company or any proposed broker-in-charge;

(9) any past revocation, suspension or denial of a business or professional license of any principal in the company or any proposed broker-in-charge;

(10) if a general partnership, a full description of the applicant entity, including a copy of its written partnership agreement or if no written agreement exists, a written description of the rights and duties of the ~~several partners;~~ partners, and the name of each partner; if a partner is an entity rather than a natural person, the name of each officer, partner, or manager of that entity, or any entity therein;

(11) if a limited liability company (LLC), a full description of the applicant entity, including a copy of its written operating agreement or if no written agreement exists, a written description of the rights and duties of the managers, and the name of each manager; if a manager is an entity rather than a natural person, the name of each officer, partner, or manager of that entity, or any entity therein;

~~(11)~~(12) if a business entity other than a corporation, limited liability company or partnership, a description of the organization of the applicant entity, including a copy of its organizational documents evidencing its authority to engage in real estate brokerage;

~~(12)~~(13) if a foreign business entity, a certificate of authority to transact business in North Carolina and an executed consent to service of process and pleadings; and

~~(13)~~(14) any other information required by this Rule.

When the authority of a business entity to engage in the real estate business is unclear in the application or in law, the Commission shall require the applicant to declare in the license application that the applicant's organizational documents authorize the firm to engage in the real estate business and to submit organizational documents, addresses of affiliated persons and similar information. For purposes of this Rule, the term "principal," when it refers to a person or entity, means any person or entity owning 10 percent or more of the business entity, or who is an officer, director, manager, member, partner or who holds any other comparable position.

(b) After filing a written application with the Commission and upon a showing to the Commission that one principal of the business entity holds a broker license on active status and in good standing who will serve as qualifying broker of the entity, the entity shall be licensed provided it appears to the Commission that the applicant entity employs and is directed by personnel possessed of the requisite character and fitness required of applicants for a broker license by G.S. 93A-4(b). The qualifying broker of a partnership of any kind must be a general partner of the partnership; the qualifying broker of a limited liability company must be a manager of the company; and the qualifying broker of a corporation must be an officer of the corporation. A licensed business entity may serve as the qualifying broker of another licensed business entity if the qualifying broker-entity has as its qualifying broker a natural person who is licensed as a broker. The natural person who is qualifying broker shall assure to the Commission the performance of the qualifying broker's duties with regard to both entities. A provisional broker may not serve as a qualifying broker.

(c) The licensing of a business entity shall not be construed to extend to the licensing of its partners, managers, members, directors, officers, employees or other persons acting for the entity in their individual capacities regardless of whether they are engaged in furthering the business of the licensed entity.

(d) The qualifying broker of a business entity shall assume responsibility for:

(1) designating and assuring that there is at all times a broker-in-charge for each office and branch office of the entity as "office" and "branch office" are defined in Rule .0110(a) of this Subchapter;

(2) renewing the real estate broker license of the entity;

(3) retaining the firm's renewal pocket card at the firm and producing it as proof of firm licensure upon request and maintaining a photocopy of the firm license certificate and pocket card at each branch office thereof;

(4) notifying the Commission of any change of business address or trade name of the entity and the registration of any assumed business name adopted by the entity for its use;

(5) notifying the Commission in writing of any change of his or her status as qualifying broker within ~~ten~~ 10 days following the change;

(6) securing and preserving the transaction and trust account records of the firm whenever there is a change of broker-in-charge at the firm or any office thereof and notifying the Commission if the trust account records are out of balance or have not been reconciled as required by Rule .0117 of this Subchapter;

(7) retaining and preserving the transaction and trust account records of the firm upon termination of his or her status as qualifying broker until a new qualifying broker has been designated with the Commission or, if no new qualifying broker is designated, for the period of time records are required to be retained by Rule .0108 of this Subchapter; and

(8) notifying the Commission if, upon the termination of his or her status as qualifying broker, the firm's transaction and trust account records cannot be retained or preserved or if the trust account records are out of balance or have not been reconciled as required by Rule .0117 of this Subchapter.

(9) notifying the Commission regarding any revenue suspension, revocation of Certificate of Authority, or administrative dissolution of the entity by the NC Secretary of State within 10 days of the suspension, revocation, or dissolution.

(e) Every licensed business entity and every entity applying for licensure shall conform to all the requirements imposed upon it by the North Carolina General Statutes for its continued existence and authority to do business in North Carolina. Failure to conform to such requirements shall be grounds for disciplinary action or denial of the entity's application for licensure. Upon receipt of notice from an entity or agency of this State that a licensed entity has ceased to exist or that its authority to engage in business in this State has been terminated by operation of law, the Commission shall cancel the license of the entity.

Authority G.S. 55-11A-04; 93A-3(c); 93A-4(a); 93A-4(b); 93A-4(d).

SECTION .1700 – MANDATORY CONTINUING EDUCATION

21 NCAC 58A .1711 CONTINUING EDUCATION REQUIRED OF NONRESIDENT BROKERS

(a) To be considered a nonresident for continuing education purposes, a real estate broker licensed in North Carolina shall

not have a North Carolina business address, mailing address or residence address at the time he or she applies for license renewal if he or she seeks to renew his or her license on active status. A nonresident North Carolina broker who wishes to renew his or her license on active status may fully satisfy the continuing education requirement by any one of the following means:

(1) A nonresident ~~licensee~~ broker may, at the time of license renewal, hold a real estate license on active status in another state and certify on a form prescribed by the Commission that the ~~licensee holds such license.~~ broker holds such license. If at any time after renewal there is a change in the status of the out-of-state license, the nonresident broker shall notify the Commission within 10 days and request that his or her North Carolina license be placed on inactive status, or provide evidence to the Commission that he or she has satisfied either Subparagraph (a)(2) or (a)(3) of this Rule or the requirements of Rule .1702 of this Section.

(2) A nonresident ~~licensee~~ broker may, within one year preceding license expiration, complete the Commission-prescribed Update course plus one Commission-approved continuing education elective course, or complete two Commission-approved continuing education elective courses.

(3) A nonresident ~~licensee~~ broker may, within one year preceding license expiration, complete eight classroom hours in courses approved for continuing education credit by the real estate licensing agency in the ~~licensee's~~ broker's state of residence or in the state where the course was taken. To obtain credit for a continuing education course completed in another state and not approved by the Commission, the ~~licensee~~ broker must submit a written request for continuing education credit accompanied by a nonrefundable processing fee of twenty dollars ($20.00) per request and evidence satisfactory to the Commission that the course was completed and that the course was approved for continuing education credit by the real estate licensing agency in the ~~licensee's~~ broker's state of residence or in the state where the course was taken.

(4) A nonresident ~~licensee~~ broker may obtain eight hours equivalent credit for a course or courses not approved by the Commission or for related educational activities as provided in Rule .1708 of this Section. The maximum amount of continuing education credit the Commission will award a nonresident ~~licensee~~ broker for an unapproved course or educational activity is eight hours.

(b) When requesting to change an inactive license to active status, or when applying for reinstatement of a license expired for not more than six months, a nonresident broker may fully satisfy the continuing education requirements described in Rules .0505 and .1703 of this Subchapter by complying with any of the options described in Paragraph (a) of this Rule, except that the requirements in Subparagraphs (a)(2) and (a)(3) of this Rule restricting the taking of courses to one year preceding license expiration shall not be applicable.

(c) No carry-over credit to a subsequent license period shall be awarded for a course taken in another state that has not been approved by the North Carolina Real Estate Commission as an elective course.

(d) A nonresident broker who has renewed his or her license on active status pursuant to Paragraph (a) of this Rule shall notify the Commission within 10 days if he or she subsequently affiliates with an office with a North Carolina business or mailing address, or becomes a resident of this State, and within 30 days provide evidence that he or she has satisfied the requirements of either Subparagraphs (a)(2) or (a)(3) of this Rule or the requirements of Rule .1702 of this Section.

Authority G.S. 93A-3(c); 93A-4.1.

SUBCHAPTER 58C – REAL ESTATE PRELICENSING EDUCATION

SECTION .0600 – PRELICENSING AND POSTLICENSING INSTRUCTORS

21 NCAC 58C .0605 REQUEST FOR EXAMINATIONS AND VIDEO RECORDINGS

(a) Upon request of the Commission, an instructor shall submit to the Commission copies of final course examinations, with answer keys, used in prelicensing courses taught by the instructor.

(b) Upon request of the Commission, an instructor ~~must~~ shall submit to the Commission a digital video recording which depicts the instructor teaching portions of a prelicensing or postlicensing course specified by the ~~Commission~~ Commission, and which demonstrates that the instructor possesses the basic teaching skills described in Rule .0604 of this Section.

(c) Any video recording submitted to the Commission in connection with an instructor application ~~must~~ shall be approximately one hour in length and ~~must~~ depict the instructor teaching one continuous block of instruction on a single topic. Any video recording submitted in connection with an instructor application or in response to a request from the Commission ~~must~~ must:

(1) have been made within 12 months of the date of ~~submission,~~ submission;

(2) ~~must~~ be recorded either on a digital video disc (DVD) ~~or on a VHS formatted videocassette,~~ USB drive or similar medium;

(3) ~~must~~ be ~~unedited,~~ unedited;

(4) ~~must~~ include a label identifying the instructor and dates of the ~~video recorded instruction,~~ video instruction; and

(5) ~~must~~ have visual and sound quality sufficient to allow ~~viewers~~ reviewers to clearly see and hear the instructor.

Authority G.S. 93A-4(a),(d); 93A-33; 93A-34.

SUBCHAPTER 58E – REAL ESTATE CONTINUING EDUCATION

SECTION .0200 – UPDATE COURSE INSTRUCTIORS

21 NCAC 58E .0203 APPLICATION AND CRITERIA FOR ORIGINAL APPROVAL

(a) A person seeking initial approval as an update course instructor ~~must make~~ shall submit an application for original approval on a form provided by the Commission. The application form shall be available on the Commission's website at www.ncrec.gov or upon request to the Commission and shall require the applicant to set forth:

(1) the applicant's legal name, occupation, address, and telephone number;
(2) the applicant's professional and occupational licensing history and status;
(3) the applicant's criminal history and history of professional license disciplinary actions;
(4) the applicant's educational background, including special real estate education;
(5) the applicant's experience in the real estate business;
(6) the applicant's real estate teaching experience; and
(7) the applicant's signature.

An applicant who is not a resident of North Carolina shall also file with the application a consent to service of process and pleadings. No application fee is required. All required information regarding the applicant's qualifications shall be submitted.

(b) The applicant shall be truthful, honest and of high integrity.

(c) The applicant shall be qualified under one of the following standards:

(1) Possession of a current North Carolina real estate broker license that is not on provisional status, a current continuing education record, and three years full-time experience on active status in general real estate brokerage, including substantial experience in real estate sales and at least one year of general brokerage experience in North Carolina, within the previous seven years. For purposes of this Rule, substantial experience is experience which is material, valuable, and worthwhile and not nominal, occasional, or intermittent; or
(2) Possession of qualifications found by the Commission to be equivalent to the standard stated in Subparagraph (c)(1) of this Rule.

(d) The applicant shall possess good teaching skills as demonstrated on a video recording portraying the instructor teaching a live audience. The applicant shall submit the video recording for Commission review on a digital video ~~disc (DVD).~~disc (DVD), USB drive or similar medium. The video recording must be 45-60 minutes in length and shall depict a continuous block of instruction on a single real estate or directly related topic. The video recording shall be unedited, show a portion of the audience, and have visual and sound quality sufficient to enable reviewers to see and hear the instructor. The video recording shall have been recorded within the previous calendar year and shall include a label identifying the instructor and date of the video instruction. The video recording shall demonstrate that the instructor possesses the teaching skills described in Rule .0509 of this Subchapter.

(e) The applicant shall take the Commission's Update Instructor Seminar for the real estate license year in which the applicant's approval would be effective prior to approval being issued. If this seminar is not taken within six months after filing the application for approval, the application shall be deemed cancelled. The Update Instructor Seminar shall be a seven hour course offered by the Commission multiple times each year to demonstrate the General Update Course and Broker-in-Charge Update Course materials described in Rule .0102(b) of this Subchapter to approved instructors to prepare them to teach those courses. Registration and available dates for the Update Instructor Seminar are available online at the Commission's website, www.ncrec.gov.

(f) An applicant shall be exempt from qualifying under Paragraphs (c) and (d) of this Rule if he or she is a Commission-approved real estate prelicensing instructor who has satisfied all requirements for an unconditional approval or possesses a current North Carolina real estate broker license, a current continuing education record, and a current designation as a Distinguished Real Estate Instructor (DREI) granted by the Real Estate Educators Association.

Authority G.S. 93A-3(c); 93A-4.1.

21 NCAC 58E .0204 ACTIVE AND INACTIVE STATUS; RENEWAL OF APPROVAL

(a) An instructor's initial approval shall be issued on active status and shall remain on active status during the approval period so long as the instructor takes the Commission's annual Update Instructor Seminar, described in Rule .0203(e) of this Section, before September 1 of each year. An instructor may teach the General Update Course or Broker-In-Charge Update Course while his or her license is on active status. When an instructor fails to complete the Update Instructor Seminar by September 1, the instructor's approval shall be placed on inactive status and shall remain on inactive status until the seminar is taken or until the expiration of the instructor's approval, whichever occurs first. An instructor shall not teach any version of the update course while his or her approval is on inactive status.

(b) If an instructor whose approval is on active status is unable to take the Update Instructor Seminar on any of the scheduled seminar dates as shown on the Commission's website at www.ncrec.gov before September 1 of any year due to a personal hardship such as a personal or family illness or a business conflict, the instructor may request and obtain from the Commission an extension of time to take the seminar on a seminar date following the September 1 deadline. The instructor shall not complete the course later than December 1 of that year. If an extension of time is granted, the instructor's approval shall remain on active status during the extension period.

(c) Commission approval of update course instructors expires on the third December 31 following issuance of approval. Approved instructors shall file applications for renewal of approval on a form provided by the Commission ~~on its website at www.ncrec.gov~~ on or before the December 1 immediately preceding expiration of approval. ~~The form shall request information pertaining to the applicant's qualifications under Rule .0203(c) of this Section.~~ The renewal application form shall be available on the Commission's website at www.ncrec.gov or upon request to the Commission and shall require the applicant to set forth:

(1) the applicant's legal name, occupation, address, and telephone number;
(2) the applicant's Update Course Instructor Number;
(3) the applicant's professional and occupational licensing history and status;
(4) the applicant's criminal history and history of professional license disciplinary actions;
(5) information regarding the applicant's experience as a real estate instructor;
(6) information regarding real estate education and instructor training received by the applicant;
(7) the applicant's real estate related employment; and
(8) the applicant's signature.

In order to renew their approval, applicants must satisfy the criteria for original approval, with the exception of the requirement in Rule .0203(d) of this Section, and their approval shall be on active status as described in Paragraph (a) of this Rule. Applicants for renewal of approval whose approval is on inactive status shall also take the Commission's annual Update Instructor Seminar for the real estate license year in which the applicant's renewal of approval would be effective.

(d) In order to reinstate an expired instructor approval, the former instructor ~~must~~ shall file an application for original approval on a form provided by the ~~Commission and~~ Commission and described in Rule .0203(a) of this Section, satisfy the criteria for original approval set forth in Rule .0203(b) and (c) of this ~~Section.~~Section, and demonstrate that he or she has attended at least three separate real estate instructor educational programs of at least six hours each during the previous three years. If the applicant's prior instructor approval was on inactive status at the time the approval expired, the applicant must additionally take the Commission's annual Update Instructor Seminar for the real estate license year in which the applicant's reinstated approval would be effective. If the applicant's prior instructor approval has been expired for more than one year, the applicant ~~must~~ shall also satisfy the criteria for original approval set forth in Rule .0203(d) of this Section.

Authority G.S. 93A-3(c); 93A-4.1.

SECTION .0300 – ELECTIVE COURSES

21 NCAC 58E .0303 APPLICATION FOR ORIGINAL APPROVAL

(a) ~~An~~ A person or entity seeking original approval of a proposed elective course ~~must make~~ shall complete an application on a form prescribed by the Commission. The form shall be available on the Commission's website at www.ncrec.gov or upon request to the Commission and shall require the applicant to set forth:

(1) the title of the proposed elective course;
(2) the applicant's legal name, address, and telephone number;
(3) the identification of the continuing education course coordinator;
(4) the applicant's sponsor code;
(5) the amount of the application fee enclosed;
(6) the credit/classroom hours awarded for completing the course;
(7) the subject matter of the course;
(8) the identification of the course owner;
(9) the information regarding the instructor guide and student manual;
(10) the identification of prospective instructors; and
(11) the applicant's signature.

(b) The applicant ~~must~~ shall submit a nonrefundable fee of one hundred dollars ($100.00) per course which may be in the form of a check payable to the North Carolina Real Estate Commission; provided, however, that no fee is required if the ~~entity making application~~ applicant is a community college, junior college, college or university located in this State and accredited by the Southern Association of Colleges and Schools, or is an agency of federal, state or local government.

(c) The application shall be accompanied by a copy of the course plan or instructor's guide for the course and a copy of materials that will be provided to students.

(d) An ~~applying entity that~~ applicant who is not a resident of North Carolina shall also file with the application a consent to service of process and pleadings.

Authority G.S. 93A-3(c); 93A-4.1.

21 NCAC 58E .0308 REQUEST FOR A VIDEO RECORDING

Upon the written request of the Commission, the sponsor of an approved elective course ~~must~~ shall submit to the Commission a digital video recording depicting the course being taught by a particular instructor designated by the Commission. The ~~video~~ instructor's course presentation ~~must~~ shall have been recorded within 12 months of the date of submission, ~~must~~ shall be ~~recorded either on a digital video disc (DVD) or on a VHS formatted videocassette,~~ submitted on a digital video disc (DVD), USB drive or similar medium, ~~must~~ shall include a label which clearly identifies the instructor and the date of the ~~video recorded~~ video presentation, and ~~must~~ shall conform to technical specifications set forth in Rule .0203(d) of this Subchapter.

Authority G.S. 93A-3(c); 93A-4.1.

SECTION .0400 – GENERAL SPONSOR REQUIREMENTS

21 NCAC 58E .0408 CHANGE IN SPONSOR OWNERSHIP

If, at any time after the original approval of a course sponsor, an aggregate of 50 percent or more of the ownership interest is transferred to natural persons or entities other than those having an ownership interest at the time of the original application, the course sponsor approval shall terminate. Termination shall be effective on the date of the transaction resulting in the aggregate transfer of 50 percent or more of the original ownership. ~~When ownership of an approved course sponsor is transferred to a different legal entity, the sponsor approval is not transferable and terminates on the effective date of the transfer. The sponsor owner transferring ownership~~ The course sponsor, the transferring owners, and the new owners shall not conduct any course after the ~~effective date of the transfer.~~termination of sponsor approval. The ~~entity~~ natural persons or entities ~~acquiring~~ holding an~~sponsor~~ ownership interest after the transfer shall obtain an original course sponsor approval as required by G.S. 93A-4.1 and Rules ~~.0103,~~ .0104, .0303 and .0402 of this Subchapter prior to advertising courses, registering students, accepting tuition, conducting courses or otherwise engaging in any sponsor activity.

Authority G.S. 93A-3(c); 93A-4.1.

21 NCAC 58E .0409 CHANGES DURING APPROVAL PERIOD

(a) Course sponsors ~~must~~ shall notify the Commission in writing prior to any change in business name, ownership interest, continuing education coordinator, address or business telephone number.

(b) Course sponsors ~~must~~ shall obtain advance approval from the Commission for any changes to be made in the content or number of hours for elective courses; provided that changes in course content which are solely for the purpose of assuring that information provided in a course is current and accurate do not require approval during the approval period, but shall be reported at the time the sponsor requests renewal of course approval. Requests for approval of changes shall be in writing.

Authority G.S. 93A-3(c); 93A-4.1.

21 NCAC 58E .0412 DENIAL OR WITHDRAWAL OF APPROVAL

(a) The Commission may deny or withdraw approval of any course or course sponsor upon finding that:

(1) the course sponsor has made any false statements or presented any false, incomplete, or incorrect information in connection with an application for course or sponsor approval or renewal of such approval;

(2) the course sponsor or any official or instructor in the employ of the course sponsor has refused or failed to comply with any of the provisions of this Subchapter;

(3) the course sponsor or any official or instructor in the employ of the course sponsor has provided false, incomplete, or incorrect information in connection with any reports the course sponsor is required to submit to the Commission;

(4) the course sponsor has engaged in a pattern of consistently canceling scheduled courses;

(5) the course sponsor has provided to the Commission in payment for required fees a check which was dishonored by a bank;

(6) an instructor in the employ of the course sponsor fails to conduct approved courses in a manner that demonstrates possession of the teaching skills described in Rule .0509 of this Subchapter;

(7) any court of competent jurisdiction has found the course sponsor or any official or instructor in the employ of the course sponsor to have violated, in connection with the offering of continuing education courses, any applicable federal or state law or regulation prohibiting discrimination on the basis of disability, requiring places of public accommodation to be in compliance with prescribed accessibility standards, or requiring that courses related to licensing or certification for professional or trade purposes be offered in a place and manner accessible to persons with disabilities;

(8) the course sponsor or any official or instructor in the employ of the course sponsor has been disciplined by the Commission or any other occupational licensing agency in North Carolina or another jurisdiction;

(9) the course sponsor or any official or instructor in the employ of the course sponsor has collected money from ~~licensees~~ brokers for a continuing education course, but refuses or fails to provide the promised instruction; ~~or~~

(10) the course sponsor or any person associated with the sponsor has provided to a ~~licensee~~ broker any false, incomplete, or misleading information relating to real estate licensing or education matters or the ~~licensee's~~ broker's education needs or license ~~status.~~ status;

(11) the course sponsor fails to submit to the Commission class rosters as required by Rule .0406 of this Section; or

(12) the course sponsor fails to submit the per-student-fee as required by G.S. 93A-4.1(d) and Rule .0406 of this Section.

(b) If a ~~licensee~~ broker who is an approved course sponsor or an instructor in the employ of an approved course sponsor engages in any dishonest, fraudulent or improper conduct in connection with the ~~licensee's~~ broker's activities as a course sponsor or instructor, the ~~licensee~~ broker shall be subject to disciplinary action pursuant to G.S. 93A-6.

Authority G.S. 93A-3(c); 93A-4.1.

SECTION .0500 – COURSE OPERATIONAL REQUIREMENTS

21 NCAC 58E .0505 ADVERTISING; PROVIDING COURSE INFORMATION

(a) Course sponsors shall not utilize advertising of any type that is false or misleading in any respect. If the number of continuing education credit hours awarded by the Commission for an approved elective course is less than the number of scheduled hours for the course, any course advertisement or promotional materials which indicate that the course is approved for real estate continuing education credit in North Carolina must specify the number of continuing education credit hours awarded by the Commission for the course.

(b) Any flyers, brochures or similar materials utilized to promote a continuing education course shall clearly describe the fee to be charged and the sponsor's cancellation and fee refund policies. Course sponsors must provide prospective students with a full description of the sponsor's cancellation and fee refund policies prior to accepting payment for any course(s).

(c) Course sponsors of any elective course shall, upon request, provide any prospective student a description of the course content sufficient to give the prospective student a general understanding of the instruction to be provided in the course.

(d) Course sponsors shall not use endorsements or recommendations of any person or organization, in advertising or otherwise, unless such person or organization has consented in writing to the use of the endorsement or recommendation and is not compensated for such use.

Authority G.S. 93A-3(c); 93A-4.1.

Note from the Codifier: *The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.*
This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *NC Medical Care Commission*

Rule Citation: *10A NCAC 13B .2101-.2102; 13C .0103, .0206*

Effective Date: *December 31, 2014*

Date Approved by the Rules Review Commission: *November 20, 2014*

Reason for Action: *The effective date of a recent act of the General Assembly. Cite: S.L. 2014-100 (Senate Bill 744) "Appropriations Act of 2014", effective August 7, 2014.*
10A NCAC 13B .2101, .2102 – *The proposed temporary adoption to the rule in Chapter 10A NCAC 13B Licensing of Hospitals is in response to a recent act of the General Assembly, specifically Session Law 2014-100, Senate Bill 744, "Appropriations Act of 2014" which became effective on August 7, 2014. In this law, revisions to the Health Care Cost Reduction and Transparency Act from Session Law 2013-328, Part X were made to clarify some components within the original law to improve transparency in the cost of health care provided by hospitals and ambulatory surgical facilities, to provide for the establishment of quality measures and to exempt certain rules from G.S. 150B-21.3. Section 12.G.2 of this Act requires the N.C. Medical Care Commission to adopt rules to ensure that the provisions of the law are properly implemented.*
The availability of information related to health care pricing and transparency of that information is of significant importance to the citizens of North Carolina. The rule will protect patients' rights to be fully informed of charges they have incurred or may incur, and will also empower patients to make informed health care decisions. The proposed temporary rule 10A NCAC 13B .2101 addresses the definitions that will be used in the quarterly reporting of billing and collections practices for hospitals to ensure that these practices are transparent, fair and reasonable to the health care consumer as intended by the General Assembly. The proposed temporary rule 10A NCAC 13B .2102 addresses the reporting requirements that will be used in the quarterly reporting of the statewide 100 most frequently reported DRGs, 20 most common outpatient imaging procedures and 20 most common surgical procedures for hospitals to ensure that these practices are transparent, fair and reasonable to the health care consumer as intended by the General Assembly. The time frame for the quarterly reporting of the data has been mandated by the General Assembly in S.L. 2014-100 and a process has been developed for the information to be provided to the public following data submission and receipt by the Department. Transparency in health care pricing and billing is important to North Carolinians. These proposed temporary rules are the first step to achieving it in a manner that is meaningful and useful to the public.
10A NCAC 13C .0103, .0206 – *The proposed temporary amendment to the rule in Chapter 10A NCAC 13C Licensing of Ambulatory Surgical Facilities is in response to a recent act of the General Assembly, specifically Session Law 2014-100, Senate Bill 744, "Appropriations Act of 2014" which became effective on August 7, 2014. In this law, revisions to the Health Care Cost Reduction and Transparency Act from Session Law 2013-328, Part X were made to clarify some components within the original law to improve transparency in the cost of health care provided by hospitals and ambulatory surgical facilities, to provide for the establishment of quality measures and to exempt certain rules from G.S. 150B-21.3. Section 12.G.2 of this Act requires the N.C. Medical Care Commission to adopt rules to ensure that the provisions of the law are properly implemented.*
The availability of information related to health care pricing and transparency of that information is of significant importance to the citizens of North Carolina. The rule will protect patients' rights to be fully informed of charges they have incurred or may incur, and will also empower patients to make informed health care decisions. The proposed amendment to the temporary rule 10A NCAC 13C .0103 addresses the definitions that will be used in the quarterly reporting of billing and collections practices for ambulatory surgical facilities to ensure that these practices are transparent, fair and reasonable to the health care consumer as intended by the General Assembly. The proposed temporary rule 10A NCAC 13C .0206 addresses the reporting requirements that will be used in the quarterly reporting of the statewide 20 most common outpatient imaging procedures and 20 most common surgical procedures for ambulatory surgical facilities to ensure that these practices are transparent, fair and reasonable to the health care consumer as intended by the General Assembly. The time frame for the quarterly reporting of the data has been mandated by the General Assembly in S.L. 2014-100 and a process has been developed for the information to be provided to the public following data submission and receipt by the Department. Transparency in health care pricing and billing is important to North Carolinians. These proposed temporary rules are the first step to achieving it in a manner that is meaningful and useful to the public.

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13B – LICENSING OF HOSPITALS

SECTION .2100 – TRANSPARENCY IN HEALTH CARE COSTS

10A NCAC 13B .2101 DEFINITIONS

~~The following definitions~~In addition to the terms defined in G.S. 131E-214.13, the following terms shall apply throughout this ~~section,~~ Section, unless text ~~otherwise~~ indicates to the contrary:

~~(2)~~(1) "Current Procedural Terminology (CPT)" means a medical code set developed by the American Medical Association.

~~(3)~~(2) "Diagnostic ~~Related Group~~ related group (DRG)" means a system to classify hospital cases assigned by a grouper program based on ICD (International Classification of Diseases) diagnoses, procedures, patient's age, sex, discharge status, and the presence of complications or co-morbidities.

~~(4)~~(3) "Department" means the North Carolina Department of Health and Human Services.

~~(5)~~(4) "Financial ~~Assistance~~ assistance" means a policy, including charity care, describing how the organization will provide assistance at its hospital(s) and any other ~~facilities,~~ facilities. Financial assistance includes free or discounted health services provided to persons who meet the organization's criteria for financial assistance and are unable to pay for all or a portion of the services. Financial assistance does not include:

(a) bad debt;

(b) uncollectable charges that the organization recorded as revenue but wrote off due to a patient's failure to pay;

(c) the cost of providing such care to ~~such patients;~~ the patients in Sub-Item (4)(b) of this Rule; or

(d) the difference between the cost of care provided under Medicare or other government programs, and the revenue derived therefrom.

~~(7)~~(5) "Healthcare Common Procedure Coding System (HCPCS)" means a ~~three-tiered~~ three-tiered medical code set consisting of Level I, II and III services and contains the CPT code set in Level I.

History Note: Authority G.S. 131E-214.13; S.L. 2013-382, s. 10.1; S.L. 2013-382, s. 13.1; S.L. 2014-100, s. 12G.2; Temporary Adoption Eff. December 31, 2014.

10A NCAC 13B .2102 REPORTING REQUIREMENTS

(a) The Department shall establish the lists of the statewide 100 most frequently reported DRGs, 20 most common outpatient imaging procedures, and 20 most common outpatient surgical procedures performed in the hospital setting to be used for reporting the data required in Paragraphs ~~(b)~~(c) through ~~(d)~~(e) of this Rule. The lists shall be determined based ~~on~~ upon data provided by the certified statewide data processor. The Department shall make the lists available on its ~~website at: http://www.ncdhhs.gov/dhsr/ahc.~~ website.

(b) All information required by Paragraphs (a), (c) and (d) of this Rule shall be posted on the Department's website at: http://www.ncdhhs.gov/dhsr/ahc and may be accessed at no cost.

~~(b)~~(c) In accordance with G.S. 131E-214.13 and quarterly per ~~year~~ year, all licensed hospitals shall report the data required in Paragraph ~~(d)~~(e) of this Rule related to the statewide 100 most ~~common~~ frequently reported DRGs to the certified statewide data processor in a format provided by the certified statewide processor. The data reported shall be from the quarter ending three months ~~previous~~ prior to the date of reporting and includes all sites operated by the licensed hospital.

~~(c)~~(d) In accordance with G.S. 131E-214.13 and quarterly per ~~year~~ year, all licensed hospitals shall report the data required in Paragraph ~~(d)~~(e) of this Rule related to the statewide 20 most common outpatient imaging procedures and the statewide 20 most common outpatient surgical procedures to the certified statewide data processor in a format provided by the certified statewide processor. This report shall include the related primary CPT and HCPCS codes. The data reported shall be from the quarter ending three months ~~previous~~ prior to the date of reporting and includes all sites operated by the licensed hospital.

~~(d)~~(e) The reports as described in Paragraphs ~~(b)~~(c) and ~~(c)~~(d) of this Rule shall be specific to each reporting hospital and shall include:

(1) the average gross charge for each ~~DRG~~ DRG, CPT code, or procedure if all charges are paid in full without any portion paid by a public or private third party;

(2) the average negotiated settlement on the amount that will be charged for each ~~DRG~~ DRG, CPT code, or procedure as required for patients defined in ~~Paragraph~~ Subparagraph ~~(d)(1)~~(e)(1) of this Rule. The average negotiated settlement ~~is to~~ shall be calculated using the average amount charged all patients eligible for the hospital's financial assistance policy, including self-pay patients;

(3) the amount of Medicaid reimbursement for each ~~DRG~~ DRG, CPT code, or procedure, including all supplemental payments to and from the hospital;

(4) the amount of Medicare reimbursement for each ~~DRG~~ DRG, CPT code, or procedure; and

(5) on behalf of patients who are covered by a Department of Insurance licensed third-party and teachers and State employees, ~~report~~ the lowest, average, and highest amount of payments made for each ~~DRG~~ DRG, CPT code, or procedure by each of the hospital's top five largest health insurers.

(A) each hospital shall determine its five largest health insurers based on the dollar volume of payments received from those insurers;

(B) the lowest amount of payment shall be reported as the lowest payment from each of the five insurers on the ~~DRG~~ DRG, CPT code, or procedure;

(C) the average amount of payment shall be reported as the arithmetic average of each of the five health insurers payment amounts;

(D) the highest amount of payment shall be reported as the highest payment from each of the five insurers on the ~~DRG~~ DRG, CPT code, or procedure; and

(E) the identity of the top five largest health insurers shall be redacted prior to submission.

~~(e)~~(f) The data reported, as defined in Paragraphs ~~(b)~~(c) through ~~(d)~~(e) of this Rule, shall reflect the payments received from patients and health insurers for all closed accounts. For the purpose of this Rule, ~~closed accounts~~ "closed accounts" are patient accounts with a zero balance at the end of the data reporting period.

~~(f)~~(g) A minimum of three data elements shall be required for reporting under Paragraphs ~~(b)~~(c) and ~~(c)~~(d) of this Rule.

~~(g)~~(h) The information submitted in the report shall be in compliance with the federal ~~"Health~~ Health Insurance Portability and Accountability Act of ~~1996."~~ 1996, 45 CFR Part 164.

~~(h)~~(i) The Department shall provide the location of each licensed hospital and all specific hospital data reported pursuant to this Rule on its website. Hospitals shall be grouped by category on the website. On each quarterly report, hospitals shall determine one category that most accurately describes the type of facility. The categories are:

(1) "Academic Medical Center Teaching Hospital," means a hospital as defined in Policy AC-3 of the N.C. State Medical Facilities Plan. The N.C. State Medical Facilities Plan ~~can~~ may be accessed ~~at the Division's website at: http://www.ncdhhs.gov/dhsr/ncsmfp.~~ at: http://www.ncdhhs.gov/dhsr/ncsmfp at no cost.

(2) "Teaching Hospital," means a hospital that provides medical training to ~~individuals~~ individuals, provided that such educational programs are accredited by the Accreditation Council for Graduated Medical Education to receive graduate medical education funds from the Centers for Medicare & Medicaid Services.

(3) "Community Hospital," means a general acute hospital that provides diagnostic and medical treatment, either surgical or nonsurgical, to inpatients with a variety of medical conditions, and that may provide outpatient services, anatomical pathology services, diagnostic imaging services, clinical laboratory services, operating room services, and pharmacy services, that is not defined by the categories listed in this Subparagraph and Subparagraphs ~~(h)(1),~~ (i)(1), (2), or (5) of this Rule.

(4) "Critical Access Hospital," means a hospital defined in the Centers for Medicare & Medicaid Services' State Operations Manual, Chapter 2 – The Certification Process, 2254D – Requirements for Critical Access Hospitals (Rev. 1, 05-21-04), including all subsequent updates and revisions. The manual may be accessed ~~at no cost~~ at the ~~internet~~ website: http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf at no cost.

(5) "Mental Health Hospital," means a hospital providing psychiatric services ~~as defined in~~ pursuant to G.S. 131E-176(21).

History Note: Authority G.S. 131E-214.4; 131E-214.13; S.L. 2013-382, s. 10.1; S.L. 2014-100, s. 12G.2;
Temporary Adoption Eff. December 31, 2014.

SUBCHAPTER 13C – LICENSING OF AMBULATORY SURGICAL FACILITIES

SECTION .0100 – GENERAL

10A NCAC 13C .0103 DEFINITIONS

In addition to the terms defined in G.S. 131E-214.13, the following terms shall apply throughout ~~As used in~~ this Subchapter, unless the context clearly requires ~~otherwise, the following terms have the meanings specified:~~ otherwise:

(1) "Adequate" means, when applied to various areas of services, that the services are ~~at least~~ satisfactory in meeting a referred to need when measured against ~~contemporary~~ professional standards of practice.

(2) "AAAASF" means American Association for Accreditation of Ambulatory Surgery Facilities.

(3) "AAAHC" means Accreditation Association for Ambulatory Health Care.

(4) "Ancillary nursing personnel" means persons employed to assist registered nurses or licensed practical nurses in the care of patients.

(5) "Anesthesiologist" means a physician whose specialized training and experience qualify him or her to administer anesthetic agents and to monitor the patient under the influence of these agents. For the purpose of ~~these Rules~~ this Subchapter, the term "anesthesiologist" shall not include podiatrists.

(6) "Anesthetist" means a physician or dentist qualified, as defined in ~~Item~~ Items (10) and ~~(22)~~ (24) of this Rule, to administer anesthetic agents or a registered nurse qualified, as defined in ~~Item~~ Items ~~(22)~~ (25) and (27) of this Rule, to administer anesthesia.

(7) "Authority ~~Having Jurisdiction"~~ having jurisdiction" means the Division of Health Service Regulation.

(8) "Chief executive officer" or "administrator" means a qualified person appointed by the governing authority to act in its behalf in the

overall management of the facility and whose office is located in the facility.

(9) "Current Procedural Terminology (CPT)" means a medical code set developed by the American Medical Association.

~~(9)~~(10) "Dentist" means a person who holds a valid license issued by the North Carolina Board of Dental Examiners to practice dentistry.

~~(10)~~(11) "Department" means the North Carolina Department of Health and Human Services.

~~(11)~~(12) "Director of nursing" means a registered nurse who is responsible to the chief executive officer or administrator and has the authority and direct responsibility for all nursing services and nursing care for the entire facility at all times.

(13) "Financial assistance" means a policy, including charity care, describing how the organization will provide assistance at its facility. Financial assistance includes free or discounted health services provided to persons who meet the organization's criteria for financial assistance and are unable to pay for all or a portion of the services. Financial assistance does not include:

(a) bad debt;

(b) uncollectable charges that the organization recorded as revenue but wrote off due to a patient's failure to pay;

(c) the cost of providing such care to the patients in Sub-Item (13)(b) of this Rule; or

(d) the difference between the cost of care provided under Medicare or other government programs, and the revenue derived therefrom.

~~(12)~~(14) "Governing authority" means the individual, ~~agency or group~~ agency, group, or corporation appointed, elected or otherwise designated, in which the ultimate responsibility and authority for the conduct of the ambulatory surgical facility is vested.

(15) "Healthcare Common Procedure Coding System (HCPCS)" means a three tiered medical code set consisting of Level I, II and III services and contains the CPT code set in Level I.

~~(13)~~(16) "JCAHO" or "Joint Commission" means Joint Commission on Accreditation of Healthcare Organizations.

~~(14)~~(17) "Licensing agency" means the Department of Health and Human Services, Division of Health Service Regulation.

~~(15)~~(18) "Licensed practical ~~nurse" (L.P.N.)~~ nurse (L.P.N.)" means any person licensed as such under the provisions of ~~G.S. 90-171.~~ G.S. 90-171.20(8).

~~(16)~~(19) "Nursing personnel" means registered nurses, licensed practical ~~nurses~~ nurses, and ancillary nursing personnel.

~~(17)~~(20) "Operating room" means a room in which surgical procedures are performed.

~~(18)~~(21) "Patient" means a person admitted to and receiving care in a facility.

~~(19)~~(22) "Person" means an individual, a trust or estate, a partnership or corporation, including associations, joint stock companies and insurance companies; the ~~state,~~ State, or a political subdivision or instrumentality of the state.

~~(20)~~(23) "Pharmacist" means a person who holds a valid license issued by the North Carolina Board of Pharmacy to practice pharmacy in accordance with ~~G.S. 90-85.~~ G.S. 90-85.3A.

~~(21)~~(24) "Physician" means a person who holds a valid license issued by the North Carolina Medical Board to practice medicine. For the purpose of carrying out these Rules, a "physician" may also mean a person holding a valid license issued by the North Carolina Board of Podiatry Examiners to practice podiatry.

~~(22)~~(25) "Qualified ~~person"~~ person," when used in connection with an occupation or ~~position~~ position, means a person:

(a) who has demonstrated through ~~relevant~~ experience the ability to perform the required functions; or

(b) who has certification, ~~registration~~ registration, or other professional recognition.

~~(23)~~(26) "Recovery area" means a room used for the ~~post-anesthesia~~ post-anesthesia recovery of surgical patients.

~~(24)~~(27) "Registered nurse" means a person who holds a valid license issued by the North Carolina Board of Nursing to practice nursing as defined in ~~G.S. 90-171.~~ G.S. 90-171.20(7).

~~(25)~~(28) "Surgical suite" means an area ~~which~~ that includes one or more operating rooms and one or more recovery rooms.

History Note: Authority G.S. 131E-149; 131E-214.13; S.L. 2013-382, s. 10.1; S.L. 2013-382, s. 13.1; S.L. 2014-100, s. 12G.2;
Eff. October 14, 1978;
Amended Eff. April 1, 2003; November 1, 1989;
Temporary Amendment Eff. December 31, 2014.

SECTION .0200 - LICENSING PROCEDURES

10A NCAC 13C .0206 REPORTING REQUIREMENTS

(a) The Department shall establish the lists of the statewide 20 most common outpatient imaging procedures and 20 most common outpatient surgical procedures performed in the ambulatory surgical facility setting to be used for reporting the data required in Paragraphs ~~(b)~~(c) ~~through (c)~~ and (d) of this

Rule. The lists shall be based ~~on~~ upon data provided by the certified statewide data processor. The Department shall make the lists available on its ~~website at: http://www.ncdhhs.gov/dhsr/ahc.~~ website.

(b) All information required by this Rule shall be posted on the Department's website at: http://www.ncdhhs.gov/dhsr/ahc and may be accessed at no cost.

~~(b)~~(c) In accordance with G.S. 131E-214.13 and quarterly per ~~year~~ year, all licensed ambulatory surgical facilities shall report the data required in Paragraph ~~(c)~~(d) of this Rule related to the statewide 20 most common outpatient imaging procedures and the statewide 20 most common outpatient surgical procedures to the certified statewide data processor in a format provided by the certified statewide processor. This report shall include the related primary CPT and HCPCS codes. The data reported shall be from the quarter ending three months ~~previous~~ prior to the date of reporting.

~~(c)~~(d) The report as described in ~~Paragraphs~~ Paragraph ~~(b)~~(c) of this Rule shall be specific to each reporting ambulatory surgical facility and shall include:

(1) the average gross charge for each ~~DRG~~ CPT code or procedure if all charges are paid in full without any portion paid by a public or private third party;

(2) the average negotiated settlement on the amount that will be charged for each ~~DRG~~ CPT code or procedure as required for patients defined in ~~Paragraph~~ Subparagraph ~~(c)(1)~~(d)(1) of this Rule. The average negotiated settlement ~~is to~~ shall be calculated using the average amount charged all patients eligible for the facility's financial assistance policy, including self-pay patients;

(3) the amount of Medicaid reimbursement for each ~~DRG~~ CPT code or procedure, including all supplemental payments to and from the ambulatory surgical facility;

(4) the amount of Medicare reimbursement for each ~~DRG~~ CPT code or procedure; and

(5) on behalf of patients who are covered by a Department of Insurance licensed third-party and teachers and State employees, ~~report~~ the lowest, average, and highest amount of payments made for each ~~DRG~~ CPT code or procedure by each of the facility's top five largest health insurers.

(A) each ambulatory surgical facility shall determine its five largest health insurers based on the dollar volume of payments received from those insurers;

(B) the lowest amount of payment shall be reported as the lowest payment from each of the five insurers on the ~~DRG~~ CPT code or procedure;

(C) the average amount of payment shall be reported as the arithmetic average of each of the five health insurers payment amounts;

(D) the highest amount of payment shall be reported as the highest payment from each of the five insurers on the ~~DRG~~ CPT code or procedure; and

(E) the identity of the top five largest health insurers shall be redacted prior to submission.

(e) The data reported, as defined in Paragraphs ~~(b) through (c)~~ (c) and (d) of this Rule, shall reflect the payments received from patients and health insurers for all closed accounts. For the purpose of this Rule, ~~closed accounts~~ "closed accounts" are patient accounts with a zero balance at the end of the data reporting period.

(f) A minimum of three data elements shall be required for reporting under Paragraph ~~(b)~~(c) of this Rule.

(g) The information submitted in the report shall be in compliance with the federal ~~"Health~~ Health Insurance Portability and Accountability Act of ~~1996."~~ 45 CFR Part 164.

(h) The Department shall provide all specific ambulatory surgical facility data reported pursuant to this Rule on its website.

History Note: Authority G.S. 131E-147.1; 131E-214.4; 131E-214.13; S.L. 2013-382, s. 10.1; S.L. 2014-100, s. 12G.2; Temporary Adoption Eff. December 31, 2014.

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Rule-making Agency: *Commission for Public Health*

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

Effective Date: *December 2, 2014*

Date Approved by the Rules Review Commission: *November 20, 2014*

Reason for Action: *A serious and unforeseen threat to the public health, safety or welfare. 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. Chikungunya virus infection was first characterized in Africa in 1952. In December 2013 sustained transmission was identified in the Caribbean Islands and travel associated cases were identified in continental U.S. shortly thereafter. In July 2014 local transmission was identified in Florida. 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. A temporary rule is needed to replace the emergency rule while the permanent rule is pursued. Immediate adoption of the rule is

required due to the serious unforeseen health threat posed by these two infectious diseases.

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 cayetanesis, the cause of cyclosporiasis.

(O) Ehrlichia spp., the causes of ehrlichiosis.

(P) Shiga toxin-producing Escherichia coli, a cause of hemorrhagic colitis, hemolytic uremic syndrome, and thrombotic thrombocytopenic purpura.

(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.

~~II)~~(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;
Temporary Amendment Eff. December 2, 2014.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATRUAL RESOURCES

Rule-making Agency: *Environmental Management Commission*

Rule Citation: *15A NCAC 02D .0544; 02Q .0502*

Effective Date: *December 2, 2014*

Date Approved by the Rules Review Commission: *November 20, 2014*

Reason for Action: *On June 23, 2014, the United States Supreme Court issued a decision in Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA) addressing the application of stationary source permitting requirements to greenhouse gas (GHG) emissions. In its decision, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a Prevention of Significant Deterioration (PSD) or Title V permit.*
To reflect the Court decision, 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases, is proposed for temporary amendment to remove the requirement that major stationary sources obtain a PSD permit on the sole basis of its GHG emissions. 15A NCAC 02Q .0502, Applicability, is proposed for temporary amendment to remove the requirement that facilities obtain a Title V permit on the sole basis of its GHG emissions.
Under G.S. 150B-19.1(a)(2), an agency shall seek to reduce the burden upon those persons or entities who must comply with the rule. Under G.S. 150B-19.1(a)(6), rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner. Therefore, temporary rule amendments are necessary to ensure that stationary sources would not be required to unnecessarily obtain a PSD or Title V permit on the sole basis of their GHG emissions while the Environmental Management Commission completes the permanent rulemaking process.

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT COMMISSION

SUBCHAPTER 02D – AIR POLLUTION CONTROL REQUIREMENTS

SECTION .0500 – EMISSION CONTROL STANDARDS

15A NCAC 02D .0544 PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS FOR GREENHOUSE GASES

(a) The purpose of this Rule is to implement a program for the prevention of significant deterioration of air quality for greenhouse gases as required by 40 CFR 51.166. For purposes of greenhouse gases, the provisions of this Rule shall apply rather than the provisions of Rule .0530 of this Section. A major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions. For all other regulated new source review (NSR) pollutants, the provisions of Rule .0530 of this Section apply.
(b) For the purposes of this Rule, the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply except the definition of "baseline actual emissions." "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with Subparagraphs (1) through (3) of this Paragraph:

(1) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit ~~actually~~ emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period ~~immediately~~ preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years ~~immediately~~ preceding the date that a complete permit application is

received by the Division, if the owner or operator demonstrates that it is more representative of normal source operation. For the purpose of determining baseline actual emissions, the following shall apply:

(A) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions;

(B) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period;

(C) For an existing emission unit (other than an electric utility steam generating unit), the average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source ~~must~~ shall currently comply. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions;

(D) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6;

(E) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant can be used for each regulated NSR pollutant; and

(F) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Parts (B) and (C) of this Subparagraph;

(2) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit; and

(3) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Subparagraph (1) of this Paragraph and for a new emissions unit in accordance with the procedures contained in Subparagraph (2) of this Paragraph.

(c) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.

(d) The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

(e) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through (o) and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

(f) 40 CFR 51.166(w)(10)(iv)(a) is changed to read: "If the emissions level calculated in accordance with Paragraph (w)(6) of this Section is equal to or greater than 80 percent of the PAL [plant wide applicability limit] level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

(g) 15A NCAC 02Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 02Q .0300 or .0500.

(h) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation ~~which~~ that was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the

source or modification as though construction had not yet begun on the source or modification.

(i) The provisions of 40 CFR 52.21(r)(2) regarding the period of validity of approval to construct are incorporated by reference except that the term "Administrator" is replaced with "Director".

(j) Permits may be issued based on innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

(k) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants shall be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

(l) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply ~~fully~~ with applicable provisions of other rules of this Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

(m) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the Director of the modification before beginning actual construction. The notification shall include:

(1) a description of the project;
(2) identification of sources whose emissions could be affected by the project;
(3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated, including identification of emissions excluded by 40 CFR 51.166(b)(40)(ii)(c);
(4) the calculated baseline actual emissions and an explanation of how the baseline actual emissions were calculated; and
(5) any netting ~~calculations~~ calculations, if applicable.

If upon reviewing the notification, the Director finds that the project will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his or her findings. The owner or operator shall not make the modification until the owner or operator has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this Rule, the owner or operator shall maintain records of annual emissions in tons per year, on a calendar year basis related to the modifications for 10 years following resumption of regular operations after the change if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant; otherwise these records shall be maintained for five years following resumption of regular operations after the change. The owner or operator shall submit a report to the Director within 60 days after the end of each year during which these records must be generated. The report shall contain the items listed in 40 CFR 51.166(r)(6)(v)(a) through (c). The owner or operator shall make the information documented and maintained under this Paragraph available to the Director or the general public pursuant to the requirements in 40 CFR 70.4(b)(3)(viii).

(n) The references to the Code of Federal Regulations (CFR) in this Rule are incorporated by reference unless a specific reference states otherwise. The version of the CFR incorporated in this Rule is that as of July 20, 2011 as set forth here http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol2/pdf/CFR-2011-title40-vol2-sec51-166.pdf, http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol3/pdf/CFR-2011-title40-vol3-sec52-21.pdf, and with the amendment set forth on 76 FR 43507 at http://www.gpo.gov/fdsys/pkg/FR-2011-07-20/pdf/2011-17256.pdf and does not include any subsequent amendments or editions to the referenced material. This Rule is applicable in accordance with 40 CFR 51.166(b)(48) and (b)(49)(iv) and (v).

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6;
Eff. January 28, 2011 pursuant to E.O. 81, Beverly E. Perdue;
Pursuant to G.S. 150B-21.3(c), a bill was not ratified by the General Assembly to disapprove this rule;
Temporary Amendment Eff. December 23, 2011;
Amended Eff. July 1, 2012;
Temporary Amendment Eff. December 2, 2014.

SUBCHAPTER 02Q – AIR QUALITY PERMITS PROCEDURES

SECTION .0500 – TITLE V PROCEDURES

15A NCAC 02Q .0502 APPLICABILITY

(a) Except as provided in Paragraph (b) or (c) of this Rule, the following facilities are required to obtain a permit under this Section:

(1) major facilities;
(2) facilities with a source subject to 15A NCAC 02D .0524 or 40 CFR Part 60, except new residential wood heaters;
(3) facilities with a source subject to 15A NCAC 02D .1110 or 40 CFR Part 61, except asbestos demolition and renovation activities;
(4) facilities with a source subject to 15A NCAC 02D .1111 or 40 CFR Part 63 or any other standard or other requirement under Section 112 of the federal Clean Air Act, except that a source is not required to obtain a permit solely because it is subject to rules or requirements under Section 112(r) of the federal Clean Air Act;
(5) facilities to which 15A NCAC 02D .0517(2), .0528, .0529, or .0534 applies;
(6) facilities with a source subject to Title IV or 40 CFR Part 72; or
(7) facilities in a source category designated by EPA as subject to the requirements of 40 CFR Part 70.

(b) This Section does not apply to minor facilities with sources subject to requirements of 15A NCAC 02D .0524, .1110, or

.1111 or 40 CFR Part 60, 61, or 63 until EPA requires these facilities to have a permit under 40 CFR Part 70.

(c) A facility shall not be required to obtain a permit under this Section on the sole basis of its greenhouse gas emissions.

~~(c)~~(d) Once a facility is subject to this Section because of emissions of one pollutant, the owner or operator of that facility shall submit an application that includes all sources of all regulated air pollutants located at the facility except for insignificant activities because of category.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108;
Temporary Adoption Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Eff. July 1, 1994;
Amended Eff. July 1, 1996;
Temporary Amendment Eff. December 1, 1999;
Amended Eff. July 1, 2000;
Temporary Amendment Eff. December 2, 2014.

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Rule-making Agency: *NC Wildlife Resources Commission*

Rule Citation: *15A NCAC 10H .0301*

Effective Date: *December 2, 2014*

Date Approved by the Rules Review Commission: *November 20, 2014*

Reason for Action: *The effective date of a recent act of the General Assembly. Cite: S.L. 2014-100, effective August 7, 2014.*
The proposed changes to 15A NCAC 10H .0301 would allow the Commission to issue new captivity licenses and permits for the purpose of holding farmed cervids in captivity and allow certified herd owners to sell or transfer cervids to any licensed facility. Senate Bill 744 ratified in the 2014 session of the General Assembly contains six sections that direct the Commission to change how captive cervids are managed. Section 14.26(c) reads as follows "Nothing in this section is intended to limit the issuance by the Commission of new captivity licenses or permits for cervid facilities containing only cervids originating within the State from facilities with an existing captivity license or permit that have achieved certified status." In order to respond in a timely manner to the intention of the General Assembly identified in this section, the Commission is initiating temporary rule-making.

CHAPTER 10 – WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10H – REGULATED ACTIVITIES

SECTION .0300 – HOLDING WILDLIFE IN CAPTIVITY

15A NCAC 10H .0301 GENERAL REQUIREMENTS

(a) Captivity Permit or License Required

(1) Requirement. The possession of any species of wild animal that is or once was native to this State or any species of wild bird, native or migratory, that naturally occurs or historically occurred in this State or any member of the family Cervidae is unlawful unless the institution or individual in possession obtains from the North Carolina Wildlife Resources Commission (Commission) a captivity permit or a captivity license as provided by this Rule.

(2) Injured, Crippled or Orphaned Wildlife. When an individual has taken possession of an injured, ~~crippled~~ crippled, or orphaned wild animal or wild bird, that individual shall contact the Commission within 24 hours of taking possession in order to apply for a captivity permit, provided, however, that under no circumstances shall an individual take possession of an injured, ~~crippled~~ crippled, or orphaned wild turkey, black bear, deer, ~~elk~~ elk, or any other member of the family Cervidae except as described in Subparagraph (3) of this Paragraph.

(3) Rehabilitation of white-tailed deer fawns. An individual may apply to the Commission to become a permitted white-tailed deer fawn rehabilitator for the State of North Carolina. Individuals deemed to be qualified according to this Section to rehabilitate injured or orphaned fawns may receive a captivity permit to possess fawns only for such a period of time as may be required for the rehabilitation and release of the fawns to the wild. These captivity permits apply only to wild white-tailed deer fawns and are available only to individuals recognized by the Commission as white-tailed deer fawn rehabilitators.

(b) Captivity Permit. A captivity permit shall be requested by mail, phone, ~~facsimile~~ facsimile, or electronic transmission or in person. A captivity permit authorizes possession of the animal or bird only for such period of time as may be required for the rehabilitation and release of the animal or bird to the wild; or to obtain a captivity license as provided by Paragraph (c) of this Rule, if such a license is authorized; or to make a proper disposition of the animal or bird if the application for such license is denied, or when an existing captivity license is not renewed or is terminated. Captivity permits shall not be issued for wild turkey or black bear. ~~turkey, black bear, deer, elk or any other member of the family Cervidae except as described in Subparagraph (a)(3) of this Rule.~~

(c) Captivity License.

(1) The purpose of captivity license is to provide humane treatment for wild animals or wild birds that are unfit for ~~release.~~ release, or for possession of cervids. For purposes of this Rule, wild animals are considered "unfit" if they are incapacitated by injury or otherwise;

if they are a non-native species that poses a risk to the habitat or to other species in that habitat; or if they have been rendered tame by proximity to humans to the extent that they cannot feed or care for themselves without human assistance. Persons interested in obtaining a captivity license shall contact the Commission for an application.

(2) Denial of captivity license. Circumstances or purposes for which a captivity license shall not be issued include the following:

(A) For the purpose of holding a wild animal or wild bird that was acquired unlawfully.

(B) For the purpose of holding the wild animal or wild bird as a pet. For purposes of this Rule, the term "pet" means an animal kept for amusement or companionship. The term shall not be construed to include cervids held in captivity for breeding for sale to another licensed operator.

(C) For the purpose of holding wild animals or wild birds for hunting in North Carolina.

(D) For the purpose of holding wild turkey or black bear.

(E) For the purpose of holding white-tailed deer (Odocoileus virginianus) ~~deer,~~ or elk (Cervus elaphus or Cervus canadensis) ~~or any other member of the family Cervidae,~~ except ~~current~~ licenses issued before December 1, 2014 ~~which~~ that may be renewed as specified in Subparagraph (6) of this Paragraph.

(3) Required Facilities. No captivity license shall be issued until the applicant has constructed or acquired a facility for keeping the animal or bird in captivity that complies with the standards set forth in Rule .0302 of this Section and the adequacy of such facility has been verified on inspection by a representative of the Commission.

(4) Term of License

(A) Dependent Wildlife. If the wild animal or wild bird has been permanently rendered incapable of subsisting in the wild, the license authorizing its retention in captivity shall be an annual license terminating on December 31 of the year for which issued.

(B) Rehabilitable Wildlife. When the wild animal or wild bird is temporarily incapacitated, and may be rehabilitated for release to the wild, any captivity license that is issued shall be for a period less than one year as rehabilitation may require.

(C) Concurrent Federal Permit. No State captivity license for an endangered or threatened species or a migratory bird, regardless of the term specified, shall operate to authorize retention thereof for a longer period than is allowed by any concurrent federal permit that may be required for retention of the bird or animal.

(5) Holders of Captivity License for cervids.

(A) Inspection of records. The licensee shall make all records pertaining to tags, ~~licenses~~ licenses, or permits issued by the Commission available for inspection by the Commission at any time during normal business hours, or at any time an outbreak of Chronic Wasting Disease (CWD) is suspected or confirmed within five miles of the facility or within the facility itself.

(B) Inspection. The licensee shall make all enclosures at each licensed facility and the record-book(s) documenting required monitoring of the outer fence of the enclosure(s) available for inspection by the Commission at any time during normal business hours, or at any time an outbreak of CWD is suspected or confirmed within five miles of the facility or within the facility itself.

(C) Fence Monitoring Requirement. The fence surrounding the enclosure shall be inspected by the licensee or licensee's agent once a week during normal weather conditions to verify its stability and to detect the existence of any conditions or activities that threaten its stability. In the event of severe weather or any other condition that presents potential for damage to the fence, inspection shall occur every three hours until cessation of the threatening condition, except that no inspection is required under circumstances that threaten the safety of the person conducting the inspection.

(D) A record-book shall be maintained to record the time and date of the inspection, the name of the person who performed the inspection, and the condition of the fence at time of inspection. The person who performs the inspection shall enter the date and time of detection and the location of

any damage threatening the stability of the fence. If damage has caused the fence to be breachable, the licensee shall enter a description of measures taken to prevent ingress or egress by cervids. Each record-book entry shall bear the signature or initials of the licensee attesting to the veracity of the entry. The record-book shall be made available to inspection by a representative of the Commission upon request during normal business operating hours.

(E) Maintenance. Any opening or passage through the enclosure fence that results from damage shall, within one hour of detection, be sealed or otherwise secured to prevent a cervid from escape. Any damage to the enclosure fence that threatens its stability shall be repaired within one week of detection.

(F) Escape. When a licensee discovers the escape of any cervid from the facility, the licensee or designee shall report within 24 hours the escape to the Commission. If possible, the escaped cervid shall be recaptured alive. If live recapture is not possible, the licensee shall request a wildlife take permit under G.S. 113-274 by contacting the Wildlife Management Division of the Commission at (919) 707-0050 and take the escaped cervid pursuant to the terms of the permit. A recaptured live cervid shall be submitted to the Commission for ~~CWD~~ Chronic Wasting Disease (CWD) testing using a test recognized by the Southeastern Cooperative Wildlife Disease Study unless the executive director determines that the risk of CWD transmission as a result of this escape is negligible based upon:

(i) amount of time the escaped cervid remained out of the facility;

(ii) proximity of the escaped cervid to wild populations;

(iii) known susceptibility of the escaped cervid species to CWD; and

(iv) nature of the terrain in to which the cervid escaped.

(G) Chronic Wasting Disease (CWD)

(i) Detection. Each licensee shall notify the Commission within 24 hours if any cervid within the facility exhibits clinical symptoms of ~~CWD~~ CWD, and may include symptoms as provided in 9 C.F.R. 81.1, or if a quarantine is placed on the facility by the State Veterinarian. All captive cervids that exhibit symptoms of CWD shall be tested for CWD. 9 C.F.R. 81.1 is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at http://www.gpo.gov/fdsys/pkg/CFR-2012-title9-vol1/pdf/CFR-2012-title9-vol1-sec81-1.pdf.

(ii) Cervid death. The carcass of any captive cervid that was 12 ~~six~~ months or older at time of death shall be transported and submitted by the licensee or his designee to a North Carolina Department of Agriculture diagnostic lab for CWD evaluation within 48 hours of the cervid's death, or by the end of the next business day, whichever is later. Ear tags distributed by the Commission and subsequently affixed to the cervids as required by this Rule, may not be removed from the cervid's head prior to submitting the head for CWD evaluation.

(iii) The Commission shall require testing or forfeiture of cervids from a facility holding cervids in this ~~state~~ State should the following circumstances or conditions occur:

(I) The facility has transferred a cervid that is received by a facility in which CWD is confirmed within five years of the cervid's transport date and that transferred cervid has tested

positive for CWD or the test for CWD was inconclusive or the transferred cervid was no longer available for testing.

(II) The facility has received a cervid that originated from a facility in which CWD has been confirmed within five years of the cervid's transport date and that received cervid has tested positive for CWD or the test for CWD was inconclusive or the received cervid was no longer available for testing.

(H) Tagging Required. Effective upon receipt of tags from the Commission, each licensee shall implement the tagging requirement using only the tags provided by the Commission as follows:

(i) All cervids born within a facility shall be tagged by March 1 following the birthing season each year.

(ii) All cervids transferred to a facility shall be tagged within five days of the cervid's arrival at the licensee's facility. However, no cervids shall be transported from one facility to another unless both sending and receiving herds are certified according to 15A NCAC 10H .0304, or the sending herd is a Certified herd and the receiving herd is a licensed facility. ~~However, no cervids shall be transported from one facility to another unless both sending and receiving herds are certified according to 15A NCAC 10H .0304.~~

(I) Application for Tags.

(i) Application for tags for calves and fawns. Application for tags for cervids born within a facility shall be made by the licensee by December 1 following the birthing season of each year. The licensee shall provide the following information, along with a statement and licensee's signature verifying that the information is accurate:

(I) ~~Applicant~~ applicant name, mailing address, and telephone number;

(II) ~~Facility~~ facility name and site address;

(III) ~~Captivity~~ captivity license number;

(IV) ~~Species~~ species of each cervid; and

(V) ~~Birth~~ birth year of each cervid.

(ii) Application for tags for cervids that were not born at the facility site shall be made by written request for the appropriate number of tags along with the licensee's application for transportation of the cervid, along with a statement and licensee's signature verifying that the information is accurate. These tag applications shall not be processed unless accompanied by a completed application for transportation. However, no transportation permits shall be issued nor shall cervids be transported from one facility to another unless both sending and receiving herds are certified according to 15A NCAC 10H .0304, or the sending herd is a Certified Herd and the receiving herd is a licensed facility. ~~15A NCAC 10H .0304.~~

(J) Placement of Tags.

(i) A single button ear tag provided by the Commission shall be permanently affixed by the licensee onto either the right or left ear of each cervid, provided that the ear chosen to bear the button tag

shall not also bear a bangle tag, so that each ear of the cervid bears only one tag.

(ii) A single bangle ear tag provided by the Commission shall be permanently affixed by the licensee onto the right or left ear of each cervid except Muntjac deer, provided that the ear bearing the bangle tag does not also bear the button tag, so that each ear of the cervid bears only one tag. Muntjac deer ~~are not required to~~ shall not be tagged with the bangle tag.

(iii) Once a tag is affixed in the manner required by this Rule, it shall not be removed.

(K) Reporting Tags Requirement. For all cervids, except calves and fawns, the licensee shall submit a Cervidae Tagging Report within 30 days of receipt of the tags. Cervidae Tagging Reports for calves and fawns shall be submitted by March 1 following the birthing season each year. A Cervidae Tagging Report shall provide the following information and be accompanied by a statement and licensee's signature verifying that the information is accurate:

(i) ~~Licensee~~ licensee name, mailing address, and telephone number;

(ii) ~~Facility~~ facility name and site address, including the County in which the site is located;

(iii) ~~Captivity~~ captivity license number;

(iv) ~~Species~~ species and sex of each cervid;

(v) ~~Tag~~ tag number(s) for each cervid; and

(vi) ~~Birth~~ birth year of each cervid.

(L) Replacement of Tags. The Commission shall replace tags that are lost or unusable and shall extend the time within which a licensee shall tag cervids consistent with time required to issue a replacement.

(i) Lost Tags. The loss of a tag shall be reported to the Commission by the licensee and application shall be made for a replacement upon discovery of the loss. Application for a replacement shall include the information required by Part (c)(5)(I) of this Rule along with a statement and applicant's signature verifying that the information is accurate. Lost tags shall be replaced on the animal by the licensee within 30 days of receipt of the replacement tag.

(ii) Unusable Tags. Tags that cannot be properly affixed to the ear of a cervid or that cannot be read because of malformation or damage to the tags or obscurement of the tag numbers shall be returned to the Commission along with an application for a replacement tag with a statement and applicant's signature verifying that the information in the application is accurate.

(6) Renewal of captivity license for cervids. Existing captivity licenses for the possession of cervids at existing facilities shall be renewed as long as the applicant for renewal ~~has live cervids and~~ continues to meet the requirements of this Section for the license. Only licensees with Certified Herds, as defined in 15A NCAC 10H .0304, may request in their renewal applications to expand pen size or the number of pens on the licensed facility to increase the holding capacity of that facility. A licensee whose license has lapsed shall not be eligible to renew his or her license, but may apply for a new license. ~~No renewals shall be issued for a license that has been allowed to lapse due to the negligence of the former licensee.~~

(7) Provision for licensing the possession of cervids in an existing facility. A captivity license shall only be issued to an individual who is 18 years of age or older. If the licensee of an existing facility voluntarily surrenders his or her captivity license, becomes incapacitated or mentally incompetent, or dies, a person who has obtained lawful possession of the facility from the previous licensee or that licensee's estate, may request that the existing captivity license be transferred to him or her to operate the existing facility. Any license transferred under this provision shall be subject to the same terms and conditions

imposed on the original licensee at the time of his or her surrender or death and shall be valid only for the purpose of holding the cervids of the existing facility within that existing facility. In addition, any actions pending from complaint, ~~investigation~~ investigation, or other cause shall be continued notwithstanding the termination of the original license.

(d) Nontransferable. No license or permit or tag issued pursuant to this Rule is transferable, either as to the holder or the site of a holding facility, except as provided in Subparagraph (c)(7) of this Rule.

(e) Sale, Transfer or Release of Captive Wildlife.

(1) It is unlawful for any person to transfer or receive any wild animal or wild bird that is being held under a captivity permit issued under Paragraph (b) of this Rule, except that any such animal or bird may be surrendered to an agent of the Commission. This Subparagraph does not apply to persons holding cervids under a captivity permit.

(2) It is unlawful for any person holding a captivity license issued under Paragraph (c) of this Rule to sell or transfer the animal or bird held under such license, except that such animal or bird may be surrendered to an agent of the Commission, and any such licensee may sell or transfer the animal or bird (except members of the family Cervidae) to another person who has obtained a license to hold it in captivity. For animals in the family Cervidae, sale or transfer of animals is allowed only between Certified Herds, as defined in 15A NCAC 10H .0304, or from a Certified Herd to a licensed facility, except facilities licensed or permitted on or after December 1, 2014 shall not take possession of white-tailed deer (Odocoileus virginianus) or elk (Cervus elaphus or Cervus canadensis). ~~15A NCAC 10H .0304.~~ Upon such a sale or transfer, the seller or transferor shall obtain a receipt for the animal or bird showing the name, address, and license number of the buyer or transferee, a copy of which shall be provided to the Commission.

(3) It is unlawful for any person to release into the wild for any purpose or allow to range free:

(A) any species of deer, elk or other members of the family Cervidae, or

(B) any wolf, coyote, or other non-indigenous member of the family Canidae, or

(C) any member of the family Suidae.

(f) Transportation Permit.

(1) Except as otherwise provided herein, no transportation permit is required to move any lawfully held wild animal or wild bird within the State.

(2) No person shall transport black bear or Cervidae for any purpose without first obtaining a transportation permit from the Commission.

(3) Except as provided in Subparagraph (f)(4) of this Rule, no transportation permits shall be issued for deer, elk, or other species in the family Cervidae except: ~~except~~

(A) into and between Certified Herds as defined in ~~15A NCAC 10H .0304.~~ 15A NCAC 10H .0304; or

(B) from a Certified Herd to a licensed facility, except no transportation permits shall be issued for white-tailed deer (Odocoileus virginianus) or elk (Cervus elaphus or Cervus canadensis) if the receiving facility was licensed or permitted on or after December 1, 2014.

(4) Cervid Transportation. A permit to transport deer, elk, or other species in the family Cervidae may be issued by the Commission to an applicant for the purpose of transporting the animal or animals for export out of state, to a slaughterhouse for slaughter, from a Certified Herd to another Certified Herd as defined in 15A NCAC 10H .0304, from a Certified Herd to a licensed facility, ~~15A NCAC 10H .0304,~~ or to a veterinary medical facility for treatment provided that the animal for which the permit is issued does not exhibit clinical symptoms of Chronic Wasting Disease, ~~Disease.~~ except no transportation permits shall be issued for white-tailed deer (Odocoileus virginianus) or elk (Cervus elaphus or Cervus canadensis) if the receiving facility was licensed or permitted on or after December 1, 2014. No person shall transport a cervid to slaughter or export out of state without bearing a copy of the transportation permit issued by the Commission authorizing that transportation. No person shall transport a cervid for veterinary treatment without having obtained approval from the Commission as provided by Part (f)(4)(D) of this Rule. Any person transporting a cervid shall present the transportation permit to any law enforcement officer or any representative of the Commission upon request, except that a person transporting a cervid by verbal authorization for veterinary treatment shall provide the name of the person who issued the approval to any law enforcement officer or any representative of the Commission upon request.

(A) Slaughter. Application for a transportation permit for purpose of slaughter shall be submitted in writing to the Commission and shall include the following information

along with a statement and applicant's signature verifying that the information is accurate:

(i) ~~Applicant~~ applicant name, mailing address, and telephone number;

(ii) ~~Facility~~ facility site address;

(iii) ~~Captivity~~ captivity license number;

(iv) ~~Name,~~ name, address, county and phone number of the slaughter house to which the cervid will be transported;

(v) ~~Vehicle~~ vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;

(vi) ~~Name~~ name and location of the North Carolina Department of Agriculture Diagnostic lab where the head of the cervid is to be submitted for CWD testing;

(vii) ~~Date~~ date of transportation;

(viii) ~~Species~~ species and sex of each cervid; and

(ix) ~~Tag~~ tag number(s) for each cervid.

(B) Exportation. Nothing in this rule shall be construed to prohibit the lawful exportation of a member of the family Cervidae for sale out of state. Application for a transportation permit for purpose of exportation out of state shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:

(i) ~~Applicant's~~ applicant's name, mailing address and telephone number;

(ii) ~~Facility~~ facility site address;

(iii) ~~Captivity~~ captivity license number;

(iv) ~~Vehicle~~ vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;

(v) ~~Name,~~ name, site address, county, state and phone number of the destination facility to which the cervid is exported;

(vi) ~~A~~ a copy of the importation permit from the state of the destination facility that names the destination facility to which the animal is to be exported;

(vii) ~~Date~~ date of departure;

(viii) ~~Species~~ species and sex of each cervid; and

(ix) ~~Tag~~ tag number(s) for each cervid.

(C) Between herds. Application for a transportation permit for purpose of moving a cervid from one Certified Herd to another Certified Herd, as defined in 15A NCAC 10H .0304, or from a Certified Herd to a licensed facility, ~~15A NCAC 10H .0304,~~ shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:

(i) ~~Applicant's~~ applicant's name, mailing address and telephone number;

(ii) ~~Facility~~ facility site address;

(iii) ~~Captivity~~ captivity license number;

(iv) ~~Vehicle~~ vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;

(v) ~~Name,~~ name, site address, county, and phone number of the destination facility to which the cervid is moved;

(vi) ~~Date~~ date of departure;

(vii) ~~Species~~ species and sex of each cervid; and

(viii) ~~Tag~~ tag number(s)for each cervid.

(D) Veterinary treatment. No approval shall be issued for transportation of a cervid to a veterinary clinic out of the state of North Carolina, or for transportation from a facility out of the state of North Carolina to a veterinary clinic in North Carolina. An applicant from a North Carolina facility seeking to transport a cervid for veterinary treatment to a facility within North Carolina shall contact the Wildlife Telecommunications Center at (800) 662-7137 or the Wildlife Management Division of the Commission at (919) 707-0050 to

obtain verbal authorization to transport the cervid to a specified veterinary clinic and to return the cervid to the facility. Verbal approval to transport a cervid to a veterinary clinic shall authorize transport only to the specified veterinary clinic and directly back to the facility, and shall not be construed to permit intervening destinations. To obtain verbal authorization to transport, the applicant shall provide staff of the Commission the applicant's name and phone number, applicant's facility name, site address and phone number, the cervid species, sex and tag numbers, and the name, address and phone number of the veterinary facility to which the cervid shall be transported. Within five days of transporting the cervid to the veterinary facility for treatment, the licensee shall provide the following information in writing to the Commission, along with a statement and applicant's signature verifying that the information is correct:

(i) ~~Applicant's~~ applicant's name, mailing address and telephone number;
(ii) ~~Facility~~ facility name and site address;
(iii) ~~Captivity~~ captivity license number;
(iv) ~~Vehicle~~ vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
(v) ~~Date~~ date of transportation;
(vi) ~~Species~~ species and sex of each cervid;
(vii) ~~Tag~~ tag number(s) for each cervid;
(viii) ~~Name,~~ name, address and phone number of the veterinarian and clinic that treated the cervid;
(ix) ~~Symptoms~~ symptoms for which cervid received treatment; and
(x) ~~Diagnosis~~ diagnosis of veterinarian who treated the cervid.

(g) Slaughter at cervid facility. Application for a permit for purpose of slaughter at the cervid facility shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:

(1) ~~Applicant~~ applicant name, mailing address, and telephone number;
(2) ~~Facility~~ facility site address;
(3) ~~Captivity~~ captivity license number;
(4) ~~Name,~~ name, and location of the North Carolina Department of Agriculture Diagnostic lab where the head of the cervid is to be submitted for CWD testing;
(5) ~~Date~~ date of slaughter;
(6) ~~Species~~ species and sex of each cervid; and
(7) ~~Tag~~ tag number(s) for each cervid.

Permits or authorization may not be sold or traded by the licensee to any individual for the hunting or collection of captive cervids. Only the licensee may kill a cervid within the cervid enclosure.

(h) As used in this Rule, "Certified Herd" means a captive cervid herd certified in North Carolina according to the procedure set forth in 15A NCAC 10H .0304 available to North Carolina licensees only.

History Note: Authority G.S. 106-549.97(b); 113-134; 113-272.5; 113-272.6; 113-274;
Eff. February 1, 1976;
Amended Eff. April 1, 1991; September 1, 1990; June 1, 1990; July 1, 1988;
Temporary Amendment Eff. October 8, 2002; May 17, 2002 (this temporary rule replaced the permanent rule approved by RRC on June 21, 2001 to become effective in July 2002); July 1, 2001;
Amended Eff. May 1, 2010; May 1, 2008; December 1, 2005; August 1, 2004;
Temporary Amendment Effective December 2, 2014.

This Section contains information for the meeting of the Rules Review Commission on November 20, 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	**Appointed by House**
Margaret Currin (Chair)	Garth Dunklin (1st Vice Chair)
Jeff Hyde	Stephanie Simpson (2nd Vice Chair)
Jay Hemphill	Jeanette Doran
Faylene Whitaker	Ralph A. Walker
	Anna Baird Choi

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

December 17 and 18, 2014 January 15, 2015
February 19, 2015 March 19, 2015

RULES REVIEW COMMISSION MEETING
MINUTES
November 20, 2014

The Rules Review Commission met on Thursday, November 20, 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, Jay Hemphill, Jeff Hyde, Stephanie Simpson, Faylene Whitaker and Ralph Walker.

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

The meeting was called to order at 9:59 a.m. with Chairman Currin presiding.

Chairman Currin addressed the Commission and presented Commission Counsel Abigail Hammond with her 5 (five) year service award.

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

APPROVAL OF MINUTES

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the October 16, 2014 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

Board of Agriculture – 02 NCAC 20B .0413 was unanimously approved.

Criminal Justice Education and Training Standards Commission – 12 NCAC 09B .0202. The Commission voted to rescind its previous approval of this Rule at the October meeting. The Commission approved staff's recommendation to approve the re-written rule.

LOG OF FILINGS (PERMANENT RULES)

Child Care Commission

All rules were unanimously approved

Department of Environment and Natural Resources
15A NCAC 28 .0302 was unanimously approved.

Department of Revenue
17 NCAC 10 .0504 was unanimously approved.

Hearing Aid Dealers and Fitters Board
All rules were unanimously approved.

Board of Occupational Therapy
21 NCAC 38 .0802 was withdrawn at the request of the agency. No action was required by the Commission.

Building Code Council
All rules were unanimously approved.

TEMPORARY RULES
Medical Care Commission
All rules were unanimously approved.

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

Commission for Public Health
10A NCAC 41A .0101 was unanimously approved.

Environmental Management Commission
All rules were unanimously approved.

Wildlife Resources Commission
15A NCAC 10H .0301 was unanimously approved.

EXISTING RULES REVIEW
Department of Commerce
04 NCAC 14 – The Commission unanimously approved the report as submitted by the agency.

Prior to the review of the report from the Department of Commerce, Commissioner Doran recused herself and did not participate in any discussion or vote concerning these rules because she is employed by the Department of Commerce.

Christine Ryan from the agency addressed the Commission.

Commissioner of Insurance
11 NCAC 14, 18, 20, 21, 22 – The Commission unanimously approved the reports as submitted by the agency.

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

Karen Waddell from the agency addressed the Commission.

Ted Hamby from the agency addressed the Commission.

Department of Labor
13 NCAC 08 – The Commission unanimously approved the report as submitted by the agency.

Occupational Safety and Health Review Commission
13 NCAC 10 – The Commission unanimously approved the report as submitted by the agency.

Department of Environment and Natural Resources
15A NCAC 01G, 01H – The Commission unanimously approved the reports as submitted by the agency.

Department of Environment and Natural Resources
15A NCAC 12A, 12B, 12C, 12D, 12F, 12G, 12I, 12J, 12K – The Commission unanimously approved the reports submitted by the agency.

Board of Registration for Foresters
21 NCAC 20 – The Commission voted not to approve the staff recommendation for rules 21 NCAC 20 .0109 and .0110 with Commissioners Choi, Doran, Dunklin, Hemphill and Walker voting against and Commissioners Currin, Hyde, Simpson, and Whitaker voting in favor. The Commission voted to unanimously approve the report as submitted by the agency.

Board of Licensing of Geologists
21 NCAC 21 – The Commission unanimously approved the report as submitted by the agency.

Commissioner Doran was not present during the discussion and vote of the report.

Landscape Contractors' Registration Board
21 NCAC 28 – The Commission unanimously approved the report as submitted by the agency.

Commissioner Doran was not present during the discussion and vote of the report.

Prior to the discussion and vote of this Rule Commissioner, Whitaker recused herself and did not participate.

Board of Licensing of Soil Scientists
21 NCAC 69 – The Commission unanimously approved the report as submitted by the agency.

Occupational Safety and Health Review Commission
24 NCAC 03 – The Commission unanimously approved the report as submitted by the agency.

COMMISSION BUSINESS
Commission counsel gave an update on re-adoption pursuant to G.S. 150B-21.3A.

At 11:30 am, Chairman Currin ended the public meeting of the Rules Review Commission and called the meeting into a closed session pursuant to G.S 143-318.11 to discuss the lawsuit filed by the State Board of Education against the Rules Review Commission.

The Commission came out of closed session at 1:31 pm.

The meeting adjourned at 1:33 p.m.

The next regularly scheduled meetings of the Commission are scheduled for Wednesday, December 17th and Thursday, December 18th at 9:00 a.m.

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

Respectfully Submitted,

_____
Julie Brincefield
Administrative Assistant

Minutes approved by the Rules Review Commission:

_____
Margaret Currin, Chair

Rules Review Commission Meeting * November 2014 *
Please **Print** Legibly

Name	Agency
CALVIN KIRVEN	NC LANDSCAPE CONTRACTORS REGISTRATION BD.
Jane Gilchrist	NCDOL
Karissa Sluss	NCDOL
Nadine Pfeiffer	DHSR
Azzie Conley	DHSR
BARRY GUPTON	NCDOI/NCBCC
Chris Evans	BCRS&C
Michael Brown	NC DOR
Jennifer Everett	DENR
Sara Koch	NCBRF
Lindsay Walaska	NC Board for Licensing of Geologists
Trevor Allen	CJFTS
TED HAMBY	NC DOI
[illegible]	NCDA&CS
Jon Lanier	NCDA&CS
Jeremy Ray	DES
Mitch Gailsby	DES
Felicia Gon Hooker	OSHRO
DAVID GRIFFIN	~~[illegible]~~ DENR
Bob MARTIN	DPI
JOHN STEVENS	NCBLG

Rules Review Commission Meeting
Please **Print** Legibly

November 2014

Name	Agency
Joelle Burleson	NCDENR- DAQ
MIKE VICARIO	NCHA
BARBARA GEIGER	NC Bd for Lic. of Geology
Patrick Knowlson	NCDENR - DAQ
Dale Mann	DCDEE
Lane Pugh	DCDEE
Karen Waddell	NCDOT
Anca GROZAV	OSBM
Jim Wellons	DOJ
Barry Bloch	DOJ
Kate Pipkin	NCWRC
Catherine Jorgensen	HADFB
Conor Brockett	NCMS
Christine Ryan	Commerce
ALAN CLAPP	NC BLSS
Ben Popkin	NC DOJ

LIST OF APPROVED PERMANENT RULES
November 20, 2014 Meeting

AGRICULTURE, BOARD OF	
Alcoholic Beverages	02 NCAC 20B .0413
CHILD CARE COMMISSION	
Infectious and Contagious Diseases	10A NCAC 09 .0804
Safe Procedures	10A NCAC 09 .1003
Transportation Requirements	10A NCAC 09 .1723
Inclusion/Exclusion Requirements	10A NCAC 09 .2404
CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION	
Responsibilities of the School Director	12 NCAC 09B .0202
ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF	
Fee Schedule	15A NCAC 28 .0302
REVENUE, DEPARTMENT OF	
Continuing Education Requirement of County Assessors	17 NCAC 10 .0504
HEARING AID DEALERS AND FITTERS BOARD	
Submission of Applications and Fees	21 NCAC 22A .0503
Communication of Results of Examinations	21 NCAC 22F .0107
Review of Examination	21 NCAC 22F .0108
Appeals and CE Program Modification	21 NCAC 22F .0206
Change of Address	21 NCAC 22I .0114
BUILDING CODE COUNCIL	
2012 NC Plumbing Code/Shower Compartments	417.4
2012 NC Fire Code/Group E in churches, private schools an...	319
2011 NC Electrical Code/Bonding	680.42(B)
2011 NC Electrical Code/Arc-Fault Circuit-Interrupter Pro...	406.4(D)(4)
2011 NC Electrical Code/Supplemental Electrode Required	250.53(A)(2)

LIST OF APPROVED TEMPORARY RULES
November 20, 2014 Meeting

MEDICAL CARE COMMISSION	
Definitions	10A NCAC 13B .2101
Reporting Requirements	10A NCAC 13B .2102
Definitions	10A NCAC 13C .0103
Reporting Requirements	10A NCAC 13C .0206

PUBLIC HEALTH, COMMISSION FOR

Reportable Diseases and Conditions	10A NCAC 41A .0101

ENVIRONMENTAL MANAGEMENT COMMISSION

Prevention of Significant Deterioration Requirements for ...	15A NCAC 02D .0544
Applicability	15A NCAC 02Q .0502

WILDLIFE RESOURCES COMMISSION

General Requirements	15A NCAC 10H .0301

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
A. B. Elkins II
Selina Brooks
Craig Croom
J. Randolph Ward

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
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	
Kelvin M. Williams, dba Da Wave v. ABC Commission	14 ABC 04723	09/12/14	
ABC Commission v. Prescott Elliot Urban Environments LLC T/A Marquis Market	14 ABC 04798	10/02/14	
ABC Commission v. Noa Noa LLC T/A Noa Noa	14 ABC 05891	11/20/14	
M & K Investments Inc. v. ABC Commission	14 ABC 06199	11/24/14	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
Travis Earl Atkinson v. NC Victims Compensation Commission	13 CPS 16304	09/02/14	
Carl John Perkinson v. Department of Public Safety	14 CPS 02245	06/24/14	
Karen Tate v. Victims Compensation Commission	14 CPS 02397	09/03/14	
Waheeda Ammeri v. Department of Public Safety	14 CPS 03254	07/21/14	
Mitchell Kent Wilson v. NC Crime Victims Compensation Commission	14 CPS 05569	11/06/14	
Jacorey Thomas v. NC DPS Victim Services	14 CPS 05922	10/20/14	
Rodger L. Ackerson v. Janice W. Carmichael, NC Crime Victims Compensation Commission	14 CPS 06627	10/14/14	
DEPARTMENT OF HEALTH AND HUMAN SERVICES			
M. Yaghi, DDS, P.A. v. DHHS	11 DHR 11579	09/15/14	
M. Yaghi, DDS, P.A. v. DHHS	11 DHR 11580	09/15/14	
Senior Home Care Services, Inc. v. DHHS	12 DHR 09750	08/13/14	
Parker Home Care LLC v. DHHS, Division of Medical Assistance	12 DHR 10864	10/06/14	
Johnson Allied Health Services, Inc. v. DHHS	12 DHR 11536	09/02/14	
Helen Graves v. Alamance County Department of Social Services and NC Department of Health and Human Services, Division of Health Service Regulation	12 DHR 12411	09/02/14	
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
At Home Personal Care Services, Inc. v. DHHS, Division of Medical Assistance	13 DHR 01922	03/20/14	29:07 NCR 834
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
Cleveland Otis Dunston v. North Carolina Nurse Aide Registry	13 DHR 10364	10/06/14	
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
Mary Lynne Nance v. DHHS, Division of Health Service	13 DHR 13351	05/13/14	29:08 NCR 959
Tricare Counseling and Consulting, Inc. v. DHHS, Division of Medical Assistance	13 DHR 14221	12/31/13	29:04 NCR 460
Neogenesis, LLC v. DHHS, Division of Medical Assistance and its agent Eastpointe Human Services Local Management Entity	13 DHR 14222	06/09/14	29:09 NCR 1113
J. Mark Oliver DDS, PLLC v. DHHS, Division of Medical Assistance	13 DHR 14369	02/19/14	29:02 NCR 206
Jabez Home Infusion Company Services v. DHHS	13 DHR 15135	09/02/14	29:12 NCR 1531
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	
Ashley Renee Davis v. Department of Human Services	13 DHR 17606	09/02/14	
Estate of Earlene W. Alston, Lewis E. Alston v. DHHS, DMA	13 DHR 17909	04/08/14	29:02 NCR 211
Total Renal Care of North Carolina, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Bio-Medical Applications of North Carolina	13 DHR 18127	06/23/14	29:07 NCR 842
Total Renal Care of North Carolina, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Bio-Medical Applications of North Carolina	13 DHR 18223	06/23/14	29:07 NCR 842
Lawanda Suggs v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 18454	08/15/14	
David LeGrand v. DHHS, Division of Health Service Regulation , Health Care Personnel Registry	13 DHR 18668	08/01/14	29:10 NCR 1229
Absolute Home Care Agency, Inc. v. DHHS, Division of Medical Assistance	13 DHR 18689	09/02/14	29:11 NCR 1445
John A. Page v. DHHS	13 DHR 19546	09/24/14	
United Home Care, Inc. d/b/a Untied Home Health, Inc. d/b/a United Home Health v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Maxim Healthcare Services, Inc.	13 DHR 19690	06/05/14	29:09 NCR 1122
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	
Akinsola Ade Okunsokan v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 20066	09/26/14	
Marilyn Sherrill v. DHHS	13 DHR 20086	08/13/14	
Angelo Cornilus Graham v. Office of Administrative Hearings	13 DHR 20090	10/01/14	
HSB Enterprise Corporation, Hettion S. Booker v. DHHS, Division of Medical Assistance, Program Integrity Section	13 DHR 20235	09/02/14	
Leisa Lenora Dockery v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 20318	09/15/14	
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 Personnel Registry	14 DHR 00460	07/10/14	
Parker Home Care LLC v. DHHS	14 DHR 00752	10/06/14	
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	
Victoria McLaughlin v. DHHS, Division of Health Service Regulation	14 DHR 01741	10/01/14	
Elite Care Inc. Demetrice Wilson v. DHHS and East Carolina Behavioral Health	14 DHR 01926	09/02/14	
Elizabeth Mitchell v. Durham DSS	14 DHR 01982	06/23/14	
Wayne Mitchell v. Durham DSS	14 DHR 02044	06/23/14	
Sylvia B. Thompson v. DHHS, Vital Records	14 DHR 02280	10/17/14	
Robert Stanley Hendricks v. Walter B. Jones	14 DHR 02367	10/21/14	
Prince Onwuka, Roda V. Onwuka v. Division of Child Development and Early Education	14 DHR 02636	07/24/14	
Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System and Hoke Healthcare, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital	14 DHR 02853	08/21/14	29:12 NCR 1588
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	
Evangela Wayne v. DHHS, Division of Health Service Regulation	14 DHR 03296	09/09/14	
Peter K. Kagwanja, owner Lighthouse Foodmart v. DHHS, Division of Public Health	14 DHR 03335	07/03/14	

Independent Living Group Home Shanita Lovelace v. DHHS	14 DHR 03482	09/05/14	
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	
Nancy A. Wood v. DHHS, Division of Social Services, Child Welfare Services	14 DHR 03938	11/04/14	
TT & T Services, Inc. v. DHHS, Division of Medical Assistance and Eastpointe Human Services	14 DHR 04461	09/19/14	
TT & T Services Inc., Euniceteen Diggs v. Eastpoint MCO	14 DHR 04560	11/04/14	
Lori Brady, Administrator, Randolph Fellowship Home Inc., Alpha House v. DHHS, Division of Health Service Regulation	14 DHR 04606	10/08/14	
Wilbert Nichols III, Community Alternative Housing Inc. v. Eastpointe MCO, Tichina Hamer	14 DHR 04640	09/16/14	
Derrik J. Brown v. DHHS	14 DHR 05065	10/08/14	
Jacqueline McAdoo v. DHHS	14 DHR 05287	09/12/14	
Eva Lewis Washington, Successful Transitions LLC	14 DHR 05447	10/06/14	
Nicole Emanuel v. DHHS, Division of Health Service Regulation	14 DHR 05881	11/14/14	
Lashawn Tillery v. DHHS, Division of Health Service Regulation	14 DHR 06059	11/25/14	
Duke Raleigh Hospital, Designated Rep: Mary Planisek v. DHHS, Division of Medical Assistance, Program Integrity Program	14 DHR 06107	10/29/14	
Forever Young Group Care LLC v. DHHS, Division of Health Service Regulation	14 DHR 06130	11/04/14	
Randolph Dugar v. Brunswick County DSS	14 DHR 06133	11/12/14	
De'Ericka Crowder v. DHHS, Division of Health Service Regulation	14 DHR 06489	11/18/14	
Muna Elmi v. DHHS	14 DHR 06563	10/13/14	
Olivia Napier Wilson v. DHHS, Division of Health Service Regulation	14 DHR 07025	11/24/14	

DEPARTMENT OF JUSTICE

Riki Paul Matsufugi Johnson v. NC Alarm Systems Licensing Board	12 DOJ 09070	09/18/14	
Brian Louis Scott v. NC Private Protective Services Board	12 DOJ 10093	09/23/14	
Stephen James Riley v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 09572	10/30/13	29:04 NCR 465
William Dale Aaronson v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 11693	01/07/14	29:03 NCR 373
Benjamin Lee Torain v. NC Private Protective Services Board	13 DOJ 14220	12/11/13	29:06 NCR 692
Jose Monserrate Acosta v. NC Private Protective Services	13 DOJ 15271	12/11/13	29:02 NCR 213
Kent Patrick Locklear v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 15368	01/03/14	29:01 NCR 74
Michael Keith Fox v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 15453	05/27/14	29:05 NCR 572
Michael Tyler Nixon v. NC Alarm Systems Licensing Board	13 DOJ 16246	11/25/13	29:01 NCR 79
Vincent Dale Donaldson v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 16255	04/14/14	29:07 NCR 877
Jason Thomas Hunt v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 16261	09/18/14	29:12 NCR 1546
Garrett Dwayne Gwin v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 17240	06/10/14	
Donald Shane Dublin v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 18990	09/12/14	29:11 NCR 1453
Howard Ron Simons v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 19148	06/20/14	
William Richard Herring v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 19149	09/18/14	
Keith Lavon Mallory, Jr. v. NC Sheriff's Education and Training Standards Commission	13 DOJ 19152	08/20/14	
Janet Staricha v. University of NC at Chapel Hill	13 DOJ 19693	06/06/14	
Scott Eric Smithers v. NC Private Protective Services Board	14 DOJ 00728	07/31/14	
Lisa Paulette Childress v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00869	07/07/14	
Derek Andre Howell v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00871	08/22/14	
Angela Renee Joyner v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00873	06/23/14	
Dennis Kevin Creed v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00878	05/23/14	29:08 NCR 992
Jeremy Samuel Jordan v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 01203	06/12/14	
Orlando Rosario v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 01519	09/15/14	
Robert James Roy v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 02039	10/13/14	
Kerry Graves v. NC Private Protective Services Board	14 DOJ 02248	09/22/14	29:11 NCR 1467
Antwain Renae Smith v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 02721	10/31/14	29:11 NCR1474
Dierdre Aston Rhinehart v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 03523	09/16/14	
Kenneth Lamont McCoy v. NC Alarm Systems Licensing Board	14 DOJ 03904	07/17/14	
Brenda Louise Lassiter v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04104	09/17/14	
Donald Edward Cottle II v. NC Alarm Systems Licensing Board	14 DOJ 04127	08/27/14	
Ossie James Adkins v. NC Alarm Systems Licensing Board	14 DOJ 04129	08/29/14	

David R. Beatson v. NC Private Protective Services Board	14 DOJ 04313	09/04/14	29:09 NCR 1183
James Cornelius Tatum, Jr. v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 05715	10/07/14	
Jeremy Clark v. NC Private Protection Services Board	14 DOJ 05882	11/07/14	
DEPARTMENT OF LABOR			
Jacquelyn Thomas v. NCDOL	14 DOL 05878	09/26/14	
DEPARTMENT OF STATE TREASURER			
Reza M. Salami v. NC A&T State University, Retirement Systems Division	13 DST 09273	06/26/14	
Ozie L. Hall v. Department of State Treasurer, Retirement Systems Division, Teachers' and State Employees Retirement System	14 DST 02877	07/07/14	
Lucy Hayes v. Department of State Treasurer, Retirement Systems Division	14 DST 03138	08/29/14	
DG Gassaway v. NC Teachers and State Employees Retirement Systems	14 DST 06260	10/06/14	
STATE BOARD OF EDUCATION			
Isaac F. Pitts, Jr. v. Department of Public Instruction	13 EDC 11604	07/23/14	29:10 NCR 1237
Tara Jane Dumas v. Department of Public Instruction	13 EDC 18876	05/02/14	29:08 NCR 966
Catherine Helgesen v. Department of Public Instruction, Licensure Section	13 EDC 20059	07/22/14	29:10 NCR 1244
Crystal Arnae Kelly v. Department of Public Instruction	14 EDC 03803	09/05/14	
Barbara Cheskin v. Department of Public Instruction	14 EDC 04962	10/06/14	
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES			
Certain Teed Corporation v. Department of Environment and Natural Resources, Division of Water Resources	13 EHR 13548	06/30/14	
Certain Teed Corporation v. Department of Environment and Natural Resources, Division of Water Resources	13 EHR 14024	6/30/14	
NC Coastal Federation, Cape Fear River Watch, Penderwatch and Conservancy, Sierra Club v. Department of Environment and Natural Resources, Division of Air Quality and Carolinas Cement Company LLC	13 EHR 17906	07/01/14	
HUMAN RELATIONS COMMISSION			
Shannon S. Smith v. Housing Authority of the Town of Mt. Airy	14 HRC 03220	08/20/14	
DEPARTMENT OF INSURANCE			
Sandy T. Moore v. Blue Cross/Blue Shield NC, State Health Plan	14 INS 00275	08/07/14	
Beryl Joan Waters v. NC State Health Plan	14 INS 01413	09/18/14	
BOARD OF LICENSED PROFESSIONAL COUNSELORS			
Beth Ford v. NC LPC Board	14 LPC 03805	08/25/14	
MISCELLANEOUS			
Timothy Odell Hicks v. Minimal Housing Standard Commission	14 CTY 05449	11/24/14	
William L. Harris v. NC Administrative Office of the Courts	14 MIS 00113	08/25/14	
Beth Ford v. Wake County Special Proceeding Court	14 MIS 01123	08/26/14	
Dammion C. Wright v. North Carolina Central University	14 MIS 05200	09/16/14	
OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)			
Ricky Lynn Mason v. NC Correctional Institution for Women	10 OSP 07753	10/09/14	
Peter Duane Deaver v. NC Department State Bureau of Investigation and NC Department of Justice	11 OSP 05950	08/26/14	29:09 NCR 1091
Azlea Hubbard v. Department of Commerce, Division of Workforce Solutions	12 OSP 08613	05/19/14	
Mark Smagner v. Department of Revenue	13 OSP 05246	12/05/13	29:04 NCR 471
Antonio Asion v. Department of Public Safety, et. Al.	13 OSP 10036	05/09/14	29:05 NCR 593
Thomas Carl Bland v. NC Agricultural & Technical State University	13 OSP 11087	10/30/13	29:06 NCR 697
Antonio Asion v. Department of Public Safety, et. Al.	13 OSP 11386	05/09/14	29:05 NCR 593
Ricky Ward v. Department of Public Safety	13 OSP 11968	05/14/14	29:05 NCR 615
Chauncey John Ledford v. Department of Public Safety	13 OSP 12223	12/31/13	29:03 NCR 381
Mary Chapman Knight v. Department of Commerce, Division of Employment Security	13 OSP 12677	07/30/14	29:12 NCR 1562

Mary S. Hardin v. Department of Public Safety	13 OSP 13014	07/10/14	29:10 NCR 1255
Harold Leonard McKeithan v. Fayetteville State University	13 OSP 13380	12/03/13	29:05 NCR 637
Vicki Belinda Johnson v. DHHS	13 OSP 13603	08/08/14	
Lenton Credelle Brown v. Department of Public Safety, W. Ellis Boyle General Counsel	13 OSP 13729	05/16/14	
Cleveland Dunston v. DHHS	13 OSP 14365	06/23/14	29:06 NCR 705
Kenneth Shields v. Department of Public Safety	13 OSP 15762	02/26/14	29:01 NCR 84
Tammy Cagle v. Swain County Consolidated Human Services Board	13 OSP 15763	12/19/13	29:04 NCR 480
Rena Pearl Bridges v. Department of Commerce	13 OSP 15896	02/19/14	29:01 NCR 95
Barbara Hinton v. Surry County Health and Nutrition Center	13 OSP 16230	02/12/14	29:03 NCR 388
Elaine Rouse v. Winston-Salem State University	13 OSP 17182	08/26/14	
Elaine Rouse v. Winston-Salem State University	13 OSP 17182	08/29/14	
Meg DeMay v. Richmond County Department of Social Services	13 OSP 18084	07/02/14	29:06 NCR 719
Chris Edward Fidler v. Department of Revenue	13 OSP 18255	08/25/14	29:11 NCR 1459
Patrick E. Holmes v. Fayetteville State University	13 OSP 188480	07/15/14	29:12 NCR 1576
Renecia Morgan v. Washington County Department of Social Services	13 OSP 18590	04/21/14	29:08 NCR 983
Gregg Sipler v. University of NC at Greensboro	13 OSP 18692	04/21/14	29:07 NCR 885
Josephine Keke v. DHHS	13 OSP 19639	04/17/14	29:08 NCR 973
Carolyn Collins v. Department of Public Safety	13 OSP 19827	07/11/14	29:10 NCR 1273
Joseph Vincoli v. Department of Public Safety	14 OSP 00389	04/10/14	29:02 NCR 218
Rose Marie Johnson v. Durham County Department of Social Services	14 OSP 01317	07/21/14	
Pamela M. Walsh v. Deborah McSwain, (NC DPS), Department of Public Safety	14 OSP 01345	09/25/14	
Ralph Douglas Moody v. NC State Treasurer's Office, Deputy Treasurer Brenda Williams	14 OSP 01733	09/24/14	
Craig Williams v. Billy Deaver NCCU Superintendent, NC Central University of Building Trades	14 OSP 02111	06/06/14	
Shaneda L. Gilliam v. Department of Public Safety, Division of Adult Correction	14 OSP 02493	10/21/14	
Crystal McLean v. Alicia Lopez, NC SCO/DOA, NC State Construction Office/Department of Administration	14 OSP 02944	07/01/14	
Sion A. Moss III v. NC School for the Deaf	14 OSP 02993	09/17/14	
Teresa Wheeler v. County of Currituck-Currituck County Fire/EMS Department	14 OSP 03688	08/12/14	
Martin J. Rios v. DHHS, Cherry Hospital	14 OSP 05062	11/03/14	
Vickey A. Ingram v. CLT Transit Management of CLT Inc.	14 OSP 05202	09/19/14	
Sallie Newton v. NC State University	14 OSP 06467	11/12/14	
Denise Malloy Hubbard v. North Carolina State University	14 OSP 06909	11/06/14	

DEPARTMENT OF REVENUE

C-Co Mini Mart Inc. v. Department of Revenue	13 REV 10490	09/10/14	
Feeling Great Inc. v. Department of Revenue	13 REV 18080	07/23/14	29:07 NCR 891
Sleep Medical Center Inc. v. Department of Revenue	13 REV 18081	07/23/14	29:07 NCR 891
Curtis Leyshon v. Department of Revenue	13 REV 20016	08/29/14	
Lisa Webb Leyshon v. Department of Revenue	13 REV 20017	08/29/14	
Cyril Broderick, Jr. v. Department of Revenue	14 REV 01773	06/24/14	
Kacey Suo v. Department of Revenue	14 REV 02878	10/14/14	
P&P of Holden Beach Inc. or Rockfish Ventures 1 Inc.	14 REV 03901	08/05/14	
C-Co Mini Mart Inc. v. Department of Revenue	14 REV 10490	08/01/14	

OFFICE OF THE SECRETARY OF STATE

Cheryl A. Tatum v. Department of Secretary of State	13 SOS 18521	06/09/14	29:09 NCR 1176
Tonya Denise Pettaway v. Department of the Secretary of State	14 SOS 02369	08/05/14	
Anthony Garrard v. Secretary of State's Office	14 SOS 03403	08/22/14	

UNC HOSPITALS

Sarah W. Robbins v. UNC Hospitals	13 UNC 13904	10/03/14	

WILDLIFE RESOURCES COMMISSION

People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski v. North Carolina Wildlife Resources Commission and Gordon Myers, as Executive Director, North Carolina Wildlife Resources Commission	14 WRC 01045	08/01/14	
People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski v. North Carolina Wildlife Resources Commission and Gordon Myers, as Executive Director, North Carolina Wildlife Resources Commission	14 WRC 01348	08/01/14	

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	13 DHR 15135

JABEZ HOME INFUSION COMPANY SERVICES,	)	
Petitioner,	)	
v.	)	**FINAL DECISION**
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Respondent.	)	

THIS CAUSE came on for hearing before the undersigned Administrative Law Judge, Craig Croom, on May 1-2, 2014 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Robert Leandro, Esq.
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Raleigh, North Carolina 27601

For Respondent: Michael T. Wood, Esq.
Special Deputy Attorney General
N.C. Dept. of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Whether the North Carolina Department of Health and Human Services correctly determined that Petitioner received an overpayment from Medicaid in the amount of $245,470.63, based on an audit of paid Medicaid claims relating to Home Infusion Therapy ("HIT")?

JURISDICTION

As stipulated by the parties: This matter is in the appropriate form and venue. The matter was filed in a timely and appropriate fashion. All parties necessary are joined, and there is no question as to misjoinder or nonjoinder of parties.

APPLICABLE STATUTES AND RULES

42 U.S.C. §§ 1396a - 1396v
42 C.F.R. Parts 455 and 456
N.C. Gen. Stat. § 150B-22 *et seq.*
10A N.C.A.C. 22F *et seq.*
N.C. State Plan for Medical Assistance

BURDEN OF PROOF

Respondent bears the burden of proof in this matter, pursuant to N.C. Gen. Stat. §108C-12.

DOCUMENTARY EVIDENCE

Prior to the hearing, the parties stipulated as to authenticity and admissibility of the following documentary evidence. All of the following documents were accepted and admitted into evidence:

For Respondent:

1. Clinical Coverage Policy 3H-1 (rev. 8/1/2007)
2. Medicaid Bulletin Feb. 2008
3. DMA Vendor Introductory Letter to Jabez (10/2/2012)
4. PCG letter to Jabez (10/2/2012)
6. Tentative Notice of Overpayment (12/19/2012) with findings chart
9. Appeal Provider Summary Report (4/29/2013)
10. Notice of Decision (5/8/2013) ($245,470.63)
11. Provider Administrative Participation Agreement
12. C. Landtroop demonstrative
13. AdvanceMed spreadsheet (01312012) (Jabez) (excerpts only)
14. CD with full Exel version of Ex. 13

For Petitioner:

1. Clinical Coverage Policy 3H-1 (Effective January 1, 2007)
4. State Medicaid Plan Excerpt – Home Infusion
5. State Medicaid Plan Excerpt – North Carolina Policy for Dually Eligible Recipients.
7. Example of Jabez Nursing Order Form with Contractor
8. Jabez Nursing Contract with 3HC.
9. Jabez Nursing Contract with Tar Heel Home Health
10. HCPCS Codes documenting Durable Medical Equipment Covered by Home Health Program
12. Excerpt Medicare Claims Processing Manual - Home Health Agency Billing
13. ARRP Public Policy Institute - Insight on the Issue Excerpt
14. Excerpt of North Carolina Report on Number of Dual Eligible Recipients – May 2013 from the North Carolina Department of Health and Human Services Website
15. DMA's Response to Petitioner's First Set of Interrogatories and First Request for Production of Documents
16. 30(b)(6) Deposition Transcript
17. Curriculum Vitae of Deanne B. Birch
25. Medicare claims manual
26. Policy 3C

WITNESSES

Linda Marsh, Manager of Special Projects and Quality Control, Program Integrity, DMA
Chad Landtroop, Chief Statistician, Advance Med Corporation
James T. Cowart, President, Jabez Home Infusion
Deanne Birch, President, HICAP Inc. Consulting
Sabrena Lea, Acting Assistant Director for Facility Home and Community Based Services, Clinical Policy, DMA

STIPULATIONS

Prior to hearing, the parties stipulated and agreed to the following issues, which are not disputed.

1. DMA Clinical Coverage Policy 3H-1 (rev. 8/1/2007) was in effect at the time that the services were rendered. This policy is authentic and admissible as an exhibit in this case.

2. At all times relevant to this audit and dispute, Petitioner submitted claims to Medicaid for Home Infusion Therapy (HIT) services for recipients who were dually-eligible under both Medicare and Medicaid. Dually-eligible recipients are eligible to receive both Medicaid benefits and Medicare-covered home health nursing services on the same date(s) of service.

BASED UPON the Court's careful consideration of the sworn testimony of the witnesses presented at the hearing, the documentary evidence, and the entire record in this proceeding, the

Undersigned Administrative Law Judge 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 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. Petitioner Jabez Home Infusion Company ("Petitioner") was a provider of Home Infusion Treatment ("HIT") Services and is located in Greenville North Carolina. (Cowart, T. Vol. 1, p. 251). Petitioner provided HIT services to patients in 42 counties until March 2014. (*Id.*).

2. Petitioner was founded in 2002 to provide HIT Services to patients that other home infusion companies would not accept, including Medicaid and dually-eligible patients. (*Id.* at pp. 249-50). James Cowart is the owner and operator of Petitioner. Mr. Cowart has nearly three decades of experience providing HIT services in North Carolina. (*Id.*).

3. Petitioner is licensed as a home care agency by the North Carolina Department of Health and Human Services, Division of Health Service Regulations, Acute and Home Care Licensure Section. (Cowart, T. Vol. 1, p. 273; Pet. Ex. 1, p. 8).

4. Respondent the North Carolina Department of Health and Human Services (the "Department" or "Agency") oversees the Division of Medical Assistance ("DMA"). DMA is the state agency responsible for administering North Carolina's program of medical assistance ("the Medicaid Program"). N.C. Gen. Stat. Chapter 108A, Article 2, Part 6. The Department also oversees the Department Hearing Office, which reviewed the post-payment review of the Department's post-payment review contractor, the Public Consulting Group ("PCG").

5. Petitioner was required to suspend these services in March 2014 pursuant to a Temporary Restraining Order (TRO) entered by the Board of Pharmacy, relating to questions about Jabez's clean room. Tr. 358-359. At that time, all of Jabez's patients were transferred over to other home infusion agencies. Tr. 359.

6. Petitioner's President Mr. Cowart provided pharmacy services to Jabez prior to November 2013, when he surrendered his pharmacy license for cause. Tr. 360-362. At the time of the hearing, Mr. Cowart did not have a pharmacy license. *Id.*

7. Home infusion therapy ("HIT") involves administering medication intravenously to patients in their homes. Tr. 255-256. The HIT services at issue in this audit all concern HIT of intravenous antibiotics. Tr. 259. HIT therapy involves multiple components, including nursing, supplies, pharmacy oversight, and the drug. Tr. 48, 119.

8. HIT provides a clinical benefit to patients because it reduces the number of viral and other infections that the individual would be exposed to if they were required to receive infusion therapy services in a hospital or nursing home setting. (Cowart, T. Vol. 1, pp. 255-56).

9. HIT is also significantly less costly than infusion services provided in a hospital or nursing home setting. (Cowart, T. Vol. 1, pp. 256-258).

10. HIT must be ordered by a physician. (Cowart, T. Vol. 1, p. 261; Respondent's Ex. 1, p. 7, § 5.4). A pharmacist must compound the drugs used for HIT in a clean and sterile environment. (Cowart, T. Vol. 1, pp. 261-268). HIT providers provide all necessary supplies and durable medical equipment needed to administer the intravenous ("IV") drugs. (Cowart, T. Vol. 1, p. 261).

11. A specially trained registered nurse ("RN") delivers the drugs and supplies and teaches the patient how to administer the IV drugs. (Marsh, T. Vol. 1, p. 128; Cowart. T. Vol. 1, p. 254). Petitioner employs one nurse to assist with this process and also contracts with home health agencies to use their nurses to provide HIT. (Cowart, T. Vol. 1, pp. 266-267; Petitioner Exs. 8-9). Petitioner pays home health agencies directly for the time contracted nurses spend providing HIT. (Id. at 267; Petitioner's Exs. 7-9).

12. A HIT pharmacist reviews lab test to determine if the proper dosage is being provided to the patient. (Cowart, T. Vol. 1, pp. 261-62).

13. Antibiotic HIT services are not covered by the Medicare. All services in this audit are antibiotic HIT services. Petitioner billed Medicare and received a rejection and remark code. This remark code, PR-204, indicates that the services were medically necessary but not covered by Medicare. (Cowart, Vol. 2, pp. 299-301; Birch, T. Vol. 2, pp 412-413; Petitioner Ex. 25).

14. At all times material to this matter, Petitioner was an enrolled provider in the North Carolina Medicaid Program. Petitioner entered into a Provider Administrative Participation Agreement with DHHS to participate in this program. (Respondent's Ex. 11; Tr. 311-312).

15. By entering into the Medicaid Participation Agreement, Petitioner agreed to "operate and provider services in accordance with all federal and state laws, regulations and rules, and all policies, provider manuals, implementation updates, and bulletins published by the Department, its Divisions and/or its fiscal agent in effect at the time the service is rendered ...." (Respondent's Ex. 11 at ¶ 3).

16. Medicaid is the payor of last resort. Tr. 185, 298, 408. Where there are other sources of insurance coverage, including Medicare, those sources must be billed first, before Medicaid may be billed. Tr. 185, 258.

17. DMA Clinical Coverage Policy 3H-1 (original effective date of January 1, 1998, revised date August 1, 2007) was in effect and applicable to the services and dates of service that

were audited. (Respondent's Ex. 1; Stip. 1). Policy 3H-1 relates to coverage by the North Carolina Medicaid program relating to Home Infusion Therapy ("HIT"). The HIT program covers self-administered infusion therapy and enteral supplies provided to a Medicaid recipient residing in a private residence or an adult care home. Resp. Ex. 1, § 1.0.

18. Before Policy 3H-1 was promulgated, it went through a formal review process. Tr. 81, 83. The policy was drafted by a clinical policy committee with a view to best practices, changes in Medicare, changes in Medicaid, and other considerations. Tr. 83. It was reviewed by a physician group. Tr. 83-84. It was put out for comment from the public and any of the professional associations with an interest in the subject matter. Tr. 84. This lengthy process can take a year. *Id.* Only after all of these steps were completed did Policy 3H-1 become final. Tr. 84.

19. Section 4.1 of Policy 3H-1 states the following, as relevant to the parties' dispute:

> 4.1 General Criteria
>
> HIT services are **not covered** when:
>
> d. the recipient is receiving Medicare-covered home health nursing services.

Resp. Ex. 1, § 4.1 (emphasis added).

20. DMA published a Medicaid Bulletin in February 2008. (Resp. Ex. 2; Tr. 85). That bulletin addressed the circumstances in which Medicaid would cover HIT services provided to dually-eligible recipients. It states the following:

> **[W]hen the recipient is dually eligible under Medicare and Medicare** and the home health services are being billed to Medicare, **the HIT provider cannot bill Medicaid for reimbursement for the provision of a home drug infusion therapy.** Medicare reimbursement for home health services is under a prospective service fee that is all inclusive. Billing the HIT drug therapy per diem would be considered a duplication of services and therefore not reimbursable by Medicaid. The home health agency should include all medical care needs of the recipient within the episode of care in accordance with Medicare reimbursement guidelines.

Resp. Ex. 2, at 12 (emphasis added). The bulletin was published to advise the provider community of these important policy limitations regarding dual-eligible recipients. Tr. 86-87. Petitioner's representative agreed that this bulletin was published to address Policy 3H-1 requirements. Tr. 355.

Medicare's Prospective Payment System

21. This dispute centers on the potential overlaps and differences in coverage under Medicare and Medicaid. A dual-eligible recipient is one who qualifies for benefits under both Medicare (which is a federal program) and Medicaid (which is a federal-state program).

22. Under a previous version of Medicare, which predates the issues in this case, Medicare had a fee-for-services system. Tr. 432. This meant that Medicare providers would bill the federal program, and be paid, for each individual medical service provided to the patient. This former fee-for-services model was replaced prior to the audit in this case. Tr. 432.

23. At all times relevant to this dispute, Medicare had in place the Prospective Payment System ("PPS"). Tr. 32, 432. The PPS applied to Medicare recipients who had an open episode of home health care. The PPS provided for a flat-fee payment from Medicare to the home health agency for a given recipient for a 60-day period of time. Tr. 32, 43, 332-333, 432. In exchange for receiving the PPS, the home health agency was responsible "to take care of that patient for whatever needs are provided during that period of time." Tr., 32-33. This includes all nursing care. Tr. 433. Petitioner's expert agreed that the Medicare PPS covers all necessary nursing services for the 60-day period. Tr. 433.

24. The PPS is "all-inclusive." Tr. 42, 43. This means that the PPS payment constitutes payment in full from Medicare for any and all costs associated with that patient for that 60-day period. Tr. 43. The PPS is payment in full for all services that are medically necessary, including nursing, physical therapy, occupational therapy, home health care aides, as well as all supplies and any other type of therapy that can be provided in the home. Tr., 33, 43, 130-31.

25. Under Medicare PPS, the home health agency that receives the 60-day payment is obligated to care for the in-home patient for the 60-day period. Tr. 148-150. By accepting the patient, and agreeing to accept the PPS payment, the agency has agreed that it will receive payment in full for the patient – even if its actual expenses exceed the PPS payment. In this respect, the PPS shifts the risk to the home care agency. Tr. 43, 44. This is true where the agency must incur expenses to provide HIT services to one of the patients for which it receives the PPS payment. Tr. 148-150.

26. The amount of money paid to the home care agency under the 60-day PPS was determined by OASIS. OASIS is the intake and assessment document that is used at the onset of the home care episode. Tr. 33. The home health agency completes the OASIS document by inputting information about the patient's condition and medical needs. Tr. 33. The OASIS document specifically asks about the patient's need for intravenous care. Tr. 33. If this question is answered in the affirmative, then the PPS payment is increased accordingly. In other words, the PPS payment is increased based on a patient's need for an IV. Tr. 34.

27. In contrast to the PPS under Medicare (which pays a flat fee for all care needed during a 60-day period), billings to Medicaid are per diem for each recipient and date of service. Tr. 266.

28. The issue here is whether "the recipient is receiving Medicare-covered home health nursing services." Resp. Ex. 1, Policy 3H-1, sec. 4.1.d. If so, then Medicaid does not cover HIT services. *Id.*

29. As shown next, the undisputed evidence showed that all recipients in this audit were receiving "Medicare-covered home health nursing services" (Policy 3H-1, sec. 4.1.d) at the time that Petitioner billed Medicaid for HIT services.

Identification of Duplicative Payments from the Medicare-Medicaid Data

30. In late 2010 or early 2011, representatives of DMA Program Integrity's Medicare-Medicaid Data Match team participated in discussions. The discussions focused on areas where there were overlaps between services covered by Medicare and Medicaid. Program overlaps are a concern to federal and state governments, as there can be duplication of payments for these recipients. Tr. 35-37.

31. The Data Match team engaged Advance Med Corporation ("Advance Med") to analyze the data. Tr. 40, 206-208. Advance Med was a federal contractor with expertise comparing federal Medicare data with state Medicaid data, and in identifying overlaps. Tr. 40-41, 202. DMA Program Integrity has worked with Advance Med for multiple years, and believed that Advance Med performed accurate work. Tr. 41.

32. Advance Med has expertise in analyzing data from federal Medicaid and state Medicaid systems. Mr. Chad E. Landtroop, Chief Statistician, testified that Advance Med regularly analyzes federal and state data to investigate and identify fraud, waste, abuse and duplication in the Medicare and Medicaid programs. Tr. 202-204. Advance Med regularly matches data for dual-eligible beneficiaries to look for overlap or duplication of payments. Tr. 204.

33. Advance Med's mission was to determine whether Medicare beneficiaries under an open home health episode (billing Medicare pursuant to the flat-fee PPS) were also billing North Carolina Medicare for home infusion therapy. Tr. 42, 208 ("We identify dually eligible beneficiaries or recipients who have an open home health episode on the Medicare side and are within that episode receiving Medicaid infusion therapy services"). Such overlapping payments are duplicative – meaning that both Medicare and Medicaid are being billed, and both programs are paying, to provide the same care for the same recipient on the same date of service. The goal was to determine whether Medicaid providers in North Carolina were billing claims to Medicaid in violation of Policy 3H-1. Tr. 46.

34. Advance Med returned a data run (spreadsheets) to Program Integrity. Tr. 45-46. Program Integrity examined this data and found "a significant number of overlaps." Tr. 45. To be as conservative as possible, Program Integrity requested that Advance Med make certain refinements to the data analysis. Tr. 47, 213. This included removing the cost of the drug from the data (because drug costs are covered by Medicare Part D, Tr. 291); it also included eliminating the first and last date of the open home health episode. Tr. 47-48, 213-214. This refinement was done to be as conservative and narrow as possible. Tr. 49-50, 215.

35. Advance Med thereafter refined the data and returned a revised data run (spreadsheets) to Program Integrity in January 2012. Tr. 50, 213, 216; Resp. Ex. 13 (printed excerpts); Resp. Ex. 14 (CD with full version of spreadsheets). The revised data run showed overlap between the federal Medicare data (i.e., Medicare recipients under an open home health episode, receiving the PPS) and the state Medicaid data (claims billed to North Carolina for HIT services). Tr. 50-51. The comparison showed "significant amounts of overlap for both nursing visits and supplies." As Program Integrity representative Ms. Marsh explained, "[i]n some instances, there were nursing visits that were billed both the same day to Medicare and to Medicaid." Tr. 51. These are duplicative and overlapping charges for the same recipient and same date of service. Tr. 51.

36. In other words, the data showed that both Medicare and Medicaid were paying for the same nursing services and HIT services, for the same patients, for the same dates of service.

37. The data run showed that Petitioner had billed and received $245,470.63 in overpayments from Medicaid. (Resp. Ex. 13, at p. 1). DMA made the decision to seek recoupment of these funds from Petitioner. Tr. 192. The data run alone was sufficient to show a potential violation by Petitioner of Policy 3H-1 requirements. Tr. 192.

The Audit Letters

38. On October 2, 2012, DMA prepared and mailed a Vendor Introductory Letter to Petitioner. (Resp. Ex. 3; Tr. 56-57, 273-74). That letter notified Petitioner that DMA had initiated a post-payment review of claims submitted to Medicaid. Resp. Ex. 3 at 1. The letter notified Petitioner that DMA had contracted with Public Consulting Group ("PCG") to conduct post-payment reviews. *Id.* The letter was sent via certified mail. *Id.*

39. PCG is a contractor to Respondent. Tr. 55. DMA asked PCG to prepare and mail letters to certain Medicaid providers that had been identified in the Advance Med data run. Tr. 55. Program Integrity did not ask PCG to analyze the Medicare-Medicaid data, as that already had been done by Advance Med. Tr. 55. PCG's role was limited to sending notices. Tr. 55.

40. Also on October 2, 2012, PCG prepared and mailed a letter to Petitioner. (Resp. Ex. 4). The PCG letter was mailed at the same time as the DMA Vendor Introductory letter, also via certified mail. *Id.*; Tr. 57, 273-74. The PCG letter cited Policy 3H-1 and the reimbursement requirements for HIT. *Id.* (The PCG letter included a typographical error and referenced 4.2.d, which does not exist, rather than the applicable section, 4.1.d.) The PCG letter noted that Petitioner had submitted claims to Medicaid between 2008 and 2010 for HIT services provided to dually-eligible recipients. *Id.* These recipients also were receiving Medicare-covered home health nursing services on the same claimed date(s) of service. *Id.* PCG's letter identified twelve examples of claims that appeared to be billed in Medicaid in violation of Policy 3H-1, section 4.2.d. *Id.* The PCG letter stated, "If your agency demonstrates that these claims do not represent a violation of the specific policy stated above, no further action will be taken." *Id.*, at 1. As Ms. Marsh explained, Respondent was giving Petitioner a chance to explain why this billing would not be a violation of Policy 3H-1. Tr. 59.

The Tentative Notice of Overpayment

41. On December 19, 2012, PCG prepared and sent a Tentative Notice of Overpayment ("TNO") to Petitioner. (Resp. Ex. 6; Tr. 62). The TNO stated that PCG had completed a review of Petitioner's Medicaid-paid claims for dates of service between 1/1/2008 to 10/31/2011. *Id.* The data showed that Petitioner's claims related to HIT services provided to dually-eligible recipients who were also receiving Medicare-covered home health nursing services on the same dates of service. *Id.* The TNO notified Petitioner that this was a violation of Policy 3H-1. *Id.* PCG notified Petitioner that it had received an overpayment of $245,470.63 as a result of this violation. *Id.*; Tr. 65. The TNO notified Petitioner of its due process rights to appeal the tentative decision. *Id.*, at 1-3. The TNO was sent via certified mail. *Id.*, at 1; Tr. 63.

42. Attached to the TNO was a multiple-page table. (Resp. Ex. 6, attachment). The table of findings summarized Petitioner's claims related to HIT services provided to dually-eligible recipients on the same dates of service. *Id.*; Tr. 63-64. For each claim, the table identified the recipient name, Medicaid identification number, date of service, payment billed and payment paid. Under findings, for each claim the table stated, "Recipient receiving Medicare-covered home health nursing services." *Id.*, findings/remarks column.

43. Petitioner received the TNO and table of findings on December 26, 2012. (Resp. Ex. 6, green card).

The Hearing Officer's Decision

44. After receiving the TNO, Petitioner requested a reconsideration review with the Hearing Office of DHHS. (Resp. Ex. 7, Tr. 274). The reconsideration review took place on February 6, 2013. (Resp. Ex. 10). Petitioner submitted documentation and argument during and after the review. *Id.*; Tr. 274.

45. Program Integrity reviewed the documents provided by Jabez as part of the reconsideration review proceeding. Tr. 60-61. The Jabez records confirmed that all recipients on the table of findings were receiving Medicare-covered home health nursing services, at the same time that Medicaid was billed. Tr. 61.

46. On May 8, 2013, the Hearing Office issued its Notice of Decision. (Resp. Ex. 10). The Hearing Officer upheld the TNO. *Id.*, at 3; Tr. 66, 275. The Hearing Officer found that the information "supports PCG's determination that the provider submitted claims for HIT services when the recipients were receiving Medicare-covered home health nursing services." The Hearing Officer recognizes that Policy 3H-1 "states that HIT services are not covered when the recipient is receiving Medicare-covered home health nursing services." *Id.*, at 3. Accordingly, the Hearing Officer upheld the recoupment amount of $245,470.63. *Id.*, at 3.

47. Following receipt of the Hearing Officer's Notice of Decision, Petitioner filed a Petition in this Court. Tr. 275. This matter came on for hearing on May 1 and 2, 2014.

Respondent's Recalculated Overpayment

48. Prior to the hearing, Respondent re-examined the data compiled by Advance Med. Tr. 66, 221-223. Respondent determined that one recipient included in the initial data run was receiving occupational therapy, billed to Medicaid, rather than nursing services. Tr. 66-67, 221-223. This recipient, arguably, did not have an open episode of home health care under Medicare, and, arguably, should have been excluded from the audit. Respondent decided to remove this claim, pertaining to recipient KN, from the audit. That reduced the claimed overpayment by $419.60 to a modified amount of $245,051.03. (Resp. Ex. 13; Tr. 66-69, 72-75, 221-223).

49. With this modification, Advance Med's data run captured only recipients who had (1) received "Medicare-covered home health nursing services" (Policy 3H-1, sec. 4.1.d); and also (2) received nursing care and HIT services paid by Medicaid. Tr. 238.

50. At the time of the hearing, Respondent had calculated and was claiming that Petitioner received an overpayment from Medicaid in the amount of $245,051.03. Tr. 75, 223.

Jabez's Duty to Verify Insurance Coverage

51. Before providing Medicaid services to recipients, Petitioner had a responsibility to check and verify whether the recipient was eligible for Medicare. Resp. Ex. 1, sec. 5.5, sec. 7.2; Tr. 76-79, 142-43. Petitioner's representative and expert witness agreed that Jabez had an affirmative duty to check insurance coverage under Medicare. Tr. 326, 435. Both witnesses agreed that it is important to know a patient's insurance coverage. Tr. 436.

52. Mr. Cowart admitted that Jabez was able to determine a patent's insurance coverage. Tr. 320. Jabez could verify Medicare coverage. Tr. 320. Jabez would know that a patient had an open home health episode under Medicare if the patient said so, or if the nursing subcontractor said so. Tr. 321. Petitioner's expert testified that software packages were available to verify whether a patient had an open home health episode. Tr. 442, 444. In addition, some of Jabez's nursing subcontractors had ways to verify an open home health episode. Tr. 323.

53. Despite its obligation to check insurance coverage, and despite Policy 3H-1, section 4.1.d, Jabez did not check whether its patients were "receiving Medicare-covered home health nursing services." (Resp. Ex. 1, Policy 3H-1, sec. 4.1.d). Tr. 320.

Jabez's Subcontracts with Nursing Companies

54. In order to provide services to its patients, Jabez entered into subcontracts with third party nursing companies. These companies provided the nursing services necessary to the HIT services. Tr. 267-268; Pet. Ex. 8-9 (contracts between Jabez and Gentiva, 3HC).

55. None of the subcontractors ever informed Jabez that the patients had open home health episodes under Medicare. Tr. 269, 329. Neither Gentiva nor 3HC informed Mr. Cowart that these subcontractors billed and collected a PPS payment from Medicare for taking care of the patient, while at the same time collecting per diem payments from Jabez (which Jabez billed

to Medicaid). Tr. 269, 337. These payments were duplicative – both Medicare, under the PPS, and Medicaid, separately (as billed by Jabez), paid for nursing services and HIT services on the same dates to the same patients.

56. Petitioner's expert Ms. Birch testified that the subcontractors "should have informed" Jabez if a patient had an open home health episode. Tr. 437; *see also* Tr. 438 ("If the patient was, in fact, qualified for homebound 60-day episode, then they [the home health agency] should have informed Jabez.").

57. For each of the recipients in the audit, Mr. Cowart admitted that both Medicare and Medicaid paid for the same nursing services, for the same recipients, for the same dates of service. Tr. 337. He admitted that subcontractors to Jabez were receiving a PPS payment from Medicare for skilled nursing services (and other medically-necessary services) at the same time that Jabez was billing Medicaid for these same nursing services. Tr. 337.

58. Mr. Cowart testified that he was not concerned about these duplicative payments. Tr. 329. To date, he has never asked Gentiva or 3HC why his subcontractors failed to inform Jabez of the patients' open home health episodes under Medicare. Tr. 340.

Jabez's Interpretation of Policy 3H-1, section 4.1.d

59. Petitioner's representative agreed that he was obligated to comply with the requirements of Policy 3H-1. Tr. 311-312. He testified that did not understand section 4.1.d, regarding dual-eligible recipients, at the time that he billed claims to Medicaid. Tr. 313-314. Mr. Cowart agreed and conceded that Jabez did not comply with section 4.1.d when it billed claims to Medicaid. Tr. 316.

60. Instead of following section 4.1.d, Petitioner's representative chose to rely only upon section 7.2.6 of Policy 3H-1. Tr. 313-316. Mr. Cowart admitted, though, that section 7.2.6 does not address the issue of dual-eligible recipients. Tr. 318. He also admitted that section 7.2.6 only addresses medications covered under Medicaid part D – which is not the same as having Medicare-covered home health nursing services. Tr. 318. Even so, Jabez chose to rely on section 7.2.6 and ignore section 4.1.d of Policy 3H-1.

61. There was no dispute that all recipients in the audit were dual eligible for both Medicare and Medicaid. Tr. 72. At all times relevant to this audit and dispute, Petitioner submitted claims to Medicaid for Home Infusion Therapy (HIT) services for recipients who were dually-eligible under both Medicare and Medicaid. Dually-eligible recipients are eligible to receive both Medicaid benefits and Medicare-covered home health nursing services on the same date(s) of service. (Stip. 1, Pre-Hearing Order).

62. There was no dispute that all recipients in this audit were receiving Medicare-covered home health nursing services, and, during the same time period, Petitioner billed HIT services to Medicaid.

63. Policy 3H-1, section 4.1.d, is clear and unambiguous on its face. It plainly provides that North Carolina Medicaid will not pay for HIT services where "the recipient is receiving Medicare-covered home health nursing services." (Resp. Ex. 1, sec. 4.1.d).

64. Petitioner's claims billed to Medicaid, as summarized in the TNO (Respondent's Ex. 6, findings chart) and on the data run spreadsheet (Respondent's Ex. 14), were in violation of Policy 3H-1, section 4.1.d.

65. Respondent has met its burden of showing that the total overpayment from Medicaid to Petitioner was $245,051.13. Tr. 75, 223. This amount equals the overpayment identified in the TNO (Resp. Ex. 6, $245,470.63) minus the one claim that Respondent removed from the audit prior to hearing (recipient KN, $419.60). Tr. 66-69, 72-75, 221-223.

66. Petitioner argued that Policy 3H-1, sec. 4.1.d, discriminates against dually-eligible recipients. However, there is no evidence showing this to be true. In fact, the record shows that every recipient in this audit did receive all medically necessary HIT services. Petitioner has not identified any recipient who has been discriminated against (*i.e.*, did not receive medically necessary HIT services) as a result of Policy 3H-1, section 4.1.d.

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings. This tribunal has jurisdiction of the parties and of the subject matter at issue.

2. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. §108C-12.

3. Petitioner and DMA entering into a valid Medicaid Participation Agreement. Respondent's Ex. 11. By entering into the Medicaid Participation Agreement, Petitioner agreed to "operate and provider services in accordance with all federal and state laws, regulations and rules, and all policies, provider manuals, implementation updates, and bulletins published by the Department, its Divisions and/or its fiscal agent in effect at the time the service is rendered ...." (Respondent's Ex. 11 at ¶ 3).

4. Respondent is responsible for administering and managing the State Medicaid plan and program. Pursuant to N.C. Gen. Stat. 108A-54, Respondent is authorized to adopt the rules and regulations for program operation. Pursuant to 10A N.C.A.C. 22F .0103(b)(5), Respondent "shall institute methods and procedures to recoup improperly paid claims."

5. Under 10A NCAC 22F .0601(a), DMA "will seek full restitution of any and all improper payments made to providers by the Medicaid Program."

6. DMA Clinical Coverage Policy 3H-1 (original effective date of January 1, 1998, revised date August 1, 2007) was in effect and applicable to the services and dates of service that were audited. (Respondent's Ex. 1). Policy 3H-1 was adopted according to the procedures set forth in N.C.G.S. § 108A-54.2 and § 54.3. At all times relevant to the audit, Petitioner was obligated to follow the requirements set forth in Policy 3H-1.

7. Respondent met its burden of showing by a preponderance of the evidence that Petitioner's claims billed to Medicaid relating to HIT services were in violation of Policy 3H-1,

sec. 4.1.d. The evidence showed that all such claims were for recipients who were receiving Medicare-covered home health nursing services during the same time that Petitioner billed Medicaid.

8. The evidence does not show that Policy 3H-1, section 4.1.d discriminates against the dual-eligible population, or that it is a violation of federal law, or the State Medicaid Plan, or state law.

9. Under N.C. Gen. Stat. § 108C-7 and § 150B-23(a), based upon the preponderance of the evidence, and "giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency," Respondent properly determined that Petitioner received an overpayment of $245,051.03 from the North Carolina Medicaid program.

10. Respondent did not deprive Petitioner of property; did not order Petitioner to pay a fine or civil penalty; and did not substantially prejudice Petitioner's rights. Further, Respondent did not exceed its authority or jurisdiction; did not act erroneously; did not fail to use proper procedure; did not act arbitrarily or capriciously; and did not fail to act as required by law or rule.

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

DECISION

The Court hereby AFFIRMS the Notice of Decision of the North Carolina Department of Health and Human Services ("DHHS") Hearing Office, issued on May 8, 2013 (Resp. Ex. 10), except that the Court finds that the Petitioner received an overpayment from Medicaid in the amount of $245,051.13.

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 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 03.012, 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.

IT IS SO ORDERED.

Dated this the 2nd day of September, 2014.

Craig Croom
Administrative Law Judge

STATE OF NORTH CAROLINA JOHNSTON COUNTY	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13 DOJ 16261
JASON THOMAS HUNT, Petitioner v. NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, Respondent	**PROPOSAL FOR DECISION**

This case came on for hearing on March 28, 2014 and April 30, 2014 before Administrative Law Judge Melissa Owens Lassiter in Raleigh, North Carolina after Respondent requested, pursuant to N.C. Gen. Stat. § 150B-40(e), 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 parties filed their respective proposed Proposals for Decision with the Office of Administrative Hearings on July 29, 2014 and August 4, 2014.

APPEARANCES

Petitioner: John P. O'Hale
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ISSUE

Whether Respondent should revoke Petitioner's general/specialized instructor certification, and suspend Petitioner's law enforcement officer certification, because Petitioner failed to comply with the minimum standards required of instructors and

criminal justice officers to have good moral character by engaging in a relationship with two female cadets while the cadets were enrolled in the Wilson Community College BLET program, and while Petitioner served as the Commission-certified School Director, and instructor of that program?

STATUTES AND RULES

N.C. Gen. Stat. § 17C-10
12 NCAC 09B .0101, 12 NCAC 9A .0204, 12 NCAC 9B .0301, 12 NCACN 9A .0205

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 (Offer of Proof only), 2 - 11

For Respondent: 1 – 13, 16
15 (Offer of Proof only)

FINDINGS OF FACT

Procedural History

1. On May 21, 2013, Petitioner's case was submitted to the Criminal Justice Education and Training Standards Commission's Probable Cause Committee. (Respondent's Exhibit 9) Respondent's Probable Cause Committee found probable cause existed:

(1) To revoke Petitioner's general/specialized instructor certification, because Petitioner failed to meet the minimum standards required for instructors to have good moral character, because he maintained unethical and unprofessional relationships with female cadets enrolled in the Wilson Community College's Basic Law Enforcement Training ("BLET") program while Petitioner served as the Commission-certified School Director and a BLET instructor of that program; and

(2) To suspend Petitioner's law enforcement officer certification, because Petitioner failed to meet the minimum standards required for instructors to have good moral character, because he maintained unethical and unprofessional relationships with female cadets, enrolled in the Wilson Community College BLET program, while Petitioner served as the Commission-certified School Director and a BLET instructor of that program.

2. Petitioner timely requested an administrative hearing.

Applicable Rules

3. Respondent is authorized by Chapter 17C of the North Carolina General Statutes, and Title 12 of the North Carolina Administrative Code, Chapter 09B, to certify instructors and to revoke, suspend or deny such certification.

4. Respondent is authorized by Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09B, to certify law enforcement officers and to revoke, suspend or deny such certification.

5. 12 NCAC 09B.0101 entitled "Minimum Standards for Criminal Justice Officers" states:

> Every criminal justice officer employed by an agency in North Carolina shall:
> . . . .
>
> (3) be of good moral character pursuant to G.S. 17C-10 and as determined by a thorough background investigation[.]

6. 12 NCAC 09A.0204, entitled "Suspension: Revocation: or Denial of Certification" states:

> (b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:
> . . . .
>
> (2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B.0100 for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B.0200 or 12 NCAC 09B.0400 for the category of the officer's certification[.]

7. 12 NCAC 09B.0301, entitled "Certification of Instructors" states:

> (f) The Commission may deny, suspend, or revoke an instructor's certification when the Commission finds that the person:
> . . . .
>
> (8) has failed to meet or maintain good moral character as defined in: in re Willis, 299 N.C. 1, 215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E. 2d 854 (1940); in re Legg, 325 N.C. 658, 386 S.E. 2d 174 (1989); in re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); in re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E. 2d 647 (1983); and their

progeny, as required to effectively discharge the duties of a criminal justice instructor[.]

8. 12 NCAC 09A.0205, entitled "Period of Suspension: Revocation: or Denial" states:

(c) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:

. . . .

(2) failure to meet or maintain the minimum standards of employment[.]

Background Facts

9. On April 22, 1995, Jason Thomas Hunt ("Petitioner") became a detention officer with the Wilson County Sheriff's Office. (Respondent's Exhibit 1). On April 22, 1996, Petitioner became a Deputy Sheriff with the Nash County Sheriff's Office. (Respondent's Exhibit 1)

10. From September, 2002 until January, 2011, Petitioner served as BLET Coordinator at Wilson Community College. (Respondent's Exhibit 7)

11. On or about February 11, 2003, Petitioner became certified as the BLET School Director. (Respondent's Exhibit 2)

12. On January 31, 2006, Petitioner successfully completed Wilson Community College's mastery test (faculty) in *Preventing Sexual Harassment* with a score of 93%. (Respondent's Exhibit 12)

13. On or about December 8, 2009, Petitioner became employed as an Instructor with Wilson Community College. (Respondent's Exhibit 14)

Respondent's Investigation

14. On October 4, 2012, Dr. Rusty Stephens, President of Wilson Community College, contacted Respondent's Deputy Director, Pam Pope by email. Dr. Stephens asked that Darlene Hall be named the School's BLET Director and that Petitioner be removed immediately as their BLET School Director and Chief of Police. Wilson Community College was investigating allegations against Petitioner for engaging in a sexual relationship with a female BLET cadet in 2007, and with another female BLET cadet in 2010.

15. In October of 2012, Alex Setzer, Respondent's investigator, conducted an investigation into the allegations of lack of good moral character against Petitioner.

Setzer interviewed Dr. Sessoms and Dean Holston of Wilson Community College, former BLET cadets Julie Jackson and Miles Rountree, and 3 other female BLET students at Wilson Community College. Setzer specifically investigated whether Petitioner engaged in a romantic relationship with Miles Rountree in 2010, while Rountree was a cadet in the BLET program at Wilson Community College. Mr. Setzer also investigated whether Petitioner had a sexual relationship with former BLET cadet Julie Jackson in 2007, while she was a cadet in the BLET program at Wilson Community College.

16. Setzer's investigation was approximately five (5) years after Julie Jackson had graduated from the Wilson Community College BLET program, and approximately 2 years after Miles Rountree had graduated from the Wilson Community College BLET program. Neither Ms. Rountree nor Ms. Jackson ever filed a complaint against Petitioner with either Wilson Community College or with Respondent regarding any alleged improprieties by Petitioner.

17. During his investigation, Setzer learned there was an allegation that the Wilson County Sheriff Calvin Woodard made complaints against Petitioner in July, September and October, 2012 because Woodard was politically motivated. Mr. Setzer never interviewed Sheriff Woodard. Mr. Setzer did not substantiate any complaints by Sheriff Woodard against Petitioner. Mr. Setzer concluded that Petitioner adequately managed the BLET program at Wilson Community College.

18. During his investigation, Mr. Setzer did not interview any person in the law enforcement community regarding Petitioner's good moral character, his reputation for truthfulness, his character for honesty, his character for fairness, his character for respect of the law, and Petitioner's respect for the rights of others.

19. On October 31, 2012, Setzer interviewed Julie Jackson and Miles Rountree at Wilson Community College. (Respondent's Exhibit 5 & 6) On November 28, 2012, Setzer interviewed Petitioner. (Respondent's Exhibit 7) By memorandum dated January 23, 2013, Mr. Setzer advised Respondent's Probable Cause Committee of the allegations against Petitioner and the facts of his investigation into such allegations. (Respondent's Exhibit 8)

Julie Jackson

20. Julie Jackson was a cadet in the BLET program at Wilson Community College from approximately August 18, 2007 until she graduated from such program on or about December 14, 2007. Jackson is now employed as a Deputy Sheriff with the Wilson County Sheriff's Department.

21. When Jackson was a cadet in 2007, she was twenty-eight (28) years of age, and single. Ms. Jackson remains single to this day.

22. At that time, Petitioner was the director for the BLET program at Wilson Community College, and instructed Ms. Jackson in her driver training in the BLET program at Wilson Community.

23. During the Thanksgiving holidays in late November, 2007, Ms. Jackson traveled to Charlotte, North Carolina with Petitioner to visit Petitioner's parents. Petitioner and Ms. Jackson occupied a motel room, and engaged in a sexual relationship. Ms. Jackson and Petitioner began a romantic relationship, and continued that relationship until well after Ms. Jackson's graduation from Wilson Community College in 2007.

24. After Jackson graduated from the BLET program, her romantic relationship with Petitioner was an on and off relationship that continued for almost five (5) years through September of 2012. At all times during her romantic relationship with Petitioner, Ms. Jackson was a mature, single, consenting adult. Any relationship that occurred between Petitioner and Ms. Jackson was private in nature, involving two mature consenting adults, was not done for commercial purposes, and did not occur while the Petitioner was engaged in his official duties as director of the BLET program at Wilson Community College.

25. While Petitioner provided one grade for one of Jackson's BLET courses, the preponderance of the evidence at hearing showed that Petitioner treated Ms. Jackson as he treated all other cadets. Petitioner did not show favoritism towards Jackson while she was a cadet, and did not take advantage of their relationship.

26. At the administrative hearing, Ms. Jackson explained that Wilson County Sheriff Woodard made a complaint to Dr. Rusty Stephens, President of Wilson Community College. Sheriff Woodard also spoke at the Wilson Community's Board of Trustees meeting regarding Petitioner's employment.

27. At the contested case hearing, Ms. Jackson opined that Woodard's complaint against Petitioner was politically motivated and without merit. Ms. Jackson characterized the Wilson Community College's meeting on Petitioner's employment as "horse shit," and opined that the WCC Board of Trustees "ganged up on Petitioner to get rid of him." Jackson supported Petitioner, and considered him honest, truthful, fair to students, respectful of the law and the cadets' rights in his BLET classes. Ms. Jackson also wrote Petitioner's Exhibit 1, and wanted Petitioner to present it at Respondent's Probable Cause Committee meeting.

Miles Rountree

28. Miles Rountree was a cadet in the Wilson Community College BLET program from approximately April 19, 2010, until approximately August 20, 2010. Rountree is now employed as a Detective with the Wilson, North Carolina Police Department.

29. Ms. Rountree and the Petitioner began a romantic relationship over the Fourth of July weekend, 2010. Ms. Rountree graduated from the Wilson Community College BLET program in August of 2010. Ms. Rountree's romantic relationship with Petitioner continued well after her graduation until sometime in late 2010 or early part of January, 2011.

30. Although Rountree's romantic relationship with Petitioner ended in either late 2010 or early 2011, Ms. Rountree continued to send Petitioner text messages through the month of March, 2011. In those text messages, Ms. Rountree told Petitioner that she still loved him. She also solicited Petitioner's assistance in securing admission to an officer survival driving class taught in the in-service training program at Wilson Community College in the spring of 2011. Petitioner assisted Rountree in securing admission to her requested officer survival driving class.

31. At all times during her attendance in the BLET program, Miles Rountree was either 26 or 27 years of age, and was a mature adult.

32. In May, 2011, Ms. Rountree became employed as a police officer with the Wilson Community College Police Department. While Petitioner was Chief of that department, and Ms. Rountree was a subordinate of Petitioner, Petitioner and Rountree had a professional law enforcement relationship.

33. Petitioner taught physical fitness when Ms. Rountree was a student in the BLET program. Petitioner was harder on Miles Rountree than on other people, did not afford her any special consideration, and did not take advantage of his relationship with Ms. Rountree.

Dr. Rusty Stephens

34. Dr. Rusty Stephens is the President of the Wilson Community College. Mr. Stephens re-employed Petitioner as an instructor at the Wilson Community College beginning August 16, 2012.

35. Calvin Woodard, Sheriff of Wilson County, North Carolina, made complaints about Petitioner to Dr. Stephens in July, September and October of 2012. In July 2012, Woodard told Stephens he heard that Petitioner had made a comment, while teaching a class, that Petitioner would like to be Sheriff of Wilson County someday. The second complaint involved Woodard's cousin who had been a student in the BLET program. The third complaint was based on an audiotape of a cell phone conversation that took place between Petitioner and Julie Jackson on May 11, 2011, approximately 3½ years after Ms. Jackson's graduation from the BLET program. After receiving Sheriff Woodard's third complaint on October 2, 2012, Dr. Stephens interviewed some BLET students and former students. Neither Miles Rountree nor Julie Jackson ever made a complaint with the Wilson Community College regarding any alleged improprieties by Petitioner.

36. On October 23, 2012, Dr. Stephens met with Petitioner to discuss his findings, and give Petitioner an opportunity to respond. By letter dated October 23, 2012, Dr. Stephens terminated Petitioner's employment with Wilson Community College. (Petitioner's Exhibit 8) On November 1, 2012, Petitioner responded to Dr. Stephens, and requested an administrative hearing of his dismissal. (Petitioner's Exhibit 9) The Wilson Community College Board of Trustees upheld Petitioner's dismissal after an administrative hearing.

Petitioner's good moral character

37. Bentley Massey is a United States Probation Officer who has secondary employment as an instructor in the Wilson Community College BLET program. Mr. Massey has been so employed as an instructor from May of 1990, and continues to instruct at Wilson Community College to this day. Mr. Massey teaches subject control arrest techniques.

38. Mr. Massey has had a professional relationship with Petitioner since Petitioner became coordinator for the BLET program at Wilson Community College in 2002. Mr. Massey was working at the Community College the day that Petitioner was terminated from his employment contract in October of 2012. Massey opined that Petitioner is a trustworthy person, and has a reputation as being responsible and fair with the cadets. Massey thinks that Petitioner is respectful of all people with whom he works, and he respects his students. Massey also notes that Petitioner enjoys a good character for honesty and truthfulness.

39. Catherine Daniel knows Petitioner, because she attended the BLET program at Wilson Community College on two separate occasions, August of 2008 and August of 2009. Ms. Daniel did not successfully complete her first BLET program, because she had difficulty with the firearms training.

40. After graduation from the BLET program, Ms. Daniel became employed as a police officer in Clayton, North Carolina. Subsequently, she left law enforcement, and is now employed as a LPN (Licensed Practical Nurse). While she was a student in the BLET program at Wilson Community College, Petitioner was coordinator for the BLET program. Ms. Daniel had regular contact with Petitioner as Petitioner was a physical fitness instructor. During the times that Daniel dealt with Petitioner, Petitioner never made any inappropriate comments or engaged in any inappropriate conduct towards Daniel or towards any other female cadets. Petitioner treated male and female cadets equally. Daniel opined that Petitioner was fair with all the cadets, and was a responsible person. Ms. Daniel never observed Petitioner exhibit any conduct with any cadet that she considered out of the ordinary.

41. Leslie Bunn is a female who is employed by Wilson Professional Services. who attended the Wilson Community College BLET program from August of 2010 through December of 2010. Ms. Bunn did not successfully complete the BLET program,

because she was unable to satisfactorily perform the physical fitness requirements. During that time, Petitioner was a physical fitness instructor at the BLET program.

42. While Ms. Bunn was a cadet, she never heard Petitioner make any inappropriate comments to either herself or any other female cadets. Bunn opined that Petitioner was harder on the female cadets than the male cadets. She realized that Petitioner being harder on females was Petitioner's effort to make the female cadets feel equal to the male cadets. Ms. Bunn also recognized that Petitioner wanted the female cadets to realize that the job of a police officer was physically demanding, and the cadets needed to be well prepared for future employment as police officers.

43. Bunn also opined that Petitioner treated the cadets fairly. Petitioner was a responsible person, and maintained a professional relationship towards all the cadets in Ms. Bunn's class. Petitioner never treated Bunn or any other of the cadets in a disrespectful manner, and Petitioner was fair to all students in the BLET program.

44. Keith Hale is a 28 year veteran of the Tarboro, North Carolina, Police Department who currently holds the rank of Lieutenant. Lt. Hale became acquainted with Petitioner when Petitioner was a student in one of Hale's BLET classes. Lt. Hale and Petitioner are friends who have worked together for a period of approximately twenty (20) years. Lt. Hale knows the Petitioner's character for trustworthiness. Hale thinks that Petitioner is very trustworthy, and respects his colleagues and the cadets. Lt. Hale opined that Petitioner is a respectful person, is always fair with other individuals, and possesses an excellent character for truth and honesty. Lt. Hale never observed Petitioner act inappropriately with any male or female cadet.

45. Lt. Hale is a firearms instructor, and has been employed on a part-time basis as a firearms instructor at Wilson Community College since the fall of 1991. Lt. Hale taught Miles Rountree as a cadet in one of his BLET classes during the summer of 2010. Lt. Hale recalls that Ms. Rountree was a platoon leader elected by her fellow students. Lt. Hale never observed any inappropriate activity or relationship at the Wilson Community College that may have existed between Petitioner and Miles Rountree.

46. John Farmer is a retired Major from the Wilson County Sheriff's Department where he spent his entire law enforcement career. Mr. Farmer first became acquainted with Petitioner when Petitioner was employed by the Wilson County Sheriff's Department in 1995.

47. Major Farmer (ret.) has been employed on a part-time basis by the Wilson Community College since 1986, where he instructs patrol techniques and teaches a driving course. Mr. Farmer worked with Petitioner when the Petitioner was an instructor in the BLET program at Wilson Community College, and when Petitioner became coordinator of the BLET program at Wilson Community College. Farmer observed the Petitioner interact with both the male and female cadets. During his many years of working with Petitioner at Wilson Community College, Mr. Farmer observed that

Petitioner was very thorough and interacted fairly with both male and female cadets, and performed his duties with the highest professional and ethical standards.

48. Mr. Farmer opined that Petitioner is a very trustworthy person, was a dedicated BLET coordinator, and ensured that the students got the best instruction possible. Petitioner respected his colleagues and the cadets, and was fair to one and all. Farmer explained that Petitioner is a responsible person who possesses an excellent character and reputation for honesty and truthfulness.

Petitioner

49. Petitioner first became employed with the Wilson County Sheriff's Department in 1995 when he was 21 years old. At the time of this contested case hearing, Petitioner was 40 years old, single, never married, and had no children. When Petitioner was terminated from his position as BLET program coordinator and Chief of Police at Wilson Community College, he was 38 years old, and had been constantly employed in law enforcement since age 21. Since the date of his termination in October of 2012, Petitioner has been unable to find any employment in the law enforcement field.

50. At hearing, Petitioner acknowledged that he engaged in a romantic relationship with Julie Jackson, a cadet in the BLET program at Wilson Community College, from approximately Thanksgiving 2007 until her graduation from the BLET program on approximately December 14, 2007. Likewise, Petitioner engaged in a romantic relationship with Miles Rountree when she was a cadet at Wilson Community College from July 4, 2010 until her graduation from the program on approximately August 18, 2010. Petitioner maintains that he was not disrespectful to any of the cadets, male or female, in the BLET program at Wilson Community College, and he never acted in a disrespectful or offensive manner towards Julie Jackson or Miles Rountree. He indicated that he never abused his authority over the cadets, and never displayed any demeaning behavior. Petitioner never took advantage of Miles Rountree, Julie Jackson, or any other cadet in the BLET program at Wilson Community College. He insisted that he did not afford Jackson or Rountree any preferential treatment at any time while either Jackson or Rountree were cadets at the Wilson Community College BLET program.

51. Petitioner acknowledged that, in hindsight, he used poor judgment, and would not engage in the same or similar conduct with any student again.

52. During cross-examination, Petitioner was asked if he was familiar with the law enforcement code of ethics. Petitioner recited such code of ethics verbatim and by memory.

53. At hearing, Respondent did not present any statute, promulgated law enforcement rule, or policy that specifically provided that Petitioner could not, or should not engage in a consensual romantic relationship with a consenting adult student. The

romantic relationships that existed between Petitioner and Rountree, and Petitioner and Jackson took place off campus, in private, and were voluntary and consensual in nature between a mature, consenting adult male and single, mature, consenting adult females. These romantic relationships did not occur during any scheduled BLET activities, and were not for any commercial purposes.

54. At hearing, Respondent did not introduce any evidence that Petitioner took advantage, either explicitly or implicitly, of his position of authority as BLET Director and/or coordinator over either Julie Jackson or Miles Rountree at any time that either of the individuals were cadets at the Wilson Community College BLET program.

55. There was no evidence presented that Petitioner afforded any preferential treatment to either Julie Jackson or Miles Rountree, because of their respective relationships with Petitioner, during the times that Jackson or Rountree were enrolled as cadets at the Wilson Community College BLET program.

56. Petitioner served as a law enforcement officer in various capacities from 1995 through and including the date of his termination from Wilson Community College in October of 2012. There were no prior complaints filed against Petitioner with Respondent, and no history of any discipline or any misconduct by Petitioner during his entire law enforcement career.

57. Respondent did not present any evidence at hearing that it or any other agency performed any background investigation during its investigation to determine Petitioner's good moral character.

CONCLUSIONS OF LAW:

1. Both parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper, and both parties received proper notice of the hearing.

2. Respondent Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9G, to certify enforcement officers and to suspend, revoke or deny such certification.

3. 12 NCAC 09B.0101 "Minimum Standards for Criminal Justice Officers" requires that:

> Every criminal justice officer employed by an agency in North Carolina shall:
> . . . .
> (3) be of good moral character pursuant to G.S. 17C-10 and as determined by a thorough background investigation[.]

4. Pursuant to N.C. Gen. Stat. 17C-10, every criminal justice officer employed by an agency in North Carolina shall be of good moral character. That statute states in pertinent part:

> In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment, training, and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, **good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.** (Emphasis added)

5. 12 NCAC 09A.0204 "Suspension: Revocation: or Denial of Certification" states that:

> (b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:
>
> . . . .
>
> (2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B.0100 [now .0101] for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B.0200 [now .0201] or 12 NCAC 09B.0400 for the category of the officer's certification[.]

6. 12 NCAC 10B.0301(a)(8) requires that justice officers certified in North Carolina shall be of good moral character. 12 NCAC 09B.0301 "Certification of Instructors" states:

> (f) The Commission may deny, suspend, or revoke an instructor's certification when the Commission finds that the person: . . . .
>
> (8) has failed to meet or maintain good moral character as defined in: re Willis, 299 N.C. 1, 215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E. 2d 854 (1940); in re Legg, 325 N.C. 658, 386 S.E. 2d 174 (1989); in re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); in re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E. 2d 647 (1983); and their progeny, as required to effectively discharge the duties of a criminal justice instructor[.]

7. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In Konigsberg v. State, 353 U.S. 252, 262-63 (1957), the Court explained:

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

8. "It is basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Treants v. Onslow County, 94 N.C. App. 453, 458, 380 S.E. 2d 602 (1989), quoting City of Mesquite v. Aladdins, 455 U.S. 283 (1982) and Grayned v. City of Rockford, 408 U.S. 104 (1972). The North Carolina test for vagueness provides that a provision is:

> vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law."

State v. Sanford Video & News, Inc., 146 N.C. App. 554, 556, 553 S.E.217, 218 (2001). A regulation is "unconstitutionally vague if [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Hines, 122 N.C. App. 545, 551-52, 471 S.E. 2d 109, 113-114 (1996).

9. The North Carolina Courts have defined "good moral character" as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." In re Willis, 288 N.C. 1, 10 (1975). Whether an applicant is of good moral character is seldom subject to proof by reference to one or two incidents. Good moral character is something more than the absence of bad character. In the Matter of David Henry Rogers, Applicant to the 1975 Bar Exam, 297 NC 48, 253 SE 2d 912 (1979) (the board ruled that an applicant for admission cannot be denied on the basis of suspicion or accusations alone. Further, an applicant may only be able to meet a charge of wrongdoing only with his denial.) Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. See In Re Rogers, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.")

10. While rulings in contested cases have no binding authority over other contested cases, such cases can be instructive. In Jonathan Mims v. North Carolina Sheriffs Education and Training Standards Commission, 02 DOJ 1263, 2003 WL 22146102 at page 11-12, Administrative Law Judge Gray stated that police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character. Mims, at page 12, Conclusion of Law 12. Respondent Commission offered the testimony of someone knowledgeable regarding moral character who opined that there are six components to good moral character of

law enforcement officers: trustworthiness, respect, responsibility, fairness, citizenship and being a caring individual. Mims, page 7 at Finding of Fact 48.

11. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult. Mims, at page 12, Conclusion of Law 4. Because of concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based upon an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. Mims, at page 12 and 13.

12. In this case, as in Mims, the issue was whether Petitioner lacked the minimum standard of good moral character required to retain his general/specialized instructor certification and his law enforcement officer certification. Specifically, whether Petitioner lacked the requisite good moral character by engaging in romantic relationships with two cadets enrolled in a BLET program of which Petitioner was the Commission-certified Director and an instructor.

13. A preponderance of the evidence established that Petitioner and Julie Jackson engaged in a romantic relationship from the end of November, 2007, while Jackson was a cadet in the Wilson Community College BLET program, until around December 14, 2007. Petitioner and Miles Rountree engaged in a romantic relationship from July 4, 2010 through August 18, 2010, while Ms. Rountree was a cadet in the Wilson Community College BLET program, and Petitioner was the Commission-certified Director and an instructor in that program.

14. Clearly, Petitioner used very poor judgment, and showed a lack of professionalism by having romantic relationships with 2 cadets enrolled in a BLET program of which Petitioner was the director, and an instructor. However, there was no evidence that Petitioner abused his authority or position as an instructor or director at the Wilson Community College BLET Program while he was dating cadet Jackson or cadet Rountree. Neither was there any evidence that Petitioner harassed or intimidated Jackson or Rountree, showed favoritism towards Jackson or Rountree, that such relationships affected the cadets' grades in the BLET program, or those relationships compromised Petitioner's job as an instructor and/or BLET director.

15. Instead, a preponderance of the evidence demonstrated that Ms. Jackson and Ms. Rountree were both single, mature, consenting adults who willingly and voluntarily entered into a consensual romantic relationship with Petitioner. Those relationships took place off campus, and in private. There was no evidence that such relationships interfered with Petitioner's job performance as the BLET director and instructor.

16. There was no evidence that Petitioner's relationship with these cadets was "unethical" in violation of any rule, regulation, or policy of Respondent.

17. Because the romantic relationships between Petitioner and two mature consenting adults took place off campus, in private, and were not for a commercial purpose, that conduct is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and should not be considered as a basis for a finding of lack of good moral character.

18. The undersigned will not review and pass judgment on any relationship between Petitioner and Jackson, and Rountree that occurred after 2 and 5 years after Jackson and Rountree graduated from the BLET program. If Petitioner's conduct during his personal relationships with Jackson or Rountree was inappropriate, harassing, or intimidating, then such misconduct is best handled by the criminal courts.

19. During Respondent's investigation, Mr. Setzer never interviewed Sheriff Woodard, and did not substantiate any complaints by Sheriff Woodard against Petitioner. Mr. Setzer never interviewed any person in the law enforcement community regarding Petitioner's good moral character, his reputation for truthfulness, for honesty, for fairness, for respect of the law, and Petitioner's respect for the rights of others. Setzer never conducted a thorough background investigation into Petitioner's good moral character. Setzer concluded that Petitioner adequately managed the BLET program at Wilson Community College.

20. A preponderance of the evidence showed that the complaints about Petitioner and inappropriate relationships were politically motivated. In July 2012, Sheriff Woodard told Dr. Stephens he heard Petitioner would run for Sheriff, and that he also heard Petitioner was having inappropriate relationships with cadets. At the Wilson Community College's Board of Trustees meeting regarding Petitioner's employment, Sheriff Woodard testified about complaints regarding Petitioner's alleged inappropriate relationships with cadets. Sheriff Woodard is running for re-election this year (2014).

21. At the administrative hearing, Ms. Jackson characterized the Wilson Community College's meeting on Petitioner's employment as "horse shit," and opined that the WCC Board of Trustees "ganged up on Petitioner to get rid of him." Jackson supported Petitioner, and considers him honest, truthful, fair to students, respectful of the law and the cadets' rights in his BLET classes. The evidence at hearing showed that if not for Sheriff Woodard's complaints, this matter would not be before the Respondent.

22. Setzer's investigation was approximately five (5) years after Julie Jackson had graduated from the Wilson Community College BLET program, and approximately 2 years after Miles Rountree had graduated from the Wilson Community College BLET program. Neither Ms. Rountree nor Ms. Jackson ever filed a complaint against Petitioner with either Wilson Community College or with Respondent regarding any alleged improprieties by Petitioner.

23. Petitioner presented undisputed witness testimony that he was trustworthy, respectful, responsible, fair, and a good citizen. He demonstrated that he had a good reputation for truth and honesty, and had a long-term employment history as a law enforcement officer with no complaints or discipline.

24. Considering the criteria set forth in Mims, supra. at pages 12-13, the preponderance of evidence in this case does not establish a clear case of misconduct, or that Petitioner lacks good moral character.

25. Given Petitioner's otherwise exemplary history of good moral character, long-term employment as a law enforcement officer, lack of any prior complaints or discipline, and Petitioner's professionalism during his law enforcement career, the facts and circumstances of this case do not warrant or justify revoking Petitioner's instructor certification, or suspending Petitioner's law enforcement certification.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby proposes that Respondent **REVERSE** its initial decision to revoke Petitioner's general/specialized instructor certification and suspend Petitioner's law enforcement certification.

NOTICE

The North Carolina Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e). It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This 18th day of September, 2014.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA	Filed	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	2014 JUL 31 PM 5:33	**13 OSP 12677**
MARY CHAPMAN KNIGHT, Petitioner,	Office of Administrative Hearings	
v.		**FINAL DECISION**
NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY Respondent.		

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, further arguments and proposals after receipt of the official transcript. The record was further left open for submission by Petitioner of their Petition for Attorney Fees and Respondent's Response to Petitioner's Petition for Attorneys' Fees.

Both Petitioner and Respondent submitted proposals and argument as well as materials relating to attorneys' fees. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until July 31, 2014 to file the decision in this case.

APPEARANCES

For Petitioner: Charles E. Monteith, Jr.
Shelli Henderson Rice
Monteith & Rice, PLLC
309 W. Millbrook Road, Suite 141
Raleigh, NC 27609

For Respondent: Camilla F. McClain
Attorney at Law
North Carolina Department of Commerce
Division of Employment Security
P.O. Box 25903
Raleigh, North Carolina 27611

ISSUE

Did Respondent have just cause to demote Petitioner in accordance with the applicable provisions of the State Personnel Act and the North Carolina Administrative Code from her position as Employment Consultant Supervisor in Respondent's Remote Service Center Adjudication Unit?

APPLICABLE STATUTES, RULES and OTHER SOURCES

(including but not limited to the following)

N.C. Gen. Stat. § 126-34
N.C. Gen. Stat. § 126-34.1
N.C. Gen Statu. § 126-35
N.C. Gen. Stat. § 150B-23
25 N.C.A.C. 01J.0604
25 N.C.A.C. 01J.0612
25 N.C.A.C. 01J.0613
25 N.C.A.C. 01J.0614
Office of State Personnel, Personnel Manual

WITNESSES

For Petitioner: Sam Colon-Velez
Darilyn Sharpe
Mary Knight
Pia Royall

For Respondent: Stephanie M. Beard
Roger L. Allen
Lisa Outlaw
Ann France
James Byrd
Audra Lynette Hines
David McAdams
Maurice Antwon Keith

EXHIBITS

For Petitioner: Petitioner Exhibits 1-13 were admitted.
For Respondent: Respondent Exhibits 1-37 were admitted.

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

FINDINGS OF FACT

1. Petitioner began working at the Division of Employment Security (then known as the "Employment Security Commission") in May 2000 as an employment consultant.

2. In 2006, Petitioner won the Chairman's Award for excellence in Customer Service in the Remote Services Center. In 2010, Petitioner was promoted to the position of Acting Night Shift Supervisor of the Remote Services Center.

3. In February 2012, Petitioner was promoted to the position of Remote Services Center Adjudication Supervisor with a pay grade of 69. Sam Colon-Velez, retired Assistant Director for Internet Claims and Operations, described Petitioner as "the kind of employee that most supervisors hope for and don't always get...someone that's dedicated...that does the job correctly and...nothing is too small or too big for her." (Transcript pp. 129-130)

4. Following her promotion to Remote Services Center Adjudication Supervisor, Petitioner received a performance evaluation from her supervisor David McAdams for the time period May 1, 2012 through December 2, 2012. Mr. McAdams gave her an overall rating of "Very Good" on said evaluation and wrote the following comments:

> [Petitioner's] strong work ethic and drive make her a strong role model for the team. I appreciate [Petitioner's] contributions to the success of the Remote Services Center Adjudication. (Transcript p. 334, Petitioner's Exhibit 3)

5. As the Remote Services Center Adjudication Supervisor, Petitioner supervised a unit of five employees that were responsible for the unit that processed and adjudicated issues involving separation pay, vacation pay, and whether a claimant was able and available for work. Among Petitioner's job responsibilities was assisting employment analysts by providing information regarding claims or claimants.

6. On November 30, 2012, Petitioner was notified via a letter from M. Antwon

Keith, Respondent's Director of Unemployment Insurance Benefits Administration, that she was demoted to the position of Employment Consultant II, pay grade sixty-seven (67), as a result of her unacceptable personal conduct. The demotion had an effective date of December 1, 2012.

7. In 2012, Respondent had two adjudication units. There was the Central Office Adjudication Unit, which adjudicated separation and non-separation issues that arose when individuals filed claims for unemployment insurance benefits; and there was the RSC Adjudication unit, which adjudicated non-separation issues.

8. As RSC Adjudication Unit Supervisor, Petitioner's job duties included supervising employees who investigated and adjudicated the non-separation issues. It was also a part of her job to assist RSC management with developing and implementing standard operating procedures. Further, she was to plan and schedule staff, facilities and equipment to meet workload forecasts. She was expected to follow Respondent's policies and ensure that those who she supervised followed them too.

9. The events that led to Petitioner's demotion began on August 21, 2012, when Margaret Johnson, employment analyst (also known as a claims analyst), approached Petitioner and told her that she was looking for a 500AB on a claimant. Margaret Johnson was an employment analyst for the Respondent and worked in the Remote Services Center and it was not unusual for Ms. Johnson to seek information of this type pertaining to a claim.

10. Petitioner advised Margaret Johnson that she could provide the information sought but that the 500AB form could not leave Petitioner's unit as it was in process. Petitioner went to the desk of James Byrd, one of Petitioner's employees, as he was in possession of the 500AB form that provided the information sought by Ms. Johnson. Petitioner wrote the desired information on a sticky note and the 500AB form remained in the possession of James Byrd.

11. Petitioner provided the sticky note with the information from the 500AB form to Ms. Johnson. As Ms. Johnson walked away with the information, Ms. Johnson stated "Oh, this is for my sister-in-law." (Transcript p. 435) Petitioner did not know prior to providing the information sought to Ms. Johnson that the information pertained to a claim concerning someone Ms. Johnson knew.

12. Respondent has a policy which provides that an employee servicing a relative's or a friend's case in agency administered programs (e.g., UI, WIA, TAA, etc.) is a policy violation.

13. Petitioner did not know at the time that she provided the information to Ms. Johnson that Ms. Johnson had filed, or "keyed," the claim on behalf of her relative, B.G. Petitioner did not think at the time that she provided the information to Ms. Johnson that Ms. Johnson was working on or had done anything improper with respect to B.G.'s claim. Mr. McAdams did not expect Petitioner to question Ms. Johnson regarding her need for information.

14. Petitioner's immediate supervisor was David McAdams, Director of Remote

Service Center, who is, and was responsible for the overall management of RSC, which includes two cost centers, one in Raleigh, NC and one in Charlotte, NC.

15. After Ms. Johnson obtained the information from Petitioner, Ms. Johnson subsequently gave the information to Ann France, an employee of the Remote Services Center, asked her to complete a fact finding report and take the report to James Byrd. Margaret Johnson did not say anything to Petitioner about doing a fact finding report at the time that she sought the information. Petitioner did not ask Margaret Johnson to prepare a fact finding report for B.G.

16. The 500AB sought by Ms. Johnson was the employer's written response to a claim that had been filed for unemployment insurance benefits. A 500AB can include the reason for the individual's or claimant's separation from employment, vacation pay and severance pay information.

17. Once a 500AB is received in RSC Adjudication Unit, it is normally assigned to an investigator to process; and to create a fact-finding report. James Byrd was the investigator in Petitioner's unit, who normally completed fact-finding reports.

18. On August 21, 2012, James Byrd attempted to contact B.G. to obtain her statement regarding the separation and vacation pay issues. Byrd left B.G. a voice mail message asking her to return his call by the end of the business day on August 23, 2012.

19. Mr. Byrd initially testified that Ann France came to his cubicle with a fact finding report on August 21, 2012. Upon cross-examination, however, Byrd conceded that if such fact finding report was dated August 23, 2012, then he would agree that he could have possibly received it on August 23, 2012. The fact finding report that Ann France completed for B.G. was dated and signed by Ms. France on August 23, 2012.

20. On August 23, 2012, Petitioner observed Ann France standing in James Byrd's cubicle. Petitioner was concerned about Ms. France's presence in the unit as Petitioner was trying to keep Mr. Byrd on task to get all the 500AB forms that required calls to be made.

21. When Petitioner approached Ms. France in Mr. Byrd's cubicle, Petitioner inquired as to why Ms. France was in the unit and if she needed Petitioner's assistance. Ms. France responded to Petitioner that it was none of Petitioner's business and that "[Petitioner] needed to go somewhere and sit down" and "now a black man is owned by a white woman." (Transcript pp. 194-95, 439). France stated she responded in such a way when Petitioner told her Byrd was not on break and belonged to her unit.

22. Mr. McAdams testified that Mr. Byrd was a fairly new employee and Petitioner questioned France being in his area because McAdams and Knight were trying to keep Mr. Byrd focused on his work.

23. When Ms. France refused to leave Mr. Byrd's cubicle, Petitioner went to David

McAdams' office to advise him of the same. When Ms. France had left the unit, Petitioner went to Mr. Byrd's cubicle to determine what Ms. France's purpose had been in coming to the unit. Mr. Byrd told Petitioner that Margaret Johnson had handed Mr. Byrd a fact finding report and told him to take care of it. When Petitioner looked at the fact finding in question, she saw that it was a fact finding report for Margaret Johnson's sister-in-law, B.G. Petitioner then returned to Mr. McAdams' office and advised him that a fact finding had come to Petitioner's unit that was not prepared by Mr. Byrd and that the claimant in question was a relative of Margaret Johnson's.

24. Petitioner told Mr. McAdams that she had given Margaret Johnson information on a sticky note about vacation pay that was received by B.G. As of August 23, 2012, Petitioner still did not know that Margaret Johnson had filed the claim for B.G.

25. Petitioner contacted one of her unit's employees, Audra Hines, on Ms. Hines' cell phone after work hours on August 23, 2012 to advise her of a claim that had surfaced in Petitioner's unit that would need investigating as B.G. was in pay status when it appeared. It was not unusual for Petitioner to call Ms. Hines after hours.

26. Ms. Hines reviewed the information on the 500AB and the fact finding report and saw that the information in the two documents did not match. The amount of vacation pay that appeared on each document matched. But, there was other information on the two documents that did not match. Consequently, Hines followed the procedure of calling the parties to obtain information to resolve the discrepancies.

27. As a result of placing calls to the parties, Hines found based on a call to the employer's representative that the claimant had received $2,098.80 in vacation pay and $2,798.40 in severance pay. Hines further found that the claimant agreed with these amounts when Hines called the claimant and asked about them.

28. Ms. Hines completed the investigation of the issue pertaining to B.G.'s claim on the morning of Friday, August 24, 2012. Once the investigation was completed, the paperwork from the investigation was ultimately forwarded to Darilyn Sharpe, an adjudicator in Petitioner's unit. Sharpe issued a ruling on August 24, 2012 finding B.G. ineligible for benefits for a specific period of time due to the vacation and severance pay B.G. received. The same ruling was amended and reissued on August 27, 2012 due to a clerical error. The ruling stopped the claimant's receipt of unemployment insurance benefits, and had the effect of finding that the claimant had received an overpayment of unemployment insurance benefits.

29. After the issuance of the adjudicator's determination, Petitioner realized that there was a typographical error and looked at the claim history for the claim in question. Petitioner learned that Margaret Johnson had actually initiated and processed the claim for B.G.

30. When Petitioner learned on August 24, 2012 that Margaret Johnson had initiated the claim on behalf of B.G., Petitioner went to Assistant Director Darian McCoy. Mr. McAdams was not present at work on August 24, 2012. It was acceptable for Petitioner to go to Mr.

McCoy in the event Mr. McAdams was not available. Petitioner reported to Mr. McCoy that Ms. Johnson had filed, or keyed, a claim for her relative and asked Mr. McCoy for a copy of the Internal Security Handbook.

31. On Monday, August 27, 2012, Petitioner reported to Mr. McAdams her discovery on Friday, August 24, 2012 that Margaret Johnson had actually processed the claim for B.G. McAdams was aware that Respondent had policies that prohibited such things as allowing preferential treatment of relatives and friends in participation with agency-administered programs, servicing the case of a friend or relative and conflicts of interest. He was concerned in this case that a conflict of interest may have occurred.

32. After Petitioner advised Mr. McAdams that Ms. France had completed a fact-finding report for Ms. Johnson's sister-in-law, Mr. McAdams interviewed the following five individuals to see whether there was probable cause to go forward with a complaint to Internal Audit: Audra Hines, Ann France, Margaret Johnson, James Byrd and Petitioner.

33. On September 6, 2012, Mr. McAdams referred a complaint to Internal Audit and requested an investigation into the conduct of two employees, Margaret Johnson and Ann France.

34. Respondent's office of Internal Audit (OIA) was organized to assist Respondent's management with assessing risk and helping to implement controls to mitigate risk. OIA also carefully examines or evaluates Respondent for fraud based on abuse of the unemployment insurance program. OIA also makes an internal security assessment. OIA carries out investigations to evaluate whether fraud has occurred or whether there were internal control weaknesses, or the circumvention of controls or the violation of policies or procedures or internal security.

35. OIA is headed by director, Lisa Outlaw, with a staff that includes two auditor investigators. OIA's investigations and reports have to comply with federal and state guidelines and ethical standards. Witnesses interviewed, as part of the investigations that OIA conducts are provided with "Fairness & Confidentiality" forms and "Internal Witness Statement" forms, advising them of their duties and what is expected of them. OIA conducts twenty to forty investigations per year, on the average.

36. Investigator, Donna Graham, was assigned to perform the OIA investigation of the complaint McAdams made. The investigation was performed in accordance with OIA's standard investigation process and witness statements were taken from individuals, including the following: Margaret Johnson, Ann France, James Byrd, Audra Lynn Hines, Darilyn Sharpe, David McAdams, Carolyn Macon and Petitioner.

37. In September 2012, Respondent's Office of Internal Audit issued a report following its investigation into the events surrounding the processing of the claim filed by B.G. (Respondent's Exhibit 19, Petitioner's Exhibit 4)

38. The conclusion of the report found that another internal security violation was discovered which was directly related to the allegations that precipitated the investigation. Specifically, it stated: "OIA found that [Petitioner] abused her management authority by providing Johnson with the Employer's NCUI 500AB information for this claim to assist Johnson in ensuring that no additional issues would be raised on her relative's claim. Thus, this unauthorized disclosure of the NCUI 500AB information to Johnson ensured that the . . . claim could be processed without further delay." (Respondent's Exhibit 19, Petitioner's Exhibit 4)

39. Antwon Keith read the OIA report and he reviewed it with Dempsey Benton, Assistant Secretary and David Clegg, Chief Operation Officer, who were members of Respondent's management at the time. Keith also shared the OIA report with Mr. McAdams. Following, the review, Petitioner was one of the individuals for whom discipline was considered. Keith had conversations with management and human resources regarding the matter.

40. Petitioner was given advance notice of a pre-disciplinary conference scheduled for her for October 30, 2012. David McAdams conducted the pre-disciplinary conference with Petitioner and Roger L. Allen, employee relations specialist. The pre-disciplinary conference continued onto a second day. The second day of the pre-disciplinary conference was on November 5, 2012.

41. On November 30, 2012, Antwon Keith informed Petitioner, in writing, that she was being demoted from her position. (Respondent's Exhibit 7)

42. Prior to issuing the disciplinary action, Antwon Keith spoke to Margaret Johnson and Ann France, but not Petitioner. In addition, Mr. Keith did not attend Petitioner's pre-disciplinary conference.

43. David McAdams, Petitioner's direct supervisor and the individual conducting the pre-disciplinary conference, believed that Petitioner's conduct warranted no disciplinary action. Based on his interviews and questions to Petitioner, Mr. McAdams concluded that Petitioner did not know when she gave the information to Ms. Johnson that it was a claim involving Johnson's sister-in-law. He found that the interaction between Johnson and Knight was not unusual and was a normal interaction between a claims analyst and any supervisor in the Remote Service Center.

44. The demotion letter, which was signed by M. Antwon Keith, made reference to Respondent's Office of Internal Audit's report as justification for Petitioner's demotion. The demotion letter stated that Petitioner "violated standard agency policies and procedures by circumventing the normal business process for no good cause, in the handling of a claimant, who was a relative of Margaret Johnson..." (Respondent's Exhibit 7) The November 30, 2012 demotion letter further stated "OIA found that you abused your management authority by providing Ms. Johnson with the Employer's NCUI 500AB information for this claim to assist her in ensuring that no additional issues would be raised on her relative's claim. Thus this

unauthorized disclosure of the NCUI 500AB information to Ms. Johnson ensured that the claimant's claim could be processed without further delay." (Id)

45. During the contested case hearing, Mr. Keith testified that he made the decision to demote Petitioner for two reasons: she allegedly did not timely inform management of Ms. Johnson's request for information related to B.G.'s claim; and, she allegedly gave the information to Ms. Johnson with knowledge that the information was for B.G., a relative of Ms. Johnson.

46. Chapter 2 of the Respondent's Internal Security Handbook sets forth Respondent's policy for reporting waste, fraud and abuse That policy provides that employees who receive information related to waste, fraud and abuse must report such information no later than three days from the receipt of the information.

47. Petitioner reported Ms Johnson's actions to Darian McKoy, the assistant director for the RCS, on August 24, 2012, three days after Ms. Johnson informed Petitioner that the information that she requested was for her sister-in-law.

48. Margaret Johnson was not called as a witness and did not testify at this hearing.

49. Petitioner's pay was not reduced as a result of the demotion; however, her pay grade was reduced from a 69 to a 67. Petitioner believes that the demotion affects her career and her potential for other positions. Further, if Petitioner is promoted, it will be from a lower pay grade which could affect her earnings. Petitioner has applied for promotional opportunities since her demotion, but has not been offered any positions that would constitute a promotion since the time that she was demoted

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.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and received proper notice of the hearing in this matter. The Office of Administrative Hearings has personal and subject matter jurisdiction to hear and decide this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. At the time of her demotion, Petitioner was a career state employee and was entitled to the protections of the North Carolina State Personnel Act and the administrative regulations promulgated pursuant to the Act.

3. North Carolina General Statute (hereinafter NCGS) § 126-35(a), in pertinent part, provides:

> No career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employees appeal rights.

4. Pursuant to NCGS § 126-35(d) in effect at the time of this action, Respondent has the burden of showing that Petitioner was demoted for just cause.

5. 25 N.C.A.C. 01J.0604(b) provides:

> There are two bases for the discipline or dismissal of employees under the statutory standard for "just cause" as set out in G.S. 126-35. These two bases are:
> (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.
> (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.

6. 25 N.C.A.C. 01J.0614(8) provides that "unacceptable personal conduct" means:

> (a) conduct for which no reasonable person should expect to receive prior warning;
> (b) job-related conduct which constitutes a violation of state or federal law;
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
> (d) the willful violation of known or written work rules;
> (e) conduct unbecoming a state employee that is detrimental to state service;
> (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
> (g) absence from work after all authorized leave credits and benefits have been exhausted; or
> (h) falsification of a state application or in other employment documentation.

7. 25 N.C.A.C. 01J.0613 (3)(d) provides that an employee who is demoted shall receive written notice of the specific acts or omissions that are the reasons for the demotion.

8. On November 30, 2012, Respondent hand delivered a written notice of demotion to Petitioner. The demotion letter, which was signed by M. Antwon Keith, made reference to

Respondent's Office of Internal Audit's report as justification for Petitioner's demotion. The demotion letter stated that Petitioner "violated standard agency policies and procedures by circumventing the normal business process for no good cause, in the handling of a claimant, who was a relative of Margaret Johnson…"

9. The substantial evidence of record shows B.G.'s claim was adjudicated in a timely fashion. Furthermore, Respondent does not dispute that Petitioner's unit made the correct decision as to B.G.'s eligibility for unemployment benefits.

10. The November 30, 2012 demotion letter further stated "OIA found that you abused your management authority by providing Ms. Johnson with the Employer's NCUI 500AB information for this claim to assist her in ensuring that no additional issues would be raised on her relative's claim. Thus this unauthorized disclosure of the NCUI 500AB information to Ms. Johnson ensured that the claimant's claim could be processed without further delay."

11. During the contested case hearing in this matter, Antwon Keith, admitted that, contrary to his assertions in the demotion letter, that the actions of Petitioner and her unit actually ensured that an additional issue was raised on B.G.'s claim. Mr. Keith also admitted that nothing that Petitioner did, or did not do, resulted in B.G. receiving benefits to which she was not entitled. In fact, the actions taken by Petitioner and her staff stopped the payment of benefits to B.G.

12. During the contested case hearing, Mr. Keith further testified that he made the decision to demote Petitioner for two reasons: she allegedly did not timely inform management of Ms. Johnson's request for information related to B.G.'s claim; and, she allegedly gave the information to Ms. Johnson with knowledge that the information was for B.G., a relative of Ms. Johnson.

13. Chapter 2 of the Respondent's Internal Security Handbook sets forth Respondent's policy for reporting waste, fraud and abuse. That policy provides that employees who receive information related to waste, fraud and abuse must report such information no later than three days from the receipt of the information. The record shows that, on August 21, 2012, Petitioner learned that Margaret Johnson had requested claims information for a relative. The record further shows that, at a minimum, Petitioner reported Ms Johnson's actions to Darian McKoy, the assistant director for the RCS, on August 24, 2012, three days after Ms. Johnson informed Petitioner that the information that she requested was for her sister-in-law. Mr. Keith testified that it was appropriate for Petitioner to go to Mr. McKoy when David McAdams, the director of the RCS, was absent. The Undersigned concludes that Petitioner reported Ms. Johnson's actions within the three day period set forth in Respondent's policy.

14. The substantial evidence of record shows that Petitioner did not know that B.G. was Margaret Johnson's relative at the time she provided the claims information to Ms. Johnson.

15. The North Carolina Supreme Court addressed the question of whether violation of a state law justified an employee's demotion in *N.C. Department of Environment and Natural Resources v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). The Supreme Court noted that the fundamental question is whether the disciplinary action taken was "just." *Carroll*, 599 S.E.2d at 900. The Supreme Court further" stated that "just cause" is a flexible concept, embodying notions of equity and fairness, which can only be determined upon an examination of the facts and circumstances of each individual case. *Id.* "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. Carroll, 358 N.C. at 665, 599 S.E.2d at 898.

16. In *Warren v. North Carolina Department of Crime Control and Public Safety*, COA11-884, ___ N.C. App. ___, 726 S.E.2d 920, 925, disc. review denied, 366 N.C. 408, 735 S.E.2d 175 (2012), the North Carolina Court of Appeals interpreted *Carroll* to mean that not every instance of unacceptable personal conduct as defined by the North Carolina Administrative Code provides just cause for discipline. The *Warren* Court further held that after the court determines whether the individual's conduct constitutes unacceptable personal conduct, then the court must "balance the equities" to determine if the unacceptable personal conduct constituted just cause for dismissal. *Warren* at 726 S.E.2d 925.

17. The substantial evidence of record fails to show that Petitioner committed the conduct alleged in the November 30, 2012 demotion letter. With respect to the additional reasons for demotion cited by Mr. Keith during his testimony at the contested case hearing, the greater weight of the evidence of record shows that Petitioner reported Ms. Johnson's action within three days as set forth in Respondent's policy regarding fraud, waste and abuse. The Undersigned also finds and concludes that Petitioner did not know of Ms. Johnson's relationship with the claimant at the time Petitioner provided such information to Ms. Johnson.

18. Respondent has failed to carry its burden of proof that just cause existed to demote Petitioner. Petitioner's actions did not constitute unacceptable personal conduct. The Undersigned notes, however, that even if Petitioner's actions were to be considered to constitute unacceptable personal conduct, Petitioner's actions did not constitute just cause for demotion when the equities in this case are balanced. Those include the following: 1) Prior to the incident in question, Petitioner was considered to be a very good employee and supervisor; 2) David McAdams, the RCS director and Petitioner's supervisor, testified that it was common practice for Petitioner to provide information to Margaret Johnson; 3) Mr. McAdams did not believe that Petitioner's actions warranted any disciplinary action; 4) Petitioner did not knowingly assist Margaret Johnson in servicing B.G.'s claim; 5) Petitioner and the unit which she supervised issued a timely and appropriate ruling as to BG's eligibility for benefits; and 6) Petitioner complied with Respondent's policy on waste, fraud and abuse when she reported Ms. Johnson's actions.

19. Petitioner has filed a Petition for Attorney Fees, Affidavits from Charles Monteith, Shelli Rice, Reagan Weaver, and Jeremy Sayre as well as Petitioner's Retainer

Agreement, Petitioner's Fee Statement, and invoices for court reporters' costs. Respondent filed a Response in Opposition to Petitioner's Petition for Attorney fees, citing among several oppositions, an error in the computation of hours. Petitioner filed a Reply to Respondent's Response and Amended Petition for Attorneys' Fees and Costs, acknowledging and apologizing for the inadvertent mathematical error in the computation of hours. The Undersigned has studied and considered all matters submitted by both parties.

20. The determination of a reasonable attorney's fee is a matter of discretion with the Court. *See Robinson v. Equifax Info. Services*, 560 F.3d 235, 243 (4th Cir. 2009). In determining what is reasonable, the Fourth Circuit has instructed that a Court should be guided by the following factors, known as the "Johnson factors": (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation;(7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Grissom v. The Mills Corp.*, 549 F.3d 313, 321 (4th Cir. 2008) (applying twelve-factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974)) (citation omitted).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

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.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that Respondent failed to carry its burden of proof by a greater weight of the evidence that there was just cause to demote Petitioner from her position as Employment Consultant Supervisor in Respondent's Remote Service Center Adjudication Unit. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. The weight of Respondent's evidence does not overbear in that degree required by law the weight of evidence of Petitioner to the ultimate issue, and as such Respondent's demotion of Petitioner was in error. Based on the conclusions of law

and the facts in this case, the Undersigned determines that the Respondent's decision to demote Petitioner from her position as a supervisor should and must be reversed.

The Undersigned further holds that Petitioner Mary Chapman Knight's Amended Petition for Attorney Fees and Costs is granted, and Petitioner shall have and recover of the Respondent the sum of seventeen thousand and eight dollars and eighty-one cents ($17,008.81) in attorneys' fees and costs.

NOTICE

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

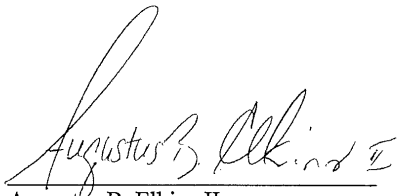
Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition 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 30th day of July, 2014.



Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA — IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CUMBERLAND COUNTY — FILE NO: 13-OSP-18480

PATRICK E. HOLMES, Petitioner,	)	
v.	)	FINAL DECISION
FAYETTEVILLE STATE UNIVERSITY, Respondent.	)	

This contested case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on March 25-26, 2014 in Cumberland County, North Carolina.

APPEARANCES:

For Petitioner:
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ISSUES:

Petitioner submits the following as issues to be resolved in this action:

I. Whether Respondent showed by a preponderance of the evidence that it had just cause to terminate Petitioner's employment for having engaged in unacceptable personal conduct under N.C. Gen. Stat. § 126-35 and 25 N.C.A.C. 1J.0604, *et seq.*

II. In the event that just cause for termination is not found, what is the appropriate remedy for Petitioner as provided in law under N.C. Gen. Stat., Ch. 126 and N.C. Admin. Code, Ch. 25, *et seq.*

EXHIBITS:

Respondent offered the following exhibits, which were entered into evidence:

Exhibit	Description	Date
1	Notice of Pre-Disciplinary Conference	5/23/13
2	Recommendation for Termination	5/29/13
3	Grievance Decision	6/30/13
4	Communications Supervisor Position	4/8/13
5	Performance Management Work Plan for SPA Employee	10/30/12
6	Oath-Law Enforcement Officer	4/2/12
7	FSU Police Department- Conduct Policy	7/20/93
12	Confidentiality Statement and Code of Ethics	

Petitioner offered the following exhibits, which were entered into evidence:

Exhibit	Description	Date
1	Affidavit of Separation of Law Enforcement Officer ("F-5b")	6/20/13
2	Webster's Definition of "Rumor" (by official notice)	10th Ed.

WITNESSES:

Respondent called the following witnesses:

1. Chief Robert Hassell
2. Officer Vernon Singletary
3. Sergeant Luis Cruz
4. Communicator Thelma Catchings
5. Benjamin Simmons

Petitioner called the following witnesses:

1. Mary Wesley
2. Sergeant Johnny Jarmon
3. Lieutenant Michael Murphy
4. Major Raymond W. Isley (SHP ret.)
5. Patrick Holmes

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including but not limited to the demeanor of the witness; any interests, biases, and/or prejudices that any witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness has testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony and admitted evidence, or the lack thereof, the undersigned Administrative Law Judge makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

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

2. Respondent Fayetteville State University ("FSU" or "the University") is subject to Chapter 126 and was Petitioner's employer.

3. Petitioner Patrick Holmes was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.

4. From September 2003 to May 29, 2013, Petitioner Patrick E. Holmes ("Petitioner") was continuously employed by the State of North Carolina and assigned to permanent positions within state government.

5. From September 2003 to around April 1, 2012, Petitioner was employed as a trooper by the North Carolina State Highway Patrol. Petitioner served with distinction while employed by the North Carolina State Highway Patrol.

6. From around April 1, 2012 to May 29, 2013, Petitioner was employed with Respondent as Public Safety Supervisor – Patrol Lieutenant with the University's Department of Police and Public Safety for just over one year until he was dismissed from his position due to unacceptable personal conduct. **(Resp. Exs. 2, 5)**

7. At all times during the relevant time period, Petitioner reported directly to Robert Hassell, Chief and Associate Vice Chancellor of Police & Public Safety, and was a member of the Chief's command staff. **(Resp. Ex. 5)**

8. As a Lieutenant and a member of the command staff, Petitioner was responsible for supervising other employees within the Department. Supervisors in the Department of Police & Public Safety were held to high standards and were expected to conduct themselves in accordance with the highest ethical standards.

9. As a Lieutenant and Patrol Commander, Petitioner was "expected to ensure that all department personnel enforce all applicable local, University, state, and federal laws and statutes." (**Resp. Ex. 5**) Petitioner was also responsible for setting "an example for all

subordinates and University Police personnel in carrying out duties, maintaining ethical standards and performing enforcement and investigative duties." (Id.)

10. The University Police Department had a set of Rules and Regulations that governed the conduct of their law enforcement officers. These Rules were intended "[t]o establish the parameters of conduct for which one is directly answerable to the Department," and "[t]o establish the specific rules of conduct to be followed by every employee of the Department." (**Resp. Ex. 7**) The Rules contained a Code of Ethics and outlined specific conduct expected of officers regarding their truthfulness.

11. On or about April 8, 2013, Chief Robert Hassell was informed that an employee within his department, Ms. LaDonna Glover, intended to file an employee grievance with the University's Human Resources regarding the interviewing and hiring process used by the University to fill the Communications Supervisor Position. (**Resp. Ex. 4**) Ms. Glover alleged that the "hiring board was unethical and bias" in part because the Petitioner had served on the board and was having an inappropriate relationship with Ms. Mary Wesley, a candidate who had been interviewed by the board and recommended for the same position sought by Ms. Glover. (**Resp. Ex. 4**)

12. Ms. Glover did not raise any issue with the composition of the interviewing committee until after she was made aware that Ms. Wesley was being recommended for the position. Approximately two weeks had passed since the interviews had been conducted.

13. The University has a Code of Ethics that governs the conduct of individuals who serve on hiring committees for the University. (**Resp. Ex. 12**) Pursuant to the University's Code of Ethics, individuals who serve on hiring committees for the University must promptly disclose to the Chairperson of the hiring committee "any appearance of a relationship between [the individual] and a prospect or candidate." (Id.)

14. The University's Code of Ethics for those serving on the search committee is not a properly promulgated rule, nor formally adopted policy. It is a written document which each member of the search committee signs agreeing to the terms therein.

15. There is no evidence that any relationship existed between Petitioner and Ms. Wesley. It is perfectly reasonable for Petitioner to have no perception that there was an "appearance of a relationship."

16. Chief Hassell, along with Mr. James Mercer, Director of Emergency Management at the University and Ms. Glover's immediate supervisor, met with Ms. Glover to discuss her grievance. During this meeting Ms. Glover provided Chief Hassell with a list of names of employees who could verify and confirm her allegations.

17. Prior to Ms. Glover's complaint, Chief Hassell had not personally heard of any rumors concerning Petitioner and Ms. Wesley or anyone else.

18. Mr. Mercer was also on the interviewing committee with Petitioner and one other. Mr. Mercer acted in a lead capacity for the interviews.

19. As a result of Ms. Glover filing a grievance with Human Resources, Chief Hassell began investigating her claims; notably, whether Petitioner was involved in a relationship with Ms. Wesley. The University does not have a policy against relationships between employees; however, if Petition was involved with Ms. Wesley it would not have been appropriate for him to serve on the hiring committee for the telecommunications position. Even the appearance of a relationship between the two would have created a conflict of interest.

20. There is no evidence to support a contention that Petitioner and Amy Wesley ever had any sexual contact or intimate relationship. It is a strange paradox that the University policy makes being untruthful about knowledge of the existence of a rumor of a relationship an offense worthy of termination, but has no sanction if in fact there is an extramarital relationship.

21. The University policy, Policy Number 203 entitled "Conduct," is designed to cut down on rumor-mongering among the officers of the department that might besmirch or demean an officer or the department in general. The policy states that if the facts expressed in the "rumor" are untruthful, then the person spreading the rumor may be punished. (**Resp. Ex. 7**)

22. At no time during Chief Hassell's internal investigation were Glover's allegations against Petitioner and Wesley ever substantiated. After the internal investigation, Chief Hassell admitted that he found no merit to Glover's employment complaint against Petitioner. (P-1)

23. Chief Hassell interviewed several employees including Police Officer Vernon Singletary, Sergeant Luis Cruz, Property Officer Mitchell McKellar, and Communicator Thelma Catchings. Chief Hassell also interviewed Petitioner by telephone on several different occasions. (**Resp. Ex. 1**)

24. On or about April 18, 2013, Chief Hassell called Petitioner on the telephone to ask him questions concerning Glover's grievance. Chief Hassell asked Petitioner whether he was aware that Glover had filed an employee grievance for not having been selected for the head dispatcher position. Petitioner responded that he had heard that Glover filed an employee grievance.

25. Chief Hassell understood Petitioner's answer to have been that he was aware of rumors concerning a relationship between Petitioner and Ms. Wesley. There was an apparent misunderstanding between the two in the initial telephone conversation concerning the topic of the rumors.

26. Around April 23, 2013, in a second telephone call, Chief Hassell called Petitioner to again ask questions regarding Glover's grievance. There is no question that in this call Chief Hassell asked Petitioner whether he recalled hearing any "rumors" that Petitioner and Amy Wesley were having an intimate relationship. Petitioner responded to Chief Hassell that he was not aware of any rumors that he and Ms. Wesley were having an intimate relationship.

27. Chief Hassell interviewed Property Officer McKellar, who informed the Chief that he had confronted Petitioner about serving on the hiring committee because McKellar was under the impression Petitioner was involved in a relationship with one of the candidates.

28. The conversation between McKellar and Petitioner was during the middle of the interviews. McKellar commented that the interviews explained why he had seen Ms. Wesley around their area on that particular day. Petitioner denied any relationship existed in the conversation with McKellar.

29. Following his conversation with McKellar, Chief Hassell again asked Petitioner whether he had heard any rumors or allegations regarding him being in a relationship with Ms. Wesley. Again Petitioner said he had not heard any allegations or rumors. Chief Hassell then asked Petitioner specifically about the conversation he had with McKellar, and Petitioner acknowledged that the conversation had occurred.

30. McKellar did not testify in this contested case hearing.

31. Communicator Thelma Catchings testified that she had spoken to Petitioner several months prior to his dismissal regarding her perception that he was having a relationship with Ms. Wesley. She stated that she warned Petitioner of the possible ramifications of his behavior and said Petitioner became upset during the conversation. Catchings testified that it appeared to her that the two were having a relationship.

32. Following his interview of Catchings, Chief Hassell again asked Petitioner if he had heard any rumors or allegations regarding him being in a relationship with Ms. Wesley. Once again Petitioner denied having heard anything. When Chief Hassell provided details of the conversation with Catchings, Petitioner stated he did not recall such a conversation. However, when Chief Hassell reminded Petitioner of the identity of the individual with whom he had the conversation, i.e. Catchings, Petitioner remembered the conversation.

33. There is credible evidence that the conversation between Catchings and Petitioner was as much as a year before the investigation.

34. Petitioner testified at the hearing and denied being untruthful to Chief Hassell during the investigation. Petitioner testified that he did not initially recall the conversations with McKellar and Catchings, but did remember them after being prompted by the Chief. Petitioner stated that he did not pay any attention to the remarks made by McKellar and thought they had been made in jest. With regard to the conversation with Catchings, Petitioner said that it had occurred a while ago and he had forgotten about it until Chief Hassell had mentioned it. Petitioner continues to deny having a relationship with Ms. Wesley.

35. At the time he was part of the interviewing committee, the only person who had made a comment to him concerning any alleged improper relationship was Catchings and it had been quite some time before. The conversation with McKellar was while the interviews were being conducted. Petitioner did not know before hand who the interviewees were going to be.

36. Chief Hassell never interviewed Ms. Wesley ostensibly because the issue was not about the truth of the matter concerning any inappropriate relationship, but only about the existence of rumors.

37. This entire inquiry began because of the questioning of the Petitioner participating on the interview committee. The issue was raised only after Ms. Glover learned that she was not going to get the promotion.

38. It is important to understand in the context of this inquiry that Ms. Wesley was determined to be the superior candidate for the job by all three of those conducting the interviews. Petitioner did not give her the highest marks among the three; Mr. Mercer did. The evidence is that it "wasn't even close" between Ms. Wesley and the second place candidate, Ms. Glover. Even if Petitioner's grades had been discarded, Ms. Wesley should have been given the position.

39. Based on the evidence in this hearing, there were irregularities in the hiring for the position at issue, but not by Petitioner. Ms. Glover was ultimately given the position. From the evidence presented the only reason Glover was found to be superior was because she was given a "veteran's preference." Based on the evidence in this hearing, she was NOT entitled to the veteran's preference as set forth in N. C. Gen. Stat. § 126-80 – 83, § 128-15.

40. During his investigation, Chief Hassell also learned that Petitioner had made a sexually explicit remark in front of two subordinates while conducting a background phone interview in the office. (**Resp. Ex. 1**) Sergeant Luis Cruz and Officer Vernon Singletary both testified that they were working with Petitioner one evening when he asked the individual on the phone whether the person liked "taking it in the ass." Cruz and Singletary both later realized that Petitioner must have pressed the mute button on the phone prior to making the comment.

41. Both Cruz and Singletary initially laughed at the remark but were shocked by the comment and believed the comment to be inappropriate. Neither man reported the incident to anyone else.

42. When Chief Hassell initially asked Sgt. Cruz about the incident, Cruz did not remember. It was only after more discussion from the Chief that Cruz's memory was refreshed about the incident.

43. When asked about the incident by Chief Hassell, Petitioner was forthcoming and admitted to his role in the incident without any hesitation. Petitioner admitted that it was wrong and in poor judgment that such comment was made. Both Cruz and Singletary admitted that such incident was an aberration from the professionalism that Petitioner typically portrayed.

44. Chief Hassell also learned during his investigation of Ms. Glover's grievance that Petitioner had been driving around for nine (9) months with expired tags on his vehicle. Chief Hassell raised the issue of the expired tags with Petitioner and Petitioner renewed the tags shortly thereafter. Petitioner explained that his tags were expired for such a long time because his truck needed extensive brake work and he did not have the money to pay for the repair. Petitioner acknowledged that he fixed the brakes immediately after Chief Hassell mentioned the expired tags.

45. Chief Hassell acknowledged that for the expired registration standing alone, the appropriate punishment probably would have been only a "counseling." Chief Hassell also

acknowledged that the appropriate punishment for the inappropriate statement in front of his subordinates might have been counseling as well, but perhaps something more.

46. Chief Hassell was the ultimate decision maker in this disciplinary matter with Petitioner. He was also the only investigator into the allegations. There is no way to measure how, or if at all, his decision making may have been tainted by extraneous information he learned through his investigation. The two roles should have been separated and conducted by different individuals.

47. Throughout his almost ten years of state employment, Petitioner was never previously subjected to any disciplinary action or sanction by any of his employers.

48. On or about October 30, 2012, Respondent evaluated Petitioner's overall work performance as "very good." (R-5)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes. The parties are properly before the Office of Administrative Hearings.

2. There is no issue of proper procedure.

3. Respondent Fayetteville State University is subject to Chapter 126 of the North Carolina General Statutes and is the former employer for Petitioner.

4. A "career State employee" is defined as a state employee who is in a permanent position appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 24 preceding months. N.C. Gen. Stat. § 126-1.1

5. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.*

6. Pursuant to regulations promulgated by the Office of State Human Resources, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b). However, "the categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case." 25 N.C.A.C. 01J .0604(c). Furthermore, "[n]o disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly." *Id.*

7. An employee must receive at least two prior disciplinary actions before being dismissed for a current incident of unsatisfactory job performance. 25 N.C.A.C.01J .0605(b). However, an employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 01J 0608(a). One instance of unacceptable conduct constitutes just cause for dismissal. *Hilliard v. North Carolina Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

8. Unacceptable personal conduct, as defined by the Office of State Human Resources, includes insubordination, "conduct for which no reasonable person should expect to receive prior warning," and "conduct unbecoming a state employee that is detrimental to state service." 25 N.C.A.C. 01J .0614(8). Insubordination is defined as the "willful failure or refusal to carry out a reasonable order from an authorized supervisor." 25 N.C.A.C. 01J .0614(7) In the case of "conduct unbecoming a state employee that is detrimental to state service," the State employer is not required to make a showing of actual harm, "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Hilliard,* 173 N.C. App at 597, 620 S.E.2d at 17.

9. A career State employee may be dismissed only for just cause. N.C. Gen Stat. § 126-35(a).

10. Respondent has the burden of showing by a preponderance of the evidence that it had "just cause" to discharge Petitioner from employment. N.C. Gen. Stat. § 126-35(d); N.C. Gen. Stat. § 150B-29(a); *see* also *Teague v. N.C. Dep't. of Transportation,* 177 N.C. App. 215, 628 S.E.2d 395, *disc. rev. denied,* 360 N.C. 581 (2006).

11. 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 disciplinary action taken. *N.C. Dep't. of Env't & Natural Res. v. Carroll,* 358 N.C. 649, 599 S.E.2d 888 (2004).

12. The fundamental question in a case brought under N.C. Gen. Stat. § 126-35 is whether a disciplinary action taken was "just." Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations. "Just cause," like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, which can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not every violation of law gives rise to "just cause" for employee discipline. *N.C. Dep't. of Env't & Natural Res. v. Carroll,* 358 N.C. 649, 599 S.E.2d 888 (2004).

13. The "best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis." *Warren v. N.C. Dep't of Crime Control,* 726 S.E.2d 920, *disc. rev. denied,* 366 N.C. 408, 735 S.E.2d 175 (2012).

14. At no time was Petitioner ever dishonest with Chief Hassell during the course of his internal investigation concerning LaDonna Glover's accusations, which were ultimately determined to be without merit. Accordingly, Respondent failed to show that Petitioner engaged in any dishonesty in responding to Chief Hassell's questions.

15. When questioned about the "rumors", Petitioner initially denied, but in each instance when his memory was refreshed he readily admitted to the conversations with McKellar and Catchings. Sgt. Cruz needed the Chief to refresh his recollection as well concerning the inappropriate comments by Petitioner. Even the North Carolina Rules of Evidence acknowledge the need to occasionally refresh ones recollection and/or memory and

establishes a procedure for doing so in court.

16. When a person's memory or recollection is refreshed, it becomes a matter of his truthfulness or veracity. In this instance, Petitioner admitted readily to the conversations when his memory was refreshed. He did not continue to deny or challenge the veracity of those who had made the statements. Importantly, he had readily and without hesitation admitted to the other two assertions against him, the improper remark and the expired registration.

17. This case poses a rather odd set of circumstances. The Petitioner is being disciplined in part for a violation of the "rumors" policy of the University. The inquiry was whether or not he was aware of rumors of his infidelity. The University cared not if he was involved in an inappropriate relationship—that was not a violation of policy. The concern was that Petitioner was not truthful with the Chief in whether or not he was aware of rumors. The policy put an affirmative burden on the inquirer to determine the truthfulness of the rumors.

18. Interestingly, the very "rumor" policy that is being applied to Petitioner also applies to Ms. Glover. The basis for her assertions was not substantiated. Per the policy, the Chief had a duty to investigate Glover, but did not. Glover could have been disciplined but instead she was promoted!

19. Petitioner admitted that he engaged in poor judgment by making the sexually explicit comment before two male subordinates. The comments were entirely inappropriate in the workplace; however, it seems to have been an isolated incident. Such conduct by itself does not constitute just cause to dismiss.

20. Petitioner likewise admitted that he improperly maintained a personal vehicle with expired registration for approximately nine months because he needed extensive repairs before it could pass inspection and be registered. Once Chief Hassell pointed out the issue to Petitioner, Petitioner got his personal vehicle properly registered within a day or two. For someone with the extensive history in law enforcement that Petitioner has to allow his personal vehicle to knowingly have expired registration for a period of nine months is extremely disconcerting. While the failure to maintain current registration on a personal vehicle is improper as well as a violation of the law, such conduct by itself does not constitute just cause to dismiss.

21. Chief Hassell did not see that either of the offenses of expired registration and inappropriate remark as being grounds to terminate. He instead felt that it was the totality of all three allegations.

22. The *Warren* Court holds that "a commensurate discipline approach applies in North Carolina." The Court noted that this inquiry is appropriate despite the fact that the regulations may rather rigidly define just cause as unacceptable personal conduct.

23. The proper analytical approach is to first determine 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 all types of discipline. If the employee's act qualifies as a type of unacceptable

conduct, the tribunal proceeds to the third inquiry: 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." (Citing *Carroll* at 669, 599 S.E.2d at 900).

24. *Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol*, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012) *review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012)

25. Respondent failed to prove by a preponderance of the evidence that Petitioner had been untruthful in addressing with the Chief the issue of rumors between Petitioner and Ms. Wesley. There was no ethical violation in Petitioner's participation on the hiring selection committee.

26. Petitioner has admitted and it is therefore concluded that he made the inappropriate remarks in the presence of his subordinates and he drove his personal automobile for approximately nine months with expired registration. Thus the next step in the *Warren* analysis would be to determine what punishment would be just under the facts and circumstances of this particular contested case.

27. Respondent failed to prove by a preponderance of the evidence and thus has not met its burden that it had just cause to terminate Petitioner's employment for allegedly having engaged in unacceptable personal conduct under N.C. Gen. Stat. § 126-35 and 25 N.C.A.C. 1J.0608, *et seq.*

28. Based upon the facts and circumstances of this contested case the "just" remedy is to demote Petitioner by one rank and pay grade and for Petitioner to forfeit two week's pay.

29. By affidavit filed separately in this matter, Petitioner's counsel performed 70.90 hours of legal work in this contested case up to and including March 31, 2014. Petitioner's counsel billed Petitioner at the average rate of $201.13 per hour, which was a reduced hourly from Petitioner's standard hourly rate of $250.00 per hour. In all, Petitioner incurred attorney's fees in the amount of $14,260.00 in attorney's fees up to and including March 31, 2014. The undersigned ALJ finds the sum of $14,260.00 as a reasonable attorney fees for Respondent to be required to reimburse Petitioner for having incurred the same.

DECISION:

Based on the forgoing findings of fact and conclusions of law, Respondent terminated Petitioner's employment without just cause in violation of N.C. Gen. Stat. § 126-35. Accordingly, Respondent shall reinstate Petitioner to a position with Respondent that is one rank and pay grade below the rank and pay grade that petitioner was receiving at the time of his dismissal. Respondent shall also reimburse Petitioner for his back pay, benefits, and attorney's fees as provided under the provisions of N.C. Gen. Stat., Ch. 126 and N.C. Admin. Code, Ch. 25, *et seq.* Petitioner shall forfeit two week's pay as part of this discipline.

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.

This the 15th day of July, 2014.

Honorable Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF HOKE	**14 DHR 02853**

CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR VALLEY HEALTH SYSTEM and HOKE HEALTHCARE, LLC,

Petitioners,

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,

Respondent,

and

FIRSTHEALTH OF THE CAROLINAS, INC. d/b/a FIRSTHEALTH MOORE REGIONAL HOSPITAL,

Respondent-Intervenor.

FINAL DECISION
ORDER OF DISMISSAL

THIS CAUSE comes on before the undersigned Administrative Law Judge, Augustus B. Elkins II, on Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the "Agency") and Respondent-Intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital's ("FirstHealth") Joint Motion to Dismiss the above-captioned contested case, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. The Undersigned, having reviewed the pleadings, the Joint Motion and documents in support thereof, the written response from Petitioners Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System and Hoke Healthcare, LLC ("Hoke Healthcare") (collectively, "Cape Fear") and documents in support thereof, and all other matters of record, and having heard the arguments of counsel during the July 1, 2014 hearing on said Motion, hereby GRANTS the Joint Motion to

Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. The Undersigned also reviewed a separate Motion to Dismiss or in the Alternative, Motion for Summary Judgment Filed under Seal made by FirstHealth (the "Motion Filed under Seal") as well as related documents, the response from Cape Fear and related documents and heard arguments on the same. Since this Final Decision on the Joint Motion disposes of this contested case in its entirety, there is no need for the Undersigned to rule on FirstHealth's Motion Filed Under Seal.

FINDINGS

1. In 2012, FirstHealth received a certificate of need ("CON") to operate an eight-bed hospital with one operating room and an Emergency Department ("ED") in Hoke County, North Carolina ("FirstHealth Hoke"). *See* Petition for Contested Case Hearing ("Petition"), ¶¶ 7-8; 12. There are eight ED treatment rooms at FirstHealth Hoke. FirstHealth Hoke opened in October 2013 and is currently the only hospital in Hoke County.

2. Although Petitioner Hoke Healthcare has a CON to develop its own hospital in Hoke County, the Hoke Healthcare hospital is not yet open. *See, e.g.*, Petition, ¶ 19 (alleging that Hoke Healthcare is an "affected person" because it has provided written notice to the Agency of its "intention to provide similar services in the future to individuals residing within the service and geographic area served by FirstHealth Hoke.")

3. On February 11, 2014, FirstHealth submitted a "no review" request (the "No Review Request") to the Agency. *See* Exhibit 1 to Petition. In the No Review Request, FirstHealth explained that since the FirstHealth Hoke ED opened in October 2013, its daily ED visits in eight ED treatment rooms "have never been below 30 visits and have increased from a peak of 61 visits on October 31, 2013 to a peak of 91 visits on December 25, 2013." The No Review Request further stated:

> The Emergency Department visit volumes have maintained their levels in 2014; however, the Emergency Department has experienced an increase in patients 'leaving without being seen' because wait times can be long due to only operating eight treatment rooms and experiencing Emergency Department visit volumes nearly 4 times higher than originally projected.

Id.

4. In order to address the dramatic increase in ED visits and to decrease the number of ED patients "leaving without being seen" due to long wait times, FirstHealth requested that the Agency make a determination that FirstHealth could use its inpatient rooms as ED treatment rooms. FirstHealth did not propose to build anything or purchase anything. *Id.*

5. The No Review Request specifically stated that this action "will be temporary while FirstHealth considers other long-term actions to address the dramatic increase in

Emergency Department visits." *Id.* The proposal to use inpatient beds was only temporary; it was not a permanent solution.

6. On March 14, 2014, Cape Fear filed comments with the Agency which opposed FirstHealth's No Review Request. *See* Exhibit 2 to Petition.

7. On March 21, 2014, the Agency issued its Decision. The Decision states:

> Based on the CON law in effect on the date of this response to your request, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need.

See Exhibit 3 to Petition. The Decision specifically referenced the fact that this proposal by FirstHealth was temporary.

8. The Agency served Cape Fear with a copy of the Decision on April 10, 2014. *See* Exhibit 4 to Petition. On April 21, 2014, Cape Fear filed its Petition challenging the Decision.

9. Cape Fear's Petition alleged that the Agency allowed FirstHealth to "materially change" the scope of its FirstHealth Hoke Application and that the Request does not materially comply with the representations of its FirstHealth Hoke CON application. It further alleged that using inpatient rooms as temporary ED treatment rooms is a "new institutional health service" that requires FirstHealth to seek another CON. *See, e.g.,* Petition, ¶¶ 31(a)-(j).

10. In the Petition, Cape Fear discusses another CON dispute between Cape Fear and FirstHealth involving 28 acute care beds (the "28 Beds Case") that were determined to be needed in the Cumberland/Hoke Acute Care Bed Service Area pursuant to the 2012 State Medical Facilities Plan ("SMFP"). *See, e.g.*, Petition, ¶¶ 10-11, 14, 33-34. The 28 Beds Case is pending at the North Carolina Court of Appeals. *Id.*, ¶¶ 11; 14. The Petition alleges:

> Cape Fear is further substantially prejudiced by its inability to obtain the 28-bed CON when FirstHealth admittedly doesn't need even 8 acute care beds, much less 28 *additional* acute care beds. Cape Fear's 28-Bed Application was conforming with all statutory and regulatory criteria and, thus was approvable for the 28-bed CON.

Id., ¶ 33 (emphasis in original).

11. FirstHealth withdrew its Request in a letter dated May 6, 2014. *See* Exhibit 3 to Affidavit of Martha Frisone ("Frisone Aff."), attached as Exhibit 1 to the Joint Motion. The Undersigned notes that the Frisone Affidavit was considered only in connection with the N.C. R. Civ. P. 12(b)(1) motion.

12. The Agency withdrew its Decision on May 28, 2014. *See* Exhibit 4 to Frisone Aff.

APPLICABLE LEGAL PRINCIPLES and CONCLUSIONS

1. In a "no review" request, providers ask the Agency whether contemplated activity requires a CON. The CON Law does not require anyone to obtain a "no review" determination. A "no review" request is entirely voluntary. *See* Frisone Aff.

2. A decision on a "no review" request applies only to the requestor; it imposes no duties, obligations, fines or penalties on third parties, or otherwise impacts how third parties utilize their property. *See* Frisone Aff., ¶ 8.

3. Although the North Carolina Court of Appeals has described "no review" requests as exemptions from the CON Law, (*see Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 7, 647 S.E.2d 651, 655-56, *disc. rev. denied*, 361 N.C. 692, 654 S.E.2d 477 (2007)), the "no review" request in this particular case is not the same as an exemption.

4. Unlike exemptions, which are specifically listed in the CON Law, (*see* N.C. Gen. Stat. § 131E-184), "no review" requests are not listed in the statute. Exemptions cover specific activities that would otherwise be regulated by the CON Law, but for the General Assembly's decision to exempt them from the law. For example, in *Hospice at Greensboro*, the activity at issue was determined to be a new institutional health service that required a CON; the only way it would not require a CON was if it was exempted. 185 N.C. App. at 16, 647 S.E.2d at 661. For the reasons stated below, the activity at issue here is not a new institutional health service and therefore requires no exemption.

5. The "no review" request in this matter is akin to an advisory opinion. It applies only to the conduct set out in the requesting letter, and only contains the Agency's view on whether the proposal, based on the facts represented by the requestor, is regulated by the CON Law.

6. The "no review" decision in this case does not state that a proposal is "exempt" from CON review. *See, e.g.*, Exhibit 3 to Petition, and compare Exhibit 2 to Frisone Aff. (a March 11, 2014 exemption letter from the Agency exempting Catawba Valley Medical Center's replacement of a CT scanner, which specifically states the proposal is "exempt from certificate of need review in accordance with N.C.G.S. 131E-184(a)(7).").

7. The subject matter of a contested case is an Agency decision. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). The subject matter of this case is the Agency's March 21, 2014 Decision.

8. The North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-33(b)(3a), states that an ALJ may "[r]ule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure." The Administrative Code authorizes ALJs to "hear and rule on motions" and to "grant dismissal when the case or any part thereof has become moot or for other reasons." 26 N.C.A.C. 3.0105(1) and (6). *See also Cmty. Psychiatric Ctrs v. N.C. Dep't of*

Human Res., 103 N.C. App. 514, 515-16, 405 S.E.2d 769, 770 (1991) (motion to dismiss for lack of subject matter jurisdiction granted in CON case); *Gummels v. N.C. Dep't of Human Res.*, 97 N.C. App. 245, 252, 388 S.E.2d 223, 228, *disc. rev. denied*, 326 N.C. 596, 393 S.E.2d 877 (1990) and 98 N.C. App. 675, 678, 392 S.E.2d 113, 115 (1990) (same).

Rule 12(b)(1) Motion

9. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Thus, the case at bar is moot if [an intervening event] had the effect of leaving plaintiff with no available remedy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.,* 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (citation omitted).

10. In North Carolina, jurisdiction "depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n, Inc. v. Happ,* 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. rev. denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

11. "Because a moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim, mootness is properly raised through a motion under N.C. Gen. Stat. § 1A–1, Rule 12(b)(1)." *Yeager v. Yeager*, __ N.C. App. __, 746 S.E.2d 427 (2013)(citations omitted). In deciding a motion to dismiss under Rule 12(b)(1), the trial court "may consider and weigh matters outside the pleadings." *Emory v. Jackson Chapel First Missionary Baptist Church,* 165 N.C. App. 489, 491, 598 S.E.2d 667, 670 (2004) (citation omitted).

12. "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994); *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988); *N.C. Press Ass'n, Inc. v. Spangler*, 87 N.C. App. 169, 170-71, 360 S.E.2d 138, 139 (1987) (*citing In re Peoples*, 296 N.C. at 147-48, 250 S.E.2d at 912 ("The issue of mootness is not determined solely by examining facts in existence at the commencement of the action.")).

13. As our Supreme Court held:

> Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979).

14. Courts have not hesitated to dismiss CON cases on grounds of mootness. *See, e.g., Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.,* 195 N.C. App. 378, 379, 673 S.E.2d 137, 138 (2009); *Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs.,* 360 N.C. 156, 622 S.E.2d 621 (2005) (per curiam), *vacating* 169 N.C. App. 641, 611 S.E.2d 431 (2005) (dismissing CON challenge to a hospital that was built while the

case was on appeal). Therefore, the mootness doctrine applies even in cases involving those who claim "affected person" status under the CON Law.

15. None of the exceptions to the mootness doctrine applies to this contested case. Voluntary cessation of a challenged practice is inapplicable since the Agency did not voluntarily "cease" doing anything. The Agency did not engage in illegal activity that it later voluntarily ceased. The Agency was asked for its interpretation of the CON Law regarding FirstHealth's proposal, and it gave its interpretation. Following FirstHealth's withdrawal of the Request, the Agency withdrew its Decision. That Decision only applies to the facts described by FirstHealth in the Request, and has no broader application. *See* Frisone Aff., ¶ 8. The Undersigned cannot reverse a Decision that has been withdrawn. *See, e.g., Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assist.*, 214 N.C. App. 522, 527-28, 715 S.E.2d 285, 289 (2011) (CMS's approval of the General Assembly's repeal of a personal care services program under Medicaid rendered moot an appeal concerning the program; the relief plaintiff sought, reversal of changes made to the program, would have no practical effect).

16. The "capable of repetition, yet evading review" exception to the mootness doctrine is also inapplicable here. "'There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Boney Publishers, Inc. v. Burlington City Council,* 151 N.C. App. 651, 654, 566 S.E.2d 701, 703–04, *disc. rev. denied*, 356 N.C. 297, 571 S.E.2d 221 (2002) (quoting *Crumpler v. Thornburg,* 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. rev. denied*, 324 N.C. 543, 380 S.E.2d 770 (1989)).

17. The "challenged action" in this case is the issuance of the Decision. The Decision is now a nullity. In order for Cape Fear to be subject to the same action, FirstHealth would have to write the same or substantially the same letter again, and the Agency would have to issue the same decision again. There is no reasonable expectation that Cape Fear will be subject to the same action again. *See, e.g., Total Renal Care,* 195 N.C. App. at 389, 673 S.E.2d at 144-45 (2009) (rejecting provider's assertion in a CON case that the "capable of repetition yet evading review" exception applied to provider's challenge to an already-completed dialysis facility because there was no reasonable expectation that the provider would face the same action again).

18. Likewise, the public interest exception does not apply. Courts infrequently apply the public interest exception, and the Court of Appeals specifically declined to apply this exception in the *Total Renal Care* CON case, *supra*. *See also Beason v. N.C. Dep't of Secretary of State*, __ N.C. App. __, 741 S.E.2d 663, 667 (2013) (rejecting "public interest" exception in case involving imposition of enhanced civil fine where petitioner alleged that the case (1) presents a dispute between two state agencies; (2) presents an internal conflict of an agency; and (3) "presents a troubling failure of an agency to comply with the requirements of the APA and to recognize the agency's statutory limitations."), *cf. State v. Corkum*, __ N.C. App. __, 735 S.E.2d 420, 423 (2012) (public interest exception applied to case involving defendant's incarceration).

19. Cape Fear's challenge to the Decision and attempt to require FirstHealth to file another CON application for a hospital that already has a CON to offer ED and inpatient services

is not a matter of such general importance to mandate hearing this moot case. The public's interest is in timely, readily-accessible emergency services.

20. Furthermore, there is no authority or support for the proposition that the Agency was required to "disavow" its withdrawn Decision or else the withdrawn Decision could still be relied upon in the future by FirstHealth or some other person. Despite the Agency's withdrawal of its Decision, the Agency did not nor could it relinquish its statutory duties to enforce the CON Law. *See* N.C. Gen. Stat. §§ 131E-189-190.

21. The Agency has withdrawn the Decision. Petitioners' Prayer for Relief asks the ALJ to reverse the Decision. *See* Prayer for Relief, ¶ 4. The Undersigned is without power or authority to reverse a Decision that has been withdrawn. As such, the case is moot and the Office of Administrative Hearings lacks subject matter jurisdiction over the claim. *See, e.g.*, *Dale v. Alcurt Carrboro, LLC*, No. COA 13-1095, 2014 WL 1384374, at *3 (N.C. App. April 1, 2014) (unpublished) (dismissing plaintiff's suit challenging a proposed condominium assessment as moot because the proposed assessment was withdrawn).

Rule 12(b)(6) Motion

22. Cape Fear also fails to state a claim upon which relief can be granted. "A complaint may be dismissed pursuant to [N.C. Gen.Stat. § 1A–1,] Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.,* 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

23. In its Petition, Cape Fear makes the legal conclusion that FirstHealth's Request proposed a "new institutional health service," *see* Petition, ¶ 32, and also asserts violations of N.C. Gen. Stat. §§ 131E-181(a) and (b) and 131E-176(16)e. *See* Petition, ¶¶ 31(a)-(j). These are legal conclusions. While the Undersigned treats factual allegations in a complaint as true when reviewing a dismissal under Rule 12(b)(6), *Fussell v. N.C. Farm Bureau Mut. Ins. Co., Inc.,* 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010), legal conclusions are not entitled to a presumption of truth. *Miller v. Rose,* 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000).

24. The CON Law regulates "new institutional health services." The CON Law states in relevant part that "[n]o person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department. ..." N.C. Gen. Stat. § 131E-178(a). The term "new institutional health services" is specifically defined in N.C. Gen. Stat. § 131E-176(16)a.-v. Nothing in the proposal set forth in FirstHealth's No Review Request meets the definition of a "new institutional health service."

25. The CON Law is plain and unambiguous concerning what it regulates. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess,* 326 N.C. at 209, 388 S.E.2d at 136–37 (1990) (citations omitted).

26. As noted *supra*, FirstHealth received a CON in April 2012 to develop its hospital in Hoke County with eight inpatient beds, one operating room and eight ED treatment rooms.

FirstHealth opened this hospital in October 2013. *See* Petition, ¶¶ 8, 12. In its No Review Request, FirstHealth was not proposing to add any new services, beds, operating rooms or equipment or spend additional funds. Instead, FirstHealth was proposing to use, on a temporary basis, its existing inpatient beds as ED treatment beds to meet growing demand for ED services. *See* Exhibit 1 to Petition.

27. ED services are not specifically regulated by the CON Law. *See, e.g.,* list of "new institutional health services" in N.C. Gen. Stat. § 131E-176(16)a.-v. ED services are regulated by the CON Law if a provider proposes to spend more than $2 million to develop such services. See, *e.g.*, N.C. Gen. Stat. § 131E-176(16)b., which regulates the obligation by any person of a capital expenditure exceeding $2 million to develop or expand a health service or a health service facility, or which relates to the provision of a health service.

28. FirstHealth's No Review Request did not seek to spend any money to use existing inpatient beds as ED treatment beds, and Cape Fear does not allege that it did. *See* Petition and Exhibit 1 to Petition. The No Review Request, which sought to use, on a temporary basis, existing inpatient beds as ED treatment beds to provide supplemental coverage for the existing ED, is not a "new institutional health service" and is therefore not regulated by the CON Law.

29. As a state administrative agency, the Agency "'is an inanimate, artificial creature of statute. Its form, shape, and authority are defined by the Act by which it was created. It is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism.'" *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 318-19, 735 S.E.2d 300, 303 (2012) (*quoting Schloss v. State Highway & Pub. Works Comm'n,* 230 N.C. 489, 492, 53 S.E.2d 517, 519 (1949)).

30. The Agency "'possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority.'" *Id.* (*quoting Lee v. Gore,* 365 N.C. 227, 230, 717 S.E.2d 356, 359 (2011)). The Agency cannot regulate activities that are not governed by the CON Law. No one, other than the Legislature, has the authority to add language to the CON Law to regulate activities that are not regulated. *Zaldana v. Smith,* __ N.C. App. ___, 749 S.E.2d 461, 463 (2013) ("We have no power to add to or subtract from the language of the statute." (internal quotations and citation omitted)). Only the legislature can change a statute. *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950).

31. Using existing inpatient beds to address ED overflow issues on a temporary basis is not among the activities the CON Law regulates. In accordance with the CON Laws, FirstHealth did not propose a "new institutional health service," and as such, Petitioners' have failed to state a claim.

32. Included in the definitions of "new institutional health services," N.C. Gen. Stat. § 131E-176(16)e., is "a change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or

portion thereof, that was constructed or developed in the project." Cape Fear alleged in ¶ 31(j) of the Petition that "[t]he Agency improperly allowed FirstHealth to establish a new institutional health service, changing the scope of its project within a year of development, without CON review." This allegation also fails to state a claim.

33. FirstHealth's No Review Request did not implicate the part of N.C. Gen. Stat. § 131E-176(16)e. that deals with spending more than 15% of the approved capital expenditure amount because FirstHealth did not propose to spend any money.

34. The only issue under N.C. Gen. Stat. § 131E-176(16)e. is whether FirstHealth was adding a "health service" to be located at FirstHealth Hoke. "Health service" is defined in the CON Law to mean "an organized, interrelated medical, diagnostic, therapeutic, and/or rehabilitative activity that is integral to the prevention of disease or the clinical management of a sick, injured, or disabled person. 'Health service' does not include administrative and other activities that are not integral to clinical management." N.C. Gen. Stat. § 131E-176(9a).

35. As the No Review Request makes clear, FirstHealth did not propose to add a "health service" to FirstHealth Hoke. *See* Exhibit 1 to Petition. FirstHealth Hoke already offers both ED services and inpatient beds. *Id.*; *see also* Petition, ¶ 8. ED services are only regulated by the CON Law if a provider proposes to spend more than $2 million to develop such services, which FirstHealth's temporary solution to an emergency room problem did not seek to do.

36. Cape Fear alleges in ¶¶ 31(a)-(i) of its Petition that FirstHealth's No Review Request violated N.C. Gen. Stat. § 131E-181(a), which states that "[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferred or assigned except as provided in G.S. § 131E-189(c)."

37. Cape Fear made no allegation of any changes to the physical location of FirstHealth Hoke or the person named in the FirstHealth Hoke Application. Likewise, Cape Fear failed to allege that the CON for FirstHealth Hoke has been transferred or assigned. Thus, the only issue is whether the scope of FirstHealth Hoke has materially changed.

38. The scope of FirstHealth Hoke has not changed. There are still inpatient beds, inpatient services, ED services and ED treatment rooms at FirstHealth Hoke. *See* Petition, ¶¶ 8, 12 and Exhibit 1 thereto. The No Review Request only sought the Agency's opinion that FirstHealth could use, on a temporary basis, its existing inpatient beds as ED treatment beds, while "FirstHealth considers other long-term actions to address the dramatic increase in Emergency Department visits." *See* Exhibit 1 to Petition. FirstHealth's use of inpatient beds on a temporary basis for ED overflow was not a change in its project under either N.C. Gen. Stat. § 131E-176(16)e. or N.C. Gen. Stat. § 131E-181(a). Accordingly, Petitioners' have failed to state a claim.

39. FirstHealth's No Review Request materially complies with the CON for FirstHealth Hoke. Inpatient and ED services were both permitted by the FirstHealth Hoke CON. *See* Petition, ¶ 8. Both services are being offered; FirstHealth only asked to use unoccupied inpatient beds as ED treatment beds on a temporary basis. *See* Exhibit 1 to Petition. The No Review Request did not represent that FirstHealth was stopping inpatient services or "changing"

or "converting" inpatient beds to ED treatment beds. Rather, the Request states that FirstHealth would use the "available inpatient rooms as Emergency Department treatment rooms while the need to decrease the number of Emergency Department patients 'leaving without being seen' exists." *See* Exhibit 1 to Petition. Thus, the inpatient beds were proposed to be used "as is" to treat ED patients; the inpatient beds were not going to "change" or be "converted.

40. Moreover, the CON Law does not afford Cape Fear a private right of action under N.C. Gen. Stat. §§ 131E-181(a) or (b) to demand that the Agency require FirstHealth to file another CON application. Only the Agency, under N.C. Gen. Stat. §§ 131E-189(b) and 190(i), has the ability to challenge whether a provider has impermissibly changed the scope of its CON or is in material compliance with its CON. These provisions of the CON Law state:

> The Department may withdraw any certificate of need, if the holder of the certificate fails to develop the service in a manner consistent with the representations made in the application or with any condition or conditions the Department placed on the certificate of need.

N.C. Gen. Stat. § 131E-189(b).

> If the Department determines that the recipient of a certificate of need, or is successor, is operating a service which materially differs from the representations made in its application for that certificate of need, the Department may bring an action in Wake County Superior Court or the superior court of any county in which the certificate of need is to be utilized for injunctive relief, temporary or permanent, requiring the recipient, or its successor, to materially comply with the representations in its application. The Department may also bring an action in Wake County Superior Court or the superior court of any county in which the certificate of need is to be utilized to enforce the provisions of this subsection and G.S. 131E-181(b) and the rules adopted in accordance with this subsection and G.S. 131E-181(b).

N.C. Gen. Stat. § 131E-190(i).

41. The "Department" means the North Carolina Department of Health and Human Services. N.C. Gen. Stat. § 131E-176(6). Cape Fear is not the Department. Accordingly, the allegations under N.C. Gen. Stat. §§ 131E-181(a) and (b) (¶¶ 31(a)-(i) of the Petition) are dismissed as Cape Fear has no private right of action thereunder.

42. To the extent that Cape Fear seeks to re-litigate the 28 Beds Case and utilize that case as a basis for its allegations of Agency error and substantial prejudice in this case, such is not allowed. *See, e.g.,* Petition, ¶¶ 10-11; 14; 33-34. The Agency's decision on the 28 Beds Case was made in November 2012. Pursuant to N.C. Gen. Stat. § 131E-188(a), the appeal period for the 28 Beds Case expired in December 2012. The 28 Beds Case is now on appeal to the North Carolina Court of Appeals. *See* Petition, ¶ 11. By statute, the Agency cannot modify its decision on the 28 Beds Case. *See* N.C. Gen. Stat. §§ 131E-185(a1) & (c) (establishing a

maximum time limit of 150 days for the Agency to make a decision on a CON application). OAH lost jurisdiction over the 28 Beds Case immediately after the Final Decision was issued in September 2013.

43. For all of the above-stated reasons, the Petition fails to state a claim upon which relief can be granted. *See* N.C.R. Civ.P. 12(b)(6).

FINAL DECISION

THEREFORE, It is hereby **ORDERED, ADJUDGED AND DECREED** that Respondent and Respondent-Intervenor's Joint Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure is **GRANTED** and Cape Fear's Petition is dismissed in its entirety for lack of subject matter jurisdiction due to mootness and/or for failure to state a claim upon which relief can be granted.

NOTICE

Under the provisions of N.C. Gen. Stat. § 131E-188(b): "Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision shall be taken within 30 days of the receipt of the written notice of final decision, and notice of appeal shall be filed with the Office of Administrative Hearings and served on the Department and all other affected persons who were parties to the contested hearing."

In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 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.

IT IS SO ORDERED.

This the 21st day of August, 2014.

Augustus B. Elkins II
Administrative Law Judge