

NORTH CAROLINA REGISTER

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July 15, 2015

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

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215 North Dawson Street

(919) 715-2893

Raleigh, North Carolina 27603

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amy.bason@ncacc.org

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(919) 715-4000

215 North Dawson Street

Raleigh, North Carolina 27603

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Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee

545 Legislative Office Building

300 North Salisbury Street

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NORTH CAROLINA REGISTER
 Publication Schedule for January 2015 – December 2015

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

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.

**PUBLIC NOTICE
STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION**

The Division of Water Resources (DWR) 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 on the draft permits may result in changes to the final versions. All comments should reference the specific permitting actions listed below and the permit number. DWR intends to renew the following NPDES General Permits for the discharge of industrial wastewater to the surface waters of North Carolina.

NCG500000 – Non contact cooling water, cooling tower and boiler blowdown, condensate, exempt stormwater, cooling waters associated with hydroelectric operations, and similar wastewaters. Public comment period ends August 14, 2015.

NCG520000 – In stream sand mining wastewater, associated stormwater and similar wastewaters. Public comment period ends August 14, 2015.

The draft General Permits and Fact Sheets may be viewed at
<http://portal.ncdenr.org/web/wq/swp/ps/npdes/calendar>

Please direct comments or objections to:
Compliance & Expedited Permitting Unit
NC Division of Water Resources
1617 Mail Service Center
Raleigh, NC 27699-1612
Telephone Number: (919) 807-6377
john.hennessy@ncdenr.gov

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days. Statutory reference: G.S. 150B-21.2.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Health and Human Services/Secretary intends to repeal the rule cited as 10A NCAC 14D .0101.

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

Proposed Effective Date: November 1, 2015

Public Hearing:

Date: September 1, 2015

Time: 9:00 a.m.

Location: Dorothea Dix Campus, Brown Building, Room 104, 1201 Umstead Drive, Raleigh, NC 27603

Reason for Proposed Action: *The Department of Health and Human Services was directed to pilot an overnight respite program in facilities that offer adult day care by Senate Bill 512 in Session Law 2011-104 with a repeal date of June 1, 2015. Rules were developed in response to this act by the General Assembly with the establishment of a new Subchapter entitled "Overnight Respite in Certified Adult Day Care Programs." This rule sets the scope of the rules in the Subchapter and identifies the expiration date of the rules, which concurs with the repeal date of the Session Law. The General Assembly rewrote the repeal date of the Session Law 2011-104 by extending it to June 30, 2017 with Senate Bill 291 in Session Law 2015-52. This rule is not current and is unnecessary due to this change therefore is proposed to be repealed.*

Comments may be submitted to: Nadine Pfeiffer, 2701 Mail Service Center, Raleigh, NC 27699-2701, email DHSR.RulesCoordinator@dhhs.nc.gov

Comment period ends: September 14, 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 14 – DIRECTOR, DIVISION OF HEALTH SERVICE REGULATION

SUBCHAPTER 14D - OVERNIGHT RESPITE IN CERTIFIED ADULT DAY CARE PROGRAMS

SECTION .0100 – SCOPE AND DEFINITIONS

10A NCAC 14D .0101 SCOPE

~~This Subchapter sets forth rules for certified adult day care programs offering overnight respite services pursuant to S.L. 2011-104. These Rules expire June 1, 2015.~~

Authority S.L. 2011-104; S.L. 2015-52.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 39 – ON-SITE WASTEWATER CONTRACTORS AND INSPECTORS CERTIFICATION BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC On-Site Wastewater Contractors and Inspectors Certification Board intends to amend the rules cited as 21 NCAC 39 .0101, .0301, .0401, .0601, .0602, .0701, .0801, .1002, .1004, and .1006.

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

Proposed Effective Date: January 1, 2016

Public Hearing:

Date: July 30, 2015

Time: 10:00 a.m.

Location: Emerald's View Event Center, 1426 Peter Mabe Road, Danbury, NC 27016

Reason for Proposed Action:

21 NCAC 39 .0101 – This proposed change defines the meaning of "building being constructed" as referenced in NCGS 90-72(b)(3).

21 NCAC 39 .0301 – This proposed change clarifies certification fees for a Combination Contractor Grade Level and Inspector certification.

21 NCAC 39 .0401 – This proposed change clarifies exam content and passing requirements for certification levels.

21 NCAC 39 .0601 – This proposed change clarifies the name of the Combination Inspector and Contractor Grade Level regarding Professional Development hours required for this level.

21 NCAC 39 .0602 – This change requires the inclusion information related to Combination Contractor Grade Level and Inspector requests for continuing education approval.

21 NCAC 39 .0701 – This proposed change provides for suspension or revocation of a combination Contractor Grade Level and Inspector certification.

21 NCAC 39 .0801 – This proposed change sets out addition ethical requirements for contractors and inspectors.

21 NCAC 39 .1002 – This proposed change sets out practice requirements related to inspector forms and other requirements for inspectors.

21 NCAC 39 .1004 – This proposed change clarifies general inspection exclusions for contractors and inspectors.

21 NCAC 39 .1006 – This proposed change clarifies the components of a minimum wastewater system inspection.

Comments may be submitted to: Connie S. Stephens, P.O. Box 132, Lawsonville, NC 27022, phone (336) 202-3126

Comment period ends: September 14, 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

SECTION .0100 - DUTIES AND DEFINITIONS

21 NCAC 39 .0101 DEFINITIONS

As used in Article 5 of Chapter 90A of the General Statutes and the rules in this Chapter:

- "Ancillary" means an on-site wastewater system that is included in a primary construction project.
"Building being constructed" means primary construction of a site-built single family residence.
"College course" means a semester unit or quarter based unit of instruction given at a college or university, that is relevant to on-site wastewater contractor or inspector activities and is pre-approved by the board as set out in these Rules.
"Course/activity" means any course or activity with a clear purpose and objective that will maintain, improve or expand skills and knowledge relevant to the practice of on-site wastewater contractor or inspector activities and pre-approved by the board.
"Employee" means a person who receives an Internal Revenue Service W2 form as a record of compensation.
"Inspection" means an inspection as defined in G.S. 90A-71(4A).
"Personally supervise" means to direct and control all on-site wastewater contractor or inspector activities during the time those activities are being conducted.
"Professional development hour" or "PDH" means an hour of instruction or presentation and is the basic unit of credit for all courses or activities related to satisfying continuing education requirements.
"Repair" means repair construction activity or alteration to an existing on-site wastewater system that is necessary to comply with a Construction Authorization for a repair permit issued by the Local Health Department.
"Wastewater Treatment Facility" means a wastewater treatment facility as defined in G.S. 90A-71(8).

Authority G.S. 90A-71; 90A-72; 90A-74.

SECTION .0300 - ONSITE WASTEWATER CONTRACTOR OR INSPECTOR FEES

21 NCAC 39 .0301 SCHEDULE OF CERTIFICATION FEES

(a) Application fees are:

Grade Level	Initial Fee	Renewal Fee
I	\$150.00	\$75.00
II	\$200.00	\$75.00
III	\$250.00	\$75.00
IV	\$300.00	\$75.00
Inspector	\$200.00	\$75.00
Combination Level IV/Inspector Contractor Grade Level & Inspector	\$500.00 Sum of individual fees	\$125.00

- (b) Application fees shall not be pro-rated.
- (c) The fee for a contractor grade level upgrade is fifty dollars (\$50.00) per level.
- (d) The fee for re-instatement of a revoked or suspended certification is five hundred dollars (\$500.00).
- (e) The fee for certificate replacement or duplication is twenty-five dollars (\$25.00).
- (f) The fee for late renewal is twenty-five dollars (\$25.00). This fee is charged if the renewal request is received after December 31.
- (g) The fee for each returned check is twenty-five dollars (\$25.00).
- (h) All fees are non-refundable.

Authority G.S. 90A-72; 90A-74; 90A-75.

SECTION .0400 - CERTIFICATION BY EXAMINATION

21 NCAC 39 .0401 ON-SITE WASTEWATER CONTRACTOR OR INSPECTOR EXAMINATIONS

- (a) On-site wastewater contractor or inspector examinations shall be comprehensive examinations that are standardized statewide.
- (b) The exam questions shall be based on the certification levels.
- (c) Combination certification shall require taking and passing the individual component exams.
- ~~(b)(d)~~ A grade on the examination of 70 percent or more shall be passing. Results of the examination shall be reported as either passing or failing.

Authority G.S. 90A-72; 90A-74; 90A-77.

SECTION .0600 - CONTINUING EDUCATION REQUIREMENTS

21 NCAC 39 .0601 REQUIREMENTS

(a) Every certified on-site wastewater contractor or inspector shall obtain Professional Development Hours (PDH) units during the renewal period as described in the following Table:

Level	Annual PDH Units Required
I	(3)

II	(3)
III	(6)
IV	(6)
Inspector	(6)
Inspector/Grade IV Combo Combination Contractor Grade Level & Inspector	(6)

- (b) The certified on-site wastewater contractor shall select courses and activities that have been approved as set out in 21 NCAC 39 .0602.
- (c) Professional Development Hours (PDH) shall be accepted by the Board for approved courses pursuant to 21 NCAC 39 .0603. Hours for all other courses must be submitted by providers to the Board for approval. If not approved, no PDH shall be granted for the course.
- (d) The class provider or authorized representative of the class provider must certify that each class attendee was present for at least 85 percent of the class. Any attendee present for less time shall not receive credit for the class.

Authority G.S. 90A-72; 90A-74; 90A-77; 90A-78; 90A-79.

21 NCAC 39 .0602 APPROVAL OF CONTINUING EDUCATION COURSES

- (a) All continuing education courses must be approved by the Board before PDH can be granted.
- (b) All continuing education courses must be approved on an annual basis.
- (c) The Board shall approve courses that instruct on on-site wastewater contractor or inspector activities and the use of on-site wastewater contractor or inspector equipment, products, and materials. The Board must determine that courses and activities contain a clear purpose and objective and result in the maintenance, improvement, or expansion of skills and knowledge related to the practice of on-site wastewater contractor or inspector activities. Requests for approval of courses or activities shall include the following information:
 - (1) Course content;
 - (2) Course schedule;
 - (3) Level of instruction provided (Level 1, 2, 3, 4, Inspector, or ~~level 4/Inspector~~; Combination Contractor Grade Level & Inspector);
 - (4) Qualifications of instructors (including both education and experience); and
 - (5) Materials provided, field experiences, and other activities available in connection with the course(s).

Authority G.S. 90A-72; 90A-74; 90A-77; 90A-78; 90A-79.

SECTION .0700 - PROCEDURES FOR DISCIPLINARY ACTIONS

**21 NCAC 39 .0701 REVOCATION, OR
SUSPENSION OF CERTIFICATION**

(a) The Board may revoke or suspend the certification of an on-site wastewater contractor or inspector in accordance with the provisions of G.S. 90A-80, 90A-81 and Chapter 150B of the NC General Statutes. For holders of the Combination Contractor Grade Level & Inspector certifications, the Board may revoke or suspend either or both certifications.

(b) Certification may be relinquished by submission to the Board of the original certificate and a notarized statement of relinquishment.

(c) The Board may issue a written reprimand to an on-site wastewater contractor or inspector. The reprimand shall be delivered in accordance with the provisions of service in G.S. 150B-42. A copy of the letter shall be kept in the on-site wastewater contractor or inspector's file. The on-site wastewater contractor or inspector shall be given the opportunity to put a letter of rebuttal into the file. The letter must be received by the Board within 30 days of receipt of reprimand.

Authority G.S. 90A-72; 90A-74; 90A-80; 90A-81.

**SECTION .0800 – ONSITE WASTEWATER
CONTRACTOR OR INSPECTORS CODE OF ETHICS**

21 NCAC 39 .0801 CODE OF ETHICS

(a) Contractors and inspectors shall at all times recognize their primary obligation is to protect the public in the performance of their professional duties and shall conduct the practice of those duties in a manner that protects the public health, safety and welfare.

(b) Opinions expressed by contractors and inspectors in the discharge of their duties shall only be based on their education, experience, and honest convictions.

(c) Neither a contractor nor an inspector shall disclose any information about the results of an inspection without the approval of the client for whom the inspection was performed, or the client's designated representative, except as required by law.

(d) No contractor or inspector shall accept compensation or any other consideration from more than one interested party for the same service without the consent of all interested parties.

(e) No contractor or inspector shall accept or offer commissions or allowances, directly or indirectly, from or to other parties dealing with the client in connection with work for which the licensee is responsible.

(f) No contractor or inspector shall provide an appraisal nor express an opinion of the market value of the inspected property during an inspection or in the inspection report.

(g) Before the execution of a contract to perform an on-site wastewater system inspection, an inspector shall disclose to the client any interest the inspector has in a business that may affect the client. No licensee shall allow his or her interest in any business to affect the quality or results of the inspection work that the inspector may be called upon to perform.

(h) Before the execution of a contract to perform an on-site wastewater system installation, a contractor shall disclose to the client any interest a contractor has in a business that may affect the client. No licensee shall allow his or her interest in any

business to affect the quality or results of the installation work that the contractor may be called upon to perform.

(i) Contractors shall not knowingly or willfully install a non-permitted system.

(j) Contractors shall not knowingly or willfully install a system or any part of a system other than what is specified in the permit by the local health department.

(k) Contractors and inspectors shall not engage in false or misleading ~~advertising~~ advertising, documentation, and reporting or otherwise misrepresent any matters to the public.

(l) Contractors and inspectors shall discharge their duties in accordance with Article 5 of Chapter 90A of the North Carolina General Statutes and the rules of the Board.

(m) No inspector shall subcontract with another inspector for an on-site wastewater system inspection without the knowledge and signed consent of the client.

(n) The contractor of record shall be the responsible party for the on-site wastewater system installation or repair.

Authority G.S. 90A-72; 90A-74.

**SECTION .1000 - NC ON-SITE WASTEWATER
INSPECTOR STANDARDS OF PRACTICE**

21 NCAC 39 .1002 GENERAL REQUIREMENTS

Inspectors shall:

(1) Provide a written contract, signed by the client or client's representative, before the on-site wastewater system inspection is performed that:

(a) States that the on-site wastewater system inspection is in accordance with the Standards of Practice of the North Carolina On-site Wastewater Contractors and Inspectors Certification Board; and

(b) Describes what services shall be provided and their cost.

(2) Obtain written permission from the owner or owner's representative to perform the inspection and its various elements, such as digging to open the tank.

~~(2)(3)~~ Inspect readily openable and readily accessible installed systems and components listed in this ~~Section;~~ and Section.

~~(3)(4)~~ Submit a written report to the client or client representative within 10 business days of the inspection that:

(a) Describes those systems and components required to be described in Rules .1005 through .1006 of this Section;

(b) States which systems and components designated for inspection in this Section have been inspected, and state any systems or components designated for inspection that were not inspected, and the reason for not

~~inspecting; inspecting.~~ As a reason for not inspecting, "could not locate" is not synonymous with "not visible". If a component could not be found, that must be stated as such;

- (c) States any systems or components inspected that do not function as intended or adversely affect the wastewater treatment system;
- (d) States whether the condition reported requires repair or subsequent observation, or warrants further evaluation by the local health department. The statements shall describe the component or system and how the condition is defective, explain the consequences of the condition, and refer the recipient to the local health department or a certified on-site wastewater contractor; and
- (e) States the name, license number, and signature of the certified inspector.

(5) Maintain records for a period of seven years.

Authority G.S. 90A-71; 90A-72; 90A-74.

21 NCAC 39 .1004 GENERAL EXCLUSIONS

- (a) Inspectors are not required to report on:
 - (1) Life expectancy of any component or system;
 - (2) The causes of the need for a repair;
 - (3) The methods, materials, and costs of corrections;
 - (4) The suitability of the property for any specialized use;
 - (5) The market value of the property or its marketability;
 - (6) The advisability or inadvisability of purchase of the property; or
 - (7) Normal wear and tear to the system.
- (b) Inspectors are not required to:
 - (1) Identify property lines;
 - (2) Offer warranties or guarantees of any kind;
 - (3) Calculate the strength, adequacy, or efficiency of any system or component;
 - (4) Operate any system or component that does not respond to normal operating controls;
 - (5) Move excessive vegetation, structures, personal items, panels, furniture, equipment, snow, ice, or debris that obstruct access to or visibility of the system and any related components;
 - (6) Determine the presence or absence of any suspected adverse environmental condition or hazardous substance, including toxins, carcinogens, noise, and contaminants in the building or in soil, water, and air;
 - (7) Determine the effectiveness of any system installed to control or remove suspected hazardous substances;

- (8) Predict future condition, including failure of components;
- (9) Project operating costs of components;
- (10) Evaluate acoustical characteristics of any system or component; or
- (11) Inspect equipment or accessories that are not listed as components to be inspected in this Section.

(c) Inspectors and Contractors shall not:

- (1) Offer or perform any act or service contrary to law or rule; or
- (2) Offer or perform engineering, architectural, plumbing, electrical, pesticide or any other job function requiring an occupational license in the jurisdiction where the ~~inspection~~ inspection, installation, or repair is taking place, unless the on-site wastewater system inspector or contractor holds a valid occupational license in that field, in which case the inspector or contractor shall inform the client that the inspector or contractor is so licensed.

Authority G.S. 90A-72; 90A-74.

21 NCAC 39 .1006 MINIMUM ON-SITE WASTEWATER SYSTEM INSPECTION

(a) The inspector shall attempt to obtain, evaluate, describe, or determine the following during the inspection:

- (1) Advertised number of bedrooms as stated in the realtor Multiple Listing Service information or by a sworn statement of owner or owner's representative;
- (2) Designed system size (gallons per day or number of bedrooms) as stated in available local health department information, such as the current operation permit or the current repair permit;
- ~~(3) Requirement for a certified subsurface water pollution control system operator pursuant to G.S. 90A-44, current certified operator's name, and most recent performance, operation and maintenance reports (if applicable and available);~~
- ~~(4) Type of water supply, such as well, spring, public water, or community water;~~

(b) The inspector shall obtain, evaluate, describe, or determine the following during the inspection:

- (1) Requirement for a certified subsurface water pollution control system operator pursuant to G.S. 90A-44, current certified operator's name, and most recent performance, operation and maintenance reports (if applicable and available);
- (2) Type of water supply, such as well, spring, public water, or community water.
- ~~(3)~~ Location of septic tank and septic tank details:
 - (A) Distance from house or other structure;

- (B) Distance from well, if applicable;
- (C) Distance from water line, if applicable and readily visible;
- (D) Distance from property line, if said property lines are known;
- (E) Distance from finished grade to top of tank or access riser;
- (F) Presence and type of access risers;
- (G) Condition of tank lids;
- (H) Condition of tank baffle wall;
- (I) Water level in tank relative to tank outlet;
- (J) Condition of outlet tee;
- (K) Presence and condition of outlet filter, if applicable;
- (L) Presence and extent of roots in the tank;
- (M) Evidence of tank leakage;
- (N) Evidence of inflow non-permitted connections, such as from downspouts or sump pumps;
- (O) Connection present from house to tank;
- (P) Connection present from tank to next component;
- (Q) Date tank was last pumped, if known; and
- (R) Percentage of solids (sludge and scum) in tank;
- (S) The inspection form shall contain the statement:

"Client requesting this inspection has been advised that for a complete inspection to be performed, the tank needs to be pumped. Client has declined to have the tank pumped at inspection and hereby acknowledges they have so declined." A space shall be provided for the client signature and date.

- ~~(6)~~(4) Location of pump tank and pump tank details:
 - (A) Distance from house or other structure;
 - (B) Distance from well or spring, if applicable;
 - (C) Distance from water line, if applicable;
 - (D) Distance from property line, if said property lines are known;
 - (E) Distance from finished grade to top of tank or access riser;
 - (F) Distance from septic tank;
 - (G) Presence and type of access risers;
 - (H) Condition of tank lids;
 - (I) Location of control panel;
 - (J) Condition of control panel;
 - (K) Audible and visible alarms (as applicable) work;

- (L) Pump turns on, and effluent is delivered to next component; and
- (M) Lack of electricity at time of inspection prevented complete evaluation;
- ~~(7)~~(5) Location of dispersal field and dispersal field details:
 - (A) Type of dispersal field;
 - (B) Distance from property line, if said property lines are known;
 - (C) Distance from septic tank and also pump tank if a pump tank exists;
 - (D) Number of lines;
 - (E) Length of lines;
 - (F) Evidence of past or current surfacing at time of inspection;
 - (G) Evidence of traffic over the dispersal field;
 - (H) Vegetation, grading, and drainage with respect only to their effect on the condition of the system or system components; and
 - (I) Confirmation that system effluent is reaching the drainfield; and
- ~~(8)~~(6) Conditions that prevented or hindered the inspection. inspection or determination of Subparagraph (b)(1) through (b)(4) of this Rule.
- ~~(b)~~(c) The inspector is not required to:
 - (1) Insert any tool, probe, or testing device inside control panels; or
 - (2) Dismantle any electrical device or control other than to remove the covers of the main and auxiliary control panels.

Authority G.S. 90A-72; 90A-74.

CHAPTER 46 – BOARD OF PHARMACY

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .1417.

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

Proposed Effective Date: November 1, 2015

Public Hearing:

Date: September 15, 2015

Time: 9:00 a.m.

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

Reason for Proposed Action: *The Board has proposed the rule amendment as a result of a petition for rulemaking submitted by a pharmacy permit holder, in order for the Board to receive public*

comment on the proposed amendment. Health care facility pharmacies are currently permitted to contract for remote medication order processing only during periods when pharmacists are not present in those pharmacies. The proposed rule amendment would permit health care facility pharmacies to contract for remote medication order processing to supplement pharmacy services during periods when pharmacists are present in those pharmacies, if done pursuant to the applicable law and rules.

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

Comment period ends: September 15, 2015, 9:00 a.m.

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

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

SECTION .1400 - HOSPITALS: OTHER HEALTH FACILITIES

21 NCAC 46 .1417 REMOTE MEDICATION ORDER PROCESSING SERVICES

(a) Purpose. The purpose of this Rule is to set out requirements under which health care facility pharmacies that are not open 24 hours a day, seven days a week, may contract for the provision of remote medication order processing services. services when no pharmacist is present.

(b) Definitions of terms in this Rule:

- "Remote medication order processing services" consists of the following:
(A) receiving, interpreting, or clarifying medication orders;

- (B) entering data and transferring medication order information;
(C) performing drug regimen review;
(D) interpreting clinical data;
(E) performing therapeutic interventions; and
(F) providing drug information concerning medication orders or drugs.

(2) "Remote medication order processing pharmacy" is a pharmacy permitted by the Board that provides remote medication order processing services.

(3) "Remote site" is a site located within the United States that is electronically linked to a health care facility licensed by the State of North Carolina for the purpose of providing remote medication order processing services.

(c) Outsourcing. A health care facility pharmacy may outsource medication order processing services to a remote medication order processing pharmacy provided the pharmacies have the same owner or the pharmacy has entered into a written contract or agreement with a remote medication order processing pharmacy that outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations. The pharmacy providing the remote processing of medication orders must notify the Board of Pharmacy prior to providing such services.

(d) Training. A pharmacy providing remote medication order processing must ensure that all pharmacists providing such services have been trained on each pharmacy's policies and procedures relating to medication order processing. The training of each pharmacist shall be documented by the pharmacist-manager to ensure competency and to ensure that performance is at least at the same level of performance as pharmacists in the outsourcing pharmacy. The training shall include policies on drug and food allergy documentation, abbreviations, administration times, automatic stop orders, substitution, and formulary compliance. The pharmacies shall jointly develop a procedure to communicate changes in the formulary and changes in policies and procedures related to medication order processing.

(e) Access.

(1) The pharmacies must share common electronic files or have technology to allow secure access to the pharmacy's information system and to provide the remote pharmacy with access to the information necessary or required to process a medication order.

(2) Pharmacists employed by or otherwise acting as an agent for a remote medication order processing pharmacy may provide those services from a remote site. Both the pharmacist providing those services from a remote site and the remote medication order processing pharmacy on whose behalf the pharmacist is providing such services are responsible for compliance with all statutes, rules, policies, and procedures governing the

provision of remote medication order processing services.

(f) Communication. The pharmacies must jointly define the procedures for resolving problems detected during the medication order review and communicating these problems to the prescriber and the nursing staff providing direct care.

(g) Recordkeeping. A pharmacy using remote order entry processing services shall maintain records of all orders entered into their information system including orders entered from a remote location. The system shall have the ability to audit the activities of the individuals remotely processing medication orders.

(h) Licensure. All remote medication order processing pharmacies must be permitted by the Board. An out-of-state remote medication order processing pharmacy must be registered with the Board as an out-of-state pharmacy. All pharmacists located in this State or employed by an out-of-state remote medication order processing pharmacy providing services in this State shall be licensed by the Board.

(i) Policy and Procedure Manual. All remote medication order processing pharmacies shall maintain a policy and procedure manual. Each remote medication order processing pharmacy, remote site, and health care facility pharmacy shall maintain those portions of the policy and procedure manual that relate to that pharmacy's or site's operations. The manual shall:

- (1) outline the responsibilities of each of the pharmacies;
- (2) include a list of the name, address, telephone numbers, and all permit numbers of the pharmacies involved in remote order processing; and
- (3) include policies and procedures for:
 - (A) protecting the confidentiality and integrity of patient information;
 - (B) maintaining records to identify the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist who performed any processing;
 - (C) complying with federal and state laws and regulations;
 - (D) operating a continuous quality improvement program for pharmacy services designed to objectively and systematically monitor and evaluate the quality and appropriateness of patient care, pursue opportunities to improve patient care, and resolve identified problems;
 - (E) annually reviewing the written policies and procedures and documenting such review; and
 - (F) annually reviewing the competencies of pharmacists providing the remote order review service.

(j) Nothing in this rule shall be construed to relieve a health care facility pharmacy of the need to provide on-site pharmacy

services required for licensure as specified in the Pharmacy Practice Act and rules promulgated thereunder.

Authority G.S. 90-85.6; 90-85.21; 90-85.21A; 90-85.26; 90-85.32; 90-85.34.

CHAPTER 69 – BOARD FOR LICENSING OF SOIL SCIENTISTS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board for Licensing Soil Scientists intends to amend the rule cited as 21 NCAC 69 .0104.

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

Proposed Effective Date: January 1, 2016

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Submit written request for public hearing to the NCBLSS office: P.O. Box 41368, Raleigh, NC 27629 or by e-mail to elaine@execman.net.

Reason for Proposed Action: Allowing Board to charge fees to cover the expenses incurred by the board in implementing NCGS 55B-11 and 57D-2-02 allows the board to operate in a sound and balanced financial way.

Comments may be submitted to: Elaine Christian, P.O. Box 41368, Raleigh, NC 27629, fax (919) 878-7413, email elaine@execmen.net.

Comment period ends: September 15, 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

PROPOSED RULES

- Substantial economic impact (\geq \$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4

- (2) license \$85.00
- (3) renewal of license \$85.00
- (4) restoration of license \$110.00
- (5) replacement of license \$50.00
- (6) licensed soil scientist seal \$30.00
- (7) application for corporate certificate of licensure (corporations and limited liability corporations) \$50.00
- (8) renewal of corporate certificate of licensure \$25.00

SECTION .0100 - STATUTORY AND ADMINISTRATIVE PROVISIONS

21 NCAC 69 .0104 FEES

Each completed application form shall be accompanied by the prescribed fee. Application fees shall not be refunded regardless of Board approval or disapproval of the application. Fees for services of the Board shall be as follows:

- (1) application for license \$50.00

Authority G.S. 55B-10; 55B-11; 57D-2-02; 89F-25; 150B-19.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission June 16, 2015 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
Jeff Hyde (1st Vice Chair)
Margaret Currin
Jay Hemphill
Faylene Whitaker

Appointed by House
Garth Dunklin (Chair)
Stephanie Simpson (2nd Vice Chair)
Anna Baird Choi
Jeanette Doran
Ralph A. Walker

COMMISSION COUNSEL

Abigail Hammond	(919)431-3076
Amber Cronk May	(919)431-3074
Amanda Reeder	(919)431-3079
Jason Thomas	(919)431-3081

RULES REVIEW COMMISSION MEETING DATES

August 20, 2015	September 17, 2015
October 15, 2015	November 19, 2015

**RULES REVIEW COMMISSION MEETING
MINUTES
June 16, 2015**

The Rules Review Commission met on Tuesday, June 16, 2015, 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, Ralph Walker, and Faylene Whitaker.

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

The meeting was called to order at 10:05 a.m. with Chairman Dunklin presiding.

Chairman Dunklin 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 Dunklin asked for any discussion, comments, or corrections concerning the minutes of the May 21, 2015 meeting. There were none and the minutes were approved as distributed.

FOLLOW UP MATTERS

Social Services Commission

10A NCAC 73A .0107 and .0108 - All rewritten rules were unanimously approved.

Board of Dental Examiners

21 NCAC 16R .0101, .0102, .0103, .0104, .0105, .0106, .0107, .0108, .0110, .0201, .0202, .0203, .0204, .0205; 16S .0101, .0102, .0202; 16T .0101, .0102; 16U .0101, .0102, .0103; 16V .0101, .0102; 16W .0101, .0102; 16Y .0101, .0102, .0103, .0104; 16Z .0101 - All rewritten rules were unanimously approved with the following exceptions:

21 NCAC 16R .0109, .0206; 16S .0203; 16U .0201, .0203, and .0204 were withdrawn at the request of the agency.

Irrigation Contractors Licensing Board

21 NCAC 23 .0105 was withdrawn at the request of the agency. No action was required by the Commission.

Building Code Council

2012 NC Residential Code, Sections R101.2, R202, and R324; 2012 Building Code, Chapter 36; and 2012 Fire Code, 4504.1. - All rewritten rules were unanimously approved.

LOG OF FILINGS (PERMANENT RULES)

Pesticide Board

The Commission extended the period of review on all rules. In accordance with G.S. 150B-21.10 and G.S. 150B-21.13, the Commission extended the period of review to allow the Pesticide Board additional time to revise the rules in response to technical change requests.

Commissioner of Agriculture

02 NCAC 09M .0101 was withdrawn at the request of the agency. No action was required by the Commission.

Department of Commerce - Division of Employment Security

All rules were unanimously approved.

Prior to the review of the rules from the Division of Employment Security, Commissioner Doran recused herself and did not participate in any discussion or vote concerning the rules because she is Chairman of the Board of Review.

Commission for Public Health

10A NCAC 46 .0201 and .0212 were unanimously approved.

Coastal Resources Commission

All rules were unanimously approved.

Commission for Public Health

15A NCAC 18C .1539 was unanimously approved.

Board of Certified Public Accountant Examiners

21 NCAC 08G .0409 was unanimously approved.

Prior to the review of the rules from the Board of Certified Public Accountant Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rules because her law firm provides legal services to the Board.

Board of Chiropractic Examiners

21 NCAC 10 .0305 was withdrawn at the request of the agency. No action was required by the Commission.

Board of Pharmacy

21 NCAC 46 .3301 was unanimously approved.

EXISTING RULES REVIEW

Alcoholic Beverage Control Commission

04 NCAC 02R - The Commission unanimously approved the report as submitted by the agency.

Bob Hamilton with the agency addressed the Commission.

Division of Medical Assistance

10A NCAC 21 – The Commission unanimously approved the report as submitted by the agency.

10A NCAC 22 – The Commission unanimously approved the report as submitted by the agency.

Coastal Resources Commission

15A NCAC 07B - The Commission unanimously approved the report as submitted by the agency.

Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors

21 NCAC 50 - The Commission unanimously approved the report as submitted by the agency.

Respiratory Care Board

21 NCAC 61 - The Commission unanimously approved the report as submitted by the agency.

COMMISSION BUSINESS

Staff gave the Commission a brief legislative update.

Chairman Dunklin informed the Commissioners that there will be a hearing in State Board of Education v. RRC on Monday, June 29, 2015.

Commissioners Choi, Currin, and Doran volunteered to serve on the RRC rulemaking subcommittee.

The meeting adjourned at 10:49 a.m.

The next regularly scheduled meeting of the Commission is Thursday, July 16th at 10:00 a.m.

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

Respectfully Submitted,

Alexander Burgos, Paralegal

Minutes approved by the Rules Review Commission:

Garth Dunklin, Chair

**LIST OF APPROVED PERMANENT RULES
June 16, 2015 Meeting**

COMMERCE - EMPLOYMENT SECURITY, DIVISION OF

<u>Office Location</u>	04	NCAC 24A	.0101
<u>Address Changes</u>	04	NCAC 24A	.0102
<u>Addresses for Notice</u>	04	NCAC 24A	.0103
<u>Addresses for Filing Claims, Appeals, Exceptions, Request...</u>	04	NCAC 24A	.0104
<u>Definitions</u>	04	NCAC 24A	.0105
<u>Filing/Mailing Dates and Use of Forms</u>	04	NCAC 24A	.0106
<u>Digital Signatures</u>	04	NCAC 24A	.0107
<u>Signatures on Reports and Forms</u>	04	NCAC 24A	.0108
<u>Power of Attorney</u>	04	NCAC 24A	.0109
<u>Written Request Required</u>	04	NCAC 24A	.0201
<u>Clear Description of Records Required</u>	04	NCAC 24A	.0202
<u>Determination as to Disclosure</u>	04	NCAC 24A	.0203
<u>Release of Information to Third Party</u>	04	NCAC 24A	.0204
<u>Fees for Copies and Services</u>	04	NCAC 24A	.0205
<u>Method of Payment</u>	04	NCAC 24A	.0206
<u>Payment Required Before Information Release</u>	04	NCAC 24A	.0207
<u>Right to Petition</u>	04	NCAC 24A	.0301
<u>Disposition of Petition</u>	04	NCAC 24A	.0302
<u>Filing a Claim</u>	04	NCAC 24B	.0101
<u>Alternative Filing Methods</u>	04	NCAC 24B	.0102
<u>Weekly Certifications</u>	04	NCAC 24B	.0103
<u>Information to be Provided to New Claimants Filing a Claim</u>	04	NCAC 24B	.0104
<u>Antedating</u>	04	NCAC 24B	.0105
<u>Suspension of Benefits for Probation Violators Who Avoid</u>	04	NCAC 24B	.0106
<u>Registration for Work</u>	04	NCAC 24B	.0201
<u>Benefits Rights of Interstate Claimants</u>	04	NCAC 24B	.0202
<u>Claims for Benefits</u>	04	NCAC 24B	.0203
<u>Determination of Claims</u>	04	NCAC 24B	.0204
<u>Appellate Procedure</u>	04	NCAC 24B	.0205
<u>Canadian Claims</u>	04	NCAC 24B	.0206
<u>Notification of Interstate Claim</u>	04	NCAC 24B	.0207
<u>Requirements for Claimants</u>	04	NCAC 24B	.0301
<u>Record of Work and Wages of Claimants</u>	04	NCAC 24B	.0302
<u>Determinations</u>	04	NCAC 24B	.0401
<u>Request for Separation Information from Employer</u>	04	NCAC 24B	.0402
<u>Notice to Employer of Labor Dispute Claim</u>	04	NCAC 24B	.0501
<u>Employer Response Requirement</u>	04	NCAC 24B	.0502
<u>Determination of Labor Dispute and Referral for Hearing</u>	04	NCAC 24B	.0503
<u>Issues</u>	04	NCAC 24B	.0504
<u>Notice Requirement for Overpayment</u>	04	NCAC 24B	.0601
<u>Bill for Repayment of Overpayment</u>	04	NCAC 24B	.0602
<u>Wage Audit Notice for Employers</u>	04	NCAC 24B	.0603

<u>Waiver of Repayments of Nonfraudulent Overpayment</u>	04	NCAC 24B	.0701
<u>Waiver of Repayments of Fraudulent Overpayment</u>	04	NCAC 24B	.0702
<u>Decision and Consideration of Waiver Petitions</u>	04	NCAC 24B	.0703
<u>Factors in Determining Equity and Good Conscience</u>	04	NCAC 24B	.0704
<u>Factors in Determining Fault</u>	04	NCAC 24B	.0705
<u>Duties of the Requesting State</u>	04	NCAC 24B	.0801
<u>Duties of Recovering State</u>	04	NCAC 24B	.0802
<u>Duties of Paying State</u>	04	NCAC 24B	.0803
<u>Withdrawals of Combined Wage Claims</u>	04	NCAC 24B	.0804
<u>Setoff Debt Collection Act Hearings</u>	04	NCAC 24B	.0901
<u>Notice of Referral</u>	04	NCAC 24B	.1001
<u>Reevaluation of Debt</u>	04	NCAC 24B	.1002
<u>Appeal Date Established by Testimony</u>	04	NCAC 24C	.0101
<u>Exception to Timeliness Requirement</u>	04	NCAC 24C	.0102
<u>Base Period Employer Denied Noncharging</u>	04	NCAC 24C	.0103
<u>Employer Party to Determination</u>	04	NCAC 24C	.0104
<u>Appearance by Party</u>	04	NCAC 24C	.0201
<u>Presenting and Scheduling Appeals Claims</u>	04	NCAC 24C	.0202
<u>Contents of Appeal to Appeals Section</u>	04	NCAC 24C	.0203
<u>Appeals Hearing Notice</u>	04	NCAC 24C	.0204
<u>Telephone Hearings</u>	04	NCAC 24C	.0205
<u>In-person Hearings</u>	04	NCAC 24C	.0206
<u>Rescheduling a Hearing</u>	04	NCAC 24C	.0207
<u>Disqualification of Appeals Referee</u>	04	NCAC 24C	.0208
<u>Conduct of Hearings</u>	04	NCAC 24C	.0209
<u>Hearsay</u>	04	NCAC 24C	.0210
<u>Controlled Substance Results</u>	04	NCAC 24C	.0211
<u>Contents of Appeals Decision</u>	04	NCAC 24C	.0212
<u>Administration Proceedings</u>	04	NCAC 24C	.0301
<u>Notices of Service to Party</u>	04	NCAC 24C	.0302
<u>Issuance of Subpoenas</u>	04	NCAC 24C	.0401
<u>Objection to Subpoena</u>	04	NCAC 24C	.0402
<u>Requirements for Appeal Statement to Board of Review</u>	04	NCAC 24C	.0501
<u>Acknowledgement of Appeal</u>	04	NCAC 24C	.0502
<u>Oral Arguments</u>	04	NCAC 24C	.0503
<u>Legal Representation</u>	04	NCAC 24C	.0504
<u>Introduction of Evidence in Higher Authority Hearings</u>	04	NCAC 24C	.0505
<u>Content of Higher Authority Decision</u>	04	NCAC 24C	.0506
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<u>Appealing Denial of Request for Noncharging</u>	04	NCAC 24D	.0203
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<u>Approved Courses and Sponsors</u>	21 NCAC 16R	.0104
<u>Reporting of Continuing Education</u>	21 NCAC 16R	.0105
<u>Variances and Exemptions from and Credit for Continuing E...</u>	21 NCAC 16R	.0106
<u>Penalty/Non-Compliance/Continuing Education</u>	21 NCAC 16R	.0107
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<u>Continuing Education Required</u>	21 NCAC 16R	.0201
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<u>Reporting Continuing Education</u>	21 NCAC 16R	.0203
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<u>Definition: Unprofessional Conduct by a Dental Hygienist</u>	21 NCAC 16V	.0102
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<u>2012 NC Residential Code/Docks, Piers, Bulkheads and Wate...</u>	

**RRC DETERMINATION
PERIODIC RULE REVIEW
June 16, 2015
Necessary with Substantive Public Interest**

**Alcoholic Beverage Control
Commission**

04 NCAC 02R .1404

**HHS - Medical Assistance,
Division of**

10A NCAC 21A .0301
10A NCAC 21A .0302
10A NCAC 21A .0303
10A NCAC 21B .0204
10A NCAC 21B .0311
10A NCAC 21D .0101
10A NCAC 21D .0102
10A NCAC 21D .0103
10A NCAC 21D .0201
10A NCAC 21D .0301
10A NCAC 21D .0302
10A NCAC 21D .0401
10A NCAC 21D .0402
10A NCAC 21D .0501
10A NCAC 21D .0502
10A NCAC 21D .0503
10A NCAC 22B .0101
10A NCAC 22B .0102
10A NCAC 22B .0103
10A NCAC 22B .0104
10A NCAC 22B .0105
10A NCAC 22C .0101
10A NCAC 22C .0102
10A NCAC 22C .0103
10A NCAC 22D .0101
10A NCAC 22F .0104
10A NCAC 22F .0105

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10A NCAC 22F .0203
10A NCAC 22F .0301
10A NCAC 22F .0302
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10A NCAC 22F .0601
10A NCAC 22F .0602
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10A NCAC 22F .0604
10A NCAC 22F .0605
10A NCAC 22F .0606
10A NCAC 22F .0704
10A NCAC 22F .0706
10A NCAC 22G .0108
10A NCAC 22G .0109
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10A NCAC 22G .0502
10A NCAC 22G .0504
10A NCAC 22G .0509
10A NCAC 22H .0101
10A NCAC 22H .0102
10A NCAC 22H .0103
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10A NCAC 22H .0305
10A NCAC 22I .0102
10A NCAC 22I .0104
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10A NCAC 22J .0103
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10A NCAC 22J .0105
10A NCAC 22J .0106
10A NCAC 22K .0101
10A NCAC 22K .0102
10A NCAC 22K .0103
10A NCAC 22L .0102
10A NCAC 22L .0103
10A NCAC 22L .0104
10A NCAC 22L .0203
10A NCAC 22N .0102
10A NCAC 22N .0202
10A NCAC 22N .0203
10A NCAC 22N .0302
10A NCAC 22N .0303
10A NCAC 22O .0112

Coastal Resources Commission

15A NCAC 07B .0701
15A NCAC 07B .0702
15A NCAC 07B .0801
15A NCAC 07B .0802

Respiratory Care Board

21 NCAC 61 .0202

**RRC DETERMINATION
PERIODIC RULE REVIEW
June 16, 2015**

Necessary without Substantive Public Interest

**Alcoholic Beverage Control
Commission**

04 NCAC 02R .0101
04 NCAC 02R .0102
04 NCAC 02R .0103
04 NCAC 02R .0201
04 NCAC 02R .0202
04 NCAC 02R .0204
04 NCAC 02R .0205
04 NCAC 02R .0303
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04 NCAC 02R .0402
04 NCAC 02R .0403
04 NCAC 02R .0404
04 NCAC 02R .0405
04 NCAC 02R .0502
04 NCAC 02R .0602
04 NCAC 02R .0603
04 NCAC 02R .0604
04 NCAC 02R .0607
04 NCAC 02R .0610
04 NCAC 02R .0611
04 NCAC 02R .0612
04 NCAC 02R .0702
04 NCAC 02R .0802
04 NCAC 02R .0821
04 NCAC 02R .0822
04 NCAC 02R .0823
04 NCAC 02R .0901
04 NCAC 02R .0902
04 NCAC 02R .0903
04 NCAC 02R .0904
04 NCAC 02R .0905
04 NCAC 02R .0907
04 NCAC 02R .1002
04 NCAC 02R .1003
04 NCAC 02R .1004
04 NCAC 02R .1005
04 NCAC 02R .1009
04 NCAC 02R .1101
04 NCAC 02R .1102
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04 NCAC 02R .1804
04 NCAC 02R .1805
04 NCAC 02R .1901
04 NCAC 02R .2001
04 NCAC 02R .2002
04 NCAC 02R .2003

**HHS - Medical Assistance,
Division of**

10A NCAC 22A .0101
10A NCAC 22B .0201
10A NCAC 22B .0202
10A NCAC 22E .0102
10A NCAC 22E .0103
10A NCAC 22F .0101
10A NCAC 22F .0102
10A NCAC 22F .0103
10A NCAC 22F .0401
10A NCAC 22F .0701
10A NCAC 22F .0702
10A NCAC 22G .0110
10A NCAC 22H .0201
10A NCAC 22H .0301
10A NCAC 22I .0101
10A NCAC 22I .0103
10A NCAC 22J .0101
10A NCAC 22L .0101
10A NCAC 22L .0201

10A NCAC 22N .0101
10A NCAC 22N .0201
10A NCAC 22N .0301

Coastal Resources Commission
15A NCAC 07B .0601

**Plumbing, Heating and Fire
Sprinkler Contractors, Board of
Examiners of**

21 NCAC 50 .0105
21 NCAC 50 .0106
21 NCAC 50 .0202
21 NCAC 50 .0301
21 NCAC 50 .0305
21 NCAC 50 .0306
21 NCAC 50 .0307
21 NCAC 50 .0308
21 NCAC 50 .0309
21 NCAC 50 .0310
21 NCAC 50 .0311
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21 NCAC 50 .0516
21 NCAC 50 .0517
21 NCAC 50 .0518
21 NCAC 50 .1002
21 NCAC 50 .1003

21 NCAC 50 .1004	21 NCAC 50 .1302	21 NCAC 61 .0401
21 NCAC 50 .1005	21 NCAC 50 .1303	21 NCAC 61 .0501
21 NCAC 50 .1006	21 NCAC 50 .1304	21 NCAC 61 .0502
21 NCAC 50 .1012	21 NCAC 50 .1305	21 NCAC 61 .0601
21 NCAC 50 .1014		21 NCAC 61 .0602
21 NCAC 50 .1101	Respiratory Care Board	21 NCAC 61 .0604
21 NCAC 50 .1102	21 NCAC 61 .0101	21 NCAC 61 .0701
21 NCAC 50 .1104	21 NCAC 61 .0103	21 NCAC 61 .0702
21 NCAC 50 .1105	21 NCAC 61 .0201	21 NCAC 61 .0703
21 NCAC 50 .1201	21 NCAC 61 .0203	21 NCAC 61 .0704
21 NCAC 50 .1202	21 NCAC 61 .0204	21 NCAC 61 .0705
21 NCAC 50 .1203	21 NCAC 61 .0205	21 NCAC 61 .0706
21 NCAC 50 .1204	21 NCAC 61 .0301	21 NCAC 61 .0707
21 NCAC 50 .1205	21 NCAC 61 .0302	21 NCAC 61 .0708
21 NCAC 50 .1207	21 NCAC 61 .0303	21 NCAC 61 .0709
21 NCAC 50 .1208	21 NCAC 61 .0305	21 NCAC 61 .0710
21 NCAC 50 .1209	21 NCAC 61 .0306	21 NCAC 61 .0711
21 NCAC 50 .1210	21 NCAC 61 .0307	21 NCAC 61 .0712
21 NCAC 50 .1211	21 NCAC 61 .0308	21 NCAC 61 .0713
21 NCAC 50 .1214	21 NCAC 61 .0309	21 NCAC 61 .0714
21 NCAC 50 .1301	21 NCAC 61 .0310	

**RRC DETERMINATION
PERIODIC RULE REVIEW
June 16, 2015
Unnecessary**

Alcoholic Beverage Control Commission	10A NCAC 22F .0705	10A NCAC 22G .0309
04 NCAC 02R .0606	10A NCAC 22F .0707	10A NCAC 22G .0401
04 NCAC 02R .0820	10A NCAC 22G .0101	10A NCAC 22G .0402
04 NCAC 02R .0906	10A NCAC 22G .0102	10A NCAC 22G .0501
04 NCAC 02R .0908	10A NCAC 22G .0103	10A NCAC 22G .0503
04 NCAC 02R .0908	10A NCAC 22G .0104	10A NCAC 22G .0505
04 NCAC 02R .0909	10A NCAC 22G .0105	10A NCAC 22G .0506
04 NCAC 02R .1006	10A NCAC 22G .0106	10A NCAC 22G .0507
04 NCAC 02R .1401	10A NCAC 22G .0107	10A NCAC 22G .0508
04 NCAC 02R .1903	10A NCAC 22G .0201	10A NCAC 22G .0510
	10A NCAC 22G .0202	10A NCAC 22G .0601
HHS - Medical Assistance, Division of	10A NCAC 22G .0203	10A NCAC 22G .0602
10A NCAC 22C .0104	10A NCAC 22G .0204	10A NCAC 22G .0603
10A NCAC 22E .0101	10A NCAC 22G .0205	10A NCAC 22G .0604
10A NCAC 22E .0104	10A NCAC 22G .0206	10A NCAC 22G .0605
10A NCAC 22E .0105	10A NCAC 22G .0207	10A NCAC 22L .0105
10A NCAC 22F .0403	10A NCAC 22G .0209	10A NCAC 22L .0202
10A NCAC 22F .0501	10A NCAC 22G .0210	10A NCAC 22O .0101
10A NCAC 22F .0502	10A NCAC 22G .0211	
10A NCAC 22F .0503	10A NCAC 22G .0212	Coastal Resources Commission
10A NCAC 22F .0504	10A NCAC 22G .0213	15A NCAC 07B .0602
10A NCAC 22F .0505	10A NCAC 22G .0301	15A NCAC 07B .0901
10A NCAC 22F .0506	10A NCAC 22G .0302	
10A NCAC 22F .0507	10A NCAC 22G .0303	Respiratory Care Board
10A NCAC 22F .0508	10A NCAC 22G .0304	21 NCAC 61 .0102
10A NCAC 22F .0509	10A NCAC 22G .0305	21 NCAC 61 .0304
10A NCAC 22F .0510	10A NCAC 22G .0306	21 NCAC 61 .0603
10A NCAC 22F .0703	10A NCAC 22G .0307	
	10A NCAC 22G .0308	

CONTESTED CASE DECISIONS

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

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

Melissa Owens Lassiter	A. B. Elkins II
Don Overby	Selina Brooks
J. Randall May	Phil Berger, Jr.
J. Randolph Ward	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>BOARD OF ARCHITECTURE</u>			
Board of Architecture v. Anthony Hunt	14 BOA 04954	03/03/15	30:01 NCR 77
<u>DEPARTMENT OF PUBLIC SAFETY</u>			
Jack Norris v. Victims Compensation Commission	14 CPS 06019	03/30/15	30:01 NCR 89
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Sunrise Clinical Associates PLLC. v. Alliance Behavioral Healthcare, NCDHHS	14 DHR 01503	04/02/15	30:01 NCR 97
Fidelity Community Support Group Inc. v. Alliance Behavioral Healthcare, NCDHHS	14 DHR 01594	04/02/15	30:01 NCR 133
Bio-Medical Applications of NC, Inc d/b/a BMA Rocky Mount v. NCDHHS, Division of Health Service Regulation, Certificate of Need Section and Total Renal Care Inc d/b/a Nash County Dialysis	14 DHR 05495	03/26/15	30:02 NCR 196
Bernita Webster v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry	14 DHR 05566	03/10/15	30:02 NCR 229
Erica Chante Johnson v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry	14 DHR 06571	03/10/15	30:02 NCR 236
<u>DEPARTMENT OF PUBLIC SAFETY</u>			
Ronnie Earl Smith Jr. v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04114	04/09/15	30:02 NCR 243
Susan Maney v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05067	04/14/15	30:02 NCR 252
<u>OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)</u>			
Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 11438	04/28/15	30:01 NCR 62
Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 19135	04/28/15	30:01 NCR 62

Filed

STATE OF NORTH CAROLINA IN THE OFFICE OF
COUNTY OF NASH Office of ADMINISTRATIVE HEARINGS
Administrative Hearings 14 DHR 05495

BIO-MEDICAL APPLICATIONS OF)
NORTH CAROLINA, INC. d/b/a BMA)
ROCKY MOUNT,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA DEPARTMENT OF)
HEALTH AND HUMAN SERVICES,)
DIVISION OF HEALTH SERVICE)
REGULATION, CERTIFICATE OF NEED)
SECTION,)
)
Respondent,)
)
And)
)
TOTAL RENAL CARE, INC. d/b/a NASH)
COUNTY DIALYSIS,)
)
Respondent-Intervenor.)

FINAL DECISION

THIS MATTER came for hearing before the undersigned Augustus B. Elkins II, Administrative Law Judge ("ALJ"), on October 8-10 and October 13-17, 2014, in Raleigh, North Carolina. Having heard all of the evidence in this case and having considered the exhibits, arguments, and relevant law, the Undersigned makes the Findings of Fact by a preponderance of the evidence, enters Conclusions of Law thereon, and makes the following Final Decision.

APPEARANCES

For Petitioner Bio-Medical Applications of North Carolina, Inc. d/b/a BMA Rocky Mount ("BMA"):

Marcus C. Hewitt
Elizabeth Sims Hedrick
Smith Moore Leatherwood LLP
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601

For Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the “CON Section” or “Agency”):

Bethany A. Burgon
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

For Respondent-Intervenors Total Renal Care, Inc. d/b/a Nash County Dialysis (“TRC”):

Lee M. Whitman
Elizabeth Frock Runyon
Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27607

APPLICABLE LAW

N.C. Gen. Stat. § 150B-1 *et seq.*
N.C. Gen. Stat. § 131E-175 *et seq.*

BURDEN OF PROOF

BMA has the burden of proof by a preponderance of the evidence regarding the issues presented in this contested case. N.C. Gen. Stat. § 150B-34(a).

PRELIMINARY MATTERS

1. These cases arise from the Agency’s decisions: (1) to approve an application submitted by TRC (“the TRC Application”) to develop a new 12-station dialysis facility in Rocky Mount, Nash County; and (2) to approve, with conditions, an application submitted by BMA (“the BMA Rocky Mount Application”) to add 7 stations to an existing dialysis facility in Rocky Mount.

2. On February 27, 2014, the Agency issued its decision approving the TRC Application and conditionally approving the BMA Application. BMA filed a petition for contested case hearing (14 DHR 02398) to appeal the Agency decision to approve the TRC Application and to conditionally approve the BMA Application for 7 stations instead of the 11 for which BMA applied. TRC intervened in this contested case with all rights of a party to support the Agency’s decision to approve the TRC Application. On July 22, 2014, this case was dismissed without prejudice pursuant to a Consent Order, and a petition for contested case hearing on the same subject matter was subsequently re-filed by BMA on July 23, 2014 (14 DHR 05495). In accordance with the terms of the Consent Order, TRC was automatically made an intervenor in case 14 DHR 05495.

3. On September 22, 2014, TRC and the Agency filed a Motion to Dismiss and Motion for Summary Judgment, seeking dismissal of the case or entry of summary judgment against BMA. TRC and the Agency asserted that BMA had failed to exhaust its administrative remedies because it failed to seek amendment of the July 2013 Semi-Annual Dialysis Report (“SDR”) or the 2013 State Medical Facilities Plan (“SMFP”), and sought to use the contested case hearing to challenge the published average annual change rate (“average annual change rate” or “AACR”) contained in those final published documents. On Oct. 2, 2014, BMA filed a Brief in Opposition to the Motion to Dismiss and Motion for Summary Judgment. A hearing on the Motion was held by the undersigned ALJ on October 3, 2014.

In response to the Motion, BMA presented evidence that reporting errors by two BMA facilities inflated the patient population reported for Nash County in the July 2013 SDR which in turn inflated the average annual change rate (“AACR”) reported for Nash County in the July 2013 SDR. BMA asserted that both TRC and the Agency knew that the published AACR was inflated and that TRC’s application would not have been conforming to certain rules and statutory criteria had TRC projected growth and utilization using the actual AACR. TRC and the Agency contended that as a matter of law, the Agency is required to apply the standards contained in the SDR, which are binding on the Agency and all CON applicants and that these standards include the AACR.

The Undersigned found that dismissal was not warranted in this case. Further, the Undersigned found that summary judgment may not be used where conflicting evidence is involved, *See Smith v. Currie*, 40 N.C. App. 739, 253 S.E.2d 645, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979); and if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied. *See City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980). The Undersigned found that multiple material facts and issues in this matter were in dispute. Respondent-Intervenor’s and Respondent’s Joint Motion was denied.

ISSUES

BMA’s Contested Issues

1. Whether the CON Section substantially prejudiced BMA’s rights when it approved the TRC Application to develop a 12-station dialysis facility in Nash County.
2. Whether the CON Section substantially prejudiced BMA’s rights when it conditioned approval of the BMA Application upon BMA developing only 7 of the stations for which it applied.
3. Whether the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it approved the TRC Application to develop a 12-station facility in Nash County.
4. Whether the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law

or rule in determining that the TRC Application was conforming with N.C. Gen. Stat. § 131E-183(a) subsections (3), (4), (5), (6), and (18a).

5. Whether the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the TRC Application was conforming with 10A N.C.A.C. 14C .2203(a).

6. Whether the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in conditioning approval of the BMA Application upon BMA developing only 7 of the stations for which it applied.

The CON Section's Contested Issues

1. Whether the Respondent substantially prejudiced Petitioner BMA; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, when it conditionally approved its CON application upon BMA developing only 7 of the stations for which it applied and in approving the application of TRC to develop a 12-station dialysis facility in Nash County.

2. Whether BMA failed to exhaust its administrative remedies for challenging the 2013 SDR by failing to petition the Governor for amendment of the SDR.

TRC'S Contested Issues

1. Whether BMA failed to exhaust its administrative remedy for challenging the July 2013 SDR when it failed to petition the Governor for amendment of the SDR?

2. Whether BMA is prevented from challenging: (a) TRC's use of the 9.6% average annual change rate published in the July 2013 SDR; and/or (b) the Agency's acceptance of that growth rate as reasonable, credible, and supported.

3. Whether the published July 2013 SDR was in effect at the time the review of the TRC application commenced?

4. Whether the Agency was correct in applying the published July 2013 SDR to the TRC application?

5. Whether TRC's use of the 9.6% average annual change rate was reasonable based on the published July 2013 SDR and the use of this 9.6% growth rate by the Planning Section to calculate a need determination of 19 dialysis stations for Nash County?

6. Whether the Agency was correct to accept TRC's use of the 9.6% average annual change rate which was published in the July 2013 SDR, as reasonable, credible and supported?

7. Whether the Agency was correct in determining that TRC conformed with all applicable statutory and regulatory review criteria?

8. Whether the Agency was correct in finding TRC's application comparatively superior to BMA's application in the comparative review?

9. Whether the Agency was correct in approving TRC for a new dialysis facility in Nash County with 12 dialysis stations?

WITNESSES

For Petitioner

Elizabeth Brown, Planner, Medical Facilities Planning Branch
Anita Harris, Director of Operations, Fresenius Medical Care
Mary Bone, Clinical Manager, Fresenius Medical Care
Cynthia Preston, Secretary, Receptionist and Ward Clerk, Fresenius Medical Care
Julie Halatek, Project Analyst, CON Section
Jim Swann, Director of Operations for Certificate of Need, Fresenius Medical Care
Martha Frisone, Interim Chief, CON Section
Dodie Robinson, Regional Operations Director, DaVita, Inc.
David French, President, Strategic Healthcare Consultants

For Respondent

Drexdal Pratt, Director, Division of Health Service Regulation

For Respondent-Intervenor

Bill Hyland, Director of Healthcare Planning, DaVita, Inc.

EXHIBITS

Joint

- 1 2013 Nash County Dialysis Review Agency File
- 2 BMA Nash County Application, Project ID No. L-10182-13
- 3 TRC Nash County Application, Project ID No. L-10211-13
- 5 10A NCAC 14C .2201 - Criteria and Standards for End Stage Renal Disease Services, Definitions
- 6 January 2014 Semiannual Dialysis Report
- 7 Required State Agency Findings, Project ID Nos. J-7438-05 and J-7451-05, 5/5/06

8 TRC's Responses to BMA's First Set of Interrogatories and Requests for
Production of Documents
9 State Health Coordinating Council Meeting Minutes, 10/2/13
11 10A NCAC 14C .0207 – Agency Decision
12 Second Amended Notice of Rule 30(b)(6) Deposition of DHSR, 7/28/14
13 Data Collection Form ESRD Facilities, December 2012
14 State Health Coordinating Council meeting minutes, 5/29/13
15 e-mail, Bone to DHSR re ESRD Collection Forms, 5/22/13
16 e-mail, Hyland to Brown re DSHR Reports - DaVita Region 4, 6/4/13
17 e-mail, Brown to multiple recipients re Request Assistance in Reviewing a Draft
of Table A for 2013 July SDR, 6/25/13
18 e-mail, Brown to Swann re Request Assistance in Reviewing a Draft of Table A
for 2013 July SDR, 6/25/13
19 e-mail, Swann to Brown, Ayden Census, 6/25/13
20 e-mail, Swann to Brown re 3427 to decert 1, 6/25/13
21 e-mail, Pfeiffer to multiple recipients re 2013 July SDR -
Final Drafts of Table A and B, 6/28/13
22 e-mail, Frisone to multiple recipients re July 2013 SDR, 7/1/13
23 e-mail, Frisone to multiple recipients re Another Incorrect FID #, 7/1/13
24 e-mail, Glendening to Brown re Narrative, Tables, and Other
Documents for the July 2013 SDR, 7/1/13
25 e-mail, Glendening to multiple recipients re On Test Site, 7/1/13
26 e-mail, Brown to Swann re July 2013 SDR, 7/2/13
27 e-mail, Brown to multiple recipients re 2013 July SDR, 7/2/13
28 e-mail, Hyland to Brown re 2013 July SDR, 7/2/13
29 e-mail, Swann to Brown re ESRD Info Submission, 7/3/13
30 e-mail, Swann to Brown re ESRD Data Collection Patient Population Tab -
Corrected, 7/3/13
31 e-mail, Swann to Brown re ESRD Data Collection Form BMA East
Rocky Mount - Corrected, 7/3/13
32 e-mail, Glendening to Brown re Request ESRD Database, 7/2/13
33 e-mail, Pfeiffer to Brown re Revised July 2013 SDR, 7/8/13
34 e-mail, Hyland to Brown re July 2013 SDR, 7/8/13
35 e-mail, Pfeiffer to Swann re Agency Report for Data Reporting
Errors Petition to SHCC, 9/10/13
36 Long-Term and Behavioral Health Committee minutes, 9/11/13
37 Long Term and Behavioral Health Committee Recommendations to the
NC State Health Coordinating Council, 10/2/13
38 DHSR's Responses to BMA's First Set of Interrogatories and Request for
Production of Documents
39 January 2013 Semiannual Dialysis Report (Reissued January 18, 2013)
40 January 2013 SDR, 1/2/13
41 DHSR's Supplemental Responses to BMA's First Set of Interrogatories and
Request for Production of Documents
42 résumé of Jim Swann
43 e-mail, Swann to multiple recipients re Brief Question, 7/30/13 (**Confidential**)

- 44 e-mail, Swann to Harris re ESRD Data Collection Patient Population Tab - Corrected, 7/3/13 **(Confidential)**
- 45 e-mail, Swann to Pfeiffer re July 2013 SDR, 7/10/13
- 47 excerpts from FMC South Rocky Mount application, 8/15/13
- 48 e-mail, Swann to Harvey re Rocky Mount CON Application, 9/3/13 **(Confidential)**
- 50 e-mail, Swann to Harris re FMC South Rocky Mount has been conditionally approved, 10/18/13 **(Confidential)**
- 57 e-mail, Brown to Hyland re July 2013 SDR, 7/8/13
- 58 e-mail, Hines to Hyland re July 2013 Semiannual Dialysis Report, 7/8/13
- 60 e-mail, Nichols to Hyland re Rocky Mount DN-TGC on the 30th, 8/23/13
- 61 e-mail to Hyland attaching Index of Patient Support Letters for Nash County Facility, 9/13/13
- 62 e-mail, Hyland to Lewis re Nash County Dialysis Patient Letters, 8/20/13
- 63 e-mail, Hyland to Robinson re Nash County Dialysis CON Application Documents, 8/8/13
- 64 excerpts from TRC's Scotland County Dialysis Application, 9/16/13
- 66 e-mail, Hyland to Hines re July 2013 SDR, 7/8/13
- 67 e-mail, Hyland to multiple recipients re TOPCATS CON Opportunities, 7/9/13
- 68 e-mail, Robinson to multiple recipients re Can you help on a few TC models, 7/26/13
- 73 David French résumé
- 75 e-mail, Hyland to multiple recipients re Nash County Dialysis CON Application Documents, 8/8/13
- 76 e-mail, Lewis to Hyland re CON, 9/4/13

Petitioner

- 101 Required State Agency Findings, Project ID No. G-7681-06, 12/11/06
- 104 Required State Agency Findings, Project ID No. F-7912-07, 1/7/08
- 105 Required State Agency Findings, Project ID No. F-8073-08, 9/5/08
- 109 Required State Agency Findings, Project ID Nos. F-8577-10, F-8581-10, F-8584-10, F-8590-10, 3/4/11
- 110 Required State Agency Findings, Project ID No. N-8801-12, 7/27/12
- 111 Required State Agency Findings, Project ID No. F-10056-12, 2/4/13
- 114 Required State Agency Findings, Project ID Nos. G-10127-13, G-10133-13, 10/28/13
- 115 Required State Agency Findings, Project ID No. O-10042-12, 2/27/12
- 117 Required State Agency Findings, Project ID No. N-10200-13, 12/20/13
- 118 Required State Agency Findings, Project ID No. J-10025-12, 2/4/13
- 119 Excerpts of Required State Agency Findings, Project ID Nos. J-8169-08, J-8170-08, J-8177-08, J-8179-08, J-8180-08, J-8181-08, J-8182-08, J-8190-08, 1/30/09
- 121 Draft Revised July 2013 SDR
- 122 June 2014 ESRD Collection Form

- 124 excerpts from Transcript of Deposition of Clarkston Hines, 8/25/14
- 125 Excerpts from Transcript of Rule 30(b)(6) deposition of NCDHHS/DHSR
- 127 e-mail, Harris to Weaver, 5/22/13
- 128 e-mail, Harris to Bone, with attachments, 7/3/13
- 133 Tables - Comparison of data reporting errors
- 134 Tables - Analysis of TRC utilization projections
- 135 Maps of facility locations
- 136 Graph - TRC projected utilization growth
- 137 Graphs - Reported and corrected patient populations
- 138 Graph - AACR as reported in SDR and as corrected
- 140 excerpted pages from deposition of Martha Frisone, 7/9/14
- 141 excerpted pages from deposition of Bill Hyland, 8/22/14

Respondent

- 200 4/23/13 e-mail from Elizabeth Brown with 5/3/13 meeting invitation
- 201 5/3/13 ESRD Data Source Meeting Agenda

Respondent-Intervenor

- 300 Bio-Medical Applications of North Carolina, Inc. d/b/a BMA Rocky Mount's Objections and Responses to First Interrogatories and First Request for Production of Documents from Total Renal Care, Inc., d/b/a Nash County Dialysis, 5/9/14
- 301 Bio-Medical Applications of North Carolina, Inc. d/b/a BMA Rocky Mount's First Supplement to Its Objections and Responses to First Interrogatories and First Request for Production of Documents from Total Renal Care, Inc., d/b/a Nash County Dialysis, 9/22/14
- 302 Demonstration of Compliance with Performance Standards Pursuant to Joint Exhibit 61

EXHIBITS SUBMITTED AS OFFERS OF PROOF

BMA Offers of Proof

- 52. Jim Swann – Summary of Expert Opinions
- 139. Required State Agency Findings, Project ID Nos. G-10254-06 and G-10262-14

TRC Offer of Proof

- 51. Email from Aaron Carrow to Mike Nelms re Project Proposal “Rocky Mount Kidney Ctr” is Ready for Your Review and Approval (January 13, 2014) (**Confidential**)

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

FINDINGS OF FACT

1. Petitioner BMA is a Delaware corporation authorized to conduct business in North Carolina, with its principal place of business in Waltham, Massachusetts, and its registered agent in Wake County, North Carolina.

2. Respondent CON Section is the Agency within the North Carolina Department of Health and Human Services that carries out the Department's administration of the CON Law, codified at N.C. Gen. Stat. § 131E-175, et. seq., including the review of applications for new institutional health services that are defined in N.C. Gen. Stat. § 131E-176 (16).

3. Respondent-Intervenor TRC is a Delaware Limited Liability Company authorized to do business in North Carolina, and is in the business of providing dialysis services.

4. Jim Swann was accepted as an expert witness for BMA in renal dialysis services and CON planning and preparation. For the last ten years, Mr. Swann has served as the Director of Operations for Certificate of Need for Fresenius Medical Care, the parent company of BMA. In that role, Swann has prepared approximately 300 Certificate of Need applications in North Carolina, West Virginia, and Washington, D.C., with a 91% approval rate.

5. David French was accepted as an expert witness for BMA in the preparation of a CON application and the applicant's filing of a CON application as it regards a need determination/competitive bid. Mr. French is a healthcare consultant and the president of Strategic Healthcare Consultants. He has 23 years' experience in Certificate of Need and has prepared about 120 CON applications for various services. French also has experience in long-range planning activities for healthcare providers.

6. Bill Hyland was accepted as an expert witness for TRC in ESRD health planning as it relates to CON planning and his role in the CON preparation and analysis. Mr. Hyland is the Director of Health Care Planning for DaVita Incorporated. Hyland has been employed by DaVita since May 4, 1999. As the Director of Health Care Planning, he is in charge of the development, relocation, and expansion of dialysis facilities operated by DaVita within North Carolina. Hyland prepared the TRC Application. He has prepared close to 300 certificate of need applications in his fifteen years at DaVita, all of which involve end stage renal disease.

7. Julie Halatek has been a project analyst for the Agency for approximately two years. She was assigned to review the TRC and BMA Applications and was primarily responsible for preparing the Required State Agency Findings.

8. Martha Frisone has served as the Interim Chief of the Certificate of Need Section of the Division of Health Service Regulation since January 1, 2013. She also held the position of Assistant Chief of the CON Section for almost four years, and she oversaw Ms. Halatek's work on the review of the BMA and TRC applications. Frisone, having been employed by the CON Section for over twenty years, has had experience with reviewing and analyzing dialysis applications as a project analyst, a team leader, assistant chief of the CON Section, and interim chief of the CON Section. Approximately one-third of the applications reviewed by the CON Section are dialysis applications.

9. Drexdal Pratt is the Director of the Division of Health Service Regulation, Department of Health and Human Services.

10. Elizabeth Brown has worked for the Medical Facilities Planning Branch of the Division of Health Service Regulation ("Planning Branch or Planning Section") since 2006 and has been a planner for more than three years. The Planning Section is responsible for preparing the State Medical Facilities Plan ("SMFP") and the Semi-Annual Dialysis Report ("SDR").

11. Dodie Robinson is a Regional Operations Director for DaVita, which is the parent company of Total Renal Care. Ms. Robinson has been in this position for over six years. In this role, Robinson has oversight for the clinical and financial performances of the eleven facilities within her region that covers the eastern part of North Carolina. She was familiar with the TRC application to develop a 12 station facility in Rocky Mount to the extent that Nash County was in her region and she collected certain documentation and patient letters of support for the TRC Application.

12. Anita Harris is a Director of Operations for Fresenius Medical Care. She is responsible for budgetary matters and regulatory compliance for seven facilities, including the BMA Rocky Mount facility in Nash County and the BMA East Rocky Mount facility in Edgecombe County.

13. Mary Bone is Clinical Manager at the BMA Rocky Mount facility. Cynthia Preston is Secretary at the BMA East Rocky Mount facility.

14. Dialysis facilities are among the types of health care organizations listed in the definition of "health service facility" in the CON Law. The construction of a dialysis facility is *per se* reviewable under the CON law and is subject to the methodologies and need determinations contained in the applicable State Medical Facilities Plan ("SMFP") and Semi-Annual Dialysis Report ("SDR").

15. The SMFP is the official plan developed and published each year which inventories certain services, facilities, and equipment that are subject to CON regulation as well as the utilization of those services, facilities, and equipment. The SMFP also projects future needs for additional services, facilities, and equipment in each service area. The SMFP is developed under

the direction of the State Health Coordinating Council (“SHCC”), which is comprised of healthcare professionals and other citizens, each of whom is appointed by the Governor.

16. As part of its planning responsibilities under the CON Law, the N.C. Department of Health and Human Services issues an SDR twice each year; and currently, the SDRs are published each January and July. SDRs contain detailed information about the number of patients in each county who are receiving any of the different dialysis services and identify the dialysis facilities that are in operation in each county, or which have received certificate of need approval to begin operations. In addition, the SDRs present information about the capacity of dialysis facilities which is expressed in terms of the number of dialysis “stations” that they are permitted to operate.

17. The SDRs contain data used to project the need for additional dialysis stations in each county in the future, based on the size and capacity of the existing dialysis facilities, and the projected dialysis patient population in the future. Based on this data, the SDR contains “need determinations” which are determinations that additional dialysis stations are needed in a given county. A county need determination is realized upon the occurrence of both a projected station deficit of 10 or more stations and a utilization rate of at least 80 percent at each existing dialysis facility in the county. Under a Facility Need methodology, a facility may apply to expand by up to ten stations if its utilization is 80% or greater.

18. The Planning Section, not the CON Section, handles the creation and publication of the SDR. The CON Section uses the published SDR to fulfill its duties in reviewing CON applications pursuant to county need determinations.

19. Historically, the data upon which need determinations were made was reported by the Southeastern Kidney Council. Beginning with the July 2013 SDR, the Planning Branch began collecting data directly from existing ESRD providers.

20. Prior to the July 2013 SDR, the Southeastern Kidney Council and the Mid-Atlantic Renal Coalition collected data from providers, which it provided to the Planning Section. Upon being informed that the data from the Southeastern Kidney Council and Mid-Atlantic Renal Coalition would no longer be available in the form that the Planning Section needed, the Planning Section implemented a new system in which dialysis providers in North Carolina would self-report data to the Planning Section. The self-reported data would then be used by the Planning Section to prepare the SDR.

21. The Planning Branch had a short lead time in which to implement the new system for collecting provider-reported data. The Planning Branch developed a form (the data collection form) which it first presented to providers at a meeting in May 2013. The data collection form was a new form that dialysis providers in North Carolina had not previously used.

22. A meeting was held on May 3, 2013, in which the Planning Section met with all of the dialysis providers in the State to discuss the new procedure and explain the obligations of the providers in self-reporting. The Planning Section showed attendees a copy of the data collection form that was to be used going forward for the July 2013 SDR. Mr. Swann and Mr. Hyland both

attended the May 2013 meeting. No directors of operations or facility managers/administrators for BMA attended the informational May 3 meeting with Swann.

23. During the May 2013 meeting, the Planning Section explained that all data would need to be reported no later than June 6, 2013, and that for any facility not reporting its information by that deadline, the SDR would reflect their utilization data as zero.

24. Based on Mr. Swann's familiarity with the SDRs and from his attendance at the May 3 Meeting, Swann knew that the Planning Section was going to use the data regarding patients' county of residence for the purpose of preparing the July 2013 SDR. Swann understood that the information regarding where patients reside flowed directly into Table B of the July 2013 SDR.

25. After Mr. Swann left the May 3 Meeting, he informed the four regional vice presidents within BMA that this new process was coming and asked to be included in any conference calls that the regional vice presidents may have about this new process. Although Swann remembers reaching out to all four regional vice presidents, he did not recall at either his deposition or the contested case hearing how many conference calls he was on which discussed the processes or procedures for returning the data collection forms. Swann did not have any in-person meetings with directors of operations to go over best practices for the data collection form before they were submitted to the state.

26. Following the State's dissemination of the data collection forms to the facilities, Mr. Swann did nothing to collect the data and/or otherwise review it for accuracy. He never saw the information from the BMA facilities before it was submitted to the Planning Section. Swann did not recall looking at any of the data collection forms until sometime after July 1, 2013 when the SDR was published.

27. Following the May 3 Meeting, Mr. Hyland briefed TRC's Regional Vice President, Clarkston Hines, TRC's six Regional Operations Directors, TRC's Regional Operations Coordinators, and directly emailed the facility administrators who would be populating the forms with a copy to the Regional Operations Coordinators and the Regional Operations Directors.

28. Once the facility administrators populated the data collection forms, Mr. Hyland asked that those forms be sent to the Regional Operations Coordinator for that particular region who would put them in zip drive and send to Hyland for review. After receiving the zip files from the six regions, Hyland reviewed each tab of each of the data collection reports for each of the 65 DaVita facilities. He personally submitted to the State on or before June 6, 2013 the data collection forms for the 65 DaVita facilities after they had been certified by the facility administrators.

29. The Planning Section collected data from all dialysis providers by the June 6 deadline and Ms. Brown prepared a draft Table A for the July 2013 SDR based on this self-reported data.

30. On June 25, 2013, Ms. Brown circulated a draft of Table A to Mr. Hyland and Mr. Swann for any comments or corrections, and stated in her cover email that it was extremely important for the information to be accurate.

31. Mr. Hyland performed an analysis of the proposed Table A and compared it to what he had reviewed on the previously submitted data collection forms. Hyland did not notice any errors in Table A.

32. In reviewing the draft of Table A, Mr. Swann was able to determine what counties had facilities that were 80% utilized. The draft Table A circulated by Ms. Brown to Swann and Mr. Hyland reflected that the facilities in Nash County and Scotland County were all over 80% utilized. Swann responded to Ms. Brown with some corrections regarding draft Table A, but no changes were identified for BMA's data relating to Nash or Scotland County.

33. Several facilities of both BMA (BMA Rocky Mount in Nash County, BMA East Rocky Mount in Edgecombe County, and BMA Laurinburg in Scotland County) and TRC (Dialysis Care of Rockingham County and Dialysis Care of Richmond County) misreported data to the Planning Branch for purposes of the July 2013 SDR.

34. Each of the misreporting BMA facilities reported that every patient receiving treatment at the facility was a resident of the county in which the facility was located. In fact, all three facilities served residents of multiple counties. One of the misreporting TRC facilities, Dialysis Care of Richmond County, made the same error. The second of the misreporting TRC facilities made a reporting error, mistakenly reporting that 47 Rockingham County in-center patients were residents of Caswell County.

35. The Planning Branch incorporated these errors (except for the Richmond County error which was discovered by TRC after the data had been submitted but before the SDR was published) into the July 2013 SDR into (1) the totals of dialysis patients living in each of the affected counties and (2) the resultant AACR for each of the affected counties that was used to calculate the deficit of stations and the need for additional dialysis stations. Accordingly, the reporting errors by the misreporting BMA facilities and misreporting TRC facilities overstated the number of dialysis patients living in Nash County, Scotland County, and Caswell County.

36. As a result, the July 2013 SDR identified deficits of stations in Nash, Caswell, and Scotland Counties that were significantly larger than would have been recognized had the information been correctly reported. The errors also resulted in need determinations for both Nash and Scotland Counties that would not have been recognized had the information been correctly reported. In the case of Caswell County, a need determination was not triggered because the existing facility in Caswell County was not at 80% utilization.

37. The July 2013 SDR reflected a county need determination in Nash County and in Scotland County. For Nash County, the published AACR contained in the official SDR was 9.6%. The 9.6% AACR published in the July 2013 SDR was used by the Planning Section to calculate the 19-station deficit in Nash County, which led to the 19-station need determination in Nash County.

38. Pursuant to the county need determinations reflected in the July 2013 SDR, both Nash and Scotland counties were open for competitive applications. As of July 2013, BMA was the only in-center dialysis provider of dialysis services in both Nash and Scotland counties.

39. Once the July 2013 SDR was published, and since the July 2013 SDR was not changed or republished, the CON Section had to proceed with accepting CON application pursuant to the county need determinations in the SDR. If providers wanted to file an application pursuant to the county need determinations for Nash or Scotland counties, providers were required to file their respective competitive applications with the CON Section.

40. Mr. Hyland noticed when reviewing the July 2013 SDR that TRC had reported to the Planning Section erroneous data caused by a facility administrator who mistakenly inverted the numbers of in-center patients by placing the Rockingham County patients on the Caswell County line. Hyland contacted Elizabeth Brown the morning after the SDR was published to inform her of the TRC error and request that she correct the TRC error in the SDR. On July 8, 2013, Hyland followed-up with Ms. Brown to inquire whether the July 2013 SDR would be amended or whether the SDR would stand as published. Brown responded to Hyland that the SDR was final and would stand as it had been published on July 1, 2013.

41. Mr. Hyland did not try to petition the Governor to amend the July 2013 SDR as a result of TRC's error. He also did not apply for a *de novo* facility in Caswell County because he believed it would not be the right thing to do since TRC made the error that would have permitted a *de novo* application which otherwise would not have existed but for TRC's error.

42. Mr. Hyland determined from his review of the SDR that TRC should file competitive applications in Scotland and Nash Counties along with 12 other CON applications on September 16, 2013.

43. BMA suspected there had been reporting errors when its Director of Operations for Certificate of Need, Jim Swann, reviewed the published July 2013 SDR on July 1, 2013. Upon reviewing Table B in the SDR, which reflects the need determinations by planning area and includes the data on which the station deficits or surplus are determined, Mr. Swann noticed that Caswell, Nash, and Scotland Counties had abnormally high deficits and immediately contacted Ms. Brown at the Planning Branch. Although the Planning Branch had provided Swann with a draft copy of Table A from the SDR prior to its publication, Table A primarily inventories the stations for each facility and thus the errors were not apparent from Table A but were apparent from Table B. Table B was not made available to any providers prior to publication of the SDR because it was not completed in time.

44. Mr. Swann promptly brought the issue to the attention of the Planning Branch, investigated the information reported by the Misreporting BMA Facilities, and provided the corrected data from those facilities within two days of the publication of the July 2013 SDR.

45. The errors that BMA discovered occurred in the data collection forms submitted by BMA. Mr. Swann agreed that Ms. Brown properly took the 259 total patients from Nash County shown in the patient origin report and accurately placed it into Table B of the July 2013 SDR. Brown then calculated the AACR to be 9.6% based on the 259 patients shown in Table B for Nash County. Swann agreed that the AACR calculates to 9.6% and agreed with Brown's math. Swann also agreed that the State does not arrive at a 19-station deficit in Nash County without using the 9.6% AACR.

46. In the week after the SDR was published, Mr. Swann emailed Ms. Brown in the Planning Section to ask whether the Agency was going to amend the SDR pursuant to the corrected forms Swann had submitted.

47. Both BMA and TRC requested that the Planning Branch correct the reporting errors. Ms. Brown emailed Mr. Swann and Mr. Hyland and notified them that the SDR would not be amended. Specifically, Brown informed Swann and Hyland that: "Legal counsel has advised the Division of Health Service Regulation that we do not have the legal authority to make changes to a Semiannual Dialysis Report once it has been released to the public. Therefore, the July 2013 Semiannual Dialysis Report released on July 1, 2013 will stand as published." (Jt. Ex. 45).

48. The CON Section proceeded to accept applications for the need determinations recognized in the July 2013 SDR, with the applications being due on September 16, 2013 for the review beginning October 1, 2013.

49. After Ms. Brown informed Mr. Swann via email communication that the Planning Section legally cannot amend the SDR, Swann requested that Brown set up a meeting between Swann and Drexler Pratt. The meeting between Swann and Director Pratt occurred on July 15, 2013. In addition to Swann and Pratt, Elizabeth Brown and Nadine Pfeiffer were also present. Erin Glendenning may also have been in attendance.

50. During the meeting with Director Pratt, Mr. Swann requested that an amended SDR be published to correct the erroneous data that BMA had reported. Pratt testified that Swann explained the errors to him during the meeting and requested that the numbers in the published July 2013 SDR be changed to eliminate the county need determinations from Nash and Scotland Counties. Director Pratt told Swann that the Agency could not amend the SDR and that the Division would not request an amendment from the Governor since the Agency had no role in the error. Pratt informed Swann that if he wanted to have the SDR changed, he should and could petition the Governor to change it.

51. Mr. Swann testified that Mr. Pratt told him that the BMA reporting error would be sorted out in the CON process. Director Pratt testified that he never suggested to Swann at the July 15 meeting that the errors Swann raised during the meeting could be sorted out during the CON process.

52. Director Pratt does not recall any discussion about the CON Section in the July 15 meeting nor does he recall there being a reason to discuss CON. Director Pratt testified that had there been any reason to discuss the CON Section or had a CON issue arisen during the course of the meeting, consistent with his typical practice, Pratt would have invited the CON Section to be present, or since the CON Section is upstairs from Pratt's conference room, he would have called to ask that the CON Section chief, assistant chief, or a manager come downstairs to join the meeting.

53. At no point after the July 15, 2013 meeting did Director Pratt have any conversation with Craig Smith, the Chief of the CON Section at the time, or Martha Frisone, the Assistant Chief of the CON Section at the time, since this was a Planning Section issue and not a CON Section issue.

54. Mr. Swann's statement that Director Pratt would sort it out during the CON process was not made in his July 31 letter, was not made in BMA's August 15, 2013 South Rocky Mount Application, was not made in BMA's September 16, 2013 Rocky Mount Application, and was not made in BMA's public written comments dated October 31, 2013. The first time that Swann made the comment that Pratt had indicated that this would be sorted out in the CON process was four months after his meeting with Pratt in BMA's public hearing comments on November 18, 2013.

55. BMA submitted a letter dated July 31, 2013 to the Planning Branch and the CON Section, which the Planning Branch subsequently treated as a petition to the State Health Coordinating Council (SHCC). BMA also sent the letter, including the corrected data, to other dialysis providers in the state to avoid "confusion or inaccurate assumptions or projections in the upcoming CON review." (Jt. Ex. 1, p. 206; Swann, T. Vol. 3, pp. 643-47). The letter stated the errors skewed the AACR and included revised calculations for Table B showing that rather than 9.6%, the actual historical AACR for Nash County was only 2.1%. It also included copies of the corrected data for the misreporting BMA facilities and requested that the Planning Branch correct the total patient population figures for the counties affected by BMA's reporting errors in future SDRs which would use the same data to calculate the AACR.

56. Mr. Swann did not send his July 31 letter to the Governor's office to explain BMA's errors or otherwise request an amendment to the July 2013 SDR. Swann never asked Director Pratt or anyone else at the Agency, DHSR, the CON Section, or the State if they would be willing to support a petition from BMA to the Governor to amend the July 2013 SDR. Swann and BMA made the decision not to petition the Governor.

57. Ms. Frisone testified that in her opinion, the Court of Appeals case, *Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Health and Human Servs.*, 179 N.C. App. 483, 634 S.E.2d 572 (2006) ("2006 BMA Case") stands for the proposition that the Governor has the final authority to approve or amend the SMFP, which becomes the binding criteria for the review of CON applications and that only the Governor can amend the SDR. Frisone included the 2006 BMA Case in the Agency File to document that only the Governor has the authority to amend the SDR.

58. The Planning Branch and the CON Section, reviewed BMA's letter and materials and prepared an Agency Report for the Long-Term and Behavioral Health Committee of the SHCC in which DHSR concluded that the data reported in the July 2013 SDR for the misreporting BMA facilities was erroneous and recommended that the SHCC correct the errors in future SDRs. The Committee adopted the recommendation of the Agency Report on September 11, 2013.

59. The SHCC adopted the recommendation of the Agency Report at its October 2, 2013 meeting, and accordingly, in the January 2014 SDR, the Planning Branch corrected the December 31, 2012 patient census totals and the resulting AACR for the years ending December 31, 2008 through December 31, 2012 for the affected counties.

60. At the time of that meeting, the TRC Application and the BMA Application were already under review by the CON Section and the CON Section had made the determination that the published July 2013 SDR was the plan in effect at the time review of the TRC Application and the BMA Application commenced.

61. The January 2014 SDR was not published as of September 16, 2013 nor had the January 2014 SDR been published on October 1, 2013 when the Nash County Review began.

62. The January 2014 SDR was not published until January 2, 2014 and was in effect for reviews that began on April 1, 2014. The January 2014 SDR is a different document published for a different review cycle than the July 2013 SDR.

63. Since the July 2013 SDR was not amended, changed or republished, the CON Section proceeded with accepting CON applications pursuant to the county need determinations in the July 2013 SDR, which was in effect for the Nash and Scotland county reviews.

64. On September 16, 2013, both BMA and TRC submitted applications for the 2013 Nash County ESRD Review. BMA proposed to add 11 new stations to its existing BMA Rocky Mount facility in Nash County. TRC proposed to develop a new 12-station dialysis facility in Rocky Mount, Nash County.

65. The BMA Application and the TRC Application were filed in the same review period. Because together the BMA Application and the TRC Application proposed to develop a total of 23 new dialysis stations, exceeding the 19 station need determination, the Agency could not approve both of the applications in their entirety. Accordingly, the Agency batched the two applications for a competitive review.

66. BMA filed its application in complement to a previously filed application to develop a new facility in southern Rocky Mount (the "South Rocky Mount Application") by relocating 12 stations from the BMA Rocky Mount facility. BMA filed the South Rocky Mount Application to allow BMA to serve existing patients living in southern Rocky Mount at a more convenient location, while freeing up space at BMA Rocky Mount for additional stations to address a growing number of patients seeking treatment at BMA's facility both from within and outside of Nash County.

67. At the time the BMA South Rocky Mount Application was filed, BMA was the sole provider of dialysis services in Nash County. BMA was the only provider that could have filed such an application for a *de novo* facility in Nash County because there were no other providers in the county at that time. Because BMA proposed to use its existing stations for the South Rocky Mount facility, this application was non-competitive.

68. BMA decided not to seek a *de novo* facility in South Rocky Mount in a single step process in a competitive review, but rather to seek a *de novo* facility in Rocky Mount through a multi-step process: (1) filing a noncompetitive application on August 15, 2013 to remove 12 stations from its Rocky Mount facility and transfer those 12 stations to a new *de novo* facility in South Rocky Mount; and (2) filing a competitive application on September 16, 2013 pursuant to the Nash County need determination to backfill 11 of the 12 the stations that were transferred out of BMA's Rocky Mount facility.

69. BMA included all of its capital costs in the non-competitive South Rocky Mount Application. In the competitive BMA Rocky Mount Application that BMA filed on September 16, Mr. Swann represented to the CON Section that BMA would have no capital costs because it

was backfilling stations. With the exception of BMA, all other competitive applications filed on September 16, 2013 had capital costs associated with those applicants' proposed projects.

70. The South Rocky Mount Application was approved during the Agency's review of the BMA Application and the TRC Application. TRC did not appeal the Agency's approval of the South Rocky Mount Application, and the Agency's approval of the South Rocky Mount Application is not an issue in this contested case.

71. BMA and TRC each filed applications during the competitive review in Scotland County on September 16, 2013. Due to the number of stations being sought in BMA's two competitive applications in the Scotland County Review, if either BMA application was approved by the Agency and BMA's application was deemed to be comparatively superior to TRC, TRC's application would have been denied because less than ten stations would have remained available.

72. BMA and TRC's applications in the Scotland County Review were found by the Agency to be conforming with all of the applicable statutory review criteria and performance standards. BMA's application was approved and was deemed comparatively superior to TRC's application. Because BMA's Scotland County application was approved, there were not enough stations for the CON Section to grant TRC's application for a *de novo* facility in Scotland County.

73. Once CON applications in this present Nash County ESRD Review matter were filed, the Agency assigned a project analyst. Julie Halatek was the project analyst assigned to the 2013 Nash County ESRD Review. The Interim Chief of the CON Section, Martha Frisone, was the co-signer for this Review. BMA and TRC each submitted written comments and public hearing comments regarding the other's application. Halatek and Frisone read and considered the comments made by the applicants, and Halatek investigated comments she thought were relevant to the statutory review criteria.

74. The Agency determined that both the BMA Application and the TRC Application were fully conforming with all applicable statutory review criteria and rules. In the comparative analysis, the Agency determined that TRC was comparatively superior with regard to more of the factors it chose in this Review and therefore decided to approve the TRC Application for all 12 stations for which it applied.

75. Because the approval of the TRC Application left seven stations which could be approved consistent with the need determination, the Agency approved the BMA Application on the condition that it develop only 7 of the 11 stations it had proposed. The Agency issued its decision in this Review on February 27, 2014, and issued the required state agency findings for the Review on March 6, 2014.

76. In the September 16, 2013 TRC application, Mr. Hyland relied on the July 2013 SDR as published by the State for TRC's applications. Hyland testified that he typically uses the AACR as published in the SDR when determining the rate at which to grow a patient population. Hyland relied on the information in the July 2013 SDR, including the AACR, and the need determination for 19 stations, to guide his preparation of the TRC Application in Nash County.

77. At the hearing in this contested case, BMA challenged the Agency's decision with respect to the statutory review criteria found at N.C. Gen. Stat. § 131E-183(a)(3), (4), (5), (6), and (18a) ("Criterion 3," "Criterion 4," "Criterion 5," "Criterion 6," and "Criterion 18a").

78. Criterion 3 in the CON Law, which pertains to demonstrating need for a proposed project, states that an applicant "shall identify the population to be served by the proposed project and shall demonstrate the need that this population has for the services proposed and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are like to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a) (3).

79. The TRC Application provided assumptions made by Mr. Hyland in order to support the application's projection utilizations to satisfy Criterion 3.

80. One of TRC's assumptions was that "TRC assumes that a significant number of Nash County in-center ESRD dialysis patients are leaving Nash County three times a week to receive their dialysis treatments at facilities outside [of] Nash County." (Hyland, Tr. Vol. 8, p. 1715; Frisone, Tr. Vol. 6, p. 1423; Jt. Ex. 3, p. 30). TRC's assumption was based on Patient Origin Data that TRC had that TRC was treating 15 Nash County in-center patients as of December 31, 2012 who were receiving services in four of DaVita dialysis facilities outside of Nash County.

81. TRC provided support for this assumption in the chart on page 31 of the TRC Application wherein TRC showed that it had 15 patients that would grow to 25 patients by September 1, 2013 that resided in Nash County but were seeking treatments in DaVita facilities outside of Nash County as of September 1, 2013. Mr. Hyland grew those 15 Nash County patients being served by the four DaVita facilities outside of Nash County to 25 patients by September 1, 2013 based on numbers he received from one of DaVita's insurance specialist, Marilyn Stauter. Stauter is responsible for and has access to all of the patient data for every DaVita facility in North Carolina, and can pull that data for Hyland by facility for him for his use in preparing CON applications.

82. Criterion 3 requires each applicant to identify the patient population to be served and to demonstrate the need that this population has for the proposed services. To identify a patient population who might use its proposed facility when it opened, TRC presented letters from existing patients at TRC facilities who were receiving in-center hemodialysis treatment, or who had received training on home dialysis, and were interested in receiving services through the new facility. TRC's identification of a starting population of patients who were projected to receive in-center or home dialysis services from its proposed Nash County facility when it opened was based upon expressions of interest from specific dialysis patients.

83. Mr. Hyland received a total of 32 patient letters to include in TRC's Application. The 32 letters from patients were presented in Exhibit 12 to the TRC Application, and the text of each letter was very similar, indicating the patient's interest in receiving treatment at the proposed facility and explaining that doing so would be more convenient and less expensive for them. Only one of the 32 letters specified the patient's county of residence.

84. BMA contends that TRC's utilization projections were not reasonable, credible, or supported because they were based on the assumption that 26 Nash County residents and six Wilson County residents had signed letters of support for the project.

85. BMA pointed out TRC's lack of documentation for its patient origin assumptions to the Agency in its written comments on the TRC Application. Ms. Halatek testified that she raised concerns during the Review over the lack of documentation to support TRC's statements regarding the patients' county of origin.

86. In a TRC application for a new facility in Scotland County filed the same day as the Nash County application and which also relied on patient letters to support the utilization projections, every support letter stated the patient's county of residence.

87. Ms. Frisone was aware at the time of the Nash County Review that only one of the 32 letters that TRC submitted in its application stated the county in which the patient lived, but this did not require the CON Section to find TRC's Application non-conforming. The CON Section did not agree with BMA's written comments that TRC's letters of support were non-specific and unreliable. Each of TRC's patients stated "I could travel between my home and a location in Rocky Mount more easily and quickly, which would save me time and money." (Hyland, Tr. Vol. 8, p. 1731). In addition, each letter stated: "But I definitely would consider transferring because it would mean a shorter trip to dialysis [and] would make getting my treatments easier." (Hyland, Tr. Vol. 8, p. 1731).

88. Ms. Frisone, Mr. Swann, Mr. French, and Mr. Hyland each agree that if an applicant is going to provide a letter of support, there is no statute, law or rule within CON that requires or dictates the content of the patient letters of support. The content placed in that letter of support is up to the provider.

89. In a prior Franklin Review in which BMA filed a CON Application to relocate stations from Wake County to Franklin County, BMA argued to the Agency that when a patient says they believe the proposed facility is closer to their home and more convenient, the Agency should give deference to that statement and place greater weight on the patients' preference for the proposed location as they expressed in the support letters. As a result of the Franklin review, the Agency has since recognized when they see a patient letter of support similar to the ones in the TRC Application that the concept of patient choice is more important than focusing on a zip code.

90. The Agency accepted TRC's representations regarding patient origin at face value. Ms. Frisone maintained that the absence of the county of residence in the support letters did not undermine the reasonableness, credibility and support for the utilization projections because there is no rule or statute that requires the letters of support to state information regarding the patient's residence. Frisone testified that, although the letters may not have documented the county of residence, they nonetheless documented intent to transfer. Although 31 of the TRC patient support letters do not indicate the county in which the patients live, there is information in the letters that supports the utilization projections used in TRC's Application.

91. The evidence presented by TRC in this contested case establishes that TRC incorrectly represented the county of residence of the patients who signed support letters. In fact,

there were letters from 21 Nash County patients, 9 Wilson County patients, 1 Edgecombe County patient, and 1 patient whose county of residence is unknown.

92. At some point in time after he had already prepared the chart on page 31 of the TRC Application based upon data provided by Ms. Stauter, Mr. Hyland received 32 patient letters back from Ms. Robinson and Ms. Lewis. Hyland made copies of those letters and attached them as an exhibit to the TRC Application.

93. In the course of discovery during this litigation, Mr. Hyland located a document which tallies the number of patient letters from Nash, Wilson, and Edgecombe counties. According to Joint Exhibit 61, TRC had obtained 21 patient letters from Nash County residents; 9 patient letters from Wilson County residents; 1 letter from an Edgecombe County resident; and 1 patient letter of unknown residence due to the illegible handwriting. Hyland recalls seeing this document for the first time in August 2014 the night before his deposition in this contested case, in connection with preparing for his deposition.

94. Although Mr. Hyland does not contest that Joint Exhibit 61 is dated September 13, 2013 and contains his handwriting, he had no specific recollection of completing this document on or about September 13, 2013. According to Joint Exhibit 61, on September 13, 2013, three days before Hyland filed 14 applications on the September 16, 2013 CON review deadline, he scanned and emailed to himself a document entitled "Index of Patient Support Letters for [the] Nash County facility." Hyland wrote on this document the county of residence for each of the 32 patients shown on that document by denoting the county with an "E," and "N", or a "W" for Edgecombe, Nash or Wilson, respectively. Hyland indicated on this document that the 32 patient letters for TRC's Nash application include 21 Nash County residents, 9 Wilson county residents, 1 Edgecombe County resident, and 1 unknown county resident whose name was illegible.

95. Mr. Hyland testified that although he had done the analysis in Joint Exhibit 61 three days before he submitted the TRC Application, he does not recall preparing this document. If he had realized that this document showed numbers that were different than what he had previously written in the TRC Application, he would have revised the TRC Application to recalculate the number of patients TRC would be serving based on assumptions that TRC would start with 21 Nash County patients and 9 Wilson County patients.

96. The information in the TRC application regarding patients' county of residence was correct based on the information that Ms. Stauter provided. Hyland made the erroneous assumption that the patient letters of support he would receive from patients through Ms. Robinson would match the information that had been provided to him by Stauter in the course of his preparation of the TRC Application. The TRC Application erroneously represents that TRC had letters of support from 26 Nash County residents. Hyland admitted his mistake of failing to realize that the numbers contained on Joint Exhibit 61 were different than what he previously wrote into the TRC Application and testified that he was in no way trying to deceive or mislead the CON Section.

97. In analyzing an applicant's demonstration of need under Criterion 3, the Agency evaluates an applicant's utilization projections to see both whether the projected utilization is

expected to meet the applicable performance standard and also whether these utilization projections are reasonable, credible, and supported.

98. The Agency has adopted rules setting forth performance standards applicable to dialysis reviews, requiring an applicant to document need by demonstrating that its stations will be utilized at the rate of 3.2 patients per station per week (or 80% utilization) by the end of the first operating year. When an applicant projects to meet the performance standard based on reasonable, credible, and supported assumptions, the Agency generally finds the application to be conforming to Criterion 3. However, if an applicant projects to meet the performance standard based on assumptions that are not reasonable, credible, and supported, the Agency finds the application nonconforming to Criterion 3.

99. Because TRC proposed a 12-station facility, it had to project that there would be at least 39 in-center patients at the end of its first year of operations in order to meet the performance standard.

100. Mr. Hyland took 25 Nash County patients treating in facilities outside of Nash County as of September 1, 2013, noted in the TRC Application that those in-center patients were based on support letters, and then added one letter from a non-DaVita patient being followed by Dr. Bynum who indicated that the patient lived in Nash County and would be referred to DaVita. As a result, Hyland based his assumption that he had 26 patients living in Nash County.

101. Mr. Hyland believed there were 6 patients from Wilson so he added the 26 patients living in Nash County and the 6 patients living in Wilson for a total of 32 patients as the starting point for TRC's utilization projections. TRC's starting census of 32 patients matched the number of support letters signed by actual patients which were attached to TRC's Application.

102. Ms. Frisone testified that without regard to whether Mr. Hyland ultimately made an error with regard to whether it was 26 Nash County patients and 6 Wilson patients or 21 Nash County patients, 9 Wilson patients, 1 from Edgecombe, and 1 unknown, there were a total of 32 patients who made direct, unambiguous statements that treating at the TRC facility in Rocky Mount would be more convenient for them. TRC's submission of support letters from 32 actual patients was a factor that Frisone took into consideration in determining that the need projections in the TRC Application were reasonable.

103. There is no error in the number of patient letters that Mr. Hyland provided with the TRC Application; there are 32 letters and 100% of those 32 patients indicated it would be more convenient and less costly to them to receive dialysis at a proposed TRC facility in Rocky Mount.

104. In addition to the 32 patient letters of support attached to the TRC Application, the following also supported TRC's patient projections in TRC's Application: (1) the December 31, 2012 Patient Origin Report, which was accurate and available to both the CON Section and Mr. Swann; (2) letters to the CON Section in support of TRC's growth projections that there was physician support for TRC's proposed project; and (3) two physician letters included with TRC's Application that evidenced the physicians' intent to refer ESRD patients to TRC's proposed facility.

105. To grow the patient population going forward, Mr. Hyland grew the 26 Nash County patients using the 9.6% AACR published in the July 2013 SDR and then added the 6 Wilson County patients. By applying the five-year AACR to TRC's assumption that it was starting with 26 Nash County in-center patients and then adding the Wilson patients, TRC projected that the Nash County facility would serve 39.8 patients by the end of Operating Year one, which would be 3.2 patients per station per week as required by 10A NCAC 14C .2203(a).

106. Mr. Hyland testified that no growth rate was applied to the Wilson County patients because the projections for the new facility already met the performance standards, and therefore he saw no need to grow the Wilson County population.

107. Mr. Hyland re-calculated in TRC Exhibit 302 projections using the numbers that were in Exhibit 61 of 21, 9, 1, and 1. When Hyland carried the same calculations through on these numbers, he concluded that at the end of Operating Year 1, TRC would have a total of 39 in-center patients with 27 Nash County patients, 10 Wilson County patients, plus two other patients. Accordingly, even using the numbers shown in Joint Exhibit 61, TRC would have projected a total of 39 in-center patients.

108. In TRC's Application, Mr. Hyland grew the 26 Nash County patients forward at 9.6% and did not add any growth rate for the six Wilson County patients. Although Hyland could have grown the Wilson County patients, he chose not to do so to be conservative and because simply growing forward the total of the 26 Nash County patients (the 25 patients Mr. Stauter indicated TRC was actually treating as of September 1, 2013 and the one patient from Dr. Bynum) allowed TRC to meet the performance standard in .2203. In contrast, in Hyland's re-calculation using the numbers shown in Joint Exhibit 61, Mr. Hyland grew the Wilson County patients by the 4.7% AACR for Wilson County in order to satisfy the performance standard of .2203.

109. BMA contends that TRC's assumption that the Nash County patient population it identified would grow at 9.6% per year was not reasonable, credible, or supported. Criterion 3 requires the applicant to reasonably demonstrate the need that its identified population has for the services proposed.

110. Before it applied, TRC and BMA knew that the published AACR was based on data erroneously reported by BMA. Mr. Swann testified that the reporting errors were obvious, noting that the population spike for Nash County residents reported in the July 2013 SDR was inconsistent with historical trends. The Agency had publicly recognized the AACR was erroneous and had endorsed the corrected data. The Agency acknowledged that 2.1% was the historical growth rate.

111. BMA's expert witness, David French testified that need determinations are hypothetical determinations that set the maximum number of dialysis stations that can be approved, but the CON review process checks the applications against real world circumstances. Mr. French testified that the fact that a statistic is published does not, in his opinion, give it more credibility than data from another source. French agreed that it is within the discretion of the Agency to determine what circumstances are reasonable or not.

112. Ms. Frisone testified that the Agency may look beyond the published growth rate and determine whether it presents a reasonable assumption noting that the Agency looks to the totality of the circumstances when evaluating conformity.

113. The 9.6% AACR was in a published SDR, which is a part of the SMFP, and was in effect at the time that the Nash County Review began. In Ms. Frisone's experience, the CON Section has historically deemed the AACR in the published SDR to be reasonable, supported, and credible. Further, the CON Section determined that TRC's use of the published AACR was reasonable, credible, and supported since the Planning Section had used that 9.6% average annual change rate to calculate the 19-station deficit.

114. Mr. Hyland routinely uses the published AACR in CON applications that he has filed over the years and has never had his practice of using the published AACR determined by the Agency to be unreasonable. Hyland testified it was reasonable for TRC to use the published 9.6% AACR in its Application to develop a 12-station *de novo* facility in Nash County for the following reasons: (1) the 9.6% AACR was the driving force to the need determination of a 19-station deficit of stations for a county need determination in Nash County; (2) one hundred percent of the CON applications Hyland submitted for *de novo* facilities and county need determination have been submitted using the published AACR; and (3) neither DaVita nor TRC has historical data on which to depend since they have never operated a facility in Nash County.

115. Ms. Frisone determined that it was reasonable for TRC to use the 9.6% AACR in its Application in the Nash County Review because it was the AACR contained in a published SDR that was in effect on the date that the Nash County Review began and was the applicable SDR for the Nash County Review. As of the time of the Nash County Review, the CON Section had found that an applicant's use of a published average annual change rate was reasonable. Frisone's analysis of the TRC Application in the Nash County Review was consistent with that historical practice. Ms. Halatek consulted with Frisone regarding the issue of whether it was reasonable to use the 9.6% AACR. Frisone advised Halatek that it was reasonable and supported for TRC to rely on the published AACR of 9.6%.

116. TRC relied on the published AACR as one of its assumptions for its need methodology of its application and had the reasonable expectation that it could rely on the published SDR that was in effect on the date that the Nash County Review began.

117. The 9.6% growth rate is what led to the need determination and is the growth rate on which the 19 stations depend. Of great importance in this case, without the 9.6% growth rate, there would not have been a 19-station deficit in Nash County nor would there have been a need determination in Nash County. If the July 2013 SDR had been changed by the Governor, then neither BMA's nor TRC's applications would have been before the CON Section.

118. The Agency has the discretion to take into account all circumstances of any given application in order to determine whether the applicant's use of the published SDR growth rate is reasonable, credible, and supported. Under the facts and circumstances of the Nash County Review, it was reasonable for TRC to use the published 9.6% growth rate.

119. Criterion 4 requires an applicant to demonstrate that the least costly or most effective alternative has been proposed where there are alternative methods of meeting the need for the proposed project. N.C. Gen. Stat. § 131E-183(a)(4).

120. The CON Section made a reasonable determination that the TRC Application was conforming with Criterion 4 because the TRC Application was conforming with all other applicable statutory and regulatory review criteria and TRC adequately demonstrated that its proposed project was the least costly or most effective alternative to meet the need.

121. Criterion 5 requires that “[f]inancial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs and charges for providing health services.” N.C. Gen. Stat. § 131E-183(a)(5).

122. The CON Section made a reasonable determination that the TRC Application was conforming with Criterion 5 because TRC adequately demonstrated that the financial feasibility of the proposed project was based on reasonable projections of revenues and operating costs.

123. Criterion 6 requires that an applicant demonstrate that its proposed project will not result in unnecessary duplication of existing or approved health service capabilities. N.C. Gen. Stat. § 131E-183(a)(6).

124. The CON Section made a reasonable determination that the TRC Application was conforming with Criterion 6 because TRC adequately demonstrated the need to develop a new 12-station dialysis facility in Nash County. As a result, the Agency found that TRC’s proposed project would not result in the unnecessary duplication of existing or approved health service capabilities or facilities.

125. Criterion 18a requires that an applicant demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition would have a positive impact upon cost effectiveness, quality, and access to the proposed services. N.C. Gen. Stat. § 131E-183(a)(18a).

126. The CON Section made a reasonable finding that the TRC Application conformed with Criterion 18a because TRC provided information in Sections II, III, V, VI, and VII of its Application which was reasonable and credible, and that adequately demonstrated that any enhanced competition in the service area would have a positive impact on the cost-effectiveness, quality and access to the proposed services.

127. The Agency found that the TRC Application was conforming with the performance standards at 10A NCAC 14C .2203(a), because it proposed to serve 3.2 patients per station by the end of operating year one.

128. The TRC and BMA applications were reviewed competitively by the Agency. Both applications could not be approved as proposed, because they collectively proposed 23 dialysis stations, but the need determination for Nash County was only for 19 dialysis stations.

129. The Agency found that the TRC Application conformed with all statutory and regulatory review criteria in N.C. Gen. Stat. § 131E-183(a). BMA was also found conforming with all applicable review criteria in the Nash County Review. The Agency's comparative analysis utilized twelve comparative factors on which the two applications were compared. These factors are consistent with the factors that the Agency has historically reviewed and used in other ESRD applications to compare those applications and determine whose application is comparatively superior.

130. The CON Section reviewed and used the following factors in the comparative analysis in the Nash County Review: Home Training, Hours of Availability, Services in Rural, Remote Areas, Facility Location, Access to Ancillary and Support Services, Service to Nash County Residents, Availability of Staff and Medical Director, Access by Underserved Groups, Average Net Revenue per Treatment, Average Operating Cost per Treatment, and Direct Care Staff Salaries. TRC was the more effective alternative on all factors where it was not an equally effective alternative to the BMA Application.

131. The Agency determined that the TRC and BMA applications were comparatively equal with respect to the following seven factors: home training; hours of availability; services in rural, remote areas; facility location; access to ancillary and support services; service to Nash County residents; and availability of staff and medical director. The Agency determined that TRC was the comparatively superior applicant with respect to the following five factors: access by underserved groups, access to alternative providers, average net revenue per treatment, average operating cost per treatment, and direct care staff salaries.

132. Because the CON Section determined that TRC was the comparatively superior applicant, the CON Section awarded TRC the 12 stations sought by the TRC Application. On February 27, 2014 and by Required State Agency Findings issued on March 6, 2014, the Agency issued its decision approving the TRC Application for a new twelve-station facility in Nash County and conditionally approving the BMA Application for seven of the eleven stations for which BMA applied.

133. Pursuant to North Carolina General Statute 131E-186, the Agency has the authority to conditionally approve an applicant for a *de novo* dialysis facility that contains fewer stations than for which the applicant applied if the Agency determines that the applicant demonstrated a need for a fewer amount of stations than for which it applied.

134. The fact that TRC's Application was comparatively superior to BMA's Application was material to Ms. Frisone's testimony that had TRC demonstrated the need for a 12, 11, or 10 station facility, Frisone would have conditionally approved TRC for a downsized facility had she felt the need to do so, which she did not.

135. Ms. Frisone reviewed and understood the chart contained in Mr. Swann's written comments wherein he took exactly what was in TRC's Application and applied a 2.1% AACR. Specifically, he used the same numbers in TRC's Application, 26 patients from Nash and 6 from Wilson, duplicated TRC's methodology, and changed the AACR to 2.1%. From this chart, prepared by Swann, Frisone surmised that if the CON Section were to accept BMA's argument that the highest possible growth rate that could be used was 2.1%, the CON Section would still

consider conditioning TRC to develop a 10-station facility instead of denying TRC's Application because by Swann's calculations using a 2.1% AACR, TRC would have satisfied the performance criteria for at least a 10-station *de novo* facility.

136. Ms. Frisone agreed that Mr. Swann conducted another analysis wherein Swann changed the AACR from 9.6% to 2.1%, the 26 Nash County patients to 21, the 6 Wilson County patients to 9, and included both the Edgecombe and unknown patients. Even under this scenario, TRC would have satisfied the performance standard and demonstrated the need for a 10-station *de novo* facility in Nash County.

137. Had Ms. Frisone determined that TRC demonstrated the need for a 10 station *de novo* facility, she would have approved TRC for the 10 station *de novo* facility and conditionally approved BMA for 9 of its requested 11 stations.

138. In BMA Exhibit 134, Mr. Swann took the same analysis that TRC used in their application except that he broke down the patient support letters as 21 Nash County patients, 9 Wilson County patients, 1 Edgecombe County patient, and 1 patient from an unknown county for a total of 32 support letters. Swann then took 21 patients for Nash County and projected those patients at the 9.6% AACR that was published in the July 2013 SDR. Swann admitted that using 21 patients for Nash County at a 9.6% AACR would satisfy the performance standard for an 11 station *de novo* facility. Had the information in TRC's Application shown 21 Nash County patients rather than 26, and 9 Wilson County patients instead of 6, Ms. Frisone would have conditioned TRC for an 11 station *de novo* facility, and conditionally approved BMA for 8 stations.

139. Ms. Frisone and Ms. Halatek both acknowledged that the Agency did not perform any analysis during the Review to determine the impact of a lower growth rate on TRC's conformity or give any consideration to the impact of the inaccurate patient support letter assumptions.

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 Office of Administrative Hearings has jurisdiction over all the parties and the subject matter of this action. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that any of the following Conclusions of Law is a Finding of Fact, it shall be so considered in spite of its designation as a Conclusion of Law.

2. The Undersigned need not make findings as to every fact which arises from the evidence and need only find those facts which are material to resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. The subject matter of the above-captioned contested cases are the CON Section's decisions to approve the TRC Application and to conditionally approve the BMA Application. N.C. Gen. Stat. §§ 131E-188(a) (providing for administrative review of Agency decision to issue, deny or withdraw certificate of need) and 150B-23(a) (providing for a contested case petition challenging an administrative agency's action). *See also Presbyterian Hosp. v. N.C. Dep't of Health and Human Servs.*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006).

4. As the Petitioner in this contested case, BMA must establish that its rights were substantially prejudiced as a result of the CON Section's decisions, in addition to establishing that the Agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. *Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs.*, 205 N.C. App. 529, 696 S.E.2d 187 (2010); *see also* N.C. Gen. Stat. §§ 131E-188(a) and 150B-23(a);

5. As the Petitioner, it is BMA's burden to prove the facts required by G.S. 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a).

6. A contested case challenging a CON decision is not a *de novo* proceeding. "[T]he purpose of the ALJ's determination in a CON case is to review the correctness of the Department's decision utilizing the standards enunciated in N.C. Gen. Stat. § 150B-23(a) rather than to engage in a *de novo* review of the evidentiary record." *E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs.*, 211 N.C. App. 397, 405 710 S.E.2d 245, 252 (2011); *see also Britthaven, Inc. v. N.C. Dep't of Health and Human Servs.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995) (rejecting petitioner's contention that initiation of a contested case commenced a *de novo* proceeding by the ALJ).

7. When a party questions whether the Agency's decision was supported by the evidence or whether it was arbitrary or capricious, the appropriate standard is the whole record test. *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

8. Under the whole record test, "a court must examine all of the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision." *Good Hope Health Sys. v. N.C. Dep't of Health and Human Servs.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462 (2008) (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d, 764, 769 (2004)). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat § 150B-2(8c).

9. A review of the Agency's determination regarding the reasonableness of an applicant's projections is subject to the whole record test. *See Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 52-53, 625 S.E.2d 837, 841 (2006).

“A reasonable projection of something that will occur in the future, by its very nature, cannot be established with absolute certainty.” *Craven*, 176 N.C. App. at 53, 625 S.E.2d at 841.

10. When employing the whole record test, a reviewing court may not substitute its opinion for that of the Agency even if it would reach a different conclusion given its consideration of the whole record. *Gordon v. N.C. Dep’t of Corr.*, 173 N.C. App. 22, 34, 618 S.E.2d 280, 289, (2005); *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. The whole record test cannot be used as a “tool of judicial intrusion.” *E. Carolina Internal Med.*, 211 N.C. App. at 407, 710 S.E.2d at 253 (quoting *Hosp. Grp. of W. N.C., Inc. v. N.C. Dept. of Human Res.*, 76 N.C. App. 265, 268, 332, S.E.2d 748, 751 (1985)).

11. Under the whole record test, even an error in the Agency’s analysis of an applicant may be harmless if it does not affect the outcome in the review. *Britthaven*, 118 N.C. App. at 386-89, 455 S.E.2d at 461-463. If a reviewing court finds that the Agency’s analysis included an error that if correctly decided would have led to the same decision, the error is harmless under the whole record test. *Id.* at 386-89, 455 S.E.2d at 461-63.

12. Administrative agency decisions may be reversed as arbitrary and capricious only if they are “patently in bad faith” or “whimsical” in the sense that “they indicate a lack of fair and careful consideration” or “fail to indicate any course of reasoning in the exercise of judgment.” *ACT-UP Triangle v. Comm’n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal citation and quotations omitted).

13. The Agency’s interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference as long as the agency’s interpretation is reasonable and based on a permissible construction of the statute. *Carpenter v. N.C. Dep’t of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), *disc. rev. improvidently allowed*, 333 N.C. 533, 427 S.E.2d 874 (1993).

14. North Carolina law presumes that the Agency has properly performed its duties. *See, e.g., In re Broad & Gales Creek Cmty. Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. of Registration for Prof’l Eng’rs & Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998); *In re Land & Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7, *disc. rev. denied*, 302 N.C. 397, 297 S.E.2d 351 (1981) (holding that “[t]he official acts of a public agency . . . are presumed to be made in good faith and in accordance with law”).

15. The development and establishment of a new dialysis facility like those proposed by BMA and TRC in their respective applications requires a certificate of need. N.C. Gen. Stat. §§ 131E-178(a) and 131E-176(16).

16. In implementing the State’s CON program, the CON Section has a statutory duty to review and decide applications submitted for certificates of need in accordance with the laws adopted by the General Assembly. N.C. Gen. Stat. § 131E-177(6). In doing so, the Agency must evaluate CON applications pursuant to North Carolina’s CON statute. *See* N.C. Gen. Stat. §§ 131E-182 and 131E-183; *see also Living Centers-Southeast, Inc. v. N.C. Dep’t of Health and Human Servs.*, 138 N.C. App. 572, 574-75, 532 S.E.2d 192, 194 (2000).

17. “N.C. Gen. Stat. § 131E-183(a) charges the Agency with reviewing all CON applications utilizing a series of criteria set forth in the statute. The application must either be consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.” *Parkway Urology*, 205 N.C. App. at 534, 696 S.E.2d at 191-92.

18. In the review of applications, the Agency must review each application individually to test it against the statutory and applicable regulatory review criteria. *Britthaven*, 118 N.C. App. at 384-85, 455 S.E.2d at 460.

19. BMA’s reliance on other sets of Agency Findings is not persuasive or controlling in determining whether the Agency erred in this case. *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep’t of Health and Human Servs.*, No. COA11-339, 2011 WL 6359618, at *10 (N.C. Ct. App. Dec. 20, 2011) (unpublished opinion) (cited for the proposition that prior Agency findings are irrelevant unless those findings address sufficiently similar issues to those presented in the above-captioned contested case).

20. The TRC Application presented reasonable, credible, and supported projections of patient origin for the services to be provided by the proposed Nash County facility, including both in-center and home dialysis services, and adequately provided the methodology and assumptions by which it projected patient origin, in conformity with 10A N.C.A.C. 14C.2203.

21. Pursuant to 10A N.C.A.C. 14C.0402, “The correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing.”

22. Based on 10A N.C.A.C. 14C.0207(a), the Agency could not use the January 2014 SDR to evaluate the conformity of the TRC or BMA applications. Although the Agency is permitted to utilize information available to it during the review, the Agency is required to apply the plan in effect at the time the review commences. The July 2013 SDR was in effect at the time the review commenced, and the Agency was correct in its decision not to use the January 2014 to evaluate the TRC or BMA application.

23. The TRC Application presented reasonable, credible and supported projections for utilization of the proposed Nash County facility, and adequately provided the methodology and assumptions by which it projected utilization, in conformity with 10A N.C.A.C. 14C.2203.

24. Pursuant to 10A N.C.A.C. 14C.2203(a), “An applicant proposing to establish a new [ESRD] facility shall document the need for at least 10 stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the facility, with the exception that the performance standard shall be waived for a need in the [SMFP] that is based on an adjusted need determination.”

25. Using the fact that TRC had 32 patient letters of support, TRC’s Application demonstrates compliance with Performance Rule .2203 requiring at least a 10-station *de novo* facility. This conclusion is true whether TRC used a 2.1% AACR, or the 9.6% AACR published in the July 2013 SDR.

26. The CON Section correctly and reasonably determined the TRC Application conformed with all statutory and regulatory review criteria applicable to applications proposing dialysis facilities, including the performance standards set forth in and 10A N.C.A.C. 14C.2203.

27. Considering all matters as found in the findings of fact, the CON Section did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in issuing its decision to approve the TRC Application for 12 dialysis stations in Nash County.

28. A petitioner must “establish that the agency named as the respondent has . . . substantially prejudiced the petitioner’s rights.” N.C. Gen. Stat. § 150B-23(a); *see also Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (noting “the ALJ is to determine whether the petitioner has met its burden in showing that *the agency* substantially prejudiced petitioner’s rights”) (emphasis in original).

29. BMA cannot establish substantial prejudice by virtue of the fact that BMA is currently the only dialysis provider operating facilities in Nash County and that approval of the TRC Application will result in increased competition. *See CaroMont Health, Inc. v. N.C. Dep’t of Health and Human Servs.*, 751 S.E.2d 244, 250-51 (2013) (holding that a provider challenging an agency decision to grant a CON must show specific evidence of harm beyond any harm resulting from additional competition arising from the approval).

30. The North Carolina Court of Appeals has held that a denied competitive CON applicant “must present other evidence at a contested case hearing to demonstrate substantial prejudice – its mere status as a denied competitive CON applicant alone is insufficient as a matter of law.” *Surgical Care Affiliates, LLC v. N.C. Dep’t of Health and Human Servs.*, No. 12 DHR 12086, 2014 WL 5770252, at *3 (N.C. Ct. App. Oct. 21, 2014) (unpublished opinion) (citing *CaroMont Health*, 751 S.E.2d at 247, and *Parkway Urology*, 205 N.C. App. at 536-37, 696 S.E.2d at 193).

31. The fact that BMA’s request for 11 stations was denied, in and of itself, does not amount to substantial prejudice. *See id.* The CON Section conditionally awarded BMA 7 of the 11 stations it requested.

32. It was BMA’s reporting error to the Planning Section that resulted in the erroneous 19 station need determination in Nash County in the July 2013 SDR, not any action of the CON Section. But for BMA’s reporting error, there would have been no county need determination in the July 2013 SDR for which TRC could have applied to establish a *de novo* facility in Nash County. Despite BMA being told by Director Pratt that the Agency could not amend the SDR and that BMA would need to petition the Governor to do so, BMA decided not to petition the Governor to amend the July 2013 SDR in order to have the need determination removed.

33. As set forth by the United State Supreme Court, “we have held that “the burden of proof” is a “‘substantive’ aspect of a claim.” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849, 187 L. Ed. 2d 703 (2014) (quoting *Raleigh v. Illinois Dept. of Revenue*, 530

U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000)); *see also* *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 271, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) (“[T]he assignment of the burden of proof is a rule of substantive law ...”); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 249, 63 S.Ct. 246, 87 L.Ed. 239 (1942) (“[T]he burden of proof ... [is] part of the very substance of [the plaintiff's] claim and cannot be considered a mere incident of a form of procedure”).”

34. Our own North Carolina courts have emphasized in multiple cases that “[t]he rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore it should be carefully guarded and rigidly enforced by the courts.” *Tippite v. Atl. Coast Line R. Co.*, 234 N.C. 641, 644, 68 S.E.2d 285, 288 (1951).

35. Petitioner has failed to carry its burden of proof that the Agency’s decisions to approve the application submitted by TRC to develop a new 12-station dialysis facility in Rocky Mount, Nash County; and to approve, with conditions, an application submitted by BMA to add 7 stations to an existing dialysis facility in Rocky Mount were in error.

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 Petitioner failed to carry its burden of proof by a greater weight of the evidence regarding the issues presented in this contested case. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. The weight of Petitioner’s evidence does not overbear the weight of evidence of Respondent to the ultimate issues, and as such Respondent’s decisions to approve the TRC Application and conditionally approve the BMA Application is **AFFIRMED**.

NOTICE

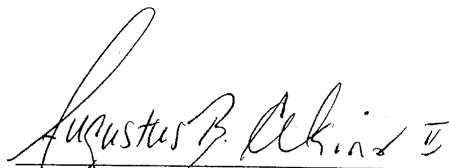
Under the provisions of N.C. Gen. Stat. § 131E-188(b): “Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in

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. 03.0102, 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 26th day of March, 2015.



Augustus B. Elkins II
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA
2015 JUL 10 AM 9:05
COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 05566

Office of
BERNITTA WEBSTER, Administrative Hearing)
Petitioner,)

v.)

NC DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, DIVISION OF)
HEALTH SERVICE REGULATION,)
HEALTH CARE)
PERSONNEL REGISTRY,)
Respondent.)

FINAL DECISION

THIS MATTER came on for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on November 19, 2014 in the Office of Administrative Hearings in New Bern, North Carolina.

APPEARANCES

For Petitioner: Bernitta Webster
Pro Se
641 Campbell Road
Vanceboro, NC 28586

For Respondent: Candace A. Hoffman
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent deprived Petitioner of property; or exceeded its authority or jurisdiction when Respondent substantiated the allegations that on or about March 23, 2014 Bernitta Webster, a Health Care Personnel, abused R.E. by willfully dragging the resident across the floor by the resident's arm resulting in physical harm and neglected R.E. by failing to provide care as she had been trained to do for a resident, resulting in physical harm.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256

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

EXHIBITS

Respondent's exhibits 1, 2 and 4-19 were admitted into evidence.
Petitioner's exhibits 1 and 2 were admitted into evidence.

WITNESSES

For Respondent: Amalia Petion
 Fernika Bryant
 Shakima Wooley
 Lakin Quinn
 Betty Overman

For Petitioner: Bernitta Webster

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

FINDINGS OF FACT

1. At all times relevant to the matter Petitioner, Bernitta Webster, was employed as a Health Care Personnel working for the Village of Kinston ("the Village"), a health care facility in Kinston, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 13)
2. Petitioner has been a practicing Certified Nursing Assistant ("CNA") for approximately 14 years. Petitioner received training on abuse and neglect policies throughout her years as a CNA. (T. pp. 12-13)
3. Petitioner received training on resident rights as part of her employment with the Village. Petitioner completed a quiz that stated in part "Residents may refuse medication as long as it is documented, and as long as they understand the importance behind the refusal." Petitioner also testified that patients may refuse to go to bed. (T. pp. 14-16; Resp. Exh. 5)
4. Petitioner was working at the Village on May 23, 2014 from 3:00 pm to 11:00

pm, during the time of the incident with R.E. Amalia Petion (“Petion”) was also working at the Village on May 23, 2014. (T. pp. 18-19; Resp. Exh. 7, 8)

6. On March 23, 2014 Petitioner worked on the 200 hall, which housed patients with Alzheimer’s and dementia. Petitioner assisted R.E. with all of his activities of daily living, including mobility, dressing, toileting, and feeding. (T. pp. 16-19; Resp. Exhs. 7, 8)

7. R.E. has a care plan that instructs CNA’s how to assist R.E. with his activities of daily living. Petitioner testified that CNA’s are to check a resident’s care plan before assisting a resident. (T. p. 17-19; Resp. Exh. 7)

8. On March 23, 2014 from 3:00 pm to 11:00 pm Petion was assigned to the 200 hall as the CNA Medtech Supervisor in Charge (“SIC”). Petion attempted to give R.E. his evening medications but he refused to take them from Petion. Petion testified that Petitioner offered to give Petitioner his medications after R.E. refused to take them from Petion. Petion handed over the medications to Petitioner. R.E. again refused to take the medications from the Petitioner, and she informed R.E. he could “either take the medicine, or go to bed.” Petion went to check on another resident and when she returned witnessed Petitioner dragging R.E. down the hallway into his room. (T. pp. 30-32; Resp. Exh. 14)

9. Petion did not immediately report the incident because she feared retaliation from the Petitioner. Petion did report the incident to another CNA Fernika Bryant (“Bryant”) a few days later when Petion became worried Petitioner would repeat the behavior. Bryant informed supervisor Alica Farmer (“Farmer”) and administrator Laken Quinn (“Quinn”) of the incident. (T. pp. 32-34; Resp. Exhs. 14, 16)

10. Farmer and Quinn performed an investigation into the incident. During the course of her investigation Quinn interviewed Petion about the incident. Quinn examined R.E. and discovered carpet burn marks on R.E.’s back and bruising on R.E.’s wrists. Quinn also looked at time logs, patient information, and interviewed all employees with any knowledge of the incident. (T. pp. 62-63; Resp. Exhs. 6, 8, 9, 10, 11)

11. Shakima Wooley (“Wooley”) was employed at the Village as a CNA Medtech during the time period of the incident. Wooley was friends with Petion outside of the work place. Wooley testified that Petitioner called her looking for Petion, and told Wooley she was waiting for Petion outside of her house. Wooley believed that this was an attempt to intimidate Petion. (T. pp. 52-53; Resp. Exh. 17)

12. Quinn filed a 24 hour and 5 Day Working Report with the Health Care Personnel Registry. Quinn also reported the incident to the Lenoir County Sheriff’s Department and the local Department for Social Services. (T. p. 60; Resp. Exhs. 1, 2)

13. Petion, when questioned by Quinn, recounted the incident she witnessed with the Petitioner and R.E. (T. p. 33; Resp. Exh. 14)

14. Quinn interviewed Petitioner about the incident with R.E. Quinn informed Petitioner there was a witness who saw her drag R.E. down the hallway into the resident's room. (T. p. 63; Resp. Exh. 6)

15. After the facility investigation was completed, Quinn terminated Petitioner from the Village. (T. p. 65; Resp. Exh. 11)

16. The Health Care Personnel Registry Investigation's Branch ("HCPRI") investigates allegations of abuse, neglect and other allegations against health care personnel in health care facilities. If the allegation is substantiated, the employee will be placed on the Registry. The HCPRI covers most health care facilities in North Carolina that provide patient care. Accordingly, health care personnel at The Village are covered by the Registry. (T. pp. 81-83)

17. At all times relevant to the incident, Betty Overman ("Overman") was employed as an investigator for the HCPRI. She is charged with investigating allegations against health care personnel in the south central region of North Carolina. Accordingly, The Village was in her region and she received and investigated the complaint that Petitioner had abused and neglected Resident R.E. (T. p. 81-83)

18. After the complaint against Petitioner was received, it was determined it needed further investigation. As part of the investigation, Overman interviewed Petitioner, Petion, Bryant, Wooley, and Quinn. She also reviewed the resident's records and took into account the internal investigation conducted by the facility. (T. pp. 83-86; Resp. Exhs. 1, 2, 4-18)

19. On August 18, 2014, Overman interviewed Petitioner at the Lenoir County Public Library in Kinston, North Carolina. Overman learned that Petitioner was terminated as a result of this incident, and that Petitioner denied abusing R.E. Petitioner also told Overman that staff were allowed to force patients to comply with orders if they were living in the Alzheimer's unit. This is not consistent with what Petion and Quinn told Overman about the Village's policies. (T. pp. 86-87; Resp. Exh. 13)

20. On October 14, 2014, Overman interviewed Petion over the phone. Petion informed Overman that staff were trained to leave residents alone when they were combative or refusing orders. Petion also told Overman that she witnessed Petitioner dragging R.E. down the hallway on the night of March 23, 2014. (T. pp. 89-90; Resp. Exh. 14)

21. On October 15, 2014, Overman interviewed Wooley over the phone. Wooley informed Overman that Petion was afraid of Petitioner, and feared retaliation for reporting the incident with R.E. (T. pp. 53-54; Resp. Exh. 17)

22. On October 16, 2014, Overman interviewed Bryant over the phone. Bryant told Overman that residents were allowed to refuse care. Bryant also informed Overman she reported the incident to Farmer and Quinn immediately after learning of the incident from Petion. (T. pp. 45-46; Resp. Exh. 16)

23. On, September 29, 2014 Overman interviewed Quinn by phone. Quinn informed Overman that she substantiated the allegation of abuse against Petitioner after taking into account the carpet burns on R.E., and the eyewitness account of the incident. Quinn also contacted local law enforcement and DSS regarding the incident. (T. pp. 90-92; Resp. Exh. 15)

24. Overman used a reasonable person standard to determine that dragging R.E. down the hallway caused pain, physical injury and mental anguish. A reasonable person standard is used when determining whether a resident who is nonverbal or unable to express themselves, has suffered mental anguish or pain. It is not necessary that signs of physical abuse be found on the resident, the mere threat to someone with severely diminish capacity is enough to cause that resident mental anguish. (*Allen v. NCDHHS*, 155 N.C. App. 77, 85, 88; 575 S.E.2d 565, 570, 572 (2002).

25. Overman took Petitioner's statement into consideration and viewed all the information together. Overman found the statements of Petition and Quinn to be credible and consistent. Overman found that on or about March 23, 2014 Petitioner abused R.E. by willfully dragging the resident across the floor by residents arm resulting in physical harm. She also found that, on or about March 23, 2014 Petitioner neglected R.E. by failing to provide care as she had been trained to do for a resident, resulting in physical harm. Overman wrote an investigation report which documented these conclusions. (T. pp 92-95; Resp. Exh. 18)

26. Neglect is defined as "a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness." Overman determined Petitioner neglected resident R.E by failing to provide care as she had been trained to do for a resident, resulting in physical harm. (Resp. Exh. 18)

27. Abuse is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." Overman determined Petitioner abused resident R.E. of The Village by willfully dragging the resident across the floor by residents arm resulting in physical harm. (Resp. Exh. 18)

28. Petitioner was notified by letter that a finding of neglect and a finding of abuse would be listed against her name in the Health Care Personnel Registry ("HCPR"). Petitioner was further notified of her right to appeal. (Resp. Exh. 19)

29. Petitioner denies willfully dragging resident R.E. down the hallway to resident's room. (T. p. 21; Resp. Exhs. 11, 13)

30. Petitioner submitted two documents into evidence which pertain to her training records within the facility. One is even dated for a date after the conclusion of this hearing. It is clear even to the untrained eye that the signatures on those documents do not belong to the Petitioner, indicative of improprieties within that facility. Even so, there is no link between the forged documents and the events at issue herein, and credible evidence supports the allegations concerning Petitioner.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 131E and 150B of the North Carolina General Statutes.
2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.
3. The North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a Registry that contains the names of all health care personnel and nurse aides working in health care facilities who are subject to a finding by the Department that they abused or neglected a resident in a health care facility.
4. As a health care personnel working in a health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.
5. The Village of Kinston is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).
6. Documents from the Village of Kinston were forged putting the Petitioner's name on them. While the appearance is that someone may have been "out to get" the Petitioner, it is just as likely that someone was trying to cover the trail for the facility by supplying a document which may have been missing within Petitioner's personnel file. At any rate, the forgeries do not affect the decision herein.
7. "Abuse" is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. 10A N.C.A.C. 130.0101, 42 CFR § 488.301.
8. On or about March 23, 2014, Petitioner abused a resident R.E. by willfully dragging the resident across the floor by residents arm resulting in physical harm.
9. "Neglect" is defined as "a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness." 10A N.C.A.C. 130.0101, 42 CFR § 488.301.
10. On or about March 23, 2014, Petitioner neglected a resident R.E. by failing to provide care as she had been trained to do for a resident, resulting in physical harm.
11. Respondent's decision to substantiate the allegation of abuse and the allegation of

neglect against the Petitioner is supported by a preponderance of the evidence. Therefore, Respondent did not deprive Petitioner of property; or exceed its authority or jurisdiction by placing substantiated findings of abuse and neglect against Petitioner's name on the Health Care Personnel Registry.

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


DECISION

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

NOTICE

Pursuant to N.C.G.S. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing 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 party seeking review must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Decision and Order. Pursuant to N.C.G.S. 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 thirty (30) days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the ^{10th} 9th day of March, 2015.


Donald W. Overby
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA
COUNTY OF BURKE

2015 MAR 10 PM 3:18

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 06571

ERICA CHANTE JOHNSON,
Petitioner,

Office of
Administrative Hearings

v.

NC DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
HEALTH SERVICE REGULATION,
HEALTH CARE
PERSONNEL REGISTRY,
Respondent.

FINAL DECISION

THIS MATTER came for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on January 7, 2015 in the Office of Administrative Hearings in Morganton, North Carolina.

APPEARANCES

For Petitioner: Wayne O. Clontz
Law Office of Wayne Clontz
400 East Meeting Street
Morganton, NC 28655

For Respondent: Candace A. Hoffman
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights or acted erroneously when Respondent substantiated the allegation that on or about March 13, 2014 Petitioner, a nurse aide, abused a resident H.E. by deliberately spraying water into the face of a resident creating a high potential for harm.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23

42 CFR § 488.301
10A N.C.A.C. 130.0101

EXHIBITS

Respondent's exhibits 1-12 were admitted into evidence.

WITNESSES

For Respondent: Keisha Watson
 Jane Jahn
 Teresa Crites

For Petitioner: Erica Johnson
 Leroy Williams
 Paula Corpening

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

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Erica Johnson, was employed as a Health Care Personnel working for Sunrise Rehabilitation & Care Home ("Sunrise"), a health care facility in Nebo, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 8-9; Resp. Exh. 2)

2. Petitioner completed all required training related to her job responsibilities as a Certified Nurse's Assistant ("CNA"). Petitioner received training while working at Sunrise on their policies concerning abuse and neglect of residents. Petitioner signed the general orientation packet, which included a segment called "defining resident abuse/neglect." Petitioner also completed an orientation quiz entitled "Rights of Residents." Petitioner's training included information on dealing with combative residents, and how to give showers. Petitioner completed a corporate compliance quiz, and correctly answered "True" to the True/False question: "Elder abuse is the intentional or unintentional hurting, either physical or emotional of a person who is over the age of 60." (T. pp. 8, 18-24; Resp. Exh.2)

3. Petitioner testified that if a resident was displaying behaviors in the shower, staff

were trained to have another staff take their place. Petitioner acknowledged that it was considered abuse to spray a resident in the face with water to intimidate the resident. (T. p. 21)

4. Petitioner was called into work on March 3, 2014 to watch a corporate compliance video by Robin Wilcox ("Wilcox"), a supervisor at Sunrise. While at Sunrise, Wilcox asked Petitioner to stay and work on the hall housing the Hospice residents. Petitioner agreed to stay and work, but noted she was wearing her "street" clothes.

5. Petitioner requested not to give showers, because she was wearing a new pair of shoes. (T. p. 25; Resp. Exh. 5) The two residents that Petitioner would have ordinarily given showers were assigned to other staff for the showers.

6. Having agreed to stay and work, Petitioner was on duty and working at Sunrise on March 3, 2014 from 2:37 pm to 10:30 pm, during the time of the incident with H.E.

7. Keisha Watson ("Watson"), another CNA, was also working at Sunrise on March 3, 2014. (T. pp.12, 38; Resp. Exh. 5) Watson often worked with H.E. (T. p. 37; Resp. Exhs. 5, 10) Petitioner admitted to seeing Watson on March 3, 2015 at Sunrise. (T. p. 26)

8. H.E. was age 91 at the time of the Health Care Personnel Registry investigation. H.E. was diagnosed with Non-Complicated Senile Dementia with Behavioral Disturbance, and Hypertension. (Resp. Exh. 7)

9. Petitioner was generally assigned to the Hospice Hall, and knew all of the residents well. Petitioner often worked with the resident H.E. Petitioner described H.E. as a "yeller" Petitioner testified that H.E. would yell constantly for any number of reasons. Petitioner also acknowledged that H.E. suffered from dementia, and was often not cognizant of what was going on around her. (T. pp. 24-25)

10. On March 3, 2014 Watson was assigned to give H.E. a shower. While Watson was assisting H.E. with her shower H.E. began yelling. H.E. often yelled while taking a shower. According to Watson, Petitioner entered the shower room where Watson was assisting H.E. and took the shower head from Watson. Petitioner then sprayed H.E. in the face for several seconds. While spraying H.E. in the face with water, Petitioner told Watson "This is how you get her to shut up." Watson took the shower head out of Petitioner's hands, and told Petitioner she should not do that. (T. pp. 38-41; Resp. Exhs. 9, 10)

11. According to Watson, H.E. began moving her face back and forth to try to avoid the water. (T. pp. 38-41; Resp. Exhs. 9, 10)

12. After the incident, Watson pushed the call light button located in the shower room. Watson immediately reported the incident to the nurse supervisor in charge on that shift. (T. p. 45; Resp. Exhs. 9, 10)

13. At the time of the incident Watson had been employed by Sunrise for only a few

months. Watson testified that she did not have any ill will or personal problems with the Petitioner before this incident occurred. (T. p. 59)

14. In March of 2014 Jane Jahn (“Jahn”) was the acting interim administrator for Sunrise. Jahn was responsible for investigating incidents within Sunrise. (T. p. 66; Resp. Exhs. 3, 6)

15. Jahn conducted the facility investigation into this incident. Jahn was conducting interviews of all staff working in Sunrise due to other allegations of abuse at the facility. Those other allegations were concerning the director of nursing and not this Petitioner. During her investigation Jahn was made aware of the incident with the Petitioner and H.E.

16. Jahn interviewed the Petitioner over the phone. (T. pp. 67; Resp. Exhs. 3, 6) Jahn interviewed Watson, and had Watson make a written statement describing the incident with H.E. Watson informed Jahn that she had witnessed the Petitioner spray H.E. in the face with water. (T. pp. 70-72; Resp. Exhs. 3, 6)

17. Jahn submitted a 24 hour and 5 Day Working Report to the Health Care Personnel Registry. (T. pp. 69-70; Resp. Exh. 1) Those reports were not submitted in a timely manner; however, it was due to the actions of the director of nursing who was being investigated, and not otherwise attributable to the facility.

18. After the facility investigation was completed, Jahn substantiated the allegation of abuse and recommended Petitioner be terminated. Petitioner was terminated from employment with Sunrise. (T. pp. 71-72; Resp. Exhs. 3, 6)

19. The Health Care Personnel Registry Investigation’s Branch (“HCPRIB”) investigates allegations of abuse, neglect and other allegations against health care personnel in health care facilities. If the allegation is substantiated, the employee will be placed on the Registry. The HCPRIB covers most health care facilities in North Carolina that provide patient care. Accordingly, health care personnel at Sunrise are covered by the Registry. (T. pp. 84-86)

20. At all times relevant to this incident, Teresa Crites (“Crites”) was employed as an investigator for the HCPRIB. She is charged with investigating allegations against health care personnel in the western region of North Carolina. Accordingly, Sunrise was in her region and she received and investigated the complaint that Petitioner had abused Resident H.E. (T. pp. 84-86; Resp. Exh. 1)

21. After the complaint against Petitioner was received, it was determined it needed further investigation. As part of the investigation, Crites interviewed Petitioner, Watson and Jahn. She also reviewed the resident’s records and took into account the internal investigation conducted by the facility. (T. pp. 84-88; Resp. Exhs. 1-11)

22. Crites spoke with Petitioner over the phone. Petitioner did not wish to participate in an interview, and opted to send a written statement to Crites. Petitioner prepared a written

statement and mailed it to Crites. Crites reviewed Petitioner's statement during the course of her investigation. (T. p. 87; Resp. Exh. 8)

23. On July 8, 2014, Crites interviewed Watson over the phone. Watson informed Crites that she witnessed Petitioner spray H.E. in the face with water in order to shut her up. (T. p. 87-88; Resp. Exh. 10)

24. On July 8, 2014, Crites interviewed Jahn over the phone. Jahn reported to Crites that she learned of the incident while performing an investigation into several other incidents of abuse at Sunrise. Jahn conducted a thorough investigation into the incident by reviewing resident files, Petitioner's files, and interviewing the Petitioner and other CNA's working at Sunrise during the time of the incident. Jahn substantiated the allegation of abuse against Petitioner. (T. p. 89; Resp. Exh. 3, 6)

25. On July 8, 2014, Crites attempted to interview resident H.E., however H.E. was generally unresponsive. (T. p. 90; Resp. Exh. 7)

26. Crites used a reasonable person standard to determine that spraying H.E. in the face resulted in mental anguish, and the potential for harm. A reasonable person standard is used when determining whether a resident who is nonverbal or unable to express themselves, has suffered physical injury, mental anguish or pain. It is not necessary that signs of physical abuse be found on the resident, the mere threat to someone with severely diminished capacity is enough to cause that resident mental anguish. (*Allen v. NCDHHS*, 155 N.C. App. 77, 85, 88; 575 S.E.2d 565, 570, 572 (2002).

27. Crites took Petitioner's statement into consideration and viewed all the information together. Crites found the statements of Watson and Jahn to be credible and consistent. Crites found that on or about March 3, 2015 Petitioner abused H.E. by deliberately spraying water into the face of a resident creating a high potential for harm. Crites wrote an investigation report which documented the conclusion. (T. pp. 91-93; Resp. Exh.11)

28. The testimony in this hearing by Watson and Jahn is found to be credible and believable

29. Abuse is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." Crites determined Petitioner abused resident by deliberately spraying water into the face of a resident creating a high potential for harm. (Resp. Exh. 11)

30. Petitioner was notified by letter that a finding of abuse would be listed against her name in the Health Care Personnel Registry ("HCPR"). Petitioner was further notified of her right to appeal. (Resp. Exh. 12)

31. Petitioner denies spraying H.E. in the face with the shower head. (T. p. 14; Resp. Exh.8)

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

CONCLUSIONS OF LAW

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

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

3. The North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a Registry that contains the names of all health care personnel and nurse aides working in health care facilities who are subject to a finding by the Department that they abused a resident in a health care facility.

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

5. Sunrise Rehabilitation is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).

6. "Abuse" is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. 10A N.C.A.C. 13O.0101, 42 CFR § 488.301.

7. On or about March 3, 2015, Petitioner abused a resident (H.E.) by deliberately spraying water into the face of a resident creating a high potential for harm.

8. In *Allen v. NC DHHS-Division of Facility Services*, 155 N.C. App. 77, 85, 573 S.E.2d 565, 570 (2002) the court stated:

Our obligation is to protect the health and safety of every resident, including those that are incapable of perception or are unable to express themselves. This presumes that instances of abuse of any resident, whether cognizant or not, cause physical harm, pain or mental anguish.

9. Respondent's decision to substantiate this allegation of abuse is supported by a preponderance of the evidence. Therefore, Respondent did not otherwise substantially prejudice Petitioner's rights or act erroneously by placing a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry.

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

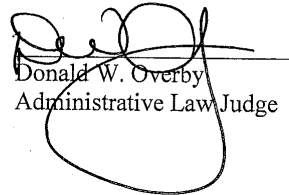
DECISION

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

NOTICE

Pursuant to N.C.G.S. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing 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 party seeking review must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Decision and Order. Pursuant to N.C.G.S. 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 thirty (30) days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 10th day of March, 2015.


Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

Filed

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 04114

RONNIE EARL SMITH, JR.,
Petitioner,

v.

N.C. CRIMINAL JUSTICE
EDUCATION AND TRAINING
STANDARDS COMMISSION,
Respondent.

Office of
Administrative Hearings

PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. This case was heard pursuant to N.C.G.S. § 150B-40, designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

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. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner's motion for extension of time to file proposals and other post hearing materials was granted. Petitioner and Respondent filed timely materials on February 2, 2015 and February 5, 2015 respectively with receipt to the Undersigned from the OAH Clerk's Office being February 10, 2015 at which time the record was closed for further submissions. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until April 17, 2015 to file the proposal for decision in this case.

APPEARANCES

For Petitioner: Steven R. Edelstein
Attorney for Petitioner
Edelstein & Payne
Post Office Box 28186
Raleigh, North Carolina 27611

For Respondent: Lauren Tally Earnhardt
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
Raleigh, N.C. 27602-0629

ISSUE

Does substantial evidence exist to suspend Petitioner's correctional officer certification for three years for commission of the "DAC Misdemeanor" offense of Resisting a Public Officer?

APPLICABLE RULES

(including but not limited to the following)

12 NCAC 09G.0102; 12 NCAC 09G.0102(9)(cc);
12 NCAC 09G.0504(b)(3); 12 NCAC 09G.0505(b)(1)

EXHIBITS

For Petitioner: Petitioner's Exhibits 1, 2 and 3 were admitted into evidence.

For Respondent: Respondent's Exhibit 1 without attachments 10 and 11
Respondent's Exhibit 2 was admitted into evidence.

WITNESSES

For Petitioner: Ronnie Earl Smith, Jr.
Dwayne Anderson
Shamira Smith
Camellia Boone

For Respondent: Kevin Wallace
Kevin Byrd

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by

taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in this case.

FINDINGS OF FACTS

1. Petitioner Ronnie Earl Smith, Jr., was 24 years old at the time of the hearing. He received a Probationary Certification to be a correctional officer on January 9, 2012 and was awarded a General Certification on January 9, 2013. Petitioner is employed with the North Carolina Department of Public Safety. Petitioner testified at the hearing that he has been employed as a Correction Officer since 2011 and outside this incident, has been in good standing with his employer with only had a minor infraction. Petitioner is still working as a correctional officer as of the date of the hearing. His employer recommended continued certification and employment while his criminal trial and OAH hearing were pending.

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

3. On April 13, 2013 Petitioner was issued a warrant charging him with Resisting Public Officer. The statutory basis of the warrant was N.C.G.S. § 14-223. Petitioner also was issued a warrant for Disorderly Conduct and a citation for being Intoxicated in a Public Place.

4. After Petitioner was initially charged with Resisting a Public Officer and the two other charges he notified his employer the Department of Adult Corrections. The Department of Adult Corrections notified the Respondent.

5. Kevin Wallace, an investigator with Respondent since January 2013, testified at the hearing. On May 7, 2013, Respondent received a Report of Arrest memo from the North Carolina Department of Public Safety indicating that on April 13, 2013, Petitioner was arrested and charged with resisting public officer, disorderly conduct, and intoxicated and disruptive.

6. On October 21, 2013, The Honorable Thomas L. Jones, District Court Judge in Northampton County found Petitioner not guilty of all three charges after a District Court trial. At the trial Deputy Sheriff Pair, a Northampton deputy, and Officer Byrd, a Rich Square police officer, testified on behalf of the State. These two law enforcement officers were at the scene and participants in the events leading to the charges against Petitioner. Petitioner Ronnie Earl Smith Jr., and Camellia Boone, his mother, testified on behalf of the Petitioner.

7. On November 18, 2013, Mr. Wallace received a certified copy of the disposition in Petitioner's criminal case. Wallace was waiting for the results of the District Court criminal trial. After the acquittal of Petitioner on all three criminal charges including Resisting a Public

Officer in violation of N.C.G.S. § 14-223, he continued his work on the accusations against Petitioner.

8. Mr. Wallace received statements from Deputy Sheriff Pair, Officer Byrd and Petitioner Ronnie Earl Smith, Jr. He talked with Pair but did not talk with the Petitioner. It does not appear that Wallace interviewed Amika Solomon, Dwayne Anderson, Shamira Smith, or Camellia Boone or any other witnesses on the scene.

9. Officer Byrd, a Rich Square police officer, was at the scene during the interaction between Pair and Petitioner and participated in the interaction. The statement of Officer Byrd was dated April 9, 2013 and referred to an incident that occurred on April 5, 2013. There is no evidence from Byrd in the incident/investigation report concerning an incident on April 12 and 13, 2013.

10. The arresting officer, Jimmy Pair, did not testify at this hearing. Kevin Byrd did testify. He was employed at the time of this hearing with Eastside EMS in Rich Square, North Carolina. He stated the "police chief was resigning, and the Town Council decided to go another route for the police chief's position that I didn't agree with, so I left." Tr. 68.

11. On December 20, 2013 a Memorandum from Mr. Wallace to the members of the Probable Cause Committee was prepared. It summarized his investigation and included Pair's statement (not admitted into evidence), a conversation with Pair (substance not admitted into evidence), Byrd's statement, Petitioner's second statement (Petitioner's first statement taken at the scene was in the custody of Deputy Sheriff Pair and its whereabouts are unknown) and the warrants charging Petitioner with three misdemeanors of which one was a DAC misdemeanor (Resisting a Public Officer).

12. Based on his investigation, Mr. Wallace prepared a memorandum summarizing his findings and that memorandum was presented to Respondent's Probable Cause Committee on February 20, 2014. He made no recommendation to the Committee. Petitioner was present at the Committee meeting and was able to speak with the Committee members and present evidence.

13. The Probable Cause Committee found probable cause to believe that Petitioner committed the DAC Misdemeanor offense of "Resisting a Public Officer." R.Ex. 2

14. On the evening of April 12, 2013, Petitioner was at his home in Rich Square. A friend came by about 10:30 pm. Petitioner had drunk a couple of beers at home. The friend asked Petitioner if he wanted to go to a party and Petitioner agreed to go. Petitioner did not drive as he had two beers and also would drink at the party. The party was about a mile and a quarter from the home of Petitioner.

15. Petitioner drank three more beers at the party. After being at the party for on or about 45 minutes, it appeared a fight might break out between a group of individuals from Rich Square and a group from another town. To avoid becoming involved in the fight Petitioner decided to leave the party. As Petitioner began to walk away from the party he was hit on his

head from behind, and someone stole his cell phone. When he turned around he was hit in the face. Petitioner could not get a ride from his friend because his friend's car was blocked in by other vehicles. Petitioner began to walk home on Highway 258. His home was about one and a quarter miles from the location of the party. It was a warm evening and Petitioner had taken off his shirt.

16. After walking about a quarter of a mile, Petitioner saw a deputy sheriff's car across the road. Dwayne Anderson resided approximately across the road from where the deputy sheriff had his patrol car. Mr. Anderson was standing in front of his home between 28 and 40 feet from where the deputy sheriff's vehicle was located. Mr. Anderson stated the lighting was such that he and others could see what was happening.

17. Kevin Byrd testified that he was a police lieutenant for Rich Square Police Department at the time of the incident. Mr. Byrd was working as a patrol officer and was called to an incident regarding a chase with multiple people involved. The incident was on the outer bounds of his jurisdiction so he accompanied the responding Sheriffs' Deputy, Deputy Pair to the location. Byrd spoke with the victim, Ms. Solomon, who explained that some unknown individuals were chasing her vehicle and had shot at her. This was not related to Petitioner.

18. Petitioner saw a deputy sheriff and crossed the road to ask for a ride home and to report the assault upon him and the theft of his cell phone. The Deputy Sheriff was Jimmy Pair of the Northampton Sheriff's Department. Pair stated loudly that couldn't Petitioner see what he was doing. Since it appeared Petitioner would not receive a ride home from Pair, he crossed the road and began walking home. Pair asked the Petitioner to come back. He did so loudly enough to have Dwayne Anderson hear him. The Petitioner did so.

19. Mr. Byrd heard an escalation in volume between Petitioner and Deputy Pair so he approached the two. Pair informed Byrd that Petitioner would not give him his name and Byrd identified Petitioner to Pair as Mr. Smith. Byrd testified that he has known Petitioner and his family for years. Byrd observed that Petitioner was shirtless, had red marks on his chest, his face was swollen, he was rather impaired, and upset.

20. Petitioner and Deputy Pair continued to have a discussion and Mr. Byrd heard Petitioner state he wanted to go home and Deputy Pair told him that they were in the middle of a call and the Petitioner was being detained. Deputy Sheriff Pair handcuffed Petitioner with Petitioner's hands behind his back and placed him in the rear seat of his patrol car. Petitioner did not resist being handcuffed. Mr. Anderson witnessed this sequence of events. Petitioner was not given a reason for being handcuffed and detained by Pair.

21. Mr. Byrd testified that Petitioner was handcuffed for safety reasons. However, Petitioner was only told by Pair that: "We don't know what's going on. We're retaining you right now." Tr. 75

22. A few minutes after being detained in the rear seat of Deputy Sheriff Pair's car, Amika Solomon (victim of the drive by shooting) told Pair that Petitioner was not involved.

23. Petitioner was kept in a very warm vehicle with the windows rolled up for about an hour more or less, handcuffed behind his back. Petitioner was upset while he was in the back of the car. Mr. Byrd and Deputy Pair periodically returned to the car to try and calm Petitioner down.

24. Petitioner kept on asking why he was being detained. Sometime in the next hour, his mother, Camellia Boone, and his sister, Shamira Smith, arrived at the scene. Petitioner told them he had done nothing wrong and did not know why he was being detained.

25. After about an hour, Petitioner was told if he wrote a statement he would be released. Petitioner still had not been given a reason for his detention and handcuffing. He was still detained in the back seat of the patrol car but had his handcuffs taken off by Pair. Pair gave him paper and pen or pencil. Petitioner wrote a statement and gave it to Pair. Deputy Pair reviewed the statement and said he could not read it, folded it and placed it in the front seat of his vehicle.

26. Byrd testified that after getting a statement he could not read, Deputy Pair “decided to charge Mr. Smith with, I believe it was standing in the roadway or intoxicated in public or something along that line.” Tr. 80

27. As a result of being detained for an hour handcuffed in the back of a hot car, after being assaulted and robbed and after being frustrated by law enforcement officials, Petitioner admits he began cursing. Up to this time Petitioner had not disturbed any person. Byrd testified that Petitioner was irate and cursing and had slammed his hand against the Plexiglas petition.

28. Mr. Byrd testified that he told Petitioner to calm down, and Deputy Pair told him to calm down or he would be arrested. Byrd testified that Pair opened the patrol car to place Petitioner under arrest, and Petitioner laid on his back on the back seat. Byrd stated that Deputy Pair told Petitioner to let him handcuff him or he would be pepper sprayed. Deputy Pair used his pepper spray on Petitioner.

29. Byrd testified that at this time there were 20 to 30 people, including Petitioner’s family members across the street in Mr. Anderson’s driveway. Anderson testified there was lighting from a road lamp and from houses to see what was happening. Petitioner testified that he did not physically resist being handcuffed. What was witnessed by others was that Deputy Pair opened the door and handcuffed Petitioner, with Petitioner being pepper sprayed after being handcuffed. The testimony of Petitioner, Ms. Boone and Ms. Smith support these findings and also support the finding that Petitioner was handcuffed and then pepper sprayed by Pair. Anderson testified he saw no resistance on the part of Petitioner and he also saw Pair pepper spray Petitioner and close the car door.

30. Camellia Boone, Petitioner’s mother, testified under oath both at this hearing and at the District Court hearing before Judge Jones. She stated she was in Mr. Anderson’s front yard and was about 20 feet from her son where she could see. She relayed that about 20 minutes passed from her arrival on the scene before she saw Deputy Pair come to the car area. She asked him if she could talk to Petitioner and he informed her that if she went over to her son, he would

carry her off to jail. Boone observed Deputy Pair place a piece of paper in the front seat of his car and then heard him tell Petitioner he could not go home but that he was being taken to "Jackson". She witnessed her son being pepper sprayed then the car door being closed with Petitioner inside with no ventilation.

31. According to Byrd's statement, Petitioner was resisting arrest because he did not want to be charged with public intoxication with an E-citation. The warrant charging Petitioner with Resisting Public Officer (13 CR 050320) states that Deputy Sheriff Pair was discharging the duty of "CONDUCTING AN INVESTIGATION OF A FIGHT AND THE SHOOTING OF A VEHICLE" (capitalization in the original). The Public Intoxication charge was not mentioned.

BASED UPON the foregoing findings of fact and upon the preponderance of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings (OAH), and jurisdiction and venue are proper. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that any of the following Conclusions of Law is a Finding of Fact, it shall be so considered in spite of its designation as a Conclusion of Law.

2. The Undersigned need not make findings as to every fact which arises from the evidence and need only find those facts which are material to resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. 12 NCAC 09G .0504(b)(3) provides that the North Carolina Criminal Justice Education and Training Standards Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer "has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification." "Resisting Public Officer" in violation of N.C.G.S. § 14-223 is a DAC misdemeanor as defined in 12 NCAC 09G .0102(9)(cc). N.C.G.S. § 14-223 states that if any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.

4. The preponderance of the evidence cannot establish that Petitioner was lawfully handcuffed and detained. Petitioner was called back and detained and handcuffed by Deputy Sheriff Pair after Petitioner began walking home. He asked for help and when he did not receive help he proceeded home. No reason for the arrest was given at that time to Petitioner. Petitioner was not disturbing the peace.

5. The preponderance of the evidence cannot establish that Petitioner was lawfully arrested. In accordance with the North Carolina Supreme Court “when the law enforcement officer by word or actions, indicates an individual must remain in the officer’s presence and come to the police station against his will, the person for all practical purposes is under arrest if there is a substantial imposition of the officer’s will over the person’s liberty.” *State v. Sanders*, 295 N.C. 361, 375-76, 245 S.E.2d 674, 684 (1978), *cert. denied* 454 U.S. 973 1981.

6. The offense of resisting arrest both by common law and statutory law presupposes a lawful arrest. The preponderance of the evidence cannot establish that Petitioner physically resisted arrest. The warrant stated that Petitioner pulled away from Pair. Four witnesses, Petitioner, Ms. Boone (Petitioner’s mother), Dwayne Anderson and Ms. Smith (Petitioner’s sister) contradict this. Four witnesses did not see any physical resistance. Petitioner could be heard begging Pair not to pepper spray him.

7. Deputy Sheriff Pair (who did not testify at this hearing) failed to preserve important evidence. Pair claimed that the statement written by Petitioner that would have allowed him to leave the vehicle he had been detained in for an hour or more was not readable, yet the statement was not preserved to be admitted into evidence.

8. Mr. Byrd indicated he did not know why Pair detained Petitioner. Then he stated Petitioner was detained for his own protection but no testimony revealed that this was ever revealed to Petitioner himself and the facts of this case cannot justify this reasoning on its face. Byrd stated Petitioner resisted arrest when he was told he would be arrested for Public Intoxication. The warrant states the duty being discharged by Pair was “CONDUCTING AN INVESTIGATION OF A FIGHT AND THE SHOOTING OF A VEHICLE.”

9. Petitioner was found not guilty by the Northampton District Court in a trial held on October 21, 2013. At the trial Pair and Byrd both testified for the State. Petitioner and Camellia Boone testified on behalf of Petitioner.

10. Respondent has the burden of proof in this case. As set forth by the United States Supreme Court, “we have held that “the burden of proof” is a “substantive’ aspect of a claim.” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849, 187 L. Ed. 2d 703 (2014) (quoting *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000)); *see also Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 271, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) (“[T]he assignment of the burden of proof is a rule of substantive law ...”); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 249, 63 S.Ct. 246, 87 L.Ed. 239 (1942) (“[T]he burden of proof ... [is] part of the very substance of [the plaintiff’s] claim and cannot be considered a mere incident of a form of procedure”).”

11. Our own North Carolina courts have emphasized in multiple cases that “[t]he rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore it should be carefully guarded and rigidly enforced by the courts.” *Tippite v. Atl. Coast Line R. Co.*, 234 N.C. 641, 644, 68 S.E.2d 285, 288 (1951).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Proposal for Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

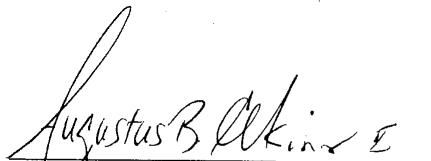
Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that Respondent failed to carry its burden of proof by a greater weight of the evidence regarding the issue presented in this contested case. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. The weight of Respondent's evidence does not overbear the weight of evidence of Petitioner to the ultimate issues, and as such the Probable Cause Committee's finding that probable cause exists to believe Petitioner's certification as a correction officer should be suspended cannot be affirmed.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed findings of fact, and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e). The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission. A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This is the 9th day of April, 2015.


Augustus B. Elkins II
Administrative Law Judge

Filed
NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS
WAKE COUNTY 2015 FEB 15 PM 5:30
14 DOJ 05067

Office of Administrative Hearings
SUSAN MANEY)
Petitioner)
v)
N.C. CRIMINAL JUSTICE)
EDUCATION AND TRAINING)
STANDARDS COMMISSION,)
Respondent)
PROPOSAL FOR DECISION

This matter coming on to be heard and being heard February 16, 2015, in the Office of Administrative Hearings, and appearing for the Petitioner is attorney Mr. Mikael R. Gross, and for the Respondent Assistant Attorney General Ms. Lauren Tally Earnhardt; based upon the evidence presented, the undersigned finds the following facts by the preponderance of the evidence:

1. Petitioner had certification as a probation/parole officer from May, 1990 through and until December, 2011. Said certification was transferred to correctional officer certification on December 29, 2011.
2. Petitioner served as a Chief Probation and Parole Officer for the State of North Carolina until 2011.
3. Petitioner was transferred to Swannanoa Correctional Center for Women in January, 2012, after being disciplined and demoted for reasons more fully set forth herein.
4. Petitioner currently serves as a correctional case manager; her duties include assisting inmates with transition, PRIA, and CBI counseling and compliance. She has been active in domestic violence counseling for inmates that are preparing to leave prison, and she believes that she is having a positive impact in her current employment.
5. Petitioner has never been disciplined by Respondent prior to the matter at issue herein.
6. On August 18, 2011, Petitioner submitted to a drug test for her employer. The results of the test were negative for controlled substances.

7. Petitioner was indicted for Felony Possession of Schedule VI Controlled Substance, Manufacturing Schedule VI Controlled Substance, and Conspiracy to Manufacture Schedule VI Controlled Substance on April 30, 2012, in Madison County, North Carolina.

8. On May 1, 2012, Petitioner prepared a statement to provide her employer, the North Carolina Department of Public Safety, with information related to her arrest and the criminal investigation. NCDPS notified the Respondent of the charges against the Petitioner on June 21, 2012.

9. Petitioner's statement regarding the substance of the criminal charges was stamped "RECEIVED" by the Respondent on June 26, 2012.

10. Respondent immediately initiated an investigation against the Petitioner.

11. Mr. Richard Squires, Deputy Director, Criminal Justice Standards Division, was an investigator for the Respondent at the time of this incident, and he was assigned to investigate the Petitioner's matter.

12. Each of the criminal charges were dismissed on February 3, 2014, with the following explanation: "Co-defendant has taken responsibility for all offenses and contraband."

13. The co-defendant in the criminal case was the Petitioner's husband, Chris Maney.

14. On February 11, 2014, Respondent received notice that all charges against the Petitioner had been dismissed.

15. Respondent's evidence showed that on February 5, 2014, Kevin Burrese, an "Authorized Representative/Manager" with the North Carolina Department of Public Safety, recommended that Petitioner's criminal justice officer certification be continued. Said notice was stamped "Received" by the Respondent on February 18, 2014.

16. Following the dismissal of the criminal charges against the Petitioner, Mr. Squires reviewed Petitioner's May 1, 2012 statement, and requested the criminal investigative file of the State Bureau of Investigation related to the Petitioner's case.

17. Squires had knowledge of the existence of a State Bureau of Investigation (SBI) investigative file, but did not request the information until after dismissal of the criminal charges. A synopsis of the SBI investigation was reviewed and prepared by Respondent's counsel on March 6, 2014.

18. Squires did not conduct an independent investigation of the allegations, relying solely on the documents provided by other sources.

19. According to Squires, the Respondent would “typically” wait for the disposition of criminal charges before a review was conducted.

20. Squires testified that summary suspension proceedings could have been initiated against the Petitioner in 2012, immediately upon receiving information regarding the criminal charges.

21. Had summary suspension proceedings been instituted in this matter, Squires would have been the individual responsible for doing so by providing information to the Probable Cause Committee.

22. Pursuant to 12 N.C. Admin. Code 9G .0506(a), a summary suspension may be made by the Respondent’s Probable Cause Committee “when the person has committed or been convicted of a violation of the criminal code that would require a permanent revocation or denial of certification.”

23. Conviction of a criminal offense is not required for a permanent revocation or denial of certification, only that a felony be committed, or other offense for which imprisonment for two years is authorized. 12 N.C. Admin. Code 09A. 0205 (a)(1) and (a)(2).

24. Squires chose not to provide the Committee with information regarding the criminal charges upon receiving the same because Petitioner did not meet the criteria for summary suspension.

25. Respondent took no action to summarily suspend or revoke Petitioner’s certifications after having been properly noticed of the pending criminal charges.

26. Despite the existence of pending felony drug charges, Respondent took no action to suspend or revoke Petitioner’s certifications.

27. Despite the existence of pending felony drug charges, the North Carolina Department of Public Safety chose to allow Petitioner to continue close contact with the state’s prison population.

28. Respondent had actual knowledge of the criminal charges and the existence of the SBI investigation for more than 20 months before they were reviewed by Squires and the Respondent.

29. Squires prepared the probable cause memorandum regarding this matter on March 26, 2014, citing the three felony drug charges and lack of good moral character as items to be considered by the Committee for possible suspension or revocation of Petitioner’s certifications.

30. On May 20, 2014, the Respondent’s Probable Cause Committee reviewed the investigative memorandum and underlying documentation.

31. At the time the Probable Cause Committee reviewed allegations associated with the Petitioner's matter, the information available to the Respondent was more than two years old.

32. The Committee found no probable cause with respect to the felony charges against Petitioner.

33. The Committee did, however, find probable cause that Petitioner lacked the good moral character required of a correctional officer and probation/parole officer.

34. C.E. Vines with the North Carolina State Bureau of Investigation interviewed the Petitioner in connection with the criminal investigation on August 10, 2011.

35. Vines is the Assistant Special Agent in Charge for the Western District of North Carolina which also includes Mitchell, Yancey and Madison counties.

36. ASAC Vines has been involved with marijuana eradication for 12 years.

37. ASAC Vines was asked to assist the Madison County Sheriff's Office with the investigation into the allegations that Petitioner's husband, Christopher Maney was growing marijuana.

38. ASAC Vines assisted the Sheriff's Office by locating the plants and surveying the area to see who came to tend to them. The plants were in pots and were located in a field off to the side of Petitioner's residence, approximately 50-75 yards from the marital home.

39. ASAC Vines swore out a warrant for Christopher Maney and processed him for possession of marijuana.

40. During the course of the investigation, Vines interviewed the Petitioner.

41. ASAC Vines testified that Petitioner was honest, forthright, and truthful during the course of the criminal investigation.

42. Petitioner told Vines that she found out about the marijuana plants in 2011 when she saw them in the upstairs section of their barn.

43. Petitioner told ASAC Vines that she didn't know how many plants there were and that she confronted her husband about the plants.

44. Agent Vines did not observe the Petitioner anywhere near the marijuana plants during the investigation and although there was video surveillance of the grow

operation, no usable video showed Petitioner near the plants or in any way exercising custody or control over the marijuana.

45. Petitioner told her husband he was jeopardizing everything they had, and that he could be charged with crimes for growing the marijuana.

46. Petitioner was concerned about the impact her husband's criminal activity could have on both of their careers.

47. Petitioner told her husband that she did not want to know anything about what he was doing with the marijuana plants. She had no information regarding sale of marijuana by her husband; only that the marijuana was for his personal use.

48. In addition to marijuana, Petitioner's husband also used alcohol to excess.

49. Petitioner testified that her husband was physically abusive towards her during the course of their marriage, and that she was the victim of repeated acts of domestic violence and domestic abuse.

50. On July 18, 2011, Petitioner called her husband and told him that she heard Madison County detectives talking about a marijuana eradication fly-over which would be taking place.

51. Petitioner told her husband about the possible fly-over because she was afraid he would become physically abusive if she knew about the fly-over and failed to tell him.

52. No fly-over marijuana eradication operation occurred at or near the time Petitioner advised her husband.

53. ASAC Vines testified had such an operation occurred, he "would have known about it because I would have been the one who was responsible for the operation."

54. Petitioner did not acquire or otherwise obtain information regarding the fly-over as part of her duties as Chief Probation/Parole Officer for Madison County.

55. Petitioner did not become aware of the information regarding the fly-over as a result of her position or duties.

56. While the Petitioner was an employee of the State and the information regarding the fly-over was in contemplation of an official action by a governmental unit, her duties as a probation officer were not associated with the fly-over.

57. Information regarding the fly-over was not made known to her in her official capacity.

58. Petitioner was not charged with violating NCGS §14-234.1; the Respondent did not allege she committed an act in violation of this statute; and her conduct did not meet the elements of NCGS §14-234.1.

59. ASAC Vines knew the Petitioner for many years preceding his investigation, and had witnessed what he believed to be evidence of domestic violence against the Petitioner.

60. While an agent with the North Carolina SBI, Vines had observed the Petitioner with bruising about the head and face on two occasions prior to 2011. Vines believed the bruising to be the result of domestic abuse.

61. Petitioner told ASAC Vines during the investigation that she sought treatment for the abuse from her doctor.

62. ASAC Vines has told Petitioner on more than one occasion that she should speak to someone about the abuse.

63. While speaking with Petitioner's co-workers during the course of the investigation, Vines confirmed that the Petitioner had spoken with them about being the victim of domestic abuse.

64. Petitioner advised Vines of several serious domestic violence situations allegedly perpetrated by her husband. On more than one occasion, Petitioner's husband discharged a firearm at her during domestic abuse incidents.

65. Petitioner testified that on one occasion while trying to escape from her husband's domestic abuse, she was running from the house and was trying to get up an embankment in her back yard when her husband began shooting at her in the dark. The bullets were hitting the ground so close to her that the dirt was flying up and hitting her in her face and on her legs where she was positioned.

66. On yet another occasion, Petitioner's husband was angry with her and had hit her, knocking her to the ground in front of the fireplace inside the home. Petitioner testified that her husband then opened fire with a .380 semi-automatic pistol striking the fireplace and shattering the doors. Glass from the fireplace struck her, causing cuts and scratches to her face and legs.

67. Petitioner's two children witnessed domestic abuse over the years, and on one occasion, her husband had beaten her, took her into the children's room, and told the boys that their mother was a whore.

68. Buncombe County Department of Social Services investigated the domestic violence and substantiated abuse in the Petitioner's case.

69. Petitioner suffered bodily injury at the hands of her husband, and was afraid that he would kill her.

70. Petitioner would often call to “test the waters” before she would go home to see if she needed to hide or avoid her husband.

71. Petitioner, at the time of this hearing, is undergoing therapy and counselling for mental and emotional issues arising from the long-term and repeated episodes of domestic violence.

72. Petitioner has been honest, truthful, and forthright throughout this process, freely admitting to her conduct.

73. Petitioner was honest and credible at this hearing, and again freely admitted to her actions. Petitioner was apologetic and testified that she understood the gravity of her actions and her current situation.

Based upon the foregoing findings of fact, the undersigned concludes as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.
2. The Respondent has the burden of proof in this matter. The burden is on the Respondent to show by preponderance of the evidence that Petitioner lacks the moral character to hold the certification of a correctional officer or probation/parole officer.
3. The North Carolina Criminal Justice Education and Training Standards Commission has the authority to suspend, revoke, or deny the certification of a corrections or probation/parole officer if the Commission finds, among other things, that a correctional officer does not meet or maintain required employment standards. 12 NCAC 9G .0504(b)(2)
4. 12 NCAC 09G .0206 provides that every person employed as a correctional officer or probation/parole officer shall demonstrate good moral character by: not being convicted of a felony, not being convicted of certain other offenses, submitting to and producing negative drug screenings, attaining certain age, education, and background requirements, and being truthful in providing information to the Department of Public Safety, Division of Adult Correction and Juvenile Justice and to the Standards Division for the purpose of obtaining probationary or general certification.
5. North Carolina case law provides that “[g]ood moral character is 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).

6. A lack of good moral character can be shown where the findings viewed as a whole reveal a pattern of conduct “that permeates that applicant’s character and could seriously undermine public confidence...” *In re Legg*, 325 N.C. 658, 675 (1989).

7. 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.”)

8. The evidence does not demonstrate a pattern of conduct that permeates Petitioner’s character.

9. To the contrary, Petitioner was forthright and truthful with law enforcement regarding her conduct and an isolated incident associated therewith.

10. Further, Petitioner was forthright and truthful with law enforcement regarding her husband’s conduct and their actions.

11. Considering the totality of the circumstances, disclosure of information to her husband regarding the fly-over does not implicate concerns regarding the Petitioner’s moral character.

12. Issues concerning lack of good moral character of an individual holding probation/parole certification and corrections certification can affect public health, safety, or welfare requiring immediate action.

13. Respondent’s failure to act on information that could have a direct impact on the health, safety, and welfare of the state’s prison population for approximately two years is evidence that Petitioner’s conduct was not and is not sufficiently egregious to justify suspension or revocation of her certifications.

14. Similarly, Respondent’s failure to conduct a timely, independent investigation in light of such serious charges is evidence that the Petitioner’s conduct was not and is not sufficiently egregious to justify suspension or revocation of her certifications.

15. Respondent’s argument that it did not want to get involved in the criminal case to protect Petitioner’s due process rights is without merit. Respondent’s obligation to the public is different from that of the criminal justice system. Respondent is charged with ensuring that those individuals who hold certification meet certain minimum standards.

16. The North Carolina Department of Public Safety’s actions in allowing the Petitioner continued contact with the state’s prison population while felony drug charges were pending against her is further evidence that the Petitioner’s conduct was not sufficiently egregious to justify suspension or revocation of her certification.

17. There is no evidence that the Petitioner violated any law.
18. Given the nature and extent of the domestic violence the Petitioner experienced and the Petitioner's fear of death or serious bodily injury from her husband, Petitioner reasonably believed her only option to avoid another domestic violence incident was to provide her husband with information regarding the fly-over.
19. Petitioner's disclosure of information regarding the fly-over does not violate NCGS §14-234.1.
20. Petitioner did not commit the drug offenses for which she was indicted.
21. The fact that a criminal charge was filed against the Petitioner, standing alone, cannot be considered evidence that she committed a crime. It is merely evidence that a charge existed.
22. Similarly, the fact that a criminal charge was filed against the Petitioner, standing alone, cannot be considered evidence that she lacked good moral character. Again, it is merely evidence that a charge existed.
23. Respondent has not proven that the Petitioner lacks good moral character through criminal conduct, and Petitioner's actions do not rise to the level of conduct warranting a finding of lack of good moral character.
24. Respondent has not established that Petitioner had a duty to disclose to her employer, or anyone else, that her husband was engaging in illegal activity.
25. Petitioner's honesty and candor regarding her actions, submission to counselling, positive role in her work and her community, her negative drug test, the testimony and evidence submitted at the hearing, and the fact that her employer recommended her certification be continued, demonstrates that the Petitioner has the good moral character sufficient to maintain her certifications.
26. No allegation of wrong-doing has been made since Petitioner's arrest, and there is no evidence that Petitioner has not been of good moral character since that time.
27. Given the passage of time from notice of the criminal charges to the Respondent's review of this matter, the availability of and access to the information by the Respondent, Petitioner's unremarkable discipline record, NCDPS's recommendation that Petitioner's certification be continued, her positive employment history, negative drug screen, and complete candor during the course of the investigation, the Respondent acted in an arbitrary and capricious manner. (See *Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Com'n.*, 101 N.C.App. 699 (N.C. App., 1991))

28. Substantial evidence to suspend or revoke Petitioner's correctional officer certification does not exist.

29. Petitioner meets or maintains the minimum employment standard that every correctional officer shall demonstrate good moral character.

PROPOSAL FOR DECISION

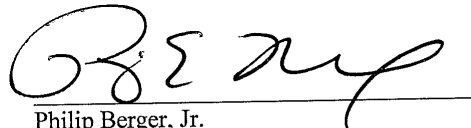
Based upon the foregoing findings of fact and conclusions of law, the undersigned recommends that the North Carolina Criminal Justice Education and Training Standards Commission find that the Petitioner is of good moral character and that she has not engaged in any conduct that would rise to the level of requiring her correctional officer and probation/parole officer certifications to be suspended or revoked.

NOTICE

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

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to her attorney of record. N.C. Gen Stat. §150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

This 14th day of April, 2015.



Philip Berger, Jr.
Administrative Law Judge