

NORTH CAROLINA REGISTER

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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
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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.

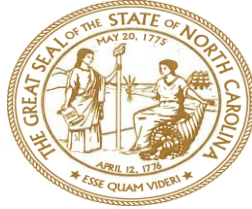
NOTICE OF TEXT

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.



State of North Carolina

PAT McCRORY
GOVERNOR

July 14, 2015

EXECUTIVE ORDER NO. 76

THE GOVERNOR'S TASK FORCE ON MENTAL HEALTH AND SUBSTANCE USE

WHEREAS, mental illness and substance use disorders are among the biggest health care challenges that our state will face over the next decade; and

WHEREAS, providing appropriate treatment for people with mental illness and substance use disorders can significantly benefit individuals, families, communities, and taxpayers; and

WHEREAS, the issues surrounding access to mental health and substance use treatment and recovery services must be addressed in a comprehensive approach to better use our existing resources and break down silos between government agencies and jurisdictions and the private sector; and

WHEREAS, the DHHS Crisis Solutions Initiative has resulted in initiatives to improve our mental health system, brought together community leaders to provide creative solutions, and promoted strategic crisis solutions that have been supported by the Governor and General Assembly; and

WHEREAS, pilot Mental Health and Substance Abuse Courts have shown success in obtaining compliance with appropriate treatment regimens and have the potential to reduce the amount of mental illness-related and substance use-related crime and the number of individuals with mental illness and substance use disorders in our jails and prisons; and

WHEREAS, providing appropriate early identification and treatment of mental illness and substance use disorders was a focus area for the Governor's Safer Schools initiative because untreated mental health disorders or substance use can affect academic achievement, family violence, medical needs, out of home placement, incarceration rates, and the overall cost associated with these problems to society.

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED:**

Section 1. Establishment

The Governor's Task Force on Mental Health and Substance Use is hereby established (hereinafter, "Task Force").

Section 2. Membership

1. The Task Force shall consist of twenty four (24) members, including the Secretary of the Department of Health and Human Services, the Chief Justice of the North Carolina Supreme Court, the Secretary of the Department of Public Safety, and the Superintendent of the Department of Public Instruction. One member from the House of Representatives shall be appointed by the Speaker of the House, and one member of the Senate appointed by the President Pro Tempore. Seven members from the justice system and related private sector professionals shall be appointed by the Chief Justice. The Governor shall appoint 11 public members, including those from the healthcare provider community, county leadership, government and non-governmental entities, and private sector employers. The Task Force shall be Co-Chaired by the Secretary of Health and Human Services and the Chief Justice of the Supreme Court of North Carolina.

Section 3. Meetings

The Task Force shall meet as necessary to properly exercise its functions, but no less frequently than quarterly, or upon the call of the Governor or the Co-Chairs.

Section 4. Duties

The Task Force shall, by May 1, 2016, submit finding and strategic recommendations to the Governor for improving the lives of North Carolina children and adults with mental illness and substance use disorders and their families. In creating these strategic findings and recommendations, the non-judicial members of the Task Force shall do the following:

1. Evaluate the linkages between agencies of state government and local government and create recommendations for the transfer of existing best practices across the state;
2. Examine the role of mental health and other specialty courts currently in North Carolina to determine how they can best be utilized to improve our efforts to address and reduce the extent to which individuals suffer from untreated mental health disorders and substance use problems;
3. Examine successful efforts to heighten awareness and reduce stigma associated with mental health treatment in our state and recommendations on how to improve these efforts;
4. Examine the ways the justice system can best handle cases of young people with mental illness and substance use disorders to provide them the best opportunity to reach their full potential as North Carolina citizens;
5. Examine the link between foster care and the need for mental health and substance use services to improve outcomes for teenagers when they leave the foster care system; and
6. Any other duties as assigned by the Governor or the Co-Chairs.

Any strategic findings and recommendations made by judicial members of the Task Force shall be limited to how mental health and substance use issues relate to the administration of justice. Judicial members of the Task Force will be deemed to have recused themselves from any findings or recommendations unrelated to the court system or the administration of justice.

Section 5. Administration

The Department of Health and Human Services shall provide administrative and staff support services, including meeting space, as may be required. Members of the Task Force shall serve without compensation, but may receive reimbursement for travel in accordance with State law and the policies and regulations of the Office of State Budget and Management.

Section 6. Effect and Duration

This Executive Order is effective immediately and shall remain in effect until October 1, 2016.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this fourteenth day of July in the year of our Lord two thousand and fifteen, and of the Independence of the United States of America the two hundred and thirty-nine.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State



NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

Notice of Rule-making Proceedings is hereby given by NC Building Code Council in accordance with G.S. 150B-21.5(d).

Citation to Existing Rule Affected by this Rule-Making: *North Carolina Electrical, Energy Conservation, Fire, Mechanical, and Plumbing Codes.*

Authority for Rule-making: *G.S. 143-136; 143-138.*

Reason for Proposed Action: *To incorporate changes in the NC State Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council.*

Public Hearing: *Tuesday, September 15, 2015, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606. Comments on both the proposed rule and any fiscal impact will be accepted.*

Comment Procedures: *Written comments may be sent to Barry Gupton, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comments on both the proposed rule and any fiscal impact will be accepted. Comment period expires on October 16, 2015.*

Statement of Subject Matter:

1. Request by Michael A. Segala, Jr., representing Aquatherm, to amend the 2012 NC Plumbing Code, Section 605.4.

605.4.1. Aquatherm green pipe with blue strip (SDR 11) shall be allowed in the North Carolina Plumbing Code for cold water potable water system applications including inside the building.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2016 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – The purpose of this amendment is to reduce the requirement for cold water potable water applications, including inside the building.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

2. Request by Jeff Tiller, representing Appalachian State University, to amend the 2012 NC Energy Conservation Code, Table 502.1.2.

Revised U-factor table less American Wood Council items (indicated as “Other proposal” below)

TABLE 502.1.2

BUILDING ENVELOPE REQUIREMENTS OPAQUE ELEMENT, MAXIMUM U-FACTORS

Climate Zone	3		4		5	
	All Other	Group R	All Other	Group R	All Other	Group R
Roofs						
X Insulation entirely above deck	U-0.039	U-0.039	U-0.032	U-0.032	U-0.032	U-0.032
Metal buildings	U-0.041	U-0.041	U-0.037	U-0.037	U-0.037	U-0.037
Attic and other-wood framing	U-0.027	U-0.041 U-0.027	U-0.021 U-0.024	U-0.021 U-0.024	U-0.021 U-0.024	U-0.021 U-0.024
Attic and other – steel framing	<u>U-0.035</u>	<u>U-0.035</u>	<u>U-0.029</u>	<u>U-0.029</u>	<u>U-0.029</u>	<u>U-0.029</u>
Walls, Above Grade						
Mass	U-0.123	U-0.104	U-0.104	U-0.090	U-0.090	U-0.060 U-0.071
Metal building	U-0.094	U-0.072	U-0.060	U-0.050	U-0.050	U-0.050
Metal framed	Other proposal	Other proposal	Other proposal	Other proposal	Other proposal	Other proposal
Wood framed and other	Other proposal	Other proposal	Other proposal	Other proposal	Other proposal	Other proposal
Walls, Below Grade						
Below-grade wall ^a	C-0.119	C-0.119	C-0.119	C-0.092	C-0.119	C-0.092
Floors						
Mass	U-0.064	U-0.064	U-0.057	U-0.051	U-0.057	U-0.051
Joist / Framing-wood	U-0.033	U-0.033	U-0.027 U-0.026	U-0.027 U-0.026	U-0.027 U-0.026	U-0.027 U-0.026
Joist / Framing-steel	<u>U-0.032</u>	<u>U-0.032</u>	<u>U-0.032</u>	<u>U-0.032</u>	<u>U-0.032</u>	<u>U-0.032</u>
Slab-on-Grade Floors						
Unheated slabs	F-0.730	F-0.540	F-0.520	F-0.520	F-0.520	F-0.510
Heated slabs	F-0.860	F-0.860	F-0.688 F-0.843	F-0.688	F-0.688	F-0.688

a. When heated slabs are placed below-grade, below grade walls must meet the *F*-factor requirements for perimeter insulation according to the heated slab-on-grade construction.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2016 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this proposal is to coordinate the U-factor table with the R-value table.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

3. Request by Wayne Hamilton, representing NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 505.1.1.

505.1.1 Suite/Room identification. Where numerical addresses are posted to identify suites or rooms within buildings, the first digit of the suite or room numbering scheme shall match the floor numerical identification signage.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2016 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This proposal is to require the first digit of room or suite numbering to match floor numbering. This will allow emergency personnel to respond more quickly to the correct floor level.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

4. Request by Wayne Hamilton, representing NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 902.1.

Section 902 Definitions

Night Club. ~~An establishment meeting all of the following~~ An A-2 occupancy meeting all of the following conditions:

1. ~~Has a posted capacity or occupant load that exceeds one occupant per 15-square foot (1.39m²) net~~ The aggregate floor area of concentrated use and standing space that is used for dancing and/or viewing of performers exceeds 10 percent of the Group A-2 fire area, excluding adjacent lobby areas ; and
2. Provides live or recorded entertainment by performing artist; and

3. ~~Serves~~ Allows alcoholic beverages consumption.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2016 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This proposal clarifies the existing code definition for a night club. The proposed definition gives the designer and code official more clarity as when to classify A-2 occupancy as a night club for the purpose of requiring sprinklers.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

5. Request by Robert Privott, representing NC Home Builders Association, to amend the 2012 NC Mechanical Code, Section 312.1.

312.1 Load calculations. Heating and cooling system design loads for the purpose of sizing systems, appliances and *equipment* shall be determined in accordance with the procedures described in the ASHRAE/ACCA Standard 183. Alternatively, design loads shall be determined by an *approved* equivalent computation procedure, using the design parameters specified in Chapter 3 of the *International Energy Conservation Code*.

For one- and two-family dwellings and townhouses, heating and cooling equipment shall be sized in accordance with ACCA Manual S based on building loads calculated in accordance with ACCA Manual J, or other approved heating and cooling calculation methodologies.

For permitting, inspections, certificate of compliance or certificate of occupancy, verification of Calculations for HVAC Systems - ACCA Manual D, ACCA Manual J nor ACCA Manual S calculation submittals and review shall not be required

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2016 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – Requirements by local jurisdictions for load calculations for HVAC systems delays construction which adds unnecessary costs to construction projects.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

6. Request by Cindy Register, representing NC Building Code Council, Electrical Committee, to adopt the 2014 NEC with the following amendments.

Proposed North Carolina Amendments to 2014 NEC
Prepared by Electrical Adhoc Committee – August 31, 2014

Item 6.1: Retain language from 2011 NEC for 110.26 (E) (2) – No Cost Impact

(2) Outdoor. Outdoor installations shall comply with 110.26(E)(2)(a) and (b).

(a) Installation Requirements. Outdoor electrical equipment shall be installed in suitable enclosures and shall be protected from accidental contact by unauthorized personnel, or by vehicular traffic, or by accidental spillage or leakage from piping systems. The working clearance space shall include the zone described in 110.26(A). No architectural appurtenance or other equipment shall be located in this zone.

(b) Dedicated Equipment Space. The space equal to the width and depth of the equipment, and extending from grade to a height of 1.8 m (6 ft) above the equipment, shall be dedicated to the electrical installation. No piping or other equipment foreign to the electrical installation shall be located in this zone.

Item 6.2: Retain Existing NC Electrical Code Amendment to 210.8(A) (3) – No Cost Impact

210.8 (A) (3) Outdoors

Exception No. 1 to (3): Receptacles that are not readily accessible and are supplied by a branch circuit dedicated to electric snow-melting, deicing, or pipeline and vessel heating equipment shall be permitted to be installed in accordance with 426.28 or 427.22, as applicable.

Exception No. 2 to (3): A single outlet receptacle supplied by a dedicated branch circuit which is located and identified for specific use by a sewage lift pump.

Item 6.3: Retain language from 2011 NEC for 210.8(A) (7) – No Cost Impact

210.8(A) (7) Sinks — located in areas other than kitchens where receptacles are installed within 1.8 m (6 ft) of the outside edge of the sink.

Item 6.4: Remove GFCI requirement for kitchen dishwasher branch circuit. This was not a requirement in the 2011 NEC. – No Cost Impact

~~**210.8 (D) Kitchen Dishwasher Branch Circuit.** GFCI protection shall be provided for outlets that supply dishwashers installed in dwelling unit locations.~~

Item 6.5: Retain location requirements from 2011 NEC for AFCI Protection and remove term “readily”. – No Cost Impact

210.12 Arc-Fault Circuit-Interrupter Protection. Arc-fault circuit-interrupter protection shall be provided as required in 210.12(A) (B), and (C). The arc-fault circuit interrupter shall be installed in an an readily accessible location.

(A) Dwelling Units. All 120-volt, single-phase, 15- and 20-ampere branch circuits supplying outlets or devices installed in dwelling unit kitchens, family rooms, dining rooms, living rooms, parlors, libraries, dens, bedrooms, sunrooms, recreation rooms, closets, hallways, ~~laundry areas~~, or similar rooms or areas shall be protected by any of the means described in 210.12(A)(1) through (6):

(1) A listed combination-type arc-fault circuit interrupter, installed to provide protection of the entire branch circuit

(2) A listed branch/feeder-type AFCI installed at the origin of the branch-circuit in combination with a listed outlet branch-circuit type arc-fault circuit interrupter installed at the first outlet box on the branch circuit. The first outlet box in the branch circuit shall be marked to indicate that it is the first outlet of the circuit.

(3) A listed supplemental arc protection circuit breaker installed at the origin of the branch circuit in combination with a listed outlet branch-circuit type arc-fault circuit interrupter installed at the first outlet box on the branch circuit where all of the following conditions are met:

- a. The branch-circuit wiring shall be continuous from the branch-circuit overcurrent device to the outlet branch-circuit arc-fault circuit interrupter.
- b. The maximum length of the branch-circuit wiring from the branch-circuit overcurrent device to the first outlet shall not exceed 15.2 m (50 ft) for a 14 AWG conductor or 21.3 m (70 ft) for a 12 AWG conductor.
- c. The first outlet box in the branch circuit shall be marked to indicate that it is the first outlet of the circuit.

(4) A listed outlet branch-circuit type arc-fault circuit interrupter installed at the first outlet on the branch circuit in combination with a listed branch-circuit overcurrent protective device where all of the following conditions are met:

- a. The branch-circuit wiring shall be continuous from the branch-circuit overcurrent device to the outlet branch-circuit arc-fault circuit interrupter.
- b. The maximum length of the branch-circuit wiring from the branch-circuit overcurrent device to the first outlet shall not exceed 15.2 m (50 ft) for a 14 AWG conductor or 21.3 m (70 ft) for a 12 AWG conductor.
- c. The first outlet box in the branch circuit shall be marked to indicate that it is the first outlet of the circuit.
- d. The combination of the branch-circuit overcurrent device and outlet branch-circuit AFCI shall be identified as meeting the requirements for a system combination–type AFCI and shall be listed as such.

(5) If RMC, IMC, EMT, Type MC, or steel-armored Type AC cables meeting the requirements of 250.118, metal wireways, metal auxiliary gutters, and metal outlet and junction boxes are installed for the portion of the branch circuit between the branch-circuit overcurrent device and the first outlet, it shall be permitted to install a listed outlet branch-circuit type AFCI at the first outlet to provide protection for the remaining portion of the branch circuit.

(6) Where a listed metal or nonmetallic conduit or tubing or Type MC cable is encased in not less than 50 mm (2 in.) of concrete for the portion of the branch circuit between the branch-circuit overcurrent device and the first outlet, it shall be permitted to install a listed outlet branch-circuit type AFCI at the first outlet to provide protection for the remaining portion of the branch circuit.

Exception: Where an individual branch circuit to a fire alarm system installed in accordance with 760.41(B) or 760.121(B) is installed in RMC, IMC, EMT, or steel sheathed cable, Type AC or Type MC, meeting the requirements of 250.118, with metal outlet and junction boxes, AFCI protection shall be permitted to be omitted.

Informational Note No. 1: For information on combination-type and branch/feeder-type arc-fault circuit interrupters, see UL 1699-2011, *Standard for Arc-Fault Circuit Interrupters*. For information on outlet branch circuit type arc-fault circuit interrupters, see UL Subject 1699A, *Outline of Investigation for Outlet Branch Circuit Arc-Fault Circuit-Interrupters*. For information on system combination AFCIs, see UL Subject 1699C, *Outline of Investigation for System Combination Arc-Fault Circuit Interrupters*.

Informational Note No. 2: See 29.6.3(5) of *NFPA 72-2013, National Fire Alarm and Signaling Code*, for information related to secondary power-supply requirements for smoke alarms installed in dwelling units.

Informational Note No. 3: See 760.41(B) and 760.121(B) for power-supply requirements for fire alarm systems.

Item 6.6: Remove exception for 6' extension at 210.12 (B). – No Cost Impact

(B) Branch Circuit Extensions or Modifications — Dwelling Units. In any of the areas specified in 210.12(A), where branch-circuit wiring is modified, replaced, or extended, the branch circuit shall be protected by one of the following:

- (1) A listed combination-type AFCI located at the origin of the branch circuit
- (2) A listed outlet branch-circuit type AFCI located at the first receptacle outlet of the existing branch circuit

Exception: AFCI protection shall not be required where the extension of the existing conductors is not more than

1.8 m (6 ft) and does not include any additional outlets or devices.

Item 6.7: Revise to reflect NC Electrical Code Amendment with January 1, 2015 effective date. - No Cost Impact

210.52 (I) Foyers. Foyers that are not part of a hallway in accordance with 210.52(H) and that have an area that is greater than 5.6 m² (60 ft²) shall have at least one receptacle(s) ~~located in each wall space 900 mm (3 ft) or more in width.~~ Doorways, door-side windows that extend to the floor, and similar openings shall not be considered wall space.

Item 6.8: Retain Existing NC Electrical Code Amendment to 250.50 – No Cost Impact

250.50 Grounding Electrode System. All grounding electrodes as described in 250.52(A)(1) through (A)(7) that are available present at each building or structure served shall be bonded together to form the grounding electrode system. Where none of these grounding electrodes exist, one or more of the grounding electrodes specified in 250.52(A)(4) through (A)(8) shall be installed and used.

Item 6.9: Modify 250.53 (A) (2) to match D-1 Agenda Item – No Cost Impact

250.53 (A) (2)

Exception No. 1: If a single, rod, pipe, or plate grounding electrode has a resistance to earth of 25 ohms or less, the supplemental electrode shall not be required.

Exception No. 2: The supplemental ground electrode shall not be required at temporary electrical service installation (saw service pole) at construction site for one and two-family residences, provided the temporary electrical service does not exceed 150 volts to ground or 100A.

Item 6.10: Retain Table and Language of 2011 NEC related to sizing of Dwelling Services and Feeders – No Cost Impact

310.15 (B) (7) 120/240-Volt, Single-Phase Dwelling Services and Feeders.

~~For one-family dwellings and the individual dwelling units of two-family and multifamily dwellings, service and feeder conductors supplied by a single-phase, 120/240-volt system shall be permitted be sized in accordance with 310.15(B)(7)(1) through (4).~~

~~(1) For a service rated 100 through 400 A, the service conductors supplying the entire load associated with a one-family dwelling, or the service conductors supplying the entire load associated with an individual dwelling unit in a two-family or multifamily dwelling, shall be permitted to have an ampacity not less than 83 percent of the service rating.~~

~~(2) For a feeder rated 100 through 400 A, the feeder conductors supplying the entire load associated with a one-family dwelling, or the feeder conductors supplying the entire load associated with an individual dwelling, unit in a two-family or multifamily dwelling, shall be permitted to have an ampacity not less than 83 percent of the feeder rating.~~

~~(3) In no case shall a feeder for an individual dwelling unit be required to have an ampacity greater than that specified in 310.15(B)(7)(1) or (2).~~

~~(4) Grounded conductors shall be permitted to be sized smaller than the ungrounded conductors, provided that the requirements of 220.61 and 230.42 for service conductors or the requirements of 215.2 and 220.61 for feeder conductors are met.~~

~~Informational Note No. 1: The conductor ampacity may require other correction or adjustment factors applicable to the conductor installation.~~

~~Informational Note No. 2: See Example D7 in Annex D.~~

Delete Example D7 in 2014 NEC

Replace with 2011 NEC text & table:

310.15 (B) (7) 120/240-Volt, 3-Wire, Single-Phase Dwelling Services and Feeders. For individual dwelling units of one-family, two-family, and multifamily dwellings, conductors, as listed in Table 310.15(B)(7), shall be permitted as 120/240-volt, 3-wire, single-phase service-entrance conductors, service-lateral conductors, and feeder conductors that serve as the main power feeder to each dwelling unit and are installed in raceway or cable with or without an equipment grounding conductor. For application of this section, the main power feeder shall be the feeder between the main disconnect and the panelboard that supplies, either by branch circuits or by feeders, or both, all loads that are part or associated with the dwelling unit. The feeder conductors to a dwelling unit shall not be required to have an allowable ampacity rating greater than their service-entrance conductors. The grounded conductor shall be permitted to be smaller than the ungrounded conductors, provided the requirements of 215.2, 220.61, and 230.42 are met.

Table 310.15(B)(7) Conductor Types and Sizes for 120/240-Volt, 3-Wire, Single-Phase Dwelling Services and Feeders. Conductor Types RHH, RHW, RHW-2, THHN, THHW, THW, THW-2, THWN, THWN-2, XHHW, XHHW-2, SE, USE, USE-2

Service or Feeder Rating (Amperes)	Conductor (AWG or kcmil)	
	Copper	Aluminum or Copper-Clad Aluminum
100	4	2
110	3	1
125	2	1/0
150	1	2/0
175	1/0	3/0
200	2/0	4/0
225	3/0	250
250	4/0	300
300	250	350
350	350	500
400	400	600

Item 6.11: Retain Existing NC Electrical Code Amendment to 334.15 (C) – No Cost Impact

334.15 (C) In Unfinished Basements and Crawl Spaces. Where cable is run at angles with joists in unfinished basements, and crawl spaces, it shall be permissible to secure cables not smaller than two 6 AWG or three 8 AWG conductors directly to the lower edges of the joists. Smaller cables shall be run either through bored holes in joists or on running boards. Nonmetallic-sheathed cable installed on the wall of an unfinished basement shall be permitted to be installed in a listed conduit or tubing or shall be

protected in accordance with 300.4. Conduit or tubing shall be provided with a suitable insulating bushing or adapter at the point the cable enters the raceway. The sheath of the nonmetallic-sheathed cable shall extend through the conduit or tubing and into the outlet or device box not less than 6 mm (1/4 in.). The cable shall be secured within 300 mm (12 in.) of the point where the cable enters the conduit or tubing. Metal conduit, tubing, and metal outlet boxes shall be connected to an equipment grounding conductor complying with the provisions of 250.86 and 250.148.

Item 6.12: Revise to reflect NC Electrical Code Amendment with January 1, 2015 effective date. – No Cost Impact

Article 404.2(C)

(8) Where installed in residential one- and two- family dwellings

Item 6.13: Remove term “readily” from 406.4 (D) and add new exception – No Cost Impact

406.4 (D) Replacements. Replacement of receptacles shall comply with 406.4(D)(1) through (D)(6), as applicable. Arc-fault circuit-interrupter type and ground-fault circuit-interrupter type receptacles shall be installed in an readily accessible location.

(1) Grounding-Type Receptacles. Where a grounding means exists in the receptacle enclosure or an equipment grounding conductor is installed in accordance with 250.130(C), grounding-type receptacles shall be used and shall be connected to the equipment grounding conductor in accordance with 406.4(C) or 250.130(C).

(2) Non–Grounding-Type Receptacles. Where attachment to an equipment grounding conductor does not exist in the receptacle enclosure, the installation shall comply with (D)(2)(a), (D)(2)(b), or (D)(2)(c).

(a) A non–grounding-type receptacle(s) shall be permitted to be replaced with another non–grounding-type receptacle(s).

(b) A non–grounding-type receptacle(s) shall be permitted to be replaced with a ground-fault circuit interrupter type of receptacle(s). These receptacles shall be marked “No Equipment Ground.” An equipment grounding conductor shall not be connected from the ground-fault circuit-interrupter-type receptacle to any outlet supplied from the ground-fault circuit-interrupter receptacle.

(c) A non–grounding-type receptacle(s) shall be permitted to be replaced with a grounding-type receptacle(s) where supplied through a ground-fault circuit interrupter. Grounding-type receptacles supplied through the ground-fault circuit interrupter shall be marked “GFCI Protected” and “No Equipment

Ground.” An equipment grounding conductor shall not be connected between the grounding type receptacles.

(3) Ground-Fault Circuit Interrupters. Ground-fault circuit-interrupter protected receptacles shall be provided where replacements are made at receptacle outlets that are required to be so protected elsewhere in this *Code*.

Exception: Where replacement of the receptacle type is impracticable, such as where the outlet box size will not permit the installation of the GFCI receptacle, the receptacle shall be permitted to be replaced with a new receptacle of the existing type, where GFCI protection is provided and the receptacle is marked “GFCI protected” and “no equipment ground,” in accordance with 406.4(D)(2) (a), (b), or (c).

(4) Arc-Fault Circuit-Interrupter Protection. Where a receptacle outlet is supplied by a branch circuit that requires arc-fault circuit-interrupter protection as specified elsewhere in this *Code*, a replacement receptacle at this outlet shall be one of the following:

- (1) A listed outlet branch-circuit type arc-fault circuit-interrupter receptacle
- (2) A receptacle protected by a listed outlet branch-circuit type arc-fault circuit-interrupter type receptacle
- (3) A receptacle protected by a listed combination type arc-fault circuit-interrupter type circuit breaker

Exception: Non-grounding type receptacles.

(5) Tamper-Resistant Receptacles. Listed tamper-resistant receptacles shall be provided where replacements are made at receptacle outlets that are required to be tamper-resistant elsewhere in this *Code*.

(6) Weather-Resistant Receptacles. Weather-resistant receptacles shall be provided where replacements are made at receptacle outlets that are required to be so protected elsewhere in this *Code*.

Item 6.14: For one- and two-family residences, remove term “readily” from 422.5 – No Cost Impact

422.5 Ground-Fault Circuit-Interrupter (GFCI) Protection. The device providing GFCI protection required in this article shall be readily accessible.

Exception: For one- and two-family residences, the device providing the GFCI protection required in this article shall be accessible.

Item 6.15: Retain Existing NC Electrical Code Amendment, Article 10. - No Cost Impact

Article 10 - ADMINISTRATIVE SECTION

10.1 TITLE

These Administrative Regulations along with the requirements included in the 2014 Edition of the National Electrical Code (NFPA-70 - 2014) as adopted by the North Carolina Building Code Council on (DATE TO BE DETERMINED), to be effective (DATE TO BE DETERMINED), with the following amendments: PROVIDE LIST OF ALL NC AMENDMENTS shall be known as the North Carolina Electrical Code, and may be cited as such or as the State Electrical Code; and will be referred to herein as “the code” or “this code”.

10.2 SCOPE

Article 80 Administration and Enforcement of the code is hereby not adopted and does not apply for this code. For Scope and Exceptions to Applicability of Technical Codes, refer to the North Carolina Administrative Code and Policies.

10.3 PURPOSE

The purpose of the code is to provide minimum standards, provisions and requirements of safe and stable design, methods of construction and uses of materials in buildings or structures hereafter erected, constructed, enlarged, altered, repaired, moved, converted to other uses of demolished and to regulate the electrical systems, equipment, maintenance, use and occupancy of all buildings or structures. All regulations contained in this code have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed liberally to those ends.

10.4 ADMINISTRATION

For administrative regulations pertaining to inspection (rough-ins and finals), permits and Certificates of Electrical Compliance, see local ordinances and the North Carolina Administrative Code and Policies. When the provisions of other codes are determined to be contrary to the requirements of this code, this code shall prevail.

10.5 DEFINITION

Unless the context indicates otherwise, whenever the word “building” is used in this chapter, it shall be deemed to include the word “structure” and all installations such as plumbing systems, heating systems, cooling systems, electrical systems, elevators and other installations which are parts of, or permanently affixed to, the building or structure.

10.6 APPLICATION OF CODE TO EXISTING BUILDINGS

For requirements of existing structures, refer to the North Carolina Administrative Code and Policies.

10.7 SERVICE UTILITIES

10.7.1 Connection of Service Utilities – No person shall make connections from a utility, source of energy, fuel or power to any building or system which is regulated by the technical codes until approved by the Inspection Department and a Certificate of Compliance is issued (General Statute 143-143.2)

10.7.2 Authority to disconnect Service Utilities – The Inspection Department shall have the authority to require disconnecting a utility service to the building, structure or system regulated by the technical codes, in case of emergency or where necessary to eliminate an imminent hazard to life or property. The Inspection Department shall have the authority to disconnect a utility service when a building has been occupied prior to Certificate of Compliance or entry into the building for purposes of making inspections cannot be readily granted. The Inspection Department shall notify the serving utility, and whenever possible the owner or occupant of the building, structure or service system of the decision to disconnect prior to taking such action. If not notified prior to disconnecting, the owner or occupant shall be notified in writing within eight (8) working hours (General Statutes 143-143.2, 153A-365, 153A-366, 160A-425 and 160A-426). **NORTH CAROLINA ELECTRICAL CODE, 2014 EDITION**

10.8 TEMPORARY POWER

10.8.1 Scope. The provisions of this section apply to the utilization of portions of the wiring system within a building to facilitate construction.

10.8.2 Provisions for Temporary Power. The Code enforcement official shall give permission and issue a permit to energize the electrical service when the provisions of 10.8 and the following requirements have been met:

- 1) The service wiring and equipment, including the meter socket enclosure, shall be installed, the service wiring terminated, and the service equipment covers installed.
- 2) The portions of the electrical system that are to be energized shall be complete and physically protected.
- 3) The grounding electrode system shall be complete.
- 4) The grounding and the grounded conductors shall be terminated in the service equipment.
- 5) At least one receptacle outlet with ground fault circuit interrupter protection for personnel shall be installed with the circuit wiring terminated.
- 6) The applicable requirements of the North Carolina Electrical Code apply.

10.8.3 Uses Prohibited. In no case shall any portion of the permanent wiring be energized until the portions have been inspected and approved by an electrical Code Enforcement Official. Failure to comply with this section may result in disconnection of power or revocation of permit.

10.8.4 Application for Temporary Power. Application for temporary power shall be made by and in the name of the applicant. The application shall explicitly state the port portions of the energized electrical system, mechanical system, or plumbing system for which application is made, its intended use and duration.

10.8.5 Security and Notification. The applicant shall maintain the energized electrical system or that portion of the building containing the energized electrical system in a secured and locked manner or under constant supervision to exclude unauthorized personnel. The applicant shall alert personnel working in the vicinity of the energized electrical system to its presence.

10.9 Requirements of Other State Agencies, Occupational Licensing Boards, or Commissions

The North Carolina State Building Codes do not include all additional requirements for buildings and structures that may be imposed by other State agencies, occupational licensing boards, and commissions. It shall be the responsibility of a permit holder, design professional, contractor, or occupational license holder to determine whether any additional requirements exist.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2016 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this proposal is to update the NC Electrical Code to the latest NEC edition. The 2014 NEC is the latest published edition and represents national industry and life-safety updates. The NEC is amended and published every three years through a consensus process.

Fiscal Statement – This rule is expected to have a substantial economic impact. This rule is not expected to increase local and state funds. A fiscal note has been prepared and is posted at the following link:

http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=BCC_-_Minutes&user=Building_Code_Council&sub=BCC_Meeting

2014 NEC – View Only

<https://archive.org/details/nfpa.nec.2014>

NOTICE:

Appeals and Interpretations of the North Carolina State Building Codes are published online at the following link.

http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=Code_Interpretations&user=Code_Enforcement_Resources

NOTICE:

Objections and Legislative Review requests may be made to the NC Office of Administrative Hearings in accordance with G.S. 150B-21.3(b2) after Rules are adopted by the Building Code Council.

<http://www.ncoah.com/rules/>

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

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Pesticide Board intends to amend the rule cited as 02 NCAC 09L .1009.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncagr.gov/AdministrativeRules/ProposedRules/index.htm>

Proposed Effective Date: December 1, 2015

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than September 1, 2015 to James W. Burnette, Jr., Secretary, NC Pesticide Board, 1090 Mail Service Center, Raleigh, NC 27699-1090.*

Reason for Proposed Action: *EPA issued a national pollinator protection strategy on May 19, 2015. These changes are necessary to keep NC rules consistent with that federal strategy, as well as with new federal neonicotinoid pesticide labeling requirements for notification of beekeepers prior to pesticide application to protect pollinators.*

Comments may be submitted to: *James Burnette, Jr., 1090 Mail Service Center, Raleigh, NC 27699-1090, phone 919-733-3556, email james.burnette@ncagr.gov*

Comment period ends: October 16, 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

02 NCAC 09L .1009 NOTIFICATION OF APIARIES

(a) Any person who hires the services of an aerial applicator to apply a pesticide labeled as toxic to bees, shall notify, based on available listings of registered apiaries, the owner or operator of any registered apiary located within ~~one-half~~ one mile of the target area not less than ~~twenty-four~~ 48 hours nor more than ten days prior to the beginning of a single application or a seasonal spray schedule, giving the approximate time of day of application and type of pesticide to be used. ~~Notification may be either oral or written.~~

(b) Notification for the purposes of this Paragraph is defined as follows:

- (1) written communication by:
 - ~~(a)~~ (A) U.S. mail,
 - ~~(b)~~ (B) Notification left at residence, or
 - ~~(c)~~ (C) Notification left at alternate as designated on the honeybee registration list.
- (2) oral communication by:
 - ~~(a)~~ (A) telephone,
 - ~~(b)~~ (B) personal communication, or
 - ~~(c)~~ (C) verbal communication with an alternate as designated on the honeybee registration list.
- (3) digital communication by:
 - (A) electronic mail, or
 - (B) instant messaging.

(c) The Pesticide Section ~~will~~ shall distribute new registrations of beekeepers and their alternates by U.S. mail on the first of each quarter (January 1, April 1, July 1, and October 1) to all farmers growing crops within ~~one-half~~ one mile of the apiaries that are identified on the "Apiary Registration Form" of the Plant Industry Division. The list of revised registered apiaries will become effective on the fifth day of the first month in the quarter stated in this Rule. The registration of apiaries shall be effective for the calendar year that they are registered.

Authority G.S. 143-458; 143-463; 143-466.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to adopt the rules cited as 10A NCAC 43J .0102, .0201 - .0205, .0301 - .0304, .0401 - .0411 and amend the rule cited as 10A NCAC 43J .0101.

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

Proposed Effective Date: January 1, 2016

Public Hearing:

Date: September 9, 2015

Time: 2:00 p.m.

Location: Cardinal Room, located at: 5605 Six Forks Road, Raleigh, NC

Reason for Proposed Action: *The authorizing legislation for the Child and Adult Care Food Program (CACFP) is found at 42 U.S.C. 1766, and the federal regulations that govern the CACFP are found at 7 C.F.R. Part 226. While 7 C.F.R. Part 226 is prescriptive in many of its requirements, it does allow states flexibility to implement certain requirements. The Nutrition Services Branch of the Division of Public Health, Department of Health and Human Services has seen the need to promulgate state rules to ensure consistency and uniformity in the administration and enforcement of the program across the State.*

After consultation with and guidance from USDA FNS program management and the NC Attorney General's Office, Nutrition Services Branch has seen the need to codify their operating procedures to ensure consistency and uniformity across the program.

Comments may be submitted to: Chris Hoke, JD, 1931 Mail Service Center, Raleigh, NC 26799-1931, phone 919-707-5006, email chris.hoke@dhhs.nc.gov

Comment period ends: October 16, 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 43 – PERSONAL HEALTH

SUBCHAPTER 43J - CHILD AND ADULT CARE FOOD PROGRAM

SECTION .0100 - GENERAL PROVISIONS

10A NCAC 43J .0101 INCORPORATION BY REFERENCE: 7 C.F.R. PART 226

Title 7, Code of Federal Regulations, Part 226 is hereby incorporated by reference along with all subsequent amendments and editions. A copy of 7 C.F.R. Part 226 is available for inspection at the Department of Health and Human Services, Division of Public Health, Women's and Children's Health Section, Nutrition Services Branch, 5601 Six Forks Road, Raleigh, North Carolina. Copies of 7 C.F.R. Part 226 may be downloaded and printed from the Internet at <http://www.fns.usda.gov/end/Care/Regs/Policy/CFR226.pdf>. <http://www.fns.usda.gov/sites/default/files/CFR226.pdf>.

Authority G.S. 130A-29; 130A-361; S.L. 1995, c. 324, s. 17.11; 42 U.S.C. 1766.

10A NCAC 43J .0102 DEFINITIONS

For purposes of this Subchapter, the following definitions apply:

- (1) "Administrative capability" means, in addition to the requirements of 7 C.F.R. Part 226, the status of an institution or facility which has an adequate number and type of key staff to ensure operation of the Program in accordance with 7 C.F.R. Part 226 and this Subchapter.
- (2) "Agreement" means an agreement either required or which the state agency is authorized to require pursuant to 7 C.F.R. Part 226 and whose purpose is to set forth the Program-related rights and responsibilities of the parties.
- (3) "Application for day care homes" means all forms or other documentation to be submitted by a day care home provider seeking entry to or continued participation in the Program, including all information required by 7 C.F.R. Part 226 and other applicable law, rule, or federal policy. The application shall include:
 - (a) A certification that the agreement with the sponsoring organization is exclusive.
 - (b) A disclosure form indicating whether the provider is involved with any other

- entity participating or applying to participate in the Program.
- (c) A certification that all information on the application is true and complete.
- (4) "Application for independent centers" means all forms or other documentation to be submitted by an independent center seeking entry to or continued participation in the Program, including all information required by 7 C.F.R. Part 226 and other applicable law, rule, or federal policy. The application shall include:
- (a) A management plan demonstrating financial viability, administrative capability, and program accountability.
- (b) A certification that the agreement with the state agency is exclusive.
- (c) The name, mailing address, and date of birth of all principals, owner(s), and key staff.
- (d) A disclosure form indicating whether any principal, owner and key staff is involved with any other entity participating or applying to participate in the Program.
- (5) "Application for sponsored centers" means all forms or other documentation to be submitted by a sponsored center seeking entry to or continued participation in the Program, including all information required by 7 C.F.R. Part 226 and other applicable law, rule, or federal policy. The application shall include:
- (a) A management plan demonstrating administrative capability, financial viability, and program accountability.
- (b) A program budget showing projected revenue and costs.
- (c) A statement listing other publicly funded programs in which the sponsored center and its principals have participated in the past seven years and either:
- (i) A certification that, during the past seven years, neither the sponsored center nor any of its principals have been declared ineligible to participate in any other publicly funded program by reason of violating that program's requirements; or
- (ii) Documentation showing that the sponsored center or the principal previously declared ineligible was later fully reinstated in, or determined eligible for, that program, including documentation
- showing the payment of any debts owed.
- (d) A certification that neither the sponsored center nor any of its principals have been convicted of any activity that occurred during the past seven years indicating a lack of business integrity. A lack of business integrity includes but is not limited to fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice.
- (e) A certification that all information on the application is true and complete.
- (f) A certification that the agreement with the sponsoring organization is exclusive.
- (g) The name, mailing address, and date of birth of all principals, owners, and key staff.
- (h) A disclosure form indicating whether any key staff, principal, or owner is involved with any other entity participating or applying to participate in the Program.
- (6) "Application for sponsoring organizations" means all forms or other documentation to be submitted by a sponsoring organization seeking entry to or continued participation in the Program, including all information required by 7 C.F.R. Part 226 and other applicable law, rule, or federal policy. The application shall include:
- (a) A management plan demonstrating financial viability, administrative capability, and program accountability.
- (b) The name, mailing address, and date of birth of all principals, owner(s), and key staff.
- (c) A disclosure form indicating whether any key staff, principal, or owner is involved with any other entity participating or applying to participate in the Program.
- (7) "Eligible meal service" means a meal served to a participant which may be claimed for reimbursement, provided that the meal service is:
- (a) Designated as a planned meal service on the institution's or facility's approved application;
- (b) Supported by all relevant documentation, as determined by 7 C.F.R. Part 226 and this Subchapter; and

- (c) Served in compliance with the meal pattern requirements of 7 C.F.R. 226.20.
- (8) "Excessive Program balance" means net cash resources in excess of three months average expenditures.
- (9) "Financial viability" means, in addition to the requirements of 7 C.F.R. Part 226, the status of an institution or sponsored center which has:
 - (a) No outstanding debt to the state agency.
 - (b) No overdue taxes at the federal, state, or local level.
 - (c) The means to satisfy an overpayment demand by the state agency.
 - (d) The means to operate the Program for a period of 30 days when a new applicant or 60 days when a renewing applicant, regardless of any expected reimbursement from the Program.
 - (e) A budget reflecting costs that are necessary, reasonable, allowable, and documented.
- (10) "Fiscal year" means a period of 12 months beginning October 1 of any calendar year and ending September 30 of the following calendar year.
- (11) "Institution training" means an instructional course covering specific content areas of the Program presented by personnel of the state agency.
- (12) "Key staff" means the individual(s) responsible for ensuring an institution's or facility's compliance with Program requirements.
- (13) "Lapse in participation" means a break in participation resulting from a terminated agreement.
- (14) "Menu" means a record stating the:
 - (a) Type of meal service (i.e., breakfast, lunch, supper, or snack);
 - (b) Type of food and beverage served to participants during the meal service; and
 - (c) Day, month, and year of the meal service.
- (15) "New facility" means a facility that applies to the Program for the first time, applies to participate under the auspices of a new sponsoring organization, or has a change in sponsorship. "New facility" also means a facility that has experienced a lapse in participation.
- (16) "Point of Service" means the point in the food service operation where a reimbursable meal has been served to an eligible participant.
- (17) "Program accountability" means, in addition to the requirements of 7 C.F.R. Part 226:

- (a) The status of a sponsored center which has:
 - (i) Oversight of the Program by a governing board or other manager(s);
 - (ii) A financial system with management controls specified in writing; and
 - (iii) The ability to meet the requirements of 7 C.F.R. 226.6(b)(1)(xviii)(C)(5) and 7 C.F.R. 226.6(b)(2)(vii)(C)(5).
- (b) The status of a day care home which has the ability to meet the requirements of 7 C.F.R. 226.6(b)(1)(xviii)(C)(5) and 7 C.F.R. 226.6(b)(2)(vii)(C)(5).
- (18) "Provider" means the individual(s) responsible for operating a day care home.
- (19) "Site-level claim" means an individualized claim for reimbursement on behalf of a single facility.
- (20) "Sponsored center" means a center that has a signed agreement with a sponsoring organization and the sponsoring organization has a signed agreement with the State Agency.
- (21) "State agency" means the North Carolina Department of Health and Human Services.
- (22) "Time of Service" means point of service as defined in this section.
- (23) "Update" to an application means the annual documentation requirements, based on 7 C.F.R. 226.6(f), which apply to institutions operating under a permanent Agreement. An "updating" institution is an institution subject to these documentation requirements.
- (24) "Updating Institution" means an institution that has a permanent agreement with the State agency to participate in the Child and Adult Care Food Program and is updating its application.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

SECTION .0200 – APPLICATION PROVISIONS

10A NCAC 43J .0201 APPLICATIONS FOR INDEPENDENT CENTERS

- (a) New and updating independent centers shall complete an application for independent centers and submit the application to the state agency for approval under the applicable provisions of 7 C.F.R. Part 226 and this Subchapter. The update application process occurs on an annual basis.
- (b) For updating independent centers, the deadline for receipt of a completed application to the state agency is the close of the business day on September 30. If September 30 falls on a

weekend, the application shall be received by the next business day after September 30.

(c) The responsibility for ensuring timely receipt of a completed update application to the state agency rests with the applicant. Failure to meet the deadline may result in the independent center being declared seriously deficient.

(d) Applications shall be submitted on the forms provided by the state agency. New independent centers shall not be approved for participation until all parts of the application have been completed.

(e) New independent centers shall complete an Agreement and submit the Agreement to the state agency with the application materials. The Agreement shall be signed by an individual legally empowered to bind the independent center. The Agreement is not effective until the Agreement is signed by an authorized agent of the state agency. Eligibility for reimbursement shall be governed by Rule .0301 of this Subchapter.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0202 APPLICATIONS FOR SPONSORING ORGANIZATIONS

(a) New and updating sponsoring organizations shall complete an application for sponsoring organizations and submit the application to the state agency for approval under the applicable provisions of 7 C.F.R. Part 226 and this Subchapter. The update application process occurs on an annual basis.

(b) For updating sponsoring organizations, the deadline for receipt of a completed application to the state agency is the close of the business day on September 30. If September 30 falls on a weekend, the application shall be received by the next business day after to September 30.

(c) The responsibility for ensuring timely receipt of a completed update application to the state agency rests with the applicant. Failure to meet the receipt deadline may result in the Sponsoring Organization being declared seriously deficient.

(d) Applications shall be submitted on the forms provided by the state agency. New sponsoring organizations shall not be approved for participation until all parts of the application have been completed.

(e) New sponsoring organizations shall complete an Agreement and submit the Agreement to the state agency with the application materials. The Agreement shall be signed by an individual legally empowered to bind the sponsoring organization. The Agreement is not effective until the Agreement is signed by an authorized agent of the state agency. Eligibility for reimbursement shall be governed by Rule .0301 of this Subchapter.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0203 APPLICATIONS FOR SPONSORED CENTERS

(a) New and renewing sponsored centers shall complete an application for sponsored centers and submit the application to the sponsoring organization for preliminary approval. The state agency is responsible for making final approval decisions under the applicable provisions of 7 C.F.R. Part 226 and this Subchapter. The renewal application process occurs on a triennial basis.

(b) Applications shall be submitted on the forms provided by the state agency. The sponsoring organization shall not forward an application to the state agency for final approval until the sponsored center has submitted all required information and satisfied all eligibility requirements.

(c) Sponsored centers shall enter into an Agreement with the sponsoring organization. An individual legally empowered to bind the sponsored center shall sign the Agreement. However, an Agreement is not required where the sponsored center is part of the same legal entity as the sponsoring organization. Eligibility for reimbursement shall be governed by Rule .0301 of this Subchapter.

(d) The agreement is not effective until approved by the State agency.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0204 APPLICATIONS FOR DAY CARE HOMES

(a) New and updating day care homes shall complete an application for day care homes and submit the application to the sponsoring organization for preliminary approval. The state agency is responsible for making final approval decisions under the applicable provisions of 7 C.F.R. Part 226 and this Subchapter. The updating application process occurs on an annual basis.

(b) Applications shall be submitted on the forms provided by the state agency. The sponsoring organization shall not forward an application to the state agency for final approval until the day care home has submitted all required information and satisfied all eligibility requirements.

(c) New day care homes shall enter into an Agreement with the sponsoring organization. The provider shall sign the Agreement. Eligibility for reimbursement shall be governed by Rule .0301 of this Subchapter.

(d) The agreement is not effective until approved by the State agency.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0205 APPLICATION UPDATE REQUIREMENTS

(a) If, upon entering a new fiscal year, an institution's Agreement remains valid and the institution desires to continue participation, the institution shall submit an update to its application, including all information required by 7 C.F.R. 226.6(f).

(b) As part of the update application, the institution shall ensure the continued accuracy of all information submitted to the state agency in connection with the most recent application, including all information submitted on behalf of any sponsored facilities. If there are any changes, the institution shall provide the up-to-date information to the state agency.

(c) Completed application updates shall be received by the close of the business day on September 30. If September 30 falls on a weekend, a completed application update shall be received by the next business day after September 30.

(d) The responsibility for ensuring timely receipt of a completed update application to the state agency rests with the updating

institution. Failure to meet the receipt deadline may result in the Institution being declared seriously deficient.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

SECTION .0300 – PAYMENT PROVISIONS

10A NCAC 43J .0301 PROGRAM PAYMENT

(a) Program payments to independent centers shall be conducted as follows: New independent centers. The institution is entitled to claim reimbursement for eligible meal services beginning no earlier than the effective date of the Agreement.

(b) Program payments to sponsoring organizations shall be conducted as follows: New sponsoring organizations. The institution is entitled to claim reimbursement for eligible meal services beginning no earlier than the effective date of the Agreement and on behalf of any facility whose application has been approved under Rules .0203 or .0204 of this Subchapter.

(c) With respect to any new facility, the sponsoring organization is entitled to claim reimbursement for eligible meal services beginning no earlier than the day that the facility's application is approved by the state agency under Rules .0203 or .0204 of this Subchapter.

(d) A final claim for reimbursement shall be postmarked and/or submitted to the State Agency not later than 30 days following the last day of the full month covered by the claim. Claims not postmarked and/or submitted within 30 days shall not be paid with Program funds unless FNS determines that an exception should be granted

(e) An Institution shall amend a claim for reimbursement no more than two times.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0302 RATE ASSIGNMENT

(a) With each month's claim for reimbursement, each independent center shall submit the number of enrolled participants who are eligible for free, reduced-price, and paid meals for the time period corresponding to the claim.

(b) Sponsoring organizations shall submit a site-level claim for each sponsored center. The site-level claim shall state the number of enrolled participants who are eligible for free, reduced-price, and paid meals for the time period corresponding to the claim.

(c) Sponsoring organizations shall submit a site-level claim for each day care home indicating as applicable:

- (1) The tier status of the day care home;
- (2) The number of enrolled participants who are eligible for free, reduced-price, and paid meals for the time period corresponding to the claim;
or
- (3) The combined information of Subparagraphs (c)(1) and (c)(2) of this Rule.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0303 ADVANCE PAYMENT

Advance payments will not be issued to institutions participating in the Child and Adult Care Food Program in North Carolina.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0304 OVERCLAIM REPAYMENT

Institutions shall repay overclaims to the State agency within 30 days of receipt of notice of the overclaim.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

SECTION .0400 – ADMINISTRATIVE PROVISIONS

10A NCAC 43J .0401 CHANGES IN OWNERSHIP OR LEGAL IDENTITY

(a) Agreements are not transferable or assignable.

(b) Institutions shall provide written notice to the state agency at least 10 business days prior to any change in ownership, business organization, business name, or legal identity, and at least 10 business days prior to a cessation of operations.

(c) Facilities shall provide written notice to the sponsoring organization at least 10 business days prior to any change in ownership, business organization, business name, or legal identity, and at least 10 business days prior to a cessation of operations. The sponsoring organization shall forward a copy of the notice to the state agency within five business days of receipt.

(d) Any Agreement shall be void upon a change in ownership where a 50 percent or greater ownership interest in the affected institution or facility is acquired by a party(ies) that did not previously possess an interest in the entity. Following such a change in ownership, any resulting entity that wishes to participate in the Program shall reapply as a new institution or new facility.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0402 MAINTAINING A NONPROFIT FOOD SERVICE

Institutions shall maintain a nonprofit food service, ensuring that all Program reimbursement funds are used solely for the conduct of the food service operation or to improve such food service operations for the benefit of the enrolled participants. To meet this requirement, institutions shall not have an excessive Program balance.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0403 RECORD KEEPING

(a) Where the state agency has developed a specific form for maintaining a record required under 7 C.F.R. Part 226 or this Subchapter, each institution and facility shall use the state-developed form.

(b) Any day care home providing care for more than 12 children in a single day shall maintain time of service meal counts.

(c) Any day care home declared to be seriously deficient due to violations involving meal counts or claims shall maintain time-of-service meal counts for 12 months following the notice of serious deficiency.

(d) Day care homes shall maintain on-site and have available for immediate review all records that support their Program activities

for the current month and the previous 12 months of operation. Day care homes may use off-site storage for the required maintenance of records older than 12 months. If requested by the state agency or the U.S. Department of Agriculture, off-site records must be produced within two business days of the request. Whether maintained on-site or off-site, all records must be maintained in accordance with and for the durations specified under 7 C.F.R. 226.10.

(e) Institutions and sponsored centers shall maintain on-site and have available for immediate review all records that support their Program activities for the current month and the previous 24 months of operation. Institutions and sponsored centers may use off-site storage for the required maintenance of records older than 24 months. If requested by the state agency or the U.S. Department of Agriculture, off-site records must be produced within one business day of the request. Whether maintained on-site or off-site, all records must be maintained in accordance with and for the durations specified under 7 C.F.R. 226.10.

(f) Institutions and facilities shall report the legal name of all enrolled participants on required CACFP forms.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0404 FREE AND REDUCED-PRICE APPLICATION

A new free and reduced-price application shall be completed for each enrolled participant no less frequently than annually. The free and reduced-price application shall expire on the last day of the same calendar month in the year following the year in which the application was signed and dated by the Institution representative.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0405 TIME RESTRICTIONS FOR MEAL SERVICE

(a) At least two and one-half hours shall elapse between the beginning of one meal service and the beginning of the next meal service, except that at least four hours shall elapse between the service of lunch and supper when no snack is served between lunch and supper. This requirement applies to all types of meal service (breakfast, lunch, supper, and snacks).

(b) A breakfast or snack service shall last not more than one and one-half hours.

(c) A lunch or supper service shall last not more than two hours.

(d) No meal or snack service shall begin later than 9:00 p.m.

(e) All enrolled participants in attendance shall be served within the meal service times designated on the institution's or facility's application. Meals served outside of the designated time frame are not eligible for reimbursement.

(f) This Rule does not apply to meals served at emergency shelters and meals served to infants (0 to 11 months).

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0406 TRAINING REQUIREMENTS

(a) Prior to submitting an application for participation, each new institution shall complete the training for potential institutions provided by the state agency.

(b) Each institution's key staff shall complete at least one institution training per fiscal year. To satisfy this requirement, the institution's representative(s) shall attend the entire training. Trainings related to the Program application process do not satisfy the requirement of this Paragraph.

(c) Each sponsoring organization shall conduct a minimum of one training per fiscal year for each employee having monitoring responsibilities. Documentation shall be maintained showing the attendance of the employee and that training has been completed in the following Program areas:

- (1) meal patterns;
- (2) meal counts;
- (3) claim review and submission procedures;
- (4) recordkeeping requirements; and
- (5) reimbursement system.
- (6) civil rights.

(d) Any newly hired key staff and any newly hired employee having monitoring responsibilities shall be trained by his/her respective institution within four weeks of employment in the areas set forth in Subparagraphs (c)(1) through (c)(5) of this Rule.

(e) Each sponsoring organization shall conduct a minimum of one training per fiscal year for key staff from each sponsored child care and adult day care facility. Attendance by key staff is mandatory. Documentation shall be maintained showing the attendance of the key staff and that training has been completed in the Program areas set forth in Subparagraphs (c)(1) through (c)(5) of this Rule.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0407 MONITORING RATIOS

The state agency determines the appropriate level of staffing for monitoring for each sponsoring organization pursuant to 7 C.F.R. 226.16, except that:

- (1) A sponsoring organization of centers shall employ the equivalent of one full-time staff person with monitoring responsibilities for each 25 to 100 centers it sponsors.
- (2) A sponsoring organization of day care homes shall employ the equivalent of one full-time staff person with monitoring responsibilities for each 50 to 100 day care homes it sponsors.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0408 EDIT CHECK REQUIREMENTS

Prior to submitting a facility's claim for reimbursement to the state agency, each sponsoring organization shall perform edit checks on the claim. The edit check process shall comply with 7 C.F.R. Part 226 and shall also ensure that:

- (1) Menus are in compliance with the Program's meal pattern requirements;
- (2) Income eligibility applications are accurately classified and up-to-date;

- (3) Enrollment forms are complete and up-to-date;
- (4) Each for-profit center meets the definitional criteria set forth in 7 C.F.R. 226.2; and
- (5) Meal counts do not exceed daily attendance.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0409 SERIOUS DEFICIENCIES

In addition to the categories of serious deficiencies set forth in 7 C.F.R. Part 226, the violation of an Agreement or a Rule of this Subchapter is ground for a serious deficiency determination.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0410 APPEAL PROCESS FOR DAY CARE HOMES

(a) Each sponsoring organization of day care homes shall conduct administrative reviews for the homes under its sponsorship and shall develop the necessary administrative review procedures in accordance with 7 C.F.R. 226.6(l).

(b) Administrative reviews shall be limited to circumstances where a day care home is seeking to appeal either:

- (1) Proposed termination and disqualification, or
- (2) Suspension.

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

10A NCAC 43J .0411 ADDITION OF NEW FACILITIES PROHIBITED

The state agency shall deny any application submitted by a sponsoring organization on behalf of a new facility if, prior to the facility's approval, the sponsoring organization is declared seriously deficient pursuant to 7 C.F.R. 226.6(c).

Authority G.S. 130A-29; 130A-361; 7 C.F.R. 226.

TITLE 14B – DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Public Safety – Division of Emergency Management intends to amend the rules cited as 14B NCAC 03 .0101 - .0104, and .0202.

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

Proposed Effective Date: December 1, 2015

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): If a public hearing is requested interested persons can contact William Polk, rulemaking coordinator for North Carolina Department of Public Safety.*

Reason for Proposed Action: *The amendments to the rules is to reflect changes to the locations and counties included in the three branch offices, updates to the organizational structure of North*

Carolina Emergency Management and updating the name from Crime Control and Public Safety to Public Safety. The rest of the changes are to conform to the statutory changes in Chapter 166A and the creation of the Department of Public Safety.

Comments may be submitted to: William Polk, 4201 Mail Service Center, Raleigh, NC 27699-4201, email will.polk@ncdps.gov.

Comment period ends: October 16, 2015

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

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

CHAPTER 03 - EMERGENCY MANAGEMENT

SECTION .0100 - GENERAL PROVISIONS

14B NCAC 03 .0101 LOCATION AND HOURS OF OPERATION

(a) The headquarters for the division of emergency management is located in the Administrative Building, Joint Force Headquarters, 416 West Jones Street, Raleigh, N.C. 27611-1636 Gold Star Drive, Raleigh, N.C. 27607. For emergency management administration and operation, the state is divided into ~~six~~ 3 branches and 15 geographical areas, each of which the ~~branches~~ is headed by ~~an a branch manager area coordinator.~~ Each branch consists of five geographical areas which is managed by an area coordinator. The addresses of the ~~area coordinators~~ branch offices are as follows:

- (1) ~~Area A P.O. Box 962, Washington, N.C. 27889;~~
- (2) ~~Area B 116 West Jones Street, Raleigh, N.C. 27611;~~
- (3) ~~Area C P.O. Box 339, Wallace, N.C. 28466;~~

- ~~(4) Area D P.O. Box 1594, Asheboro, N.C. 27203;~~
- ~~(5) Area E P.O. Box 276, Lincolnton, N.C. 28092;~~
- ~~(6) Area F P.O. Box 7177, Asheville, N.C. 28807.~~
- (1) Eastern Branch Office - 3802 Highway 58 North, Suite B, Kinston, N.C. 28502
- (2) Central Branch Office - 401 Central Avenue, Butner, N.C. 27509
- (3) Western Branch Office - 3305-15 16th Avenue SE, Conover, N.C. 28613

(b) The division and all ~~area-branch~~ offices are open to the public for conducting business during normal business hours and maintain operation during time of emergency and disaster. The counties served by the above ~~area-branch~~ offices are as follows:

- ~~(1) Area A Beaufort, Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Hyde, Martin, Pasquotank, Perquimans, Pitt, Tyrrell, Washington;~~
- ~~(2) Area B Chatham, Durham, Edgecombe, Franklin, Granville, Halifax, Johnston, Lee, Nash, Northampton, Orange, Person, Vance, Wake, Warren, Wilson;~~
- ~~(3) Area C Bladen, Brunswick, Carteret, Columbus, Craven, Cumberland, Duplin, Greene, Harnett, Hoke, Jones, Lenoir, New Hanover, Onslow, Pamlico, Pender, Robeson, Sampson, Scotland, Wayne;~~
- ~~(4) Area D Alamance, Anson, Caswell, Davidson, Davie, Forsyth, Guilford, Montgomery, Moore, Randolph, Richmond, Rockingham, Stokes, Surry, Yadkin;~~
- ~~(5) Area E Alexander, Alleghany, Ashe, Avery, Burke, Cabarrus, Caldwell, Catawba, Cleveland, Gaston, Iredell, Lincoln, Mecklenburg, Mitchell, Rowan, Stanly, Union, Watauga, Wilkes, Yancey;~~
- ~~(6) Area F Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Polk, Rutherford, Swain, Transylvania.~~
- (1) Eastern Branch —
Area 1- Camden, Chowan, Currituck, Dare, Gates, Hertford, Pasquotank, Perquimans,
Area 2- Beaufort, Bertie, Hyde, Martin, Pitt, Tyrrell, Washington,
Area 3- Carteret, Craven, Greene, Lenoir, Pamlico, Wayne,
Area 4- Cumberland, Duplin, Jones, Onslow, Pender, Sampson,
Area 5- Bladen, Brunswick, Columbus, Hoke, New Hanover, Robeson;
- (2) Central Branch —
Area 6- Franklin, Granville, Halifax, Northampton, Person, Vance, Warren,
Area 7- Edgecombe, Harnett, Johnston, Nash, Wake, Wilson,

- Area 8- Anson, Chatham, Lee, Montgomery, Moore, Richmond, Scotland,
- Area 9- Caswell, Davie, Forsyth, Rockingham, Stokes, Surry, Yadkin,
- Area 10- Alamance, Davidson, Durham, Guilford, Orange, Randolph;
- (3) Western Branch —
Area 11- Alexander, Alleghany, Cabarrus, Iredell, Rowan, Stanly, Wilkes,
Area 12- Ashe, Avery, Caldwell, McDowell, Mitchell, Watauga, Yancey,
Area 13- Burke, Catawba, Cleveland, Gaston, Lincoln, Mecklenburg, Union,
Area 14- Buncombe, Cherokee, Graham, Haywood, Madison, Swain,
Area 15- Clay, Henderson, Jackson, Macon, Polk, Rutherford, Transylvania.

Authority G.S. 143B-10; 143B-601; 166A-19.12.

14B NCAC 03 .0102 PURPOSES AND OBJECTIVES

The purpose of the division of emergency management is to provide for the preservation of life and protection of property of the citizens of the state during emergencies and disasters. Toward this end, the objectives of the division are to obtain financial and material support for the state and local governments' emergency preparedness operations, prepare plans and operations procedures for all hazards, afford training for all personnel and manage preparedness programs of the federal government. In addition, the division provides coordination assistance for emergency activities before, during and after emergencies and disasters at state and local levels to minimize the adverse effects of any emergency or disaster. It also coordinates the emergency preparedness efforts of the political subdivisions of the state, provides them with necessary guidance and assistance, determines that they comply with federal and state regulations, and assists them in obtaining federal assistance. Further, the division performs the activities authorized by the federal government and assigned by the Department of ~~Crime Control and Public Safety~~ in the post-disaster functions of providing services and funds to governments and individuals for the accomplishment of recovery, rehabilitation and reconstruction measures.

Authority G.S. 143B-601; 166A-19.1; 166A-19.12.

14B NCAC 03 .0103 DEFINITIONS

As used in this Chapter, the following words shall mean:

- (1) ~~"CCPS"~~ ~~"DPS"~~ shall mean the Department of ~~Crime Control and Public Safety~~;
- (2) "Division" shall mean the ~~division of emergency management~~ Division of Emergency Management of the Department of ~~Crime Control and Public Safety~~;
- (3) "Director" shall mean the director of the division of emergency management of the Department of ~~Crime Control and Public Safety~~;

- (4) "FEMA" shall mean the Federal Emergency Management Agency.

Authority G.S. 143B-10; 143B-601; 166A-19.12.

14B NCAC 03 .0104 ORGANIZATION

(a) The division of emergency management is headed by a director who, under the direction of the ~~Deputy Secretary~~ Commissioner of Law Enforcement of the Department of ~~Crime Control and~~ Public Safety, supervises and controls the activities of the division and assists in the coordination of the emergency preparedness activities of all state departments and agencies. The director provides assistance, guidance, and coordination to county and municipal governments in developing and maintaining emergency plans and organizations.

(b) The division is subdivided into the ~~emergency preparedness operations section, the emergency response planning and homeland security section, the logistics section, the recovery section, risk management section, public affairs office and the administrative support branch.~~ The emergency preparedness operations section is headed by the deputy director who supervises the assistant directors of the planning and homeland security section, logistics section, recovery section, and risk management sections. ~~and the emergency response section are headed by an assistant director.~~ The administrative support branch ~~and public affairs office~~ comes under the direction of the director of the division of emergency management.

(c) The functions of the ~~emergency preparedness operations~~ section are to manage delivery of State assistance and services in support of local governments. During emergency operations center (EOC) activations the operations section identifies, assigns and manages the resources needed to accomplish the incident objectives. Outside of EOC activation, the operations section coordinates emergency management activities among counties and local governments and plans and prepares for its duties during activations. The operations section consists of three field branch offices, the civil air patrol branch, and the EOC operations branch. plan and train in all aspects of emergency response to include radiological matters. It provides advice to local government officials and emergency management personnel on development of plans, facilities, and training of staff personnel and the general public.

(d) The function of the ~~administrative support branch~~ planning and homeland security section manages and coordinates all information and planning functions as they relate to disaster contingency planning and the homeland security grant program planning within the division of emergency management. This includes research, development, coordination, implementation and evaluation of plans and polices focused on natural disasters (hurricanes, tornadoes, flash floods, riverine flooding, storm surge, earthquakes, mudslides, etc.), hazardous materials, nuclear power plants, other radiological/nuclear events, other man-made/technological disasters (dam failure, airplane accidents, search and rescue events, large transportation accidents), weapons of mass destruction, acts of terrorism, and terrorist incidents. The planning and homeland security section coordinates preparation of both strategic (short and long term) and operational (emergency, disaster operations) plans. is to provide support to

~~the division and to local governments in qualifying and applying for federal preparedness funds and programs.~~

(e) ~~The functions of the emergency response section are to develop and implement operating procedures for the state and local emergency operating centers; organize and train the state emergency response team; supervise the area coordinators' activities; and supervise the emergency response efforts of the division logistics section are that they fulfill the division's daily logistics requirements. This includes but is not limited to the following; transportation and distribution (mail, vehicle pools, movement of large items); handling of surplus items and inventory control (both fixed assets and non); warehousing of goods and equipment (including minimal office supplies); large scale contracting; large scale purchasing; training and conference coordination, both internal and external; and exercise coordination, both internal and external. The section also conducts short and long term planning functions and assists facility managers as needed. During EOC activations, the section provides logistical support to the State Emergency Response Team (SERT). The logistics section has three branches: logistics operations, logistics supply, and training and exercise.~~

(f) ~~The functions of the recovery section are plans and coordinate recovery activities among citizens, local governments, and various State and Federal agencies with disaster-related primary and support responsibilities to ensure these entities return to normalcy after a disaster. The section provides immediate assistance to reduce or relieve human suffering and support the restoration of essential services, and it coordinates and directs those operations when local government resources are inadequate or exhausted. The recovery section requests and coordinates assistance from other states, the federal government, and private disaster relief organizations as necessary and appropriate. The recovery section has three branches: public assistance, hazard mitigation, and individual assistance.~~

(g) ~~The functions of the risk management section are plans, implements, and manage the efficient and effective acquisition, management, use, and dissemination of geospatial data, information, and information technology. Risk Management's primary mission is to accomplish the goal of a "prepared and resilient North Carolina from all hazards and threats". Risk Management works towards improving the preparedness, incident command, response and recovery of North Carolina's homeland security, law enforcement, and emergency management policy makers and practitioners from hazards and threats. The risk management section provides three broad critical service functions that support local, state and federal homeland security, emergency management, and law enforcement efforts. These functions are:~~

- (1) ~~identification, monitoring, and mapping of vulnerability and consequences from hazards and threats on key infrastructure and key resources.~~
- (2) ~~establishment and maintenance of key data exchange and information technology infrastructure and applications for the efficient exchange of communication and data, and~~
- (3) ~~management of data acquisition, dissemination, maintenance, and exchange between local, state~~

and federal partners. Risk management consists of four branches: information technology branch, GIS data and manipulation branch, flood warning branch, and floodplain mapping branch

(h) The administrative branch includes elements of human resources and finance. Both units fall under the supervision of the division director. The executive officer for the division supervises both elements. Human resources is responsible personnel services in include hiring, firing, promotions, demotions, reassignments, awards, time keeping and maintaining the division personnel files. Additionally, processes the monthly vehicle and telephone billing. During activation of the state emergency operations center provides support to the logistics section in support of the State Emergency Response Team (SERT). Finance is responsible for processing invoices from vendors for payment and forwarding to department account payable, reviewing and approving procurement transactions, monitors the application, submission and closeout of grants awarded to the division, works with the department budget controller sections on issues. During activation of the state emergency operations center collects and provides financial information to the State Emergency Response Team (SERT), Governor's Office and other state agencies. Responsible for submitting division expenditures to the Federal Emergency Management Agency (FEMA) for federally declared disasters.

(i) The function of the public affairs office is to work to ensure the people of North Carolina are informed and knowledgeable about programs, events and conditions affecting their safety and well-being. The staff works to provide timely and accurate information to news media and to inform the general public of emergency action steps to be taken during natural or man-made disasters. The members of the public affairs office respond to media inquiries, write speeches and press releases, and produce educational materials. Public affairs staff members are available for duty 24 hours a day, 7 days a week assisting members of the news media either by phone or at the scenes of incidents. When necessary, public affairs staff prepares and distribute news releases and arrange for news conferences. The public affairs staff sets up a joint information center (JIC) for actual events and drills — to include those relating to the three nuclear plants in North Carolina and one just beyond the border in South Carolina.

(j) The state is divided into ~~six~~ 3 branches and 15 geographical areas, each branch is headed by a branch manager and each area of which is headed by an area coordinator who, coordinates the state response to emergencies, provides assistance and guidance to local officials and ~~coordinators~~ coordinates in planning and testing plans for emergency services during times of disaster. During disasters, the branch offices serve as regional coordination centers; receiving resource requests, deploying regional assets and tracking state resources to support local government.

Authority G.S. 143B-10; 143B-601; 166A-19.12.

14B NCAC 03 .0202 WHERE TO OBTAIN MANUALS/FORMS AND ASSISTANCE

All forms and manuals used by the division may be obtained from the division ~~headquarter~~, headquarters. Information and

assistance are available to citizens, local government units and emergency management agencies and others from the division office or any ~~area~~-branch office.

Authority G.S. 143B-10; 143B-601; 166A-19.12.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 10 – NC BOARD OF CHIROPRACTIC EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Chiropractic Examiners intends to adopt the rules cited as 21 NCAC 10 .0106, .0214 and amend the rule cited as 21 NCAC 10 .0208.

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

Proposed Effective Date: January 1, 2016

Public Hearing:

Date: September 16, 2015

Time: 10:00 a.m.

Location: Board Office, 174 N Church Street, Concord, NC 28025

Reason for Proposed Action:

21 NCAC 10 .0106 CONFLICTS OF INTEREST – This new rule would prohibit sitting Board members from simultaneously serving in leadership positions of private trade associations dedicated to promoting the financial and political interests of the chiropractic profession, thereby minimizing conflicts of interest between chiropractors, patients and the general public.

21 NCAC 10 .0214 RANDOM OFFICE INSPECTIONS – This new rule would create a program of random office inspections to enable the Board to better monitor licensee compliance with the chiropractic practice act and the rules of the Board.

21 NCAC 10 .0208 ACUPUNCTURE – This amendment would increase the required training for chiropractors to perform acupuncture from 200 to 300 hours. The amendment would take effect in July 2019, and chiropractors certified prior to that date would be grandfathered.

Comments may be submitted to: Carol Hall, Executive Secretary, P.O. Box 312, Concord, NC 28026

Comment period ends: October 19, 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 – ORGANIZATION OF BOARD

21 NCAC 10 .0106 CONFLICTS OF INTEREST

(a) Private Trade Associations. During his or her term of service on the Board of Examiners, a member of the Board shall not serve as an officer, director, district president or committee chair of any private trade association that exists primarily to advance, promote and protect the commercial and political interests of the chiropractic profession in this State. Such private trade associations include the North Carolina Chiropractic Association.

(b) Membership Allowed. Paragraph (a) of this Rule shall not prohibit a member of the Board from becoming or continuing to be an ordinary member of a private trade association and exercising the rights and privileges of membership while simultaneously serving on the Board.

Authority G.S. 90-142.

SECTION .0200 – PRACTICE OF CHIROPRACTIC

21 NCAC 10 .0208 ACUPUNCTURE

Until July 1, ~~2008~~, 2019, in order to perform acupuncture, a licentiate or applicant for licensure ~~must~~ shall first certify to the Board that he or she has completed a minimum of ~~400~~ 200 hours' coursework in acupuncture-meridian therapy, including sterile needle technique, theory of acupuncture and differential diagnosis of clinical indications. This coursework ~~must~~ shall be offered as either part of the curriculum leading to the Doctor of Chiropractic degree or at the post-graduate level, and by a college accredited pursuant to G.S. 90-143(b). Beginning July 1, ~~2008~~, 2019, in order to perform acupuncture, a licentiate or applicant for licensure ~~must~~ shall first certify to the Board that he or she has completed a minimum of ~~200~~ 300 hours of the above-described coursework; provided, that this requirement of ~~200~~ 300 hours' coursework shall apply only to a licentiate or applicant for licensure whose initial certification date falls on or after July 1, ~~2008~~, 2019. Any licentiate certified prior to July 1, ~~2008~~, 2019 may continue to perform acupuncture without obtaining additional education.

Authority G.S. 90-142; 90-143; 90-151.

21 NCAC 10 .0214 RANDOM OFFICE INSPECTIONS

(a) Random Inspections Authorized. The Board shall conduct periodic inspections of chiropractic offices for the purpose of assessing compliance with the chiropractic practice act and the rules of the Board. Inspections shall be conducted as follows:

- (1) Physicians shall be selected for office inspection randomly and not based on any suspicion of wrongdoing.
- (2) The Board shall provide at least 30 days' advance written notice to a physician whose office is to be inspected.
- (3) The inspector shall not be a competitor of the physician whose office is to be inspected.
- (4) The inspector shall use a published, standardized checklist provided by the Board and shall record a grade of "Pass" or "Fail" for each item on the checklist. The inspector shall leave a copy of the graded checklist with the physician and file the original with the Secretary of the Board.
- (5) The inspector shall examine individual patient records only for the purpose of evaluating formatting, legibility and completeness. The inspector shall not draw any conclusions as to the quality of care or reasonableness of charges based on his examination of patient records.
- (6) If the inspector issues a failing grade on any checklist item, the physician shall have thirty days to correct the problem and request re-inspection.

(b) Appeal of Failing Grade. A physician whose office receives a failing grade on any checklist item may appeal to the Secretary of the Board. The Secretary shall have the authority to reverse the grade for good cause shown, or grant additional time within which to correct the problem. If the physician negligently or willfully fails to correct a problem after exhausting his or her appeal to the Secretary, the physician shall be subject to disciplinary action by the Board.

(c) Exemption. A physician whose office has been inspected pursuant to this Rule shall not be subject to further random office inspections for a period of three years following the inspection.

(d) Inspections For Cause. This rule shall not apply to office inspections ordered by the Secretary of the Board for cause as part of the investigation and prosecution of suspected disciplinary violations.

Authority G.S. 90-142.

CHAPTER 14 – BOARD OF COSMETIC ART EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Cosmetic Art Examiners intends to amend the rules cited as 21 NCAC 14T .0302-.0304.

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

Proposed Effective Date: *December 1, 2015*

Public Hearing:

Date: *September 1, 2015*

Time: *9:00 a.m.*

Location: *1207 Front Street, Suite 110, Raleigh, NC 27609*

Reason for Proposed Action: *This language change updates these three rules with language already present in the chapter.*

Comments may be submitted to: *Stefanie Kuzdrall, 1207 Front Street, Suite 110, Raleigh, NC 27609*

Comment period ends: *October 16, 2015*

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

Fiscal impact (check all that apply).

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

SUBCHAPTER 14T – COSMETIC ART SCHOOLS

SECTION .0300 – SCHOOL EQUIPMENT AND SUPPLIES

21 NCAC 14T .0302 EQUIPMENT FOR COSMETOLOGY SCHOOLS

(a) The ~~beginner-practice~~ department in a cosmetology school must be equipped with the following equipment:

- (1) One manicure table and stool;

- (2) ~~Two~~^{One} shampoo bowls and chairs. Each side approach shampoo bowl must be at least 40 inches apart, center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart, center of bowl to center of bowl;
- (3) Thermal styling equipment for the purpose of curling and straightening the hair;
- (4) Visual aids;
- (5) One mannequin practice table/stand to accommodate each student ~~enrolled~~ in the ~~beginner-practice~~ department; and
- ~~(6) Five dozen cold wave rods for each student in the department.~~

(b) The ~~advanced-clinic~~ department in a cosmetology school must be equipped with the following equipment for up to 40 students in the department:

- (1) 20 stations: a station shall include one mirror, one electrical outlet and one hydraulic chair;
- (2) ~~Six~~^{Four} hooded floor type dryers and chairs;
- (3) Four shampoo bowls and chairs. Each side approach shampoo bowl must be at least 40 inches apart, center of bowl to center of bowl, free standing shampoo bowls must be at least 31 inches apart, center of bowl to center of bowl, all other types of shampoo bowls must be at least 31 inches apart, center of bowl to center of bowl;
- (4) Two manicure tables and stools;
- (5) One pedicure station: a pedicure station shall include a chair, a foot bath and a stool; and
- (6) One facial treatment table or chair and a stool.

(c) The advanced department in a cosmetology school must be equipped with the following equipment if there are more than 40 enrolled advanced students:

- (1) One station for each additional two students;
- ~~(2) One hooded floor type dryer for each additional 10 students;~~
- ~~(3)~~⁽²⁾ One shampoo bowl for each additional 10 students;
- ~~(4)~~⁽³⁾ One manicure table and stool for each additional 15 students;
- ~~(5)~~⁽⁴⁾ One pedicure station for each additional 20 students; and
- ~~(6)~~⁽⁵⁾ One facial lounge or chair for each additional 40 students.

(d) Cosmetology schools that also offer the disciplines of esthetics, manicuring and natural hair care must be equipped with one additional station (as defined in this section per discipline) per five students and the equipment requirements specific to the discipline.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0303 EQUIPMENT FOR ESTHETICS SCHOOLS

(a) The ~~beginner-practice~~ department in an esthetics school must be equipped with ~~the following equipment:~~

- (1) One mannequin practice table/stand to accommodate each student ~~enrolled in the beginner-practice department.~~ ~~department;~~
 - (2) ~~One sink with hot and cold running water.~~
- (b) The ~~advanced-clinic~~ department in an esthetics school shall be equipped with the following equipment for 1-20 students:
- (1) Ten facial treatment chairs or treatment tables;
 - (2) Ten esthetician's stools and waste container at each station;
 - (3) One facial vaporizer;
 - (4) One galvanic current apparatus;
 - (5) One infra-red lamp;
 - (6) One woods lamp;
 - (7) One magnifying lamp;
 - (8) One hair removal wax system;
 - (9) One thermal wax system;
 - (10) One suction machine;
 - (11) One exfoliation machine with brushes; and
 - (12) One hand washing sink with hot and cold running water, separate from restrooms.
- (c) The ~~advanced-clinic~~ department in an esthetics school must be equipped with the following equipment if there are more than 20 enrolled advanced students:
- (1) One station for each additional two students: a station shall include one facial treatment table or chair and one stool; and
 - (2) Two hand washing sinks with hot and cold running water, separate from restrooms.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0304 EQUIPMENT FOR MANICURING SCHOOLS

- (a) The ~~beginner-practice~~ department in a manicuring school must be equipped with the following equipment:
- (1) ~~One one~~ mannequin practice table/stand to accommodate each student enrolled in the ~~beginner department; and practice department.~~
 - (2) ~~One hand washing sink with hot and cold running water, separate from restrooms.~~
- (b) The ~~advanced-clinic~~ department in a manicuring school must be equipped with the following equipment:
- (1) Two hand washing sinks with hot and cold running water, separate from restrooms, located in or adjacent to the clinic area;
 - (2) Ten work tables with two chairs per table;
 - (3) Ten pedicure chairs and basins;
 - (4) A waste container at each station; and
 - (5) A covered container for soiled or disposable towels located in the clinic area.
- (c) The ~~advanced-clinic~~ department in a manicuring school must be equipped with the following equipment if there are more than 20 enrolled advanced students:
- (1) One station for each additional two students a station shall include one work table and two chairs; and
 - (2) Two hand washing sinks with hot and cold running water, separate from restrooms.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

TITLE 25 – OFFICE OF STATE HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Human Resources Commission intends to adopt the rules cited as 25 NCAC 01D .2702 - .2704, and amend rules cited as 25 NCAC 01D .2701; 01H .0801, .0902, and repeal the rule cited as 25 NCAC 01H .0802.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.oshr.nc.gov/Guide/SPC/rulemaking.htm>

Proposed Effective Date: February 1, 2016

Public Hearing:

Date: September 16, 2015

Time: 2:00 p.m.

Location: Learning and Development Center, Mountain Room, 101 West Peace Street, Raleigh, NC 27603

Reason for Proposed Action:

25 NCAC 01D .2701 - .2704 - House Bill 834 (Session Law 2013-382) resulted in amendments to G.S. 126 (State Human Resources Act which changed the definition of probationary status from 3 to 9 months to 24 months which in turn impacted a trainee employee's eligibility for severance pay. In addition, the severance rules were amended to comply with G.S. 126-8.5(a) which states that State employees are only eligible for severance if reemployment is not available. The law does not make allowances for exceptions such as temporary employment, employment at a lower level or lower pay, etc. As a result, RIF employees become ineligible for severance upon availability of any position for which they meet qualifications. Corrections to the severance rules are necessary to accurately reflect the impact on eligibility for severance when an employee declines a placement or job offer.

25 NCAC 01H .0801, .0802, .0902 - Amendments to the promotion and RIF Priority rules are required to match the new definition of promotion for career banded salary administration policy, which was approved by the State Human Resources Commission at the December 2014 meeting. The change in the salary administration policy was in response to requests received from agencies and universities to reconsider how promotions were defined due to concerns that the previous definition did not accurately reflect true promotional opportunities. During the last legislative salary freeze that was in place from 2009 through 2013, agencies and universities could not award salary adjustments except in cases of promotion or reallocation to higher level duties and responsibilities. The salary freeze restrictions created recruitment problems for some classifications in the career banded system that were perceived by employees and management to be higher level duties and responsibilities but did not qualify for an increase under the legislative salary freeze as a result of how promotions were defined in the career banding system. When the freeze was lifted, agencies and universities

asked the Office of State Human Resources to fix the issue with the definition of promotion in order to avoid future recruitment problems related to salaries, promotional priority and RIF priority in case of another future legislative salary freeze.

Comments may be submitted to: Maggie Craven, 1331 Mail Service Center Raleigh, NC 27699, phone 919-807-4805, email, Maggie.craven@nc.gov

Comment period ends: October 16, 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 01 - OFFICE OF STATE HUMAN RESOURCES

SUBCHAPTER 01D - COMPENSATION

SECTION .2700 - SEVERANCE SALARY CONTINUATION

25 NCAC 01D .2701 SEVERANCE SALARY CONTINUATION POLICY

G.S. 143-27.2 G.S. 126-8.5 provides for severance salary continuation or a discontinued service retirement allowance when the Director of the Budget determines that the closing of a State institution or a reduction-in-force will accomplish economies in the State Budget, provided reemployment is not available. "Economies in the State Budget" means economies resulting from elimination of a job and its responsibilities or from a lack of funds to support the job. The provisions outlined below provide for uniform application of severance salary continuation for eligible employees: Severance salary continuation shall be paid to eligible

employees as defined in 25 NCAC 01D .2702 in accordance with the rules in this Section. Severance pay shall be subject to available funding and approval by the Office of State Budget and Management.

(1) Eligible Employees:

- (a) A full time or part time (20 hours or over) employee with a permanent appointment who does not obtain another permanent or time limited permanent job in State government or any other permanent position that is funded in part or in whole by the State by the effective date of the separation shall be eligible for severance salary continuation. Also eligible are employees with trainee appointments who have completed six months of service, and employees who had a permanent appointment prior to entering a trainee appointment;
(b) An employee with a probationary, temporary or intermittent appointment is not eligible for severance salary continuation;
(c) An employee separated from a time limited permanent appointment is not eligible for severance salary continuation. If the appointment extends beyond three years, the appointment is made permanent and the employee becomes eligible for severance salary continuation;
(d) An employee who is separated or scheduled to be separated due to reduction in force and who applies for retirement benefits based on early retirement, service retirement, long term disability or a discontinued service retirement as provided by G.S. 143-27.2 shall not be eligible for severance salary continuation. An employee who is eligible for early or service retirement may elect to delay retirement and receive severance salary continuation;
(e) An employee who is reemployed from any retired status with the State and who is subsequently terminated as a result of reduction in force shall be eligible for severance salary continuation;
(f) An employee who is receiving workers' compensation or short term disability payments is eligible for severance salary continuation;
(g) An employee on leave with pay or leave without pay shall be separated on the effective date of the reduction

in force, the same as other employees, and shall be eligible to receive severance salary continuation;

- (h) An employee with a permanent appointment separated by reduction in force, may accept a temporary State position and remain eligible to receive severance salary continuation in accordance with this Section;
- (i) An employee may continue to receive severance salary continuation if reemployed under a contractual arrangement in a State university or community college in accordance with

G.S. 143-27.2. However, an employee receiving salary continuation may not be reemployed in any other State agency until 12 months have elapsed since the separation; and

- (j) An employee with a permanent appointment scheduled to be separated through reduction in force may decline a lower level position with regard to salary grade (or salary grade equivalency), salary rate or appointment type and retain eligibility for severance salary continuation.

(2) Amount and Method of Payment:

- (a) Severance salary continuation shall be based on total State service and supplemented by an age adjustment factor as follows:

(i) Amount of Salary Continuation:

Less than 1 year	2 weeks
1 but less than 5 years	1 month
5 but less than 10 years	2 months
10 but less than 20 years	3 months
20 or more years	4 months

(ii) Age Adjustment Factor:

An employee qualifies for the age adjustment factor at 40 years of age. To compute the amount of the adjustment, 2.5 percent of the annual base salary shall be added for each full year over 39 years of age; however, the total age adjustment factor payment shall be limited by the service payment and cannot exceed the total service payments;

- (b) When calculating severance, the employee's annual salary at the time of separation shall be used except when the employee has received a promotion to a higher salary grade (or salary grade equivalency) and salary rate within the previous 12 months. If an employee has been promoted within the last 12 months, the salary used to calculate severance is the employee's salary rate prior to the promotion, including any across the board legislative salary increases since the promotion;
- (c) Severance salary continuation shall be paid on a pay period basis and is not subject to employee or employer retirement contributions, and as a result, shall not be included in

computing average final compensation for retirement purposes;

- (d) Any period covered by severance salary continuation shall not be credited as a period of state service;
- (e) An employee who is reemployed in any permanent position with the State or any other permanent position that is paid in part or in whole by the State while receiving severance salary continuation will no longer be eligible for such pay effective on the date of reemployment;
- (f) If an employee dies while receiving severance salary continuation, the balance of such payment shall be made to the deceased employee's death benefit beneficiary as designated with the Teachers' and State Employees' Retirement System in a lump sum payment; and
- (g) Funds for severance salary continuation shall be provided as directed by the Office of State Budget and Management.

- (3) For each employee who receives severance salary continuation, agencies shall show on the separate form, Form PD-105, the calculation and amount of such payment.

Authority G.S. 126-4(10); 126-8.5

25 NCAC 01D .2702 SEVERANCE SALARY CONTINUATION ELIGIBILITY

(a) An employee who has been reduced in force and who does not obtain employment to another position in State government or any other position that is funded in part or in whole by the State by the effective date of the separation shall be eligible for severance salary continuation as follows:

- (1) full-time and part-time (half time or more) permanent employees;
- (2) trainee employees with 24 or more months of State service;
- (3) trainee employees who obtained career status with no break in service, as defined in 25 NCAC 01D .0114, prior to entering a trainee appointment;
- (4) time-limited employees with 36 or more months of continuous State service; and
- (5) employees in exempt policymaking or exempt managerial positions as defined in G.S. 126-5(b) are eligible for severance salary continuation if the position is abolished as result of a reduction in force.

(b) Trainee employees with less than 24 continuous months of service, time-limited employees with less than 36 continuous months of service, probationary, and temporary employees are not eligible for severance salary continuation.

(c) An employee who is separated, or who has received written notification of separation due to reduction in force and who applies for or begins receiving retirement benefits based on early retirement, service retirement, long term disability, or a discontinued service retirement as provided by G.S. 126-8.5 shall not be eligible for severance salary continuation. An employee who is eligible for early or service retirement may elect to delay retirement and receive severance salary continuation.

(d) An employee who is reemployed from any retired status with the State and who is subsequently terminated as a result of reduction in force shall be eligible for severance salary continuation if the employee meets the eligibility requirements in Paragraph (a) of this Rule.

(e) An employee who is receiving workers' compensation or short-term disability payments is eligible for severance salary

(b) Severance salary continuation shall be based on total State service as defined in 25 NCAC 01D .0114 and supplemented by an age adjustment factor as follows:

- (1) Amount of Severance Salary Continuation:

<u>Years of Service</u>	<u>Payment</u>
<u>Less than 1 year</u>	<u>2 weeks</u>
<u>1 but less than 2 years</u>	<u>1 month</u>
<u>2 but less than 5 years</u>	<u>1 month</u>
<u>5 but less than 10 years</u>	<u>2 months</u>
<u>10 but less than 20 years</u>	<u>3 months</u>
<u>20 or more years</u>	<u>4 months</u>

- (2) An employee qualifies for the age adjustment factor at 40 years of age. To compute the amount of the adjustment, 2.5 percent of the annual base salary shall be added for each full

continuation if the employee meets the eligibility requirements in Paragraph (a) of the Rule.

(f) An employee on leave with or without pay shall be separated on the effective date of the reduction-in-force, the same as other employees, and shall be eligible to receive severance salary continuation if the employee meets the eligibility requirements in Paragraph (a) of this Rule.

Authority G.S. 126-4(10); 126-8.5.

25 NCAC 01D .2703 EFFECTS OF REEMPLOYMENT ON SEVERANCE PAY

(a) An employee who is reemployed in any position with the State, or any other position that is funded in part or in whole by the State, while receiving severance salary continuation, shall not be eligible for severance salary continuation effective on the date of reemployment.

(b) An eligible employee who is offered employment in any position with the State and declines to accept the employment offer, either prior to or following separation, shall not be eligible for severance salary continuation effective on the date that the offer is declined.

(c) The agency offering employment or reemployment is responsible for determining if an employee is receiving severance salary continuation payments and shall notify the separating agency of the date severance salary continuation should be terminated.

Authority G.S. 126-4(10); 126-8.5.

25 NCAC 01D .2704 AMOUNT AND METHOD OF PAYMENTS FOR SEVERANCE

(a) The salary used to determine severance salary continuation is the last annual salary in effect upon separation unless the employee was promoted within the previous 12 months. If the employee was promoted within the last 12 months, the salary used to calculate severance salary continuation is the annual salary prior to the promotion plus any across-the-board legislative salary increases.

year over 39 years of age; however, the total age adjustment factor payment shall be limited by the service payment and cannot exceed the total service payments;

(c) Severance salary continuation shall be paid on a pay period basis.

(d) Any period covered by severance salary continuation shall not be credited as a period of State service.

(e) If an employee dies while receiving severance salary continuation, the balance of the severance salary continuation shall be made to the deceased employee's death benefit beneficiary as designated with the Teachers' and State Employees' Retirement System in a lump sum payment.

Authority G.S. 126-4(10); 126-8.5.

SECTION .0800 - PROMOTIONAL PRIORITY

25 NCAC 01H .0801 PROMOTIONAL PRIORITY CONSIDERATION FOR CURRENT EMPLOYEES

(a) Promotional priority consideration shall be provided when a career State employee, as defined in G.S. 126-1.1, applies for a position that is a higher salary grade (salary grade equivalency) or has a higher ~~statewide journey~~-market rate and the eligible employee is in competition with outside applicants.

(b) If it is determined that an eligible employee and an outside applicant have "substantially equal qualifications," then the eligible employee ~~must~~ shall receive the job offer over an outside applicant.

(c) "Substantially equal qualifications" occur when the employer cannot make a reasonable or justifiable determination that the job-related qualifications held by one applicant are significantly better suited for the position than the job-related qualifications held by another applicant.

(d) For purposes of this Rule, an outside applicant is any applicant who is not a member of the State government workforce as defined in 25 NCAC 01H .0631(c).

Authority G.S. 126-1A; 126-4; 126-7.1.

25 NCAC 01H .0802 RELATIONSHIP TO OTHER EMPLOYMENT PRIORITY CONSIDERATIONS

~~(a) Eligible exempt employees with priority consideration and employees with reduction in force priority status are not considered outside applicants for the purpose of promotional priority.~~

~~(b) Providing equal employment opportunity requires that hiring authorities act affirmatively in minimizing or eliminating underrepresentations of women, minorities and persons with disabilities throughout all levels of the State's workforce. Therefore, when promotional opportunities exist in occupational categories where there is an established underrepresentation of minorities, women, and persons with disabilities, and the selection decision will be made from among applicants in the existing State workforce, hiring authorities shall consider and support these equal employment opportunity needs. Affirmative recruitment efforts shall be taken, both internally and externally, to optimize the presence of the most qualified persons from the underrepresented categories in the applicant pool.~~

Authority G.S. 126-4; 126-7.1; 126-16.

25 NCAC 01H .0902 REQUIREMENTS FOR REDUCTION IN FORCE PRIORITY CONSIDERATION

Upon written notification of imminent separation through reduction in force (RIF), a career state employee shall receive priority consideration for positions at an equal or lower salary grade (or salary grade equivalency) for a period of 12 months pursuant to G.S. 126-7.1, unless the priority has been satisfied in accordance with this section. The following conditions apply:

- (1) For employees receiving notification of imminent separation from trainee or flat rate positions, the salary grade for which priority is to be afforded shall be determined as follows: For employees in flat rate positions, the salary grade shall be the grade that has as its maximum a rate nearest to the flat rate salary of the eligible employee. For eligible employees in trainee status, the salary grade shall be the salary grade of the full class;
- (2) For employees receiving notification of imminent separation through reduction in force while actively possessing priority consideration from a previous reduction in force shall retain the initial priority for the remainder of the 12-month priority period. A new priority consideration period shall then begin at the salary grade (or salary grade equivalency), or salary rate of the position held at the most recent notification of separation and shall expire 12 months from the most recent notification date;
- (3) If after receiving formal notice of imminent reduction in force, an employee retires or applies for retirement prior to the separation date, an employee shall have no right to priority consideration;
- (4) Employees notified of separation from permanent full-time positions shall have priority consideration for permanent full-time and permanent part-time positions. Employees notified of separation from permanent part-time positions shall have priority consideration for permanent part-time positions only;
- (5) Employees who have priority consideration at the time of application for a vacant position, and who apply during the designated agency recruitment period, shall be continued as priority applicants until the selection process is complete;
- (6) If an employee with priority consideration applies for a position but declines an interview or offer of the position, the employee loses priority if the position is at a salary grade (or salary grade equivalency), market rate or salary rate equal to or greater than that held at the time of notification;
- (7) If an employee with priority consideration is placed in another position prior to the separation due to reduction in force, the

- employee does not lose priority if the position is at a lower salary grade (or salary grade equivalency), market rate or salary rate less than that held at the time of notification and if the position is at the same appointment status;
- (8) An employee with priority consideration may accept a temporary position at any level and retain priority consideration;
 - (9) When priority has been granted for a lower salary grade (or salary grade equivalency) or lower market rate and lower salary rate than that held at the time of notification, the employee retains priority for higher salary grades (or salary grade equivalencies) or higher market rate up to and including that held at the time of the notification of separation;
 - (10) An employee with priority consideration may accept employment outside State government or in a State position not subject to the State Human Resources Act and retain the priority consideration through the 12-month priority period;
 - (11) Priority consideration for an eligible employee is terminated when:
 - (a) an employee accepts a permanent or time-limited position with the State at the same salary rate or higher rate than the salary rate at the time of notification of separation; or
 - (b) an employee accepts a permanent or time-limited position with the State equal to or greater than the employee's salary grade (or salary grade equivalency) of the full-time or part-

time position held at the time of notification, in accord with Item (4) of this Rule;

- ~~(e)~~ an employee accepts a career banded position at the same or higher competency level in the same banded classification as held at the time of notification;
 - ~~(d)~~(c) an employee accepts a career banded position in a different banded classification with the same or higher ~~journey~~ market rate than that held at the time of notification;
 - ~~(e)~~(d) an employee has received 12 months priority consideration;
 - ~~(f)~~(e) an employee applies for retirement or retires from State employment
- (12) Priority consideration for employees notified of or separated through reduction in force shall not include priority to any exempt positions;
 - (13) When an employee with priority consideration accepts a position at a lower salary rate or lower employee's salary grade (or salary grade equivalency) and is subsequently terminated by disciplinary action, any remaining priority consideration ceases; and
 - (14) An employee with priority consideration shall serve a new probationary period when there is a break in service, as defined in 25 NCAC 01D .0114.

Authority G.S. 126-4(6),(10); 126-7.1.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission July 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
July 16, 2015**

The Rules Review Commission met on Thursday, July 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, and Stephanie Simpson.

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

The meeting was called to order at 10:06 a.m. with Chairman Dunklin presiding.

Chairman Dunklin introduced OAH extern Andrew Dennis.

Chairman Dunklin welcomed new Commission Counsel Jason Thomas.

Jason Thomas addressed the Commission.

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 June 16, 2015 meeting. There were none and the minutes were approved as distributed.

FOLLOW UP MATTERS

Pesticide Board

02 NCAC 09L .0529, .1103, and .1109 - The Commission approved the rewritten rules.

02 NCAC 09L .0504, .0505, .0507, .0522, .1102, .1104, and .1108 - The Commission extended the period of review for these rules.

Commissioner Hemphill was not present during the vote.

LOG OF FILINGS (PERMANENT RULES)

Child Care Commission

10A NCAC 09 .0607 was unanimously approved.

Commissioner Hemphill was not present during the vote.

Criminal Justice Education and Training Standards Commission

All rules were unanimously approved.

Commissioner Hemphill was not present during the vote.

Board of Electrolysis Examiners

The Commission voted to object to Rule 21 NCAC 19 .0409. The Commission found that the agency did not cite to any authority for the Rule. Specifically, the Commission found that while the Rule purports to govern client evaluations by electrologists and laser hair practitioners, the Board cites to only G.S. 88A-16 as the authority for this Rule. That statute applies only to electrologists and governs the practice in permanent establishments. G.S. 88A-16 only requires the Board to write rules governing sanitation standards, equipment, and supplies in those establishments. It also requires the Board to create rules for the use of equipment and instruments outside the office. The cited statute does not contain any language to give the Board authority to govern client evaluations and require records for them.

In addition, the Commission voted to extend the period of review for Rules 21 NCAC 19 .0201, .0202, .0203, .0204, .0407, .0501, .0602, .0608, .0622, .0701, and .0702 in accordance with G.S. 150B-21.10. They did so in response to a request from the Board of Electrolysis Examiners to extend the period in order to allow the agency to make technical changes and submit the rewritten rules at a later meeting.

Commissioner Hemphill was not present during the vote.

Board of Massage and Bodywork Therapy

The Commission voted to extend the period of review for 21 NCAC 30 .0201, .0701, .0702, .1001, .1002, .1003, .1004, .1005, .1006, .1007, .1008, .1009, .1010, .1011, .1012, .1013, .1014, and .1015 in accordance with G.S. 150B-21.10. They did so in response to a request from the Board to provide them additional time to revise the rules in response to technical change requests.

Commissioner Hemphill was not present during the vote.

Board of Examiners for Nursing Home Administrators

These rules were withdrawn at the request of the agency. No action was required by the Commission.

Prior to the discussion of the rules from the Board of Examiners for Nursing Home Administrators, Commissioner Choi recused herself and did not participate in any discussion concerning these rules because her law firm provides legal representation to the Board.

Board of Pharmacy

21 NCAC 46 .1801 was unanimously approved.

Substance Abuse Professional Practice Board

All rules were unanimously approved.

State Human Resources Commission

All rules were unanimously approved.

Prior to the review of the rules from the State Human Resources Commission, Commissioner Doran recused herself and did not participate in any discussion or vote concerning these rules because she is a state employee.

EXISTING RULES REVIEW

Board of Agriculture

02 NCAC 20B - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 37 - The Commission unanimously approved the report as submitted by the agency.

Gasoline and Oil Inspection Board

02 NCAC 42 - The Commission unanimously approved the report as submitted by the agency.

Soil and Water Conservation Commission

02 NCAC 59A - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 59B - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 59C - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 59E - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 59F - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 59G - The Commission unanimously approved the report as submitted by the agency.

Board of Agriculture

02 NCAC 60A, transferred and recodified from 15A NCAC 09A - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 60B, transferred and recodified from 15A NCAC 09B and 15A NCAC 09C - The Commission unanimously approved the report as submitted by the agency.
02 NCAC 60C, transferred and recodified from 15A NCAC 01I - The Commission unanimously approved the report as submitted by the agency.

Board of Employee Assistance Professionals

21 NCAC 11 - The Commission unanimously approved the report as submitted by the agency.

Board of Refrigeration Examiners

21 NCAC 60 - The Commission unanimously approved the report as submitted by the agency.

Prior to the review of the report from the Board of Refrigeration Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the report because her law firm provides legal representation to the Board.

Social Work Certification and Licensure Board

21 NCAC 63 - The Commission unanimously approved the report as submitted by the agency.

Prior to the review of the report from the Social Work Certification and Licensure Board, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the report because her law firm provides legal representation to the Board.

Office of State Budget and Management

09 NCAC 03 – As reflected in the attached letter, the Commission voted for readoption of these rules pursuant to G.S. 150B-21.3A(c)(2) no later than April 30, 2016.

Board of Barber Examiners

21 NCAC 06 – As reflected in the attached letter, the Commission voted for readoption of these rules pursuant to G.S. 150B-21.3A(c)(2) no later than March 31, 2016.

Social Services Commission

10A NCAC 70I and 10A NCAC 70K - The Commission reviewed the Social Services Commission's request for an extension of time to complete the Periodic Review and Expiration of Existing Rules for the reports, scheduled for

review in August 2015. The Commission granted the motion for an extension of time, and rescheduled the reports to be reviewed at the March 2016 meeting with Commissioners Choi, Currin, Dunklin, Hemphill, Hyde, and Simpson voting in favor of the motion for an extension and rescheduling of review, and Commissioner Doran voting against both motions.

Carlotta Dixon with the agency addressed the Commission.

Commission for Public Health

10A NCAC 40 and 10A NCAC 46 - The Commission approved the waiver request of the comment period requirement under 26 NCAC 05 .0206 (b)(3) pursuant to Rule 26 NCAC 05 .0112. These reports will be reviewed at the October and November 2016 meetings.

COMMISSION BUSINESS

Staff gave the Commission a brief legislative update.

At 11:00 a.m., Chairman Dunklin ended the public meeting of the Rules Review Commission and called the meeting into closed session pursuant to G.S. 143-318.11(a)(3) to discuss the lawsuit filed by the State Board of Education against the Rules Review Commission.

The Commission came out of closed session and reconvened at 12:47 p.m.

The meeting adjourned at 12:47 p.m.

The next regularly scheduled meeting of the Commission is Thursday, August 20th 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

July 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Paula Kukulinski	OSHR
Curt Roman	BOP
Tina Hlabse	NCDACS
Jimmy Brunetta	NCDACS
Trevor Allen	CJETS!
Richard Harrison	NC DOT
Katie Gilmore	NCSAPPB
DAVID PIRCE	OSHR
Tony Beatty	NCSAPPB
Shari Howard	OSHR
Maggie Craven	OSHR
Bryce Martin	IDPH
Micki Lilly	NCSWCLB
Elizabeth Pope	NCSWCLB
E. Ann Christian	NCSAPPB
Hvandi	DOT

July 2015

Rules Review Commission
Meeting
Please Print Legibly

Name	Agency
<i>Carlota Dixon</i>	<i>NC DSS</i>

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

PESTICIDE BOARD

<u>Soil and Growing Media Fumigation Examination Waiver</u>	02	NCAC 09L .0529
<u>Certification Examination</u>	02	NCAC 09L .1103
<u>Certification of Private Applicators</u>	02	NCAC 09L .1109

CHILD CARE COMMISSION

<u>Emergency Preparedness and Response</u>	10A	NCAC 09 .0607
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CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Specialized Driver Instructor Training</u>	12	NCAC 09B .0227
<u>Basic Training - Wildlife Enforcement Officers</u>	12	NCAC 09B .0228
<u>Basic Training - Juvenile Court Counselors and Chief Cour...</u>	12	NCAC 09B .0235
<u>Basic Training - Juvenile Justice Officers</u>	12	NCAC 09B .0236
<u>Terms and Conditions of Specialized Instructor Certification</u>	12	NCAC 09B .0305
<u>Time Requirement for Completion of Training</u>	12	NCAC 09B .0401
<u>Probationary Certification</u>	12	NCAC 09C .0303
<u>Minimum Training Specifications: Annual In-Service Training</u>	12	NCAC 09E .0105

PHARMACY, BOARD OF

<u>Right to Refuse a Prescription</u>	21	NCAC 46 .1801
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SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD

<u>Definitions</u>	21	NCAC 68 .0101
<u>Credentials by Endorsement or Reciprocity Based on Milita...</u>	21	NCAC 68 .0227
<u>Substance Abuse Credential by Endorsement or Reciprocity ...</u>	21	NCAC 68 .0228

STATE HUMAN RESOURCES COMMISSION

<u>Exempt Priority Consideration-Policy and Scope</u>	25	NCAC 01H .1001
<u>Agency Responsibilities</u>	25	NCAC 01H .1003
<u>Office of State Personnel Responsibilities</u>	25	NCAC 01H .1004
<u>Mandatory Right to a Position</u>	25	NCAC 01H .1005

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

Agriculture, Board of	02 NCAC 60B .0202	02 NCAC 60B .0603
02 NCAC 37 .0201	02 NCAC 60B .0205	02 NCAC 60B .0604
02 NCAC 37 .0203	02 NCAC 60B .0302	02 NCAC 60B .0605
02 NCAC 60B .0101	02 NCAC 60B .0401	02 NCAC 60B .0701
02 NCAC 60B .0201	02 NCAC 60B .0402	02 NCAC 60B .0702

RULES REVIEW COMMISSION

02 NCAC 60B .0804
02 NCAC 60B .0805
02 NCAC 60B .0901
02 NCAC 60B .1003
02 NCAC 60B .1004
02 NCAC 60B .1005
02 NCAC 60B .1006
02 NCAC 60B .1007
02 NCAC 60B .1008
02 NCAC 60B .1009
02 NCAC 60B .1010
02 NCAC 60B .1011
02 NCAC 60B .1012
02 NCAC 60B .1013
02 NCAC 60B .1014
02 NCAC 60B .1015
02 NCAC 60B .1016
02 NCAC 60B .1017
02 NCAC 60B .1018
02 NCAC 60B .1019
02 NCAC 60B .1020
02 NCAC 60B .1021
02 NCAC 60B .1022
02 NCAC 60B .1023
02 NCAC 60B .1024

02 NCAC 60B .1025
02 NCAC 60B .1026
02 NCAC 60B .1027
02 NCAC 60B .1028
02 NCAC 60B .1029
02 NCAC 60B .1030
02 NCAC 60B .1031
02 NCAC 60B .1032
02 NCAC 60C .0101
02 NCAC 60C .0102
02 NCAC 60C .0201
02 NCAC 60C .0202
02 NCAC 60C .0203
02 NCAC 60C .0204
02 NCAC 60C .0205
02 NCAC 60C .0206
02 NCAC 60C .0207
02 NCAC 60C .0208
02 NCAC 60C .0209

**Soil and Water Conservation
Commission**

02 NCAC 59C .0303
02 NCAC 59E .0101
02 NCAC 59E .0102

02 NCAC 59E .0103
02 NCAC 59E .0104
02 NCAC 59E .0105
02 NCAC 59F .0106
02 NCAC 59G .0101
02 NCAC 59G .0102
02 NCAC 59G .0103
02 NCAC 59G .0104
02 NCAC 59G .0105

**Employee Assistance
Professionals, Board of**

21 NCAC 11 .0104
21 NCAC 11 .0108
21 NCAC 11 .0111
21 NCAC 11 .0112

**Social Work Certification and
Licensure Board**

21 NCAC 63 .0102
21 NCAC 63 .0204
21 NCAC 63 .0211
21 NCAC 63 .0401
21 NCAC 63 .0505

**RRC DETERMINATION
PERIODIC RULE REVIEW
July 16, 2015
Necessary without Substantive Public Interest**

Agriculture, Board of

02 NCAC 20B .0101
02 NCAC 20B .0102
02 NCAC 20B .0103
02 NCAC 20B .0104
02 NCAC 20B .0106
02 NCAC 20B .0111
02 NCAC 20B .0112
02 NCAC 20B .0201
02 NCAC 20B .0202
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02 NCAC 20B .0409
02 NCAC 20B .0410
02 NCAC 20B .0411
02 NCAC 20B .0412
02 NCAC 20B .0413
02 NCAC 20B .0425
02 NCAC 20B .0426
02 NCAC 37 .0202
02 NCAC 60A .0102
02 NCAC 60A .0103
02 NCAC 60B .0103
02 NCAC 60B .0204
02 NCAC 60B .0301

02 NCAC 60B .0303
02 NCAC 60B .0501
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02 NCAC 60B .0512
02 NCAC 60B .0513
02 NCAC 60B .0601
02 NCAC 60B .0602
02 NCAC 60B .0801
02 NCAC 60B .0802
02 NCAC 60B .0803
02 NCAC 60B .0806
02 NCAC 60B .0902
02 NCAC 60B .0903
02 NCAC 60B .1001
02 NCAC 60B .1002

Gasoline and Oil Inspection Board

RULES REVIEW COMMISSION

02 NCAC 42 .0101
02 NCAC 42 .0102
02 NCAC 42 .0201
02 NCAC 42 .0202
02 NCAC 42 .0204
02 NCAC 42 .0301
02 NCAC 42 .0302
02 NCAC 42 .0401
02 NCAC 42 .0501
02 NCAC 42 .0502
02 NCAC 42 .0503
02 NCAC 42 .0504
02 NCAC 42 .0505
02 NCAC 42 .0601
02 NCAC 42 .0602
02 NCAC 42 .0603
02 NCAC 42 .0604
02 NCAC 42 .0701
02 NCAC 42 .0702

**Soil and Water Conservation
Commission**

02 NCAC 59A .0101
02 NCAC 59A .0102
02 NCAC 59A .0103
02 NCAC 59A .0104
02 NCAC 59B .0101
02 NCAC 59B .0102
02 NCAC 59B .0103
02 NCAC 59B .0104
02 NCAC 59C .0101
02 NCAC 59C .0201
02 NCAC 59C .0301
02 NCAC 59C .0302
02 NCAC 59C .0401
02 NCAC 59C .0402
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02 NCAC 59C .0409
02 NCAC 59C .0410
02 NCAC 59C .0411
02 NCAC 59F .0101
02 NCAC 59F .0102
02 NCAC 59F .0103
02 NCAC 59F .0104
02 NCAC 59F .0105

**Employee Assistance
Professionals, Board of**

21 NCAC 11 .0101
21 NCAC 11 .0105
21 NCAC 11 .0106
21 NCAC 11 .0107
21 NCAC 11 .0109
21 NCAC 11 .0110

Refrigeration Examiners, Board of

21 NCAC 60 .0102
21 NCAC 60 .0103
21 NCAC 60 .0206
21 NCAC 60 .0207
21 NCAC 60 .0208
21 NCAC 60 .0209
21 NCAC 60 .0211
21 NCAC 60 .0212
21 NCAC 60 .0213
21 NCAC 60 .0304
21 NCAC 60 .0310
21 NCAC 60 .0311
21 NCAC 60 .0312
21 NCAC 60 .0313
21 NCAC 60 .0314
21 NCAC 60 .0316
21 NCAC 60 .1102
21 NCAC 60 .1103

**Social Work Certification and
Licensure Board**

21 NCAC 63 .0106
21 NCAC 63 .0202
21 NCAC 63 .0203
21 NCAC 63 .0208
21 NCAC 63 .0209
21 NCAC 63 .0210
21 NCAC 63 .0212
21 NCAC 63 .0213
21 NCAC 63 .0301
21 NCAC 63 .0302
21 NCAC 63 .0303
21 NCAC 63 .0304
21 NCAC 63 .0305
21 NCAC 63 .0306
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21 NCAC 63 .0903

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

Agriculture, Board of
02 NCAC 20B .0219

02 NCAC 60A .0101
02 NCAC 60B .0102

02 NCAC 60B .0203
02 NCAC 60B .0807

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>
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<u>DEPARTMENT OF PUBLIC SAFETY</u>			
Kimberly H. Oliver v. Victims Compensation Commission	13 CPS 14371	04/17/15	30:03 NCR 354
Jack Norris v. Victims Compensation Commission	14 CPS 06019	03/30/15	30:01 NCR 89
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
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Rex Hospital v. DHHS, Division of Medical Assistance	13 DHR 18151	05/29/15	30:03 NCR 372
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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
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Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 19135	04/28/15	30:01 NCR 62
Raymond Gene Gonzales v. NCDHHS, Division of Vocational Rehabilitation Services	14 OSP 07804	02/27/15	30:04 NCR 534

STATE OF NORTH CAROLINA

THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

14 DHR 1500

CAROLINA COMMUNITY SUPPORT)
SERVICES, INC.,)

Petitioner,)

v.)

ALLIANCE BEHAVIORAL HEALTHCARE,)
as legally authorized contractor of and agent for)
N.C. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES,)

Respondent.)

Office of
Administrative Hearings
2014-12-17 10:17
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FINAL DECISION

THIS MATTER came on for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on November 12 and 13 and December 2, 2014 in Raleigh, North Carolina.

APPEARANCES

For Petitioner Carolina Community Support Services, Inc., ("Petitioner" or "Carolina Community"):

Robert A. Leandro
Parker Poe Adams & Bernstein, LLP
301 Fayetteville Street, Suite 1400
Raleigh, North Carolina 27601

For Respondent Alliance Behavioral Healthcare, *as legally authorized contractor and agent for* the North Carolina Department of Health and Human Services (“Respondent” or “Alliance”):

Joseph T. Carruthers
Wall Esleek Babcock
1076 West Fourth Street, Suite 100
Winston-Salem, North Carolina 27101

APPLICABLE LAW

The laws and regulations applicable to this contested case are N.C. Gen. Stat. Chapter 108C, Article 3 of N.C. Gen. Stat. Chapter 150B, and 42 C.F.R. § 438.214.

BURDEN OF PROOF

Under N.C. Gen. Stat. § 108C-12(d), Respondent Alliance Behavioral Healthcare has the burden of proof as to the adverse determinations at issue in this contested case.

ISSUES

Petitioner Carolina Community contends the issue to be resolved in this case is whether Respondent Alliance, acting as the legally authorized contractor of and agent for the N.C. Department of Health and Human Services, failed to act as required by law or rule, exceeded its authority, acted erroneously, failed to use proper procedure, or acted arbitrarily or capriciously when it terminated Carolina Community’s participation in the Medicaid Community Support Team, Intensive In-Home, and Substance Abuse Intensive Outpatient programs.

Respondent Alliance contends the issues to be resolved at the hearing are whether Alliance reasonably exercised its discretion in assigning scores in the interview step of the RFP process; whether Alliance reasonably exercised its discretion in deciding not to offer a contract for RFP services to Carolina Community; whether Alliance has the right to determine which providers will be in its network; and whether the maximum relief for Petitioner that is possible under N.C. law would be to allow Petitioner to provide RFP services through but not beyond December 31, 2014.

ADMITTED EXHIBITS

Petitioner's Exhibits 1–5, 7, 8, 10–13, 16, 19–21, and 27–31 were allowed into evidence. These exhibits are:

1. Carolina Community RFP Review Summary
2. Alliance RFP Interview Questions with Written Summaries of Responses
3. Contract Between NC Department of Health and Human Services and Alliance
4. Contract Between the NC Department of Health and Human Services, Division of Medical Assistance and Alliance
5. Carolina Community Provider Interview Sign-In Sheet
7. Carolina Community Gold Star Monitoring Results
8. Alliance RFP Desk Review Scoring Tool for Carolina Community
10. Alliance Request for Proposal, Community Support Team
11. Alliance Request for Proposal, Intensive In-Home Services
12. Alliance Power Point Presentation for Alliance's RFPs Committee Training, November 15, 2013
13. Alliance RFP Selection Summary
16. Alliance Behavioral Healthcare Provider Operations Manual
19. Carolina Community Support Intensive In-Home RFP Response
20. Carolina Community Support SAIOP RFP Response
21. Carolina Community Support Team RFP Response
27. Alliance Operational Procedure #6023 – Request for Information/Request for Proposal (Rev. 8/26/13)
28. Alliance Operational Procedure #6012 – Provider Network Capacity and Network Development (Rev. 9/15/14)
29. NCDHHS Provider CABHA website, "CABHAs: Critical Access Behavioral Health Agencies"
30. Email dated 5/24/14 from MINT Operations Manual to Lamar Marshall regarding MINT training membership listings

31. Alliance Notice of Non-Renewal of Contract to Carolina Community dated November 12, 3014

The Court took Judicial Notice of Petitioner's Exhibits 22, 23, and 26. These exhibits are:

22. 42 C.F.R. §438.214
23. N.C. Gen. Stat. §108C
26. Clinical Coverage Policy No. 8A (May 1, 2013)

Respondent's Exhibits 1-6, 7A, 8-28, 29A, 29B, and 29C were allowed into evidence. These exhibits are:

1. Alliance RFP for IHH
2. Alliance RFP for CST
3. Alliance RFP for SAIOP
4. Petitioner's Response to RFP for IHH
5. Petitioner's Response to RFP for CST
6. Petitioner's Response to RFP for SAIOP
- 7A. Desk Review Scoring Tool for Carolina Community for CST/SAIOP/IHH, reviewer Mary Ann Johnson (11/19/13)
8. Desk Review Scoring Tool for Carolina Community for CST, reviewer Alison Rieber (11/30/13)
9. 2013 Contract between Alliance and Carolina Community
10. Three-month extension to 2013 Contract between Alliance and Petitioner (through 3/31/14)
11. Non-renewal letter from Alliance to Carolina Community dated January 10, 2014
12. RFP Staff Training PowerPoint
13. Sign-in sheets for Carolina Community interview
14. Interview notes by Cathy Estes
15. Interview notes by Damali Alston
16. Interview notes by Alison Rieber
17. Interview notes by Mary Ann Johnson
18. Affidavit of Cathy Estes
19. Affidavit of Damali Alston
20. Affidavit of Alison Rieber
21. Affidavit of Carlyle Johnson, with exhibits
22. Provider RFP Review Summary
23. 2014 Contract with Petitioner for non-RFP services

24. 2014 Contract with B and D Behavioral for RFP services through June 30, 2014 (example of a contract given to providers who scored between 55 and 65 on interview)
25. 2014 Contract with Carolina Outreach for RFP services through December 31, 2014 (example of a contract given to providers who scored 65 and above on interview)
26. April 1, 2014 Contract Amendment with Petitioner following Preliminary Injunction Order
27. Contract between Alliance and DHHS
28. Alliance's Provider Manual
- 29A. Contract Amendment between Alliance and Evergreen Behavioral Management
- 29B. Contract Amendment between Alliance and Fidelity Community Support Group
- 29C. Contract Amendment between Alliance and Sunrise Clinical Associates

The Court took Judicial Notice of Respondent's Exhibits 30, 31, and 32. These exhibits are:

30. Order Denying Preliminary Injunction, *First Family Support Center v. Alliance*, 14 DHR 1737 (April 21, 2014)
31. Order Denying Petitioner's Motion for Preliminary Injunction, *Essential Supportive Services v. Alliance*, 13 DHR 20386 (January 22, 2014)
32. 42 C.F.R. §438.12

WITNESSES

Petitioner presented the testimony of:

1. Oswald Nwogbo, CEO of Carolina Community Support Services
2. Lamar Marshall, Director of Operations for Carolina Community Services

Respondent presented the testimony of:

1. William Carlyle Johnson, PhD, employee of Alliance Behavioral Healthcare
2. Cathy Estes, employee of Alliance Behavioral Healthcare
3. Alison Rieber, employee of Alliance Behavioral Healthcare
4. Mary Ann Johnson, previous employee of Alliance Behavioral Healthcare

5. Damali Alston, employee of Alliance Behavioral Healthcare

PROCEDURAL HISTORY

On February 27, 2014, Petitioner Carolina Community Support Services, Inc. (“Petitioner” or “Carolina Community”) filed a Petition for Contested Case Hearing against Alliance Behavioral Healthcare (“Respondent” or “Alliance”) acting as a contractor of the N.C. Department of Health and Human Services. Carolina Community contemporaneously filed a Motion for a Temporary Restraining Order and Stay of Contested Actions.

A Temporary Restraining Order was entered by the undersigned on March 7, 2014, and Petitioner’s Motion for Stay was heard on March 28, 2014. By written Order dated April 11, 2014, the undersigned granted Petitioner’s Motion for Stay and Preliminary Injunction. Said Order also memorialized the undersigned denial of Respondent’s Motions to Dismiss for lack of jurisdiction made at the TRO hearing and again at the preliminary injunction hearing. The undersigned later denied Respondent’s Motion to Reconsider Prior Motion to Dismiss on November 5, 2014.

This matter came on for full hearing before the undersigned over three days on November 12 and 13 and December 2, 2014.

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 makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to, the demeanor of each 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 creditable evidence in the case.

FINDINGS OF FACT

The Parties

1. Carolina Community is a provider of mental health and behavioral health services with its principal place of business in Raleigh, North Carolina. Carolina Community assists consumers, including Medicaid recipients, at home, in school, and in the community in

preventing, overcoming, and managing functional deficits caused by mental health issues and developmental delays.

2. Petitioner Carolina Community is located in Durham, North Carolina and serves Medicaid recipients in Durham, Wake, and Johnston County. (Nwogbo, Vol. 2, p. 511). Carolina Community was founded in 2009. (*Id.* at p. 510). Carolina Community is a provider of Medicaid Intensive In-Home (“IIH”), Community Support Team (“CST”), and Substance Abuse Intensive Outpatient (“SAIOP”) services. (Nwogbo, Vol. 2, p. 560). These services are all Medicaid programs. (Johnson, Vol. 1, pp. 194–95).

3. Carolina Community is also a Critical Access Behavioral Health Agency (“CABHA”) certified by the North Carolina Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (“DMH”) and the Division of Medical Assistance (“DMA”). (Nwogbo, Vol. 2, p. 510). Carolina Community must provide some combination of CST, IIH, or SAIOP services to continue to qualify as a CABHA. (Johnson, Vol. 1, p. 186-87).

4. Alliance is a multi-county area mental health, developmental disabilities, and substance abuse authority established pursuant to N.C. Gen. Stat. § 122C-115(c). Alliance is a local management entity (“LME”) for publicly funded mental health, developmental disabilities, and substance abuse (“MH/DD/SA”) services as defined in N.C. Gen. Stat. § 122C-3(20b). (Johnson, Vol. 1, p. 175). Alliance is not incorporated in North Carolina. (*Id.*).

5. Under federal and State law the North Carolina Department of Health and Human Services (“DHHS”) is the single State agency authorized by the federal government to administer the Medicaid program. *See* 42 U.S.C. § 1396A(A)(5); N.C. Gen. Stat. § 108A-54. Under the law, DHHS is the only agency that is authorized to manage the Medicaid program, unless a waiver is granted by the federal government.

6. DHHS received approval from the federal government to operate a Medicaid waiver program under Sections 1915(b) and 1915(c) of the Social Security Act (“the 1915(b)(c) Medicaid Program”). (Johnson, Vol. 1, p. 176; Pet. Exs. 3–4). As a part of the 1915(b)(c) Medicaid Program, DHHS is permitted to enter into contracts with managed care organizations (“MCO”) to operate a prepaid inpatient health plan (“PIHP”) pursuant to 42 C.F.R. § 438.2.

7. In February 2013, Alliance entered into two contracts with DHHS allowing it to serve as a managed care organization (“MCO”) under the 1915(b)(c) waiver. Alliance manages Medicaid mental health, developmental disability, and substance abuse services provided in Cumberland, Durham, Johnston, and Wake Counties. (Pet. Ex. 16, p. 9). Alliance’s duties include authorizing and paying for recipient services, contracting with providers, and monitoring providers for compliance with regulatory and quality standards. (Johnson, Vol. 1, pp. 28–29, 138).

Federal, State and Alliance Policy Requirements

8. The federal government has promulgated regulations that apply when states receive a waiver to operate Medicaid MCOs and PIHPs. One of these regulations is 42 CFR § 438.214(a) entitled, “*Provider Selection*.” This regulation requires the State to ensure, through a contract, that each MCO/PIHP “implements written policies and procedures for selection and retention of providers.” (Pet. Ex. 22) (Emphasis added).

9. 42 CFR § 438.214(e) requires MCO/PIHPs to “comply with any additional requirements established by the State.” (*Id.*).

10. Alliance’s witness, Carlyle Johnson, agreed that 42 CFR § 438.214 is applicable to Alliance because it operates as a PIHP pursuant a Medicaid waiver. (Johnson, Vol. 1, pp. 178–79).

11. In conformity with 42 CFR § 438.214, Alliance has executed two contracts with DHHS. These contracts require Alliance to create Provider Selection and Retention policies. (Pet. Exs. 3, 4). One of the contracts states that in determining whether CABHAs will remain in the MCO’s network the MCO must consider the “performance of the agency as measured against identified indicators and benchmarks.” (Pet. Ex. 4, p. 92, Attachment O, Sec. 4).

12. The contract also anticipates that Alliance may issue RFPs, but states that “if there is a competitive Request for Proposal, a scoring process will be developed to assess the provider’s competencies specific to the requirements of the Request for Proposal, the service definition, and enrollment requirements as delineated above.” (Pet. Ex. 4, p. 94, Attachment O).

13. Pursuant to federal law and the State contracts Alliance has developed provider selection and retention policies, which are included in the Alliance Provider Operations Manual. (Pet. Ex. 16, pp. 35–38; Johnson, Vol. 1, p. 180).

14. In instances where Alliance decides to use an RFP to select or retain providers, it has created an RFP Procedure that sets forth the process that Alliance will use in selecting providers. The purpose of these procedures “is to ensure that Alliance Behavioral Healthcare has a fair, uniform and consistent approach for establishing contracts with potential, new and current providers” (Pet. Ex. 27, p. 1).

The Alliance RFP

15. On September 30, 2013, Alliance announced that all current network providers off IIIH, CST, and SAIOP would be required to respond to a Request for Proposal (“RFP”) in order to continue to provide services in the Alliance Network. (Pet. Ex. 12, p. 7). Only existing providers were allowed to submit a response and the RFP was closed to providers who were not currently operating in the Alliance network. (Johnson, Vol. 1, p. 28).

16. Alliance contends that the reasons for the RFPs included that Alliance had excess capacity in its network and had concerns about quality of care; however, Alliance had no expectation regarding the number of existing providers that would be retained as a part of the RFP process. (Johnson, Vol. 1, p. 168; Vol. 2, p. 292; Pet. Ex. 12, p. 7). Prior to implementing the RFP process, Alliance conducted no study to determine if there were too many providers in the network. Alliance had no data indicating the number of providers that are needed for these three services in order to serve the Medicaid recipients in Alliance’s service area. (Johnson, Vol. 1, p. 168).

17. One of the reasons Alliance issued the RFP was concerns it had over the quality of care being provided. (Johnson, Vol. 1, p. 172-173). However, Alliance did no review of the quality of services that had actually been provided by the providers who submitted an RFP response. (*Id.*). Rhetorically, if Alliance was truly concerned about quality of care, there were

many other more efficient options for dealing with those providing sub-standard care, including the state mandated Gold-Star Monitoring assessments, which had already been completed in part.

18. Alliance released a separate RFP for each of the services. However the contents of the RFPs were almost identical. (Johnson, Vol. 1, pp. 29–30; *compare* Res. Exs. 1–3). The RFP process consisted of four steps. Alliance’s articulated end goal was the identification and selection of an appropriate number of providers who can provide high quality, evidence-based and effective services for consumers in Alliance’s four-county catchment area.

19. The first step required meeting certain minimum requirements. If providers did not meet minimum requirements, they went no further in the RFP process. If providers met these minimum requirements, Alliance offered three-month contract extensions from January 1, 2013, to March 31, 2014. (Res. Ex. 1, p. 12; Res. Ex. 2, p. 13; Res. Ex. 3, pp. 12-13).

20. If a provider met the minimum requirements, the Selection Committee would next evaluate and score the written proposal (the “Desk Review”). Providers that met a certain score on the Desk Review would then be invited to participate in an interview. (Res. Ex. 1, p. 12; Res. Ex. 2, p. 13; Res. Ex. 3, pp. 12-13).

21. Carolina Community met the established minimum requirements and was offered a three-month contract. Carolina Community accepted and signed a contract with an ending date of March 31, 2014. (Respondent Exhibit 10). The three-month contracts offered by Alliance, including the one with Carolina Community, contained no right to renewal or extension.

22. The RFPs included a number of service preferences that may be considered by Alliance during the review. (Res. Exs. 1-3, p. 2). These preferences included:

- Demonstrated capacity to implement the requirements specified in the Scope of Work in this RFP;
- Have a solvent and financially viable organization with a history of financial stability that has sufficient financial and administrative resources to implement and operate the services specified in this RFP;
- Have a history of serving a monthly average of at least 6 per team in Intensive In-Home, 15 recipients for Community Support Team, and 15 recipients for SAIOP. Although caseload size is not a determining factor, organizations must demonstrate experience, financial viability, and the ability to provide the service in accordance with the service definition and the criteria in this RFP;
- History of submitting timely and complete requests for prior authorization that contain all administrative and clinical requirements (i.e. does not have an excessive number of administrative denials);
- Demonstrated ability to timely and successfully submit clean claims using the Alpha provider portal or 837s;

- Have a well-developed quality management program that monitors and improves access, quality, and efficiency of care;
- Have human resources and management support necessary to effectively recruit and retain clinical and administrative qualified professional staff.

(Res. Exs. 1–3, p. 2)

23. In addition to these preferences, the RFP “Scope of Work” Section of the RFPs states that:

- Clinical Staff must be proficient in Motivational Interviewing and must have received training for a MINT-Certified trainer;
- CST Staff are dedicated only to the CST program and not “shared” within the agency to staff other programs;
- Provider must offer outpatient services within the same county(ies) in which they provide the service;
- Provider must demonstrate that they have access to medication management and psychiatric services within the local community or using telepsychiatry through either a staff position or an established contract. There must be clear evidence of oversight/involvement by the CABHA Medical Director in the organization. If the Medical Director is a contract position, minimum hours contracted must be 10 hours per week;
- Provider must provide evidence they provide general health screening, partnership with physical health providers and integration of health services within model of care;
- Provider must demonstrate compliance with service definition requirements associated with staff training and ratios. Preference will be given to agencies that employ a fully licensed team lead.

(Res. Exs. 1–3, p. 5).

24. Other than the preferences contained on page 2 of the RFP and the bullets points listed above, the RFP contained no other guidance or standards for determining if a provider would be retained or terminated from participation. (Res. Exs. 1–3, p. 5).

25. The RFP response also requested that each RFP written response contain three references. The RFP indicates that references will be checked to “verify the accuracy of submitted materials and to ascertain the quality of past performance.” (Res. Ex. 1, p. 11; Res. Exs. 2, 3, p. 12) Alliance did not use the references in any way during the review. (Johnson, Vol. 2, p. 338).

Alliance's Training of Staff that Conducted RFP Reviews

26. On November 5, 2013, Alliance held a training session for all staff members that would participate in the Desk Review or Interview process. (Johnson, Vol. 1, pp. 40–42; Pet. Ex. 12, p. 1).

27. As part of this training Alliance created a 14-page PowerPoint presentation. (Pet. Ex. 12; Johnson, Vol. 1, p. 216). The first 12 pages of the PowerPoint contain no information directing reviewers on how to judge or score a provider's RFPs during the Desk Review or Interview. (Estes, Vol. 1, p. 105; Johnson, T. Vol. 1, pp. 217–20; Pet. Ex. 12).

28. Page 13 is the only page in the entire PowerPoint that contains any guidance on how the reviewers should assign scores during the Desk Review and Interview. Page 13 contains a Likert Rating Scale that ranges from 1 to 5. (Pet. Ex. 12, p. 13). The scale contains general descriptive terms for the 1–5 ratings. For example, a score of 1 is “unsatisfactory, unclear and incomplete, insufficient;” a score of 3 is “sufficient and satisfactory but some questions or concerns;” and a score of 5 is “exceptional model program, no questions remain.” Page 13 contains no guidance on how these scores should be assigned and does not outline the criteria that should be considered when assigning these scores. (*Id.*).

29. Alliance testified that the PowerPoint and the RFP were the only guidance reviewers were given to determine how to score a provider's response during the Desk Review and Interview. (Johnson, Vol. 1, pp. 226–227; Alston, Vol. 2, p. 501).

30. The RFP contained no information or guidance to reviewers indicating how the Likert Scores of 1–5 should be assigned. (Res. Ex. 1–3). The only substantive guidance contained in the RFP are the preferences and the six Scope of Work requirements. (Res. Exs. 1–3, pp. 2, 5). There was no guidance instructing reviewers on how these preferences or Scope of Work requirements should affect the score awarded to the provider during the Desk Review or Interview.

31. Many of the preferences Alliance listed in the RFP were not considered in the review at all or were not considered by the interview panel when assigning scores to providers. For example, Alliance did not consider its preference for providers that demonstrate timely submission of clean claims during the review. (Johnson, Vol. 2, pp. 321–22). Some of the RFP preferences were only considered during the Desk Review while others were considered in both the Desk Review and the Interview. (*Id.* at pp. 326–327). There was no guidance given to the reviewers as to how to determine which preferences should be considered and what score should be assigned for meeting or not meeting these preferences. (Estes, Vol. 1, p. 105; Pet. Ex. 12; Res. Exs. 1–3).

32. When asked by the Court if the reviewers had been given guidance on how to score providers, Allison Rieber, one of the individuals that participated in both the Desk Review and the Interview of Carolina Community, stated – “there was not specific guidance.” (Rieber, Vol. 2, p. 421). Similarly, Cathy Estes, another individual that participated in both the Desk Review and the Interview for Carolina Community, testified that the training never included what an answer should look like, or what the requirements were. (Estes, Vol. 1, pp. 105–106, 115).

33. Instead RFP reviewers were instructed to use their own experience and judgment when assigning scores. (Johnson, Vol. 1, p. 239). Ms. Estes admitted that this standard was subjective in nature. (Estes, Vol. 1, pp. 130, 151).

34. The lack of any standards led to many disparities over what information was relevant and responsive to the RFP and how that information should be scored. Reviewers trained through the exact same process and reviewing the exact same information scored responses very differently. In several instances a reviewer would determine a RFP response was inadequate and unsatisfactory while a different reviewer would find that same response good, strong and clear. (Pet. Ex. 8, Chart of Scores).

35. The lack of any standards allowed reviewers to substitute their own preferences when no such preference existed in the Alliance RFP. For example, Alliance admitted that a reviewer or interview panel might believe that the provider should provide certain information regarding HIPAA compliance while another interview panel might believe that providing information regarding HIPAA compliance was unnecessary. (Rieber, Vol. 2, p. 423). Dr. Johnson testified that for CABHA medical directors the “preference is for psychiatrists.” (Johnson, Vol. 1, p. 252). No such preference is expressed by Alliance in its RFPs. (Res. Exs. 1-3).

Carolina Community’s RFP Review

36. The Alliance RFP Review Process consisted of three steps once a provider submitted its written proposal. (Res. Ex. 1, pp. 12–13; Johnson, Vol. 1, p. 32–34, 40). First, Alliance reviewed the written proposal to determine if the provider met minimum criteria. (Res. Ex. 1, p. 12; Johnson, Vol. 1, p. 32). All three of Carolina Community’s RFP Responses passed the minimum criteria requirements and proceeded to the Desk Review. (Pet. Ex. 1, p. 3).

The RFP Desk Review

37. The second step of the RFP process consisted of a Desk Review of the provider’s written RFP Response. (Johnson, Vol. 1, p. 33). At the Desk Review stage, several individuals were assigned to review and score specific sections of the providers’ written responses, which were given different weights when the Desk Review Score was assigned. (Johnson, Vol. 1, pp. 218–219). The RFP sections scored by Alliance in the Desk Review included: the Executive Summary (5%); Organizational Background (10%); Clinical Programing and Response to Scope of Work (50%); Legal and Compliance Information (10%); Financial Information (20%); and Technological Capability (5%). (Pet. Ex. 12, p. 10; Res. Ex. 1 p. 13).

38. The review was conducted by various individuals employed by Alliance. For example, Alliance’s legal department would review the legal and compliance information and Alliance’s financial department would review the provider’s financial information. (Johnson, Vol. 2, pp. 307–308). For the Clinical Programing Section of the Desk Review two individuals reviewed the written response and provided scores for each of seven categories. The scores for the seven categories were averaged to determine the Clinical Programing Score and Alliance used the highest average score as the provider’s Clinical Programing score for the Desk Review. (Johnson, Vol. 1, p. 220).

39. If the provider scored 65% or higher on the Desk Review, the provider proceeded to the final stage of the RFP process. (Johnson, Vol. 1, pp. 33–34). At the Desk Review portion of the process, Carolina Community received scores of 73.1% (CST), 75.1% (IIH) and 69% (SAIOP) and thus Carolina Community qualified for an interview for all three services. (Pet. Ex. 1, p. 3).

40. The Clinical Scores for Carolina Community’s Desk Review varied significantly. For Carolina Community’s CST Desk Review, one reviewer, Allison Rieber, gave Carolina Community a score of 4 for Clinical Questions 2–4. (Pet. Ex. 8, Chart of Scores). A score of 4 indicates the reviewer believed that the answer was “Good, Strong, Well-Planned, Clear, and Reasonable.” (Pet. Ex. 12, p. 13).

41. The other clinical reviewer, Cathy Estes, reviewing the exact same information gave Carolina Community a score of 2 for Clinical Question 2 and scores of 1 to Clinical Question 3–4. (Pet. Ex. 8, Chart of Scores). A score of 1 denotes that the reviewer considered the response “Unsatisfactory, Unclear, Incomplete, and Insufficient.” A score of 2 denotes that the response was “Minimal, Weak, Confusing, and Lacks some info.” (Pet. Ex. 12, p. 13).

42. The wide variation in these scores means that for almost 50% of the clinical questions in the Carolina Community Desk Review, the reviewers had completely different understandings of what was required in the RFP. Ms. Estes explained that the difference between her and Ms. Rieber’s scores were the result of the fact that she and Ms. Rieber had “different backgrounds and experiences.” (Estes, Vol. 1, p. 151).

43. Ms. Estes’ testimony reveals a very troubling aspect of Alliance’s review because it shows that the review standards used by Alliance were not objective. Instead, reviewers were left to their own devices to determine how to score a provider’s response based on their individual experience and backgrounds. As evidenced by the wide variation in the scores assigned by Ms. Rieber and Ms. Estes, it is clear to the Undersigned that these scores have little to no value because they are not based on whether the *provider’s answer* complied with established criteria but instead were based on how the *reviewer’s skills and experience* meshed with the provider’s response.

44. Dr. Johnson could not recall the total number of reviewers that participated in the RFP process, but thought it was around ten. (Johnson, Vol. 2, 306). What is clear is that each reviewer that participated in the RFP process did not participate in every review. (Johnson, Vol. 1, p. 41; Vol. 2, pp. 314–315). This means that a provider’s score was not based on objective and identifiable criteria but instead was almost entirely dependent on the subjective experience and expectation of each individual reviewer.

The RFP Interview Process

45. The final step of the RFP process was an interview (the “Interview”). At the Interview, a committee of individuals asked providers a series of nine scripted questions that corresponded to nine scoring categories. (Pet. Ex. 12). The individuals made up the provider interview panel varied from provider to provider. (Johnson, Vol. 1, p. 41; Vol. 2, pp. 314–15).

46. Scores at the Desk Review stage, whether good or bad, had no impact on the interview stage. Scores from the desk review were used only as a cut-off point to get to the next stage in the RFP process.

47. Both Ms. Estes and Ms. Rieber, participated in the Carolina Community Interview. (Res. Ex. 13). Despite the fact that Alliance had noted the discrepancy in Ms. Rieber's and Ms. Estes's Desk Review scores, Alliance undertook no efforts to discuss these discrepancies prior to the Interview and did not provide Ms. Rieber or Ms. Estes with additional guidance, training or feedback regarding how the responses should be scored during the interview stage. (Johnson, Vol. 1, pp. 224–25; Estes, Vol. 1, pp. 101–2).

48. A concern is that a provider's score could be affected by its oratorical skills and ability to communicate. The more skilled communicator could receive a higher score that may not be truly reflective of his agency as compared to others, and the converse is true as well.

49. At the interview stage, if a provider received a score 55% to 64% it received a six-month contract extension and a list of areas of improvement it should work on during that time period. (Johnson, Vol. 1, pp. 52–53). Providers that received a 65% or higher in the Interview received a one-year contract extension. (*Id.*, p. 56).

50. If a provider made it to the interview portion of the RFP process, the determination of whether that provider would be retained or terminated was made solely on the score assigned by the provider's interview panel. (Estes, Vol. 1, pp. 137–138; Johnson, Vol. 2, p. 314).

51. Alliance did no further review of the scores assigned by the different interview panels to determine if the interview scores were consistent. (Johnson, Vol. 2, pp. 330–31). It is problematic that no attempt was made to review or standardize these interview scores. Alliance had knowledge that its reviewers had different understandings regarding what was required by the RFP and yet did nothing to correct this problem.

Carolina Community Interview Scores

52. Carolina Community received scores of 52.2% (CST), 54.4% (IIH), and 54.4% (SAIOP) in the interview stage of the RFP. (Pet. Ex. 1, p. 3). If Carolina Community's score would have been 0.1 higher (54.5%) it would have been retained as a provider of IIH and CST services. (Johnson, Vol. 1, pp. 52–53).

53. Carolina Community's final interview score was determined by the scores given by the interview panel in response to nine different questions that were asked during the interview. (Pet. Ex. 1 p. 3; Ex 2, p 1-3). As with the Desk Review, the interview panel used the Likert score of 1–5 for scoring these nine questions. (Estes, Vol. 1, pp. 96–97). The interview panel was given the same training and guidance on how to score the provider's interview responses set forth in the Findings of Fact above. (Johnson, Vol. 1, pp. 40–42).

54. As with the Desk Review Scores, at the interview a provider's score was not based on objective and identifiable criteria but instead was almost entirely dependent on the subjective experience and expectation of each individual reviewer. Merely averaging the divergent scores at

any stage of the review does not address the fundamental problem of the subjective scoring. This process does not insure that all providers were being scored in a consistent and fair manner.

55. After Carolina Community was notified it would no longer be a provider, Alliance provided Carolina Community with written justification for the scores it received in the interview process. If Carolina Community received a score below 3 Alliance provided specific justifications for why that the score was assigned. (Pet. Ex. 1, p. 4–5). If a score of 3 or higher was assigned, Alliance did not provide any justification for the score. (*Id.*).

Interview Question 2 - Medication Management and Psychiatric Capacity

56. For the category of *Medication Management and Psychiatric Capacity*, Carolina Community was given a score of 2.5. (Pet. Ex. 1, p. 4). Alliance’s justification for the 2.5 score was that Carolina Community only offers medication management for two hours a week on an every other week basis and that it also has a contract with AIMS to provide psychiatric assessments and medication management. (Pet. Ex. 1, p. 4; Johnson, Vol. 1, p. 235; M. Johnson, Vol. 2, pp. 442-443).

57. Based on the notes kept by Alliance’s note taker and the interview panel members, when Carolina Community was asked about its medication management and psychiatric capacity it responded that its Medical Director provided medication management two hours a week on an every other week basis, and the Medical Director was “very accessible,” making himself available at other times if the clients were not able to meet this time period. (Pet. Ex. 2, p. 1; M. Johnson Interview Notes, p. 5 C. Estes Interview Notes).

58. Alliance’s low score justification makes no mention of the fact that Carolina Community told the panel its Medical Director was “very accessible” and is generally available to provide medication management if the scheduled times do not meet consumers’ needs. (Pet. Ex. 1, p. 4; Nwogo, Vol. 2, p. 532). The RFP also creates no preference and sets forth no standard for the number of hours of medication management that should be available, so it is impossible to know why the reviewers believed this response was not sufficient. (Res. Exs. 1-3, pp. 2, 5).

59. In regard to Carolina Community’s contract with AIMS, which is noted in the low score justification. The RFP states that “the provider must demonstrate that they have medication management and psychiatric services, either through a staff position, or an established contract.” (Res. Exs. 1–3, p. 5). The RFP creates no preference that medication management or psychiatric services be provided by a staff position, only that the service be available either through a staff member or a contract. (*Id.*). Carolina Community’s contract with AIMS cannot serve as a justification for the low score assigned for the *Medication Management and Psychiatric Capacity* category.

60. Alliance also justified its score of 2.5 for the *Medication Management and Psychiatric Capacity* category by stating that Carolina Community “does not provide medication management for any of their Wake consumers.” (Pet. Ex. 1, p. 4). At the time of the interview, Carolina Community only provided services to one consumer residing in Wake County. (Nwogbo Vol. 2, p. 529; Marshall, Vol. 3, p. 576). Prior to receiving services from Carolina Community, this consumer had a relationship with a physician who provided medication management. (*Id.*).

61. Medicaid recipients are given provider choice and are allowed to determine whether they want to receive medication management from their existing physician or from their mental health provider. (Nwogdo, Vol. 2, pp. 529–530). Alliance agrees that this consumer had the right to continue to receive medication management from her physician. (Johnson, Vol. 1, pp. 249–250). In addition, Carolina Community made clear during the interview that it had the capability of providing medication management to this consumer. (Marshall, Vol. 3, p. 577).

62. The justifications for the score of 2.5 for the *Medication Management and Psychiatric Capacity* category are not supported by the RFP, any regulation or policy and are erroneous.

63. Carolina Community met all the requirements of the RFP for *Medication Management and Psychiatric Capacity* because it offers medication management and has a contract with AIMS to provide psychiatric assessments. Carolina Community's activities are consistent with the preferences and requirements set forth in the RFP.

Interview Question 3 – CABHA Medical Director and Clinical Oversight

64. Carolina Community received a score of 2 in the *CABHA Medical Director and Clinical Oversight* category. One of the justifications for the score of 2 was that the medical director's contract had been 8 hours a week, but was recently increased to 10 hours a week. (Pet. Ex. 1, p. 4).

65. Under State law, CABHA medical directors are not required to provide any specific number of hours of service per week. (Pet. Ex. 29; Estes, Vol. 1, p. 93). However, in the RFP, Alliance indicated a preference for medical directors that provided ten hours of service per week. (Res. Exs. 1–3, p. 2). Accordingly, prior to the submission of the RFP, Carolina Community adopted the preference set forth by Alliance in its RFP by extending the Medical Director to ten hours per week. (Nwogbo, Vol. 2, p. 531).

66. The fact that Carolina Community extended its Medical Director's hours to meet the newly issued preference of ten hours cannot reasonably serve as a justification for a low score. Since prior to the issuance of the RFP there was no specific requirement at all for the hours of the Medical Director, and once the RFP was issued, then Carolina Community met the preference, reason would dictate that is a positive and not a negative for consideration.

67. Another basis for the low score in the *CABHA Medical Director and Clinical Oversight* category was that the medical director is a family physician. (Pet. Ex. 1, p. 4). The RFP and the CABHA statute contains no restrictions on using a family physician as a medical director. The RFP also did not create a preference that the Medical Director be a psychiatrist. (Res. Exs. 1–3; Johnson, Vol. 2, p. 328). Dr. Johnson testified that any preference by the interview panel that the medical director not be a family physician was inappropriate and should not have been used by the reviewers. (*Id.*, p. 328). In this case, Carolina Community's medical director had significant psychiatric training. (Pet. Ex. 19, pp. 9–10).

68. Another justification for the low score assigned to the *Medical Director and Clinical Oversight* category was that the medical director did not review all of the CCAs (Comprehensive Clinical Assessments) but instead only reviewed the more complex cases. (Pet.

Ex. 1, p. 4). Under Clinical Coverage Policy 8A promulgated by DMA, CCAs do not need to be reviewed by a physician or a medical director. (Pet. Ex. 26, pp. 42, 53). There is no criteria or preference in the RFP relating to a medical director's review of CCAs (Res. Exs. 1-3).

69. The low score in the *Medical Director and Clinical Oversight* category also states that the medical director refers some of the more complex cases to Duke psychiatrists for their medication needs. (Pet. Ex. 1, p. 4). There is no preference or requirement in the RFP relating to a provider's decision to refer more complex cases to an academic medical center, like Duke University. (Res. Ex. 1-3, p. 2, 5). Alliance conceded that Duke University would have clinical staff with specific training which could be helpful to individuals with complex needs and that it would be appropriate to refer some complex cases to Duke University. (Estes, Vol. 1, p. 119).

70. Another justification for the low score in the *Medical Director and Clinical Oversight* category states that Carolina Community's medical director did not provide formal oversight and is available to staff via phone and email, but does not participate in regularly occurring meetings. Based on the evidence this statement is misleading. It is correct that Carolina Community's medical director makes himself available by phone and email, in excess of his 10 hour-a-week requirement. (Marshall, Vol. 3, p. 579). The evidence shows that the Medical Director also attends weekly meetings with Carolina Community's staff. (Marshall, Vol. 3, p. 579).

71. Based on the above Findings of Fact, a score of 2 for the *CABHA Medical Director and Clinical Oversight* criteria was erroneous because it was based on factually erroneous findings and standards, preferences, and requirements not contained in the RFP or any rule or regulation.

Interview Question 4 – Staffing for Services

72. Carolina Community received a score of 2 in the *Staffing for CST services* category and a score of 3 for the *Staff of IIH and SAIOP services* category. Alliance's justification for these scores states that all of the IIH team leads were provisionally licensed and that two of the three CST teams used a provisionally licensed team leader. (Pet. Ex. 1, p. 4).

73. Although the use of a fully-licensed team leader was listed as a preference in the RFP, Carlyle Johnson testified that meeting the clinical coverage policy requirements (*i.e.*, the use of provisionally licensed team leaders) should have resulted in a score of 3. (Johnson, Vol. 1, pp. 253-255). It is also inconsistent that Carolina Community received a score of 3 in IIH staffing even though all of its team leaders for that service are provisionally licensed, but Carolina Community received a score of 2 for its CST staffing, where only one of the team leaders for that service is provisionally licensed. (Pet. Ex. 1, p. 4).

74. The only other justification for the low score provided in the *Staffing Services* category is that Alliance had doubts, based on the written materials provided by Carolina Community, if all of Carolina Community's staff had Motivational Interview training ("MINT-Training") and for the ones trained in motivational interviewing, it did not appear that the training was done by MINT-certified trainers. (Pet. Ex. 1, p. 4).

75. Alliance testified that its concern came from the fact that some of the individuals listed as MINT-certified trainers in the Carolina Community RFP response were not listed on the

MINT trainer website. Alliance did no research to determine why these trainers would not be listed on the website. (M. Johnson, Vol. 2, p. 441).

76. Alliance's "doubts" and thus low score was based on speculation and not founded in fact.

77. After receiving its score, Carolina Community called the MINT training service to inquire why the individuals who provided training to Carolina Community staff were no longer listed as MINT-certified trainers. (Marshall, Vol. 3, pp. 585–586). Carolina Community was told that only those trainers that were currently providing MINT training were listed on the website. Certified individuals who no longer provided training would have been removed from the website. (*Id.*). This was confirmed by an email Carolina Community received from the MINT trainers' agency. (Pet. Ex. 30).

78. Alliance also had information that Carolina Community's staff was trained by MINT-certified trainers. Alliance conducted a Gold Star Monitoring of Carolina Community only a few months prior to the interview. (Rieber, Vol. 2, p. 404). During the Gold Star Monitoring, Alliance spent a significant amount of time on-site at Carolina Community reviewing its records, including staff qualifications. (*Id.* p. 397). During that time, Alliance reviewers determined that Carolina Community was in 100% compliance with staff training. (Pet. Ex. 7).

79. Alliance asked no question of Carolina Community at the interview regarding its use of MINT-certified trainers. (M. Johnson, Vol. 2, p. 440). If Alliance had a question regarding Carolina Community's use of MINT trainers, it should have asked a question and allowed Alliance to respond. Further, Alliance failed to review its own Gold Star findings which confirmed that Carolina Community's staff training was 100% compliant. (M. Johnson, Vol. 2, p. 439).

80. Based on the Findings of Facts above, Alliance's score in the *Staffing* category is not supported by the evidence and is erroneous.

Interview Question 5 – Evidenced Based Practices and Model Fidelity

81. Carolina Community received a score of 2 in the *Evidence Based Practices and Model Fidelity* category. (Pet. Ex. 1, p. 5). The RFP contains no criteria or guidance for judging this category other than stating that the providers should have implemented evidence-based practices. (Res. Exs. 1–3, p. 2, 5).

82. One of the justifications for the low score in this category was that Carolina Community stated it focused more on the clinical and less on data. (Pet. Ex. 1, p. 5). Alliance provided no evidence that it is inappropriate for a mental health provider to focus more on clinical services than data.

83. Alliance also used as a justification for its score the statement that Carolina Community gives clinicians written materials and the clinicians show evidence of using CBT by assigning clients homework. (Pet. Ex. 1, p. 5). This statement is accurate, however, incomplete. Carolina Community provided several other examples of how it implemented evidenced-based practices during its interview including, the use of surveys, monthly supervision meetings, chart review, and group observation (Pet. Ex. 2, p. 2). Carolina Community also informed Alliance that

it has a contract with the Federal Prison System and that requires Carolina Community to be in 100% compliance with fidelity measures. (*Id.*).

84. Based on the above, the score of 2 in the *Evidence Based Practices and Model Fidelity Category* is not supported by the evidence and is erroneous.

Interview Question 9 – Quality Management

85. In the *Quality Management* category, Carolina Community received a score of 2. (Pet. Ex. 1, p. 5). In its justification for this score, Alliance states that it appeared that Carolina Community did not fully understand Quality Improvement (“QI”) processes and measures and when questioned about QI projects, some of the projects were to get a new space and the fact that they were looking into obtaining an electronic medical records system. (*Id.*).

86. The interview questions relating to this category asked the provider to tell the panel about “complaints, grievances, and incidents, what they have learned through their review and what they were doing differently.” (Pet. Ex. 2, p. 2). The interview notes also indicate that the panel asked Carolina Community to tell it about its quality improvement projects. (Pet. Ex. 1, p. 5; Pet. Ex. 2, p. 2).

87. The justification for the low score in the category does not seem to relate to the question asked of Carolina Community regarding what it had learned through the complaint and grievance process. The score justification also implies that Carolina Community’s projects of getting new space and obtaining an electronic medical records system do not qualify as a quality improvement project. (Pet. Ex. 1, p. 5).

88. Carolina Community provided significant testimony demonstrating how electronic medical records and a new space would improve the quality of services it provided. (Marshall, Vol. 3, pp. 590–599). Alliance’s witnesses conceded that electronic medical records and obtaining a new space could better serve consumers and could improve the quality of services provided by Carolina Community. (Rieber, Vol. 2, pp. 417–418).

89. Based on the above Findings of Fact, the scores given to Carolina Community by Alliance in the interview portion of the RFP process are not supported by the justifications cited by Alliance. These justifications are erroneous, often unrelated to the RFP, do not demonstrate that Carolina Community was not conforming with any statute, regulation, or clinical coverage policy, and are arbitrary and capricious. Because Alliance’s staff was not trained in the qualifications and requirements of the RFP, it appears that the interview panel simply substituted its own subjective judgment by assigning scores to Carolina Community that were not related to the RFP requirements and preferences.

Federal Requirements for Retention of Providers

90. As with all other providers in the Alliance network, Carolina Community was required to entered into a contract with Alliance to provide IIIH, CST, and SAIOP services. These contracts are given to providers without any opportunity to negotiate or revise the contract. (Johnson, Vol. 2, p. 380).

91. Carolina Community's contract was in effect for a period between February 2013 and December 31, 2013. The contract of Carolina Community, and every other provider that met the minimum criteria, was extended through March 2014. (Res. Exs. 9, 29A, 29B, 29C).

92. Alliance contends that Alliance, at its sole discretion, can renew a contract or let it expire. (Johnson, Vol. 2, p. 368, 370; Res. Ex. 21, p. 6). If a contract expires the provider can no longer participate in that Medicaid program. Alliance contends in large part that the sole discretion is because it has a "closed network" which allows it to, in essence, do whatever it wants. "Closed Network" will be discussed further below.

93. The federal government has promulgated regulations that apply when states receive a waiver of federal Medicaid law to operate Medicaid MCOs and PIHPs. One of these regulations is 42 CFR § 438.214(a) entitled "*Provider Selection*." This regulation requires the State to ensure, through a contract, that each MCO/PIHP "implements written policies and procedures for selection and retention of providers." (Pet. Ex. 22) (Emphasis added). 42 CFR § 438.214(e) requires MCO/PIHPs to "comply with any additional requirements established by the State."

94. 42 CFR § 438.214 does not limit the selection and retention policies that can be implemented by an MCO/PIHP such as Alliance, but does require that these policies include at a minimum: (1) a process for credentialing and re-credentialing of providers who have signed contracts or participation agreements; (2) policies relating to nondiscrimination for providers that serve high-risk populations or costly treatment; and (3) a policy that the MCO/PHIP will exclude providers that are excluded by the federal health care program. See 42 CFR § 438.214.

95. Alliance's witness, Carlyle Johnson agreed that 42 CFR § 438.214 is applicable to Alliance because it operates as a PIHP as part of a Medicaid waiver program. (Johnson, Vol. 1, pp. 178-79). Alliance's position that it has absolute discretion to determine if it will renew a contract is contradicted by the existence of 42 CFR § 438.214, which requires Alliance to have selection and retention policies.

DHHS Contract Requirements Relating to Provider Retention

96. Pursuant to 42 CFR § 438.214, Alliance has executed two contracts with DHHS that contain Provider Selection and Retention requirements. First, Alliance executed a contract with the Department of Health and Human Services, Division of Mental Health ("DMH"). The DMH Contract requires Alliance to have written policies and procedures for "the determination of need, selection and retention of network providers." (Pet. Ex. 3, p. 23).

97. Alliance has also entered into a contract with the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"). The DMA Contract contains a similar provision requiring Alliance to create written policies and procedures for the selection and retention of network providers. (Pet. Ex. 4, pp. 32-33).

98. The DMA Contract further requires that "qualification for Providers shall be conducted in accordance with the procedures delineated in Attachment O." (*Id.*). Attachment O of the DMA Contract states that:

Alliance shall maintain a provider network that provides culturally competent services. The provider network is composed of providers that demonstrate competency in past practices and consumer outcomes, ensure health and safety for consumers, and demonstrate ethical and responsible practices.

(Pet. Ex. 4, p. 92, Contract Attachment O).

99. Under the DMA Contract, CABHAs are considered agency-based providers. (Pet. Ex. 4, p. 92, Contract Attachment O). The DMA Contract states that “maintenance of agency-based providers [such as CABHAs] depends on performance of the agency as measured against identified indicators and benchmarks as well as Alliance’s need as identified in an annual assessment.” (Pet. Ex 4, p. 92, Attachment O, Sec. 4). Thus, under Attachment O, whether CABHA is allowed to continue to provide services must depend on the performance of the agency, specific measurable benchmarks and Alliances annual needs assessment.

100. As a CABHA in the Alliance network, Carolina Community must provide IIIH, CST, or SAIOP in order to continue to be a CABHA. (Johnson, Vol. 1, pp. 186-187). Thus, Alliance’s RFP decision determined whether Carolina Community would be maintained or terminated as an agency based Medicaid provider.

101. The DMA Contract also required Alliance’s decision to be based on “identified indicators and benchmarks.” (Ex.4, p. 4, p. 92, Attachment O, Sec. 4). Alliance did not base its decision on identified indicators and used no benchmarks during in the RFP process. Alliance violated the contract requirement based on the RFP review it conducted in this case.

102. Attachment O contemplates the use of an RFP, stating that “if there is a competitive Request for Proposal a scoring process will be developed to assess the provider’s competencies specific to the requirements of the Request for Proposal, the service definition, and the enrollment requirements as delineated above.” (Ex. 2, p. 94, Attachment O). Based on this language when an RFP is used, Alliance must use the requirements set forth in Attachment O of the DMA Contract when it makes its decision. (*Id.*). Based on the findings of facts above, Alliance did not use these factors in making its decision.

Alliance Policies and Procedures Relating to Provider Retention

103. In conformity with federal law and the State contracts, Alliance has developed provider selection and retention policies, which are included in the Alliance Provider Operations Manual. (Pet. Ex. 16, pp. 35–38; Johnson, Vol. 1, p. 180).

104. Section K of the Provider Operations Manual sets forth Alliance’s Selection Criteria for initial participation in the Alliance network and is not applicable here because Carolina Community is already a provider in the Alliance network. (Pet. Ex. 16, p. 35).

105. Section L of the Provider Operations Manual sets forth Alliance’s Retention Criteria (the “Retention Criteria”). Section L applies to decisions by Alliance relating to “contract renewal and reductions in network providers based on State and Federal laws, rules, regulations,

DHHS contract requirements, the Network Development Plan, and the Alliance Selection and Retention Criteria.” (Pet. Ex. 16, p. 36).

106. This policy applies to this contested case because Alliance was determining whether Carolina Community would be retained or terminated as a provider.

107. The Retention Criteria states that the Alliance Provider Network Management Committee (“PNMC”) is responsible for making decisions about contract renewal and provider network reductions. (Pet. Ex. 16, p. 36). The evidence demonstrates that, in this case, the PNMC did not make the determination whether Carolina Community would be retained. (Johnson, Vol. 1, pp. 207–208).

108. Alliance’s policy sets forth 17 criteria that it considers a “basis for non-renewal of contract(s).” (*Id.*, pp. 16–17). The policy states that Alliance’s decision will be based on, but not limited to these 17 criteria. These 17 criteria mostly relate to demonstrated actions by a provider, such as demonstrated compliance with policies and procedures, efforts to achieve evidence-based practices, and demonstrated consumer friendly service” (*Id.*). Based on the findings of facts above, Alliance did not use this criteria in the RFP.

109. The Retention Criteria also states that Alliance “has the right not to renew a contract with a Network Provider for any reason... at the sole discretion of Alliance.” (Pet. Ex. 16, p. 37). Alliance sites this language from the policy as the basis for it having complete discretion to determine if a provider will be retained. (Res. Ex. 21, p. 6).

110. Alliance’s policy that it has a right not to renew for any reason at its sole discretion is directly contradicted by federal law and the State contract requirements. It is illogical for the federal government and the State to require Alliance to have provider retention policies but allow one of those policies to be that Alliance need not follow any policy and has complete discretion to determine when it will retain a provider.

111. According to Dr. Johnson because Alliance operates a closed network, it has absolute discretion to determine with whom it wants to contract. (Johnson, Vol. 2, pp. 371-372). Alliance’s contention of its position of authority as a “closed network” is demonstrated in part by the RFP which states that “Alliance reserves the right to reject any and all proposals for any reason, . . .” Further, Alliance has said that in exercise of its discretion, it simply does not want to contract with Carolina Community.

112. Dr. Johnson stated that as a closed network “Alliance is not required to admit any provider into the network once we have sufficient providers in the network.” (Johnson, Vol. 1, p. 29). This case however, is not about admitting providers in the network, Carolina Community is already a provider in the network. Instead, this case is about whether Carolina Community would be retained in the network. There is no evidence that Alliance made a determination that it had “sufficient providers.”

113. Alliance’s argument that because it operates a closed network it has absolute discretion to determine if a provider will be retained is erroneous. When asked by the undersigned to define what is meant by a closed network, Alliance provide no response, other than it was likely

defined in the DHHS Contracts. (Johnson, Vol. 2, pp. 371, 373). A review of the DHHS Contracts reveals that it contains no definition for a closed network. (Pet. Exs. 3, 4).

114. North Carolina statute defines the term “closed network” as:

The network of providers that have contracted with a local management entity/managed care organization to furnish mental health, intellectual or developmental disabilities, and substance abuse services to enrollees.

N.C. Gen. Stat. § 108D-1(2).

115. The statutory definition of “closed network” simply delineates those providers that have contracted with the LME-MCOs to furnish services to Medicaid enrollees. Under the statute, Carolina Community would qualify as a network provider within Alliance’s closed network. Nothing in the definition of “closed network” indicates that the General Assembly provided MCOs absolute discretion to determine which existing providers can remain in the MCO’s closed network once it is given a contract. Further, nothing in any North Carolina statute that references the term “closed network” delegates any discretion to Alliance to terminate an existing provider from its network. *See generally* Chapter 108D.

116. Alliance has provided no evidence that its operation of a “closed network” gives it absolute discretion to determine if it will retain a current network provider. Alliance has seemingly read something in the phrase “closed network” that does not exist in North Carolina law. Dr. Johnson and Alliance’s contention that it has absolute discretion as to whom it will contract with because it operates a “closed network” simply is not true.

117. After stating that Alliance has absolute discretion, Alliance’s Retention Criteria goes on to state that “in general Alliance will renew a Network Contract unless there is excess service capacity or the Network Provider meets any of the conditions outlined below.” (*Id.*, p. 37–38). All but one of these conditions relate to failures by the provider to meet certain requirements. None of the requirements serve as the basis for Carolina Community’s termination. (*Id.*).

118. One of the conditions in Alliance’s reasons for nonrenewal is if Alliance issues an RFP, RFI. (*Id.*, p. 38). However, its policy does not state that if Alliance issues an RFP it can ignore its 17 provider retention factors when it creates the RFP review criteria. (*Id.*) Furthermore, Alliance’s contract with DMA specifically states that if an RFP is used, Alliance must use the clinical coverage policies and the other requirements for retention contained in the DMA contract. (Pet. Ex. 4, p. 94, Attachment O).

Alliance’s RFP Procedures

119. In instances where Alliance decides to use an RFP process, it has created an RFP Procedure that sets forth the process that Alliance will use in selecting providers. Alliance expects its staff to follow the RFP procedure when conducting an RFP review (Johnson, Vol. 1, p. 226). The purposes of these procedures “is to ensure that Alliance Behavioral Healthcare has a fair, uniform and consistent approach for establishing contracts with potential, new and current

providers.” (Pet. Ex. 27, p. 1). Alliance’s RFP Policy sets forth instances when exceptions to the procedure can be made. None of those exceptions apply in this contested case. (*Id.*).

120. The RFP Procedure requires Alliance to create and organize an RFP Selection Committee consisting of at least five members and reflecting relevant community stakeholder representation, including one or more, Community and Family Advisory Committee (“CFAC”) members and/or consumers representing the disability affected by the RFP. (Pet. Ex. 27, p. 2, Sec. 2.C.d). Alliance failed to follow this requirement. (Johnson, Vol. 2, p. 375).

121. The evidence shows that anyone that participated in the RFP Desk Review or interview was considered to be a member of the selection committee. This would have included the Legal Department, the Financial Department, the clinical reviewers, and all of the individuals that conducted any interviews or Desk Reviews for the 100 RFP applicants. (Johnson, Vol. 2, pp. 306–308).

122. The RFP Procedure also requires Alliance to develop a RFP Scoring Sheet based upon Bidder Criteria and Response Requirements outlined in the RFP template. (Pet. Ex. 27, p. 2, Sec. 2.C.f). The evidence demonstrates that Alliance did not follow this procedure. The RFP scoring sheet and guidance given to Alliance reviewers only outlined a scoring range of 1–5 but did not contain Bidder Criteria or Response Requirements. (Pet. Ex. 12, p. 13).

123. Alliance’s RFP Procedure further requires the Project Leader to gather relevant agency compliance, complaint, and performance history and disseminate it to the Selection Committee to use as part of the evaluation/review process. (Pet. Ex. 27, p. 2 Sec. D.3). Alliance failed to do provide its interview panels with any compliance history. (Johnson, Vol. 2, p. 339). As a result, the interview panels had no way of knowing if the provider’s response about their program was confirmed or contradicted by their compliance history.

124. In addition, the DMA Contract requires Alliance to base its decision on the demonstrated performance of the agency. (Pet. Ex. 4, p. 94, Attachment O). A provider’s past compliance record would have provided valuable information to the interview panel about the demonstrated performance of the agency.

125. Carolina Community has had no compliance issues since it opened. (Nwogbo, Vol. 2, pp. 512-514). In addition, Alliance had conducted a thorough state-mandated review of Carolina Community called “Gold Star Monitoring” only a few months prior to the interview. (*Id.*).

126. Alliance’s “Gold Star Monitoring” showed that Carolina Community received a very good score in this review. (Rieber, Vol. 2, p. 405). Carolina Community received a total score of 97% in this monitoring, with no score in any category below 95%. (Pet. Ex. 27). In contrast, over 40% of the reviewed providers received at least one score below 85% and required a plan of correction. (*Id.*, p. 402). Ms. Rieber confirmed that the results from the Gold Star monitoring would constitute provider compliance history (Rieber, Vol. 2, p. 405). Under Alliance’s RFP policy, the members of the Selection Committee should have been provided with information regarding Carolina Community’s Gold Star Monitoring Score. (Pet. Ex. 27, p. 2 Sec. D.3).

127. If Alliance was truly concerned about quality of care the state mandated Gold Star Monitoring would have been a good place to start.

128. Alliance's RFP procedure also requires that the Selection Committee should be "convened to evaluate and review all responses." In this RFP review, the Selection Committee was not convened to evaluate and review all responses. (Johnson, Vol. 2, pp. 308, 310, 330-31). Instead, if the provider made it to the interview stage, the decision was made solely by the provider's interview panel. (Estes, Vol. 1, pp. 137-138; Johnson, Vol. 2, pp. 313-314).

129. Alliance failed to even review the basis for the interview panel's decision to determine if the panel had followed the RFP requirements or preferences. (Johnson, Vol. 2, pp. 330-31). In this case, if the Selection Committee would have been convened, it may have discovered that the Carolina Community interview panel had assigned scores based on criteria not found in the RFP, the clinical coverage policy, or any other policies or requirements.

Provider's Selected by the RFP Process

130. The providers selected through the RFP process were all allowed to continue to provide the services at issue and were given a contract that extended either through July or December 2014.

131. At the expiration of those contracts, the providers that were selected through the RFP process were all provided contract extension into 2015 if they continued to provide and bill Alliance for the service. (Johnson, Vol. 1, p. 258). The only way a contract would not have been extended into 2015 is if the provider had a serious compliance issue. (*Id.* p. 258).

132. Carolina Community has continued to provide services pursuant to a stay issued by this Court. Alliance has had no compliance issue during this time period (Nwogbo, Vol. 2, p. 512-14). Under the criteria set forth by Alliance, if Carolina Community would have been awarded a contract extension under the RFP, it would still be allowed to provide services in 2015.

133. Alliance has not cited any retention criteria that Carolina Community has violated since the stay was issued and has not provided any justification under its provider retention policies for why Carolina Community should not be a provider in its network.

134. Alliance's contention that Carolina Community remained a credential, enrolled provider in the Alliance network without regard to the contract between Alliance and Carolina Community for CST, IIH, and SAIOP services is of no consequence. The administering of the RFP was specific to the provision of CST, IIH, and SAIOP services, and were necessary for Carolina Community to continue as a CABHA. The undersigned has consistently rejected in prior decisions such a narrow interpretation that obviates the harm in Alliance's decision merely because the Petitioner may be continuing to participate in other ways.

CONCLUSIONS OF LAW

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 as Conclusions of Law.

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

1. As previously determined by this Court in response to Alliance's Motions to Dismiss, all parties are properly before the Office of Administrative Hearings, and this Court has jurisdiction of the parties and subject matter.

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

3. Alliance contends that Carolina Community has no right to be a Medicaid provider and therefore this Court cannot find that Carolina Community's rights have been substantially violated by its decision. Alliance also argues that Carolina Community's rights are solely contractual in nature and once the contract expired, Carolina Community had no rights.

4. This contested case is not merely a contract case as Alliance contends. This contested case is about Alliance's almost total disregard for Federal and State laws and regulations and its own policies. Based on the evidence, the process for the RFP seems almost like it began on a whim—ostensibly to fix problems that had no basis in fact. The result was a flawed RFP in which providers which might otherwise be comparable were treated differently, based in significant part on a subjective review.

5. Under numerous Supreme Court holdings, most notably the Court's holding in *Board of Regents v. Roth*, 408 U.S. 564 (1972) the right to due process under the law only arises when a person has a property or liberty interest at stake. See also *Bowens v. N.C. Dept. of Human Res.*, 710 F.2d 1015, 1018 (4th Cir. 1983).

6. In determining whether a property interest exists a Court must first determine that there is an entitlement to that property. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Unlike liberty interests, property interests and entitlements are not created by the Constitution. Instead, property interests are created by federal or state law and can arise from statute, administrative regulations, or contract. *Bowens* 710 F.2d at 1018.

7. Under North Carolina case law, the Fourth Circuit Court of Appeals has determined that North Carolina Medicaid providers have a property interest in continued provider status. *Bowens*, 710 F.2d 1018. In *Bowens*, the Fourth Circuit recognized that North Carolina provider appeals process created a due process property interest in a Medicaid provider's continued provision of services, and could not be terminated "at the will of the state." The court determined that these safeguards, which included a hearing and standards for review, indicated that the provider's participation was not "terminable at will." *Id.* The court held that these safeguards created an entitlement for the provider, because it limits the grounds for his termination such that the contract was not terminable "at will" but only for cause, and that such cause was reviewable.

The Fourth Circuit reached the same result in *Ram v. Heckler*, 792 F.2d 444 (4th Cir. 1986) two years later.

8. Since the Court's decision in *Bowen*, a North Carolina Medicaid provider's right to continued participation has been strengthened through the passage of Chapter 108C. Chapter 108C expressly creates a right for existing Medicaid providers to challenge a decision to terminate participation in the Medicaid program in the Office of Administrative Hearings. It also makes such reviews subject to the standards of Article 3 of the APA. Therefore, North Carolina law now contains a statutory process that confers an entitlement to Medicaid providers. Chapter 108C sets forth the procedure and substantive standards for which OAH is to operate and gives rise to the property right recognized in *Bowens* and *Ram*.

9. Under Chapter 108C, providers have a statutory expectation that a decision to terminate participation will not violate the standards of Article 3 of the APA. The enactment of Chapter 108C gives a providers a right to not be terminated in a manner that (1) violates the law; (2) is in excess of the Department's authority; (3) is erroneous; (4) is made without using proper procedures; or (5) is arbitrary and capricious. To conclude otherwise would nullify the General Assembly's will by disregarding the rights conferred on providers by Chapter 108C. This expectation cannot be diminished by a regulation promulgated by the DMA which states that provider's do not have a right to continued participation in the Medicaid program because under the analysis in *Bowen* the General Assembly created the property right through statutory enactment.

10. Alliance's contention that Carolina Community was not really terminated since they can participate in Alliance's network in ways other than providing CST, IHH, and SAIOB services, as well as continuing as a CABHA, is without merit. Carolina Community is being terminated from providing those services.

11. Alliance's contention that providers have no right to challenge Alliance's termination is therefore without merit given that the General Assembly has specifically given providers a right to contest a termination decision at OAH. If Alliance's position were correct, the appeals process provided by N.C. Gen. Stat. § 108C would be meaningless and would undermine the authority and power of legislative enactments. This is certainly not the case.

12. Based on all of the above, the undersigned finds that Chapter 108C provides Carolina Community the right to not be terminated in a manner that violates the standards of N.C. Gen. Stat. § 150B-23(a).

13. Alliance's contention that it operates a "closed network" and thus can terminate a provider at its sole discretion is also not supported by the law. Alliance can cite to no statute, regulation or contract provision that gives it such authority. The statutory definition of "closed network" simply delineates those providers that have contracted with the LME-MCOs to furnish services to Medicaid enrollees.

14. Alliance is relying on its own definition of “closed network” to exercise complete and sole control and discretion which is without foundation and/or any merit. Alliance’s definition has no basis in law.

15. Nothing in the definition of “closed network” indicates that the General Assembly provided MCOs absolute discretion to determine which existing providers can remain in the MCO’s closed network. Further, nothing in any North Carolina statute that references the term “closed network” delegates absolute discretion to Alliance to terminate an existing provider from its network.

16. Alliance’s consistent position has been that this contested case should not be before OAH because the matter at hand is nothing more than a contract dispute. Alliance believes that it has absolute discretion to determine if a provider will be retained and that a provider’s right to continued participation is automatically extinguished at the end of the provider’s contract term. This position is without merit.

17. Alliance’s reliance on N.C. Gen. Stat. § 150B-23(a3) as a basis to narrow OAH’s jurisdiction in this case is without merit. N.C. Gen. Stat. § 150B-23(a3) states:

A Medicaid enrollee, or network provider authorized in writing to act on behalf of the enrollee, who appeals a notice of resolution issued by an LME/MCO under Chapter 108D of the General Statutes may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article. Solely and only for the purposes of contested cases commenced as Medicaid managed care enrollee appeals under Chapter 108D of the General Statutes, an LME/MCO is considered an agency as defined in G.S. 150B-2(1a). The LME/MCO shall not be considered an agency for any other purpose.

N.C. Gen. Stat. § 150B-23 (a3)

18. The undersigned has addressed the issue of N.C. Gen. Stat. § 150B-23 (a3) in prior orders in this contested case, finding specifically that OAH has jurisdiction to hear this contested case and that § 150B-23 (a3) does not impinge OAH’s jurisdiction in this case at all.

19. Chapter 108D of the General Statutes principally applies to Medicaid enrollees or recipients. It does not apply to this contested case other than the definitions. N.C. Gen. Stat. § 150B-23(a3) makes the LME/MCOs equivalent to DHHS; it makes the LME/MCOs “the” agency for disposition of recipient cases.

20. It is well settled law that DHHS is the single state agency responsible for Medicaid. For whatever reasons the General Assembly gave LME/MCOs that status for recipient cases. LME/MCOs have consistently been held to be the agent for DHHS which contracts to provide particular services. The last line of G.S. 150B-23(a3) does not change that relationship. It merely

states that the LME/MCOs are not the agency for any purpose other than recipient cases. The distinction is between being the agency itself as opposed to being an agent of the agency.

21. 42 CFR § 438.214 entitled “*Provider Selection*” requires the State to ensure, through a contract, that each MCO/PIHP “implements written policies and procedures for selection and retention of providers.”) (Pet. Ex. 22) (Emphasis added). Alliance admits that it is subject to this regulation.

22. A plain reading of the law makes clear that MCOs that operate a PIHP, such as Alliance, are required to have written policies and procedures for retention of providers. The fact that the law requires Alliance to have policies and procedures relating to provider retention means that Alliance must follow those policies and procedures. Requiring policies and procedures would be pointless if they are not followed.

23. 42 C.F.R. § 438.214(e) requires MCO/PIHPs to “comply with any additional requirements established by the State.” The State through its contract with Alliance has established certain criteria for provider selection and retention that Alliance must follow.

24. Alliance has created a Provider Operations Manual and an RFP pursuant to the federal regulation and the State contracts. To the extent that Alliance’s policy states that it can decide not to retain a provider for any reason at its sole discretion, such a policy does not conform with Federal law and the State requirements.

25. Alliance cannot circumvent federal law and State requirements that it have policies and procedures for deciding if a provider will be retained by creating a policy that allows it to make the determination for any reason in its sole discretion. Such a provision is tantamount to having no policies and procedures at all.

26. The federal law and the State contract requirements demonstrate that Alliance is incorrect that this case is a simple contract dispute and that courts have no right to force a party to enter into a contract against its will. Unlike contracts between two private parties, the contract at issue in this case is a contract that allows a Medicaid provider to participate in the Medicaid program, pursuant to a Medicaid waiver. Alliance’s authority over Carolina Community and every other provider in its network only exists because of the Medicaid waiver. Without such a waiver, and DHHS’s delegation of authority, Alliance would have no right to manage public funds. With this responsibility comes legal obligations. One of those obligations is to create and subsequently abide by provider selection and retention criteria. Alliance has created retention criteria and RFP policies. It must abide by them. As long as Alliance manages Medicaid dollars pursuant to a Medicaid waiver, it must abide by the laws and requirements that are attached to these funds.

27. Alliance also contends that this Court has no authority to determine Alliance violated 42 C.F.R. § 438.214 because the statute does not create a specific private right of action for providers.

28. A “private cause of action” is defined as a private person's right to invoke a federal enforcement statute against another private person in a civil suit. *See* James T. O'Reilly, *Deregulation and Private Causes of Action: Second Bites at the Apple*, 28 Wm. & Mary L. Rev. 235 (1986-1987); *see also Cort v. Ash*, 422 U.S. 66, 74 (1975). The case before this Court is not a private civil suit. Instead, Petitioner seeks an administrative review, pursuant to N.C. Gen. Stat. Chapter 108C. Thus, the analysis offered by Alliance has no applicability because it relates to private civil actions and not contested cases.

29. Alliance’s contention also lacks merit because it ignores the standards by which an ALJ is expressly authorized to judge a contested case. N.C. Gen. Stat. § 150B-23(a)(5) states that an ALJ can consider that the Respondent “failed to act as required by law or rule.” Indeed, OAH routinely finds that a Respondent’s violation of state and federal law is the basis for reversing the administrative decision. *See Heartfelt Alternatives Inc., v. Alliance Behavioral Health*, 13 DHR 19958 (Dec. 11, 2014) (finding that Alliance acted contrary to 42 C.F.R. § 438.12 by not using Attachment O Provider Re-Enrollment Criteria when terminating provider from network); *see also Association For Home and Hospice Care of North Carolina, Inc., v. Division of Medical Assistance* 01 DHR 2346 (May 6, 2001) (finding that DMA’s decision violated 42 C.F.R. §440.240 and 42 USC § 1396(a)(10)(B)).

30. Alliance’s contention that its decision to not renew Carolina Community’s contract based upon the RFP, and its own conclusion that it could refuse to renew for no reason at all, and that such was not an “adverse determination” is erroneous. The undersigned has previously addressed the fact that such is indeed an adverse determination.

31. Based on the Findings of Fact and Conclusions of Law above, Alliance failed to follow federal law and State requirements in its RFP process. Alliance also failed to properly follow its own policies and procedures, including its Provider Retention Policy and its RFP Procedure. Alliance has exceeded its authority, acted erroneously and failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23(a).

32. Regarding Carolina Community’s interview scores, the evidence demonstrates that these scores were erroneous, not supported by the RFP requirements, and not based on any statutory, regulatory or clinical coverage policy requirements. Based on the above findings of fact, Carolina Community should have received a passing interview score. Alliance has exceeded its authority, acted erroneously, and failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23(a).

33. Under relevant North Carolina case law, decisions are arbitrary or capricious 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 and the exercise of judgment.” *Lewis v. N.C. Dept. of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (emphasis added).

34. The evidence in this case demonstrates that the RFP process and Alliance’s interview scores were arbitrary and capricious because both clearly lacked fair and careful consideration. The Findings of Fact document several examples where the scores for a particular interview category were given in a haphazard and illogical manner. Alliance’s blind reliance on its “closed network” in order to do its own bidding lacked any fair and careful consideration. Alliance’s actions are, therefore, arbitrary and capricious and violate N.C. Gen. Stat. § 150B-23(a)(4).

35. Based on the Findings of Fact, there is no basis for Alliance to terminate Carolina Community’s participation in these Medicaid program and ability to operate as an agency-based CABHA provider in the Alliance network. Carolina Community should have received a passing interview score. The Alliance RFP process was not conducted in a manner that complied with federal law, the State Contract requirements, or Alliance’s own policies and procedures.

36. Carolina Community has met every standard to continue to be a provider of IIH, CST, and SAIOP services in the Alliance Network. But for the erroneous and legally improper RFP decision, Carolina Community could still participate in these Medicaid program and could still qualify as a CABHA.

37. Alliance’s decision to terminate Carolina Community’s ability to participate in these Medicaid programs as an agency-based CABHA provider was in excess of Alliance’s authority, erroneous, in violation of the law and Alliance’s own policies and procedures, and arbitrary and capricious. N.C. Gen. Stat. § 150B-23(a).

DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent substantially prejudiced Petitioner’s rights, acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, and failed to act as required by law or rule in its decision to terminate Carolina Community as a provider of CST, IIH, and SAIOP services in the Alliance service area. The Undersigned also finds that the RFP process itself violated procedure and law and was arbitrary and capricious in its design and implementation. Respondent’s decision is hereby **REVERSED**.

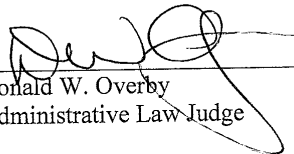
Alliance is accordingly ordered to disregard its RFP findings and treat Carolina Community as it would any other provider that was offered a contract extension based on the RFP process. Based on the evidence in the record, this means that Carolina Community should be allowed to continue to provide these services until such time as Alliance determines that Carolina Community should not be retained in its network based on the requirements of federal law, the State contract, and its own policies as interpreted herein.

This Court further finds that reasonable attorney's fees should be awarded to Petitioner pursuant to N.C. Gen. Stat. § 150B-33(b)(11). As set forth above, Respondent's decision was arbitrary and capricious and substantially prejudiced Petitioner.

NOTICE

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court where the person aggrieved by the administrative decision resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' Rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of April, 2015.



Donald W. Overby
Administrative Law Judge

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4/29/2015 4:36 PM

STATE OF NORTH CAROLINA

THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 1500

COUNTY OF WAKE


CAROLINA COMMUNITY SUPPORT)
SERVICES, INC.,)
)
Petitioner,)
v.)
)
ALLIANCE BEHAVIORAL HEALTHCARE,)
as legally authorized contractor of and agent for)
N.C. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES,)
)
Respondent.)

AMENDED FINAL DECISION

THIS MATTER came on for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on November 12 and 13, and December 2, 2014 in Raleigh, North Carolina. A Final Decision was issued by the Undersigned on April 2, 2015. This Amended Final Decision is intended to correct a typographical error on page 6 in the Findings of Fact, whereby the principal place of business of Petitioner Carolina Community Support Services Inc. was inadvertently identified as Raleigh, North Carolina when it should have been identified as Durham, North Carolina.

Entered, *nunc pro tunc*, the 2nd day of April 2015.

This Amended Final Decision signed and entered this the 29th day of April, 2015


Donald W. Overby
Administrative Law Judge

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ05502

RACHAEL ELISABETH HOFFMAN PETITIONER, V. N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.	PROPOSAL FOR DECISION
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This case came on for hearing on January 8, 2015 before Administrative Law Judge J. Randall May, in Charlotte, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Rachel Elisabeth Hoffman, *pro se*
8705 Creek Trail Lane Apt 525
Cornelius, North Carolina 28031

Respondent: William P. Hart, Jr.
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
P.O. Box 629
Raleigh, North Carolina 27602-0629

ISSUES

1. Whether Petitioner knowingly made one or more material misrepresentations of any information required for certification?
2. What sanction, if any, should be imposed against Petitioner's justice officer certification?

PROPOSED FINDINGS OF FACT

1. Petitioner applied for certification as a law enforcement officer with the Charlotte Mecklenburg Police Department on February 28, 2013. She was previously certified as a full-time law enforcement officer with the Charlotte/Douglas International Airport Police Department. Petitioner was first awarded certification on June 25, 2008, and the Charlotte/Douglas International Airport Police Department merged with the Charlotte-Mecklenburg Police Department, giving rise to the Petitioner's application for certification that is in question.

2. In 2002 Petitioner was charged with Underage Possession of Alcohol (Volusia Co., FL No. CTC0234906MMAES) (guilty); and in 2003 Petitioner was charged with Possession of Fortified-Wine/Liquor/Mix Beverage less than 21 (Mecklenburg Co. No. 03 CR 53013) (deferred prosecution).

3. In her application for appointment and certification as a justice officer with the Charlotte/Douglas International Airport Police Department in or about 2008, Petitioner was required to fill out, sign, and submit a Form F-5A Report of Appointment/Application for Certification-Law Enforcement Officer. This document contains, *inter alia*, a section with the heading of "ALL APPLICANTS AND TRANSFERS READ AND COMPLETE THIS CRIMINAL RECORD SECTION." Petitioner failed to list the following offenses: Underage Possession of Alcohol (Volusia Co., FL No. CTC0234906MMAES) (guilty); and Possession of Fortified-Wine/Liquor/Mix Beverage less than 21 (Mecklenburg Co. No. 03 CR 53013) (deferred prosecution).

4. Petitioner's signature on the Charlotte/Douglas International Airport P.D. Form F-5A, dated June 9, 2008, indicated, among other things, her understanding and agreement that "any omission, falsification, or misrepresentation of any factor or portion of such information can be the sole basis for termination of my employment and/or denial, suspension or revocation of my certification at any time, now or later. Petitioner also attested by her signature "that the information provided above and all other information submitted by me, both oral and written throughout the employment and certification process, is thorough, complete, and accurate to the best of my knowledge." As of the date of her Charlotte/Douglas International Airport P.D. Form F-5A, Petitioner had never previously been certified as a Law Enforcement Officer.

5. Also in support of her application for appointment and certification as a justice officer with the Charlotte/Douglas International Airport Police Department in or about 2008, Petitioner was required to fill out, sign, and submit a Form F-3 Personal History Statement. On the second page of the Form F-3 is a section headed "CRIMINAL OFFENSE RECORD AND DISCIPLINARY ACTIONS." The questions in this section are preceded by introductory language which reads in pertinent part as follows:

NOTE: Include all offenses other than minor traffic offenses. . . .

Answer all of the following questions completely and accurately. Any falsifications or misstatements of fact may be sufficient to disqualify you. If any

doubt exists in your mind as to whether or not you were arrested or charged with a criminal offense at some point in your life or whether an offense remains on your record, you should answer "Yes." You should answer "No" **only** if you have never been arrested or charged, or your record was expunged by a judge's court order.

6. Question number 47 under the criminal offense section of the Form F-3 reads: "Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?" In her response to this question, Petitioner checked the box indicating her answer to be "Yes." However, Petitioner failed to list Underage Possession of Alcohol (Volusia Co., FL No. CTC0234906MMAES) (guilty). Petitioner did list Possession of Fortified-Wine/Liquor/Mix Beverage less than 21 (Mecklenburg Co. No. 03 CR 53013) (deferred prosecution). This Form F-3 was signed by Petitioner and notarized on April 2, 2008. Petitioner's signature indicated her certification "that each and every statement made on this form is true and complete and I understand that any misstatement or omission of information will subject me to disqualification or dismissal."

7. In her application for appointment and certification as a justice officer with the Charlotte-Mecklenburg Police Department in or about 2013, Petitioner was required to fill out, sign, and submit a Form F-5A Report of Appointment/Application for Certification—Law Enforcement Officer. This document contains, *inter alia*, a section with the heading of "ALL APPLICANTS AND TRANSFERS READ AND COMPLETE THIS CRIMINAL RECORD SECTION." Petitioner failed to list the following offense: Underage Possession of Alcohol (Volusia Co., FL No. CTC0234906MMAES) (guilty).

8. Petitioner provided a notarized written statement regarding her omission of the following offense in 2008: Possession of Fortified-Wine/Liquor/Mix Beverage less than 21 (Mecklenburg Co. No. 03 CR 53013) (deferred prosecution). According to her statement and testimony, Petitioner likely misread the question on the F-5A form leading her to fail to disclose the charges. She disclosed the charge during her job interview and mistakenly omitted it from her F-5A. Her account was substantially corroborated by other testimony at the hearing, as well as the inclusion of the charge on her 2008 F-3 form. This omission is not found to be a knowing, material misrepresentation.

9. Petitioner also provided a notarized written statement regarding her omission of the following offense in both 2008 and 2013: Underage Possession of Alcohol (Volusia Co., FL No. CTC0234906MMAES) (guilty). According to her statement and testimony, Petitioner could not recall whether she had disclosed the charge on her F-3 and F-5A forms. She stated she may have made an error or oversight, and because she had disclosed the 2003 charge from Mecklenburg County on her 2013 forms, she was not being deceitful. The Florida underage possession charge was based upon an ordinance alleged to have been violated during Petitioner's Spring break trip to that State. Petitioner was not required to appear in court to answer the charge but instead mailed her payment of the fine assessed to her.

10. At the hearing in this matter, Petitioner does not deny any of the foregoing omissions from her prior application and certification documents. Petitioner's account is

consistent with the notarized statements she provided, which tend to indicate inadvertence on her part.

11. Several other officers-both peers and superior officers-with the Charlotte-Mecklenburg P.D. testified on Petitioner's behalf at the hearing and spoke highly of her integrity and performance as an officer. At present, Petitioner consumes alcohol only on rare social occasions and does so in moderation.

12. The forms associated with Petitioner's application for employment and certification through Charlotte/Douglas International Airport P.D. and Charlotte-Mecklenburg P.D. were unequivocal in requesting criminal background information from Petitioner. She did not make any inquiry to either the Charlotte/Douglas International P.D. or the Charlotte-Mecklenburg P.D. regarding the 2002 charge in order to address any concerns about whether it should be disclosed. Petitioner failed to provide a plausible reason for omitting the charge originally. Moreover, Petitioner's contention that oversight led to her omission of the charge on both forms is not plausible given the firm and unambiguous language of both the F-5A and F-3 forms. Therefore, Petitioner's omission of her criminal charge of Underage Possession of Alcohol (Volusia Co., FL No. CTC0234906MMAES) (guilty) in association with her application for appointment and certification as a law enforcement officer with Charlotte/Douglas International Airport P.D. and Charlotte-Mecklenburg P.D. constitutes a knowing misrepresentation.

PROPOSED CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings, and jurisdiction and venue are proper.

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

3. Pursuant to 12 NCAC 09A .0204(b)(6), the Commission may suspend or revoke the certification of a justice officer when the Commission finds the certified officer "has knowingly made a material misrepresentation of any information required for certification." The sanction for such a violation, if imposed, "shall be for a period of not less than five years" unless reduced or suspended following an administrative hearing. 12 NCAC 09A .0205(b). Alternatively, a period of probation may be imposed, instead. *Id.*

4. The threshold for the element of "knowingly" must be lower than the threshold for the violation of 12 NCAC 09A .0204(b)(7), which prohibits an applicant or certified officer from obtaining or attempting to obtain certification from the Commission "knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever." The intention to deceive is not necessary to be proven for violations of 12 NCAC 09A .0204(b)(6), which is charged here.

5. Given the nature of the law enforcement provision and the fact that criminal charges and convictions are pertinent to the investigation of possible violations of other rules of the Commission, Petitioner's misrepresentations were material.

6. By a preponderance of the evidence, Petitioner violated 12 NCAC 09A .0204(b)(6) when she knowingly omitted criminal background information during her application for appointment and employment with the Charlotte/Douglas International Airport P.D. and the Charlotte Mecklenburg P.D. Therefore, her justice officer certification is subject to denial for a period of not less than five years. However, the Commission may consider whether the authorized sanction should be suspended or a period of probation imposed instead.

7. In order to fully understand and apply the foregoing, the petitioner's youth, lack of animus, years of good service and the testimony of her peers should be used to mitigate her possible sanctions.

Therefore, it is the recommendation of the undersigned that the Commission consider the following:

PROPOSAL FOR DECISION

Based on the foregoing Proposed Findings of Fact and Proposed Conclusions of Law, the undersigned recommends Petitioner's application for Law Enforcement Certification be granted subject to a one year period of probation. This is based on her relative youth at the time of the occurrences and the superlative recommendation of the witnesses.

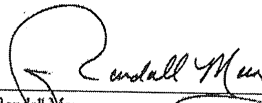
NOTICE AND ORDER

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

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

IT IS SO ORDERED.

This the 11th day of March, 2015


J. Randall May
Administrative Law Judge

Filed

NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS

CUMBERLAND COUNTY 14 DOJ 8347

Office of Administrative Hearings

DONALD EARL SCHWAB)

Petitioner)

v)

PROPOSAL FOR DECISION

NORTH CAROLINA SHERIFF'S)

EDUCATION AND TRAINING STANDARDS)

COMMISSION)

Respondent)

This matter coming on to be heard and being heard February 11 and 12, 2015, in Cumberland County pursuant to the Respondent's request under N.C. Gen. Stat. §150B-40(e) for designation of an Administrative Law Judge to preside over hearing of this contested case, and it appearing to the undersigned that the Petitioner is represented by attorney Ms. Malea D. Drew, and the Respondent is represented by Assistant Attorney General Matthew L. Boyatt.

The issues to be addressed are as follows:

Is Respondent's proposed revocation of Petitioner's certification based upon Petitioner's failure to meet or maintain the minimum employment standards that every justice officer shall be of good moral character supported by a preponderance of the evidence?

Is Respondent's proposed revocation of Petitioner's certification based upon Petitioner's commission of the Class B misdemeanor offense of willfully failing to discharge duties supported by a preponderance of the evidence?

Based upon the evidence presented and the arguments of counsel, the undersigned makes the following findings of fact by a preponderance of the evidence:

1. Petitioner was employed with the Hoke County Sheriff's Department in June, 2004, and obtained his General Deputy Sheriff Certification from the Respondent on June 29, 2004.
2. Petitioner has 16 years of law enforcement experience. He is an Army combat veteran. At the time of this hearing, he was completing the final semester for his Bachelor's Degree in Criminal Justice with a Minor in Business Administration with a 3.9 GPA. The Petitioner holds

all North Carolina Justice Academy advanced certifications available, is a General Instructor, a firearms instructor, and is certified to teach in many other advanced law enforcement subject areas.

3. This contested case arose from Petitioner's failure to disclose a sexual relationship between Ms. Alicia Hatzianoglou and him, and his subsequent termination from the Hoke County Sheriff's Department where he was a Lieutenant in the Detective Division. Petitioner was terminated on March 13, 2014 for general conduct violations, untruthfulness, and interference with due process.

4. In October, 2010, Petitioner was the lead detective assigned to investigate the murder of Nicholas Bekiaris. Bekiaris was shot and killed during a home invasion in Hoke County.

5. Petitioner testified that Alicia Hatzianoglou was the sister of the decedent, Bekiaris.

6. Petitioner worked to identify suspects during the investigation, which led to the arrest of 3 co-defendants, Richard Perez, Oseas Santiago and Justin Vasquez.

7. Perez, Santiago, and Vasquez were charged with First Degree Murder for their involvement in the death of Bekiaris.

8. In December 2011, the First Degree Murder case against Perez was still pending in Hoke County Superior Court and the Petitioner was a potential witness in that case.

9. Petitioner interviewed the decedent's sister, Alicia, at Eva Hatzianoglou's residence, concerning allegations that Alicia was taking photographs of Perez during a hearing in court. Petitioner reported that no such photographs existed on Alicia's phone.

10. After this interaction and while the murder case was still pending in Hoke County Superior Court, Petitioner began a personal relationship with Alicia.

11. Petitioner and Alicia Hatzianoglou spoke by telephone on multiple occasions, discussing personal issues and matters related to the Bekiaris murder. Petitioner could not recall if he documented these conversations in the Bekiaris investigative file.

12. Petitioner subsequently met with Alicia to talk and get to know each other. Petitioner denied any sexual contact occurred during this encounter.

13. On another occasion, later in December, 2011, Petitioner and Alicia met at Walmart and Petitioner then took Alicia for a ride in his automobile.

14. During this encounter, Petitioner and Alicia hugged and kissed each other, and Alicia performed fellatio on the Petitioner.

15. Petitioner did not note this sexual encounter or the personal relationship between he and Alicia in the Bekiaris investigative file.

16. Following this sexual encounter, Petitioner returned Alicia to Eva Hatzianoglou's residence.

17. Prosecutors had previously announced that they would be seeking the death penalty in the Perez case, and District Attorney Kristy Newton and Assistant District Attorney John Thompson were handling preparations for the case in December, 2013 and January, 2014.

18. Defense attorneys had filed a motion for sanctions against the state for discovery violations in the Perez murder case.

19. The alleged discovery violations concerned Petitioner's failure to preserve and turn over text messages he received from decedent's brother, Versalious Hatzianoglou, Jr.

20. Mr. Hatzianoglou is the brother of Ms. Alicia Hatzianoglou.

21. As a result of the above-referenced discovery violation involving text messages, Mr. Hatzianoglou mailed his cellular phone directly to the District Attorney's Office so that the messages could be recovered. The District Attorney's Office received the cellular phone on December 16, 2013.

22. Mr. Hatzianoglou began leaving voicemail messages for Newton and Thompson. On January 23, 2014, the two prosecutors spoke with Mr. Hatzianoglou by phone.

23. During this communication, Mr. Hatzianoglou alleged that a detective "Stein" was having a sexual relationship with the decedent's sister.

24. Newton did not give the allegation any weight at that time because she was not aware of any law enforcement officer named "Stein" in her district.

25. On January 24, 2014, Mr. Hatzianoglou emailed Thompson and advised that a Hoke County detective named "Schwab" was dating his sister Alicia.

26. Thompson communicated with Petitioner about the statements made by Mr. Hatzianoglou by phone, text messages, and in person.

27. Thompson advised Petitioner that Mr. Hatzianoglou was making various allegations regarding the Bekiaris murder investigation, including the allegation that Petitioner was engaged in a relationship with Alicia Hatzianoglou.

28. Thompson, Newton and Petitioner met in January, 2014 in Thompson's office about an email from Mr. Hatzianoglou containing various allegations, including allegations about the sexual relationship with Alicia. Petitioner laughed about the allegation initially. District Attorney Newton asked the Petitioner if he had anything to tell them. Petitioner told Newton and Thompson that the claim was ridiculous.

29. Petitioner went on to tell Newton and Thompson that he would not engage in a sexual act with Alicia and that he had higher standards.

30. Shortly thereafter, District Attorney Newton spoke with Petitioner in person outside of Thompson's office regarding his relationship with Alicia Hatzianoglou.

31. Petitioner engaged both Newton and Thompson in conversations about the discovery violations on multiple occasions during this time period.

32. Newton acknowledged that many of the allegations were ridiculous.

33. Petitioner told Newton that he had not had a sexual relationship with Alicia Hatzianoglou.

34. Petitioner then asked if Newton had ever met Alicia. Newton responded that she had not, and Petitioner told Newton that Alicia was a "pill head."

35. Newton held the Petitioner in high regard and believed him when he denied having sexual involvement with Alicia Hatzianoglou.

36. In late January or early February, 2014, Newton and Petitioner had another conversation regarding allegations of sexual contact with Alicia Hatzianoglou. Thompson and Investigator John Joseph were also present.

37. The Petitioner again denied having a sexual relationship with Alicia Hatzianoglou, and joked about the situation, gyrating his hips and stating, "who can resist all this."

38. Petitioner's denial of a sexual relationship to the District Attorney was untruthful, and the Petitioner knew it was untruthful at the time it was made.

39. Newton, Thompson, and the Petitioner met again on March 5, 2014, to prepare for the hearing on the Motion for Sanctions. Newton told Petitioner that she believed the defense was using the Motion for Sanctions as leverage to obtain a better plea agreement.

40. Newton hoped to resolve the motion so that the case could move forward without further delay.

41. Newton advised Petitioner that she felt everything would be fine during the hearing since the state had cured the discovery violation by providing the requested text messages to the defense.

42. Newton advised the Petitioner that he could be questioned regarding the allegations of sexual contact with Alicia Hatzianoglou, and that the defense team could call Mr. Hatzianoglou to testify.

43. Petitioner maintained that he did not have a sexual relationship with Alicia, and he told Newton that if the defense asked these questions regarding sexual impropriety, his testimony under oath would be that he did not have a sexual relationship with Alicia.

44. Petitioner appeared to be very nervous to Newton and Thompson while preparing for the hearing, and repeatedly asked questions about possible outcomes of the hearing, and what could happen to him. Newton told the Petitioner that he had nothing to worry about based upon the information he had provided.

45. Thompson advised Newton that Petitioner was in contact with him on numerous occasions while the discovery motion was pending, and that that their conversations would always turn to the Perez case and the motion. Thompson advised that Petitioner seemed nervous about the hearing.

46. The Motion for Sanctions was scheduled for March 12, 2014.

47. Prior to the hearing, Perez's defense attorneys had an ex parte communication with the judge.

48. During this ex parte communication, the defense submitted three (3) ex parte affidavits. Prosecutors were not provided copies of these affidavits, and as of hearing of this matter, still have not seen the contents of these affidavits.

49. Defense attorneys were seeking to delay hearing on the motion due to the contents of the affidavits.

50. Newton argued against postponing the hearing based in part on reassurances by Petitioner that there was nothing unusual going on. The State was ready to move forward and was of the belief that the defense in the Perez case was attempting to postpone the matter in part to obtain a better plea deal.

51. Hearing on the motion was continued from March 14, 2014 to May, 2014.

52. Prosecutors did not understand why the motion in a First Degree Murder case was continued.

53. Following the hearing, Petitioner and Newton met in her office to discuss what had taken place.

54. Petitioner would not leave Newton's office and persisted in discussing the hearing and what could happen to him as a result of the known discovery violation.

55. Petitioner stated that he was recently married and that it was not fair that the defense could bring up these allegations.

56. Petitioner told Newton that he was worried and upset and that maybe they should just offer a plea to Perez case so that they would not have to deal with the Motion for Sanctions.

57. Newton became concerned that Petitioner was not being truthful.

58. Newton asked Petitioner if there was something he needed to tell her, and the Petitioner stated there was nothing he needed to tell her.

59. Petitioner's statement to District Attorney Newton was untruthful, and the Petitioner knew it was untruthful at the time it was made.

60. While the Petitioner was still in Newton's office, defense attorneys in the Perez case, Tony Buzzard and Tim Morris, appeared unannounced wanting to discuss what had taken place in court.

61. Newton believed the defense attorneys did not want Petitioner to remain in the office, but she informed them that if there was something they wanted to say, they could say it with the Petitioner present.

62. At this time, Newton also told defense attorneys that the Petitioner told her everything he knew about the discovery violations.

63. Defense attorneys maintained that the State needed to give them a plea in the Perez case, and that Newton did not want to have a hearing on the discovery motion.

64. Newton advised the defense that she was comfortable going through the hearing because she trusted Petitioner and he had assured her he had done nothing wrong, and the defense attorneys left her office.

65. Newton and Petitioner discussed the interaction that occurred with the defense attorneys in the Perez case, and Petitioner continued to maintain the he was shocked to be a target of the defense attorneys.

66. Petitioner reassured Newton again that there was nothing she needed to know regarding the Perez case and the allegations surrounding Petitioner's alleged sexual impropriety.

67. Petitioner's statement to Newton was untruthful, and the Petitioner knew it was untruthful at the time it was made.

68. Newton then received communication from one of the defense attorneys that they knew about the sexual relationship between Petitioner and Alicia Hatzianoglou, and that she did not want to go through with the hearing on the discovery violations.

69. Newton was advised that defense attorneys had 3 witnesses who would testify the Petitioner had a sexual relationship with Alicia Hatzianoglou, and that information was provided to the judge in the three affidavits.

70. Defense attorneys did not disclose who the three affiants were, but suggested Newton speak with Eva Hatzianoglou.

71. After this communication, Newton warned Petitioner that the defense had three (3) witnesses who were going to testify regarding Petitioner's sexual relationship with Alicia Hatzianoglou, and that she believed one of the witnesses was Eva Hatzianoglou.

72. Newton told the Petitioner that he better be honest with her. Petitioner then stated that he did not do anything.

73. Petitioner's statement to the District Attorney was untruthful, and the Petitioner knew it was untruthful at the time it was made.

74. Newton told Petitioner she did not believe him.

75. Newton advised Petitioner that she was going to contact Eva Hatzianoglou to find out what happened.

76. It was only at this point that the Petitioner conceded that something occurred between Petitioner and Alicia Hatzianoglou. However, Petitioner refused to say what occurred.

77. Because the Petitioner refused to acknowledge his behavior, Newton was forced to ask Petitioner specific and detailed questions about his interaction with Alicia.

78. Newton asked the Petitioner if he hugged her, if he kissed her, and if he had intercourse with her. Petitioner advised only that the two hugged and kissed.

79. Newton also asked if there was any touching in a sexual manner between the two. Petitioner denied any such touching.

80. Petitioner's statement to the District Attorney was untruthful, and the Petitioner knew it was untruthful at the time it was made.

81. When Newton asked why the Petitioner had been untruthful with her and her staff, the Petitioner responded that he did not want to lose his job, and that if he disclosed the information, it would diminish his standing with the District Attorney's Office.

82. At the conclusion of their meeting on March 12, 2014, Petitioner asked Newton if he should resign from the Sheriff's Office. Newton advised Petitioner that she did not know what he should do, and that Petitioner should just leave her office because she needed time to consider what had just transpired and to consult with her staff before proceeding forward with the Perez murder case.

83. Petitioner subsequently made contact with ADA Thompson and apologized for what had taken place.

84. On March 13, 2014, Newton interviewed Eva Hatzianoglou, and confirmed that Petitioner had been untruthful regarding his relationship with Alicia Hatzianoglou.

85. Later that day, Newton called Petitioner and told him she was aware that more than just kissing and hugging occurred between Petitioner and Alicia Hatzianoglou, and that she knew the Petitioner was untruthful with her and her staff. Newton further advised that she was required to inform the Sheriff about the Petitioner's actions.

86. During the late afternoon on March 13, 2014, Petitioner told Captain John Kivett of the Hoke County Sheriff's Department that he had been having a sexual relationship with the decedent's sister in the Perez capital murder case. Petitioner told Captain Kivett that he had made out with Alicia Hatzianoglou, and that she performed oral sex on him.

87. Petitioner further disclosed to Captain Kivett that the District Attorney had asked Petitioner on numerous occasions whether a sexual relationship existed between Petitioner and the Alicia, and Petitioner stated that he had not been honest with the District Attorney over an extended period of time.

88. Petitioner attempted to explain to Captain Kivett that he had not had a sexual "relationship" with Alicia Hatzianoglou because the two had only fooled around. Captain Kivett reminded Petitioner that having oral sex with someone is considered sexual contact and should have been disclosed to the District Attorney.

89. The Petitioner admitted to Captain Kivett that he lied to the District Attorney and her staff about the sexual relationship with Alicia until March 12, 2014. At that point, Petitioner admitted to only providing minimal details about the affair to Newton.

90. Following his conversation with Captain Kivett, Petitioner and Captain Kivett went to the office of Chief Deputy Gary Hammond. Petitioner entered the office and told Chief Deputy Hammond, "Chief, I fucked up. I fucked up real bad." Petitioner then advised Chief Hammond that he started "dating" Alicia Hatzianoglou approximately 8 months after the homicide, and that he had lied to the District Attorney about the sexual relationship.

91. Chief Deputy Hammond advised Petitioner that lying to a District Attorney was very serious and that his career as a law enforcement officer was probably over. Petitioner asked whether he should resign. Chief Deputy Hammond advised the Petitioner that even if he did resign, this matter would be turned over to Sheriffs' Education and Training Standards Commission.

92. Chief Deputy Hammond also advised Petitioner that his conduct would need to be investigated by internal affairs.

93. Petitioner met with Major Freddy Johnson, Sr. on March 13, 2014. Petitioner admitted to Major Johnson that he was involved in a sexual relationship with Alicia Hatzianoglou. Petitioner further advised Major Johnson that he repeatedly lied to the District Attorney and her

staff when he was questioned over an extended period of time about sexual contact between him and Alicia Hatzianoglou.

94. Following a review of the information disclosed by Petitioner, he was immediately terminated from his employment with the Hoke County Sheriff's Department.

95. Petitioner's assertions that he did not engage in a dating or sexual relationship with Alicia Hatzianoglou is without merit.

96. Petitioner knew as early as January 24, 2014, that there was an allegation in a First Degree Murder case that Petitioner had engaged in sexual contact with the murder victim's sister. Petitioner knew that the First Degree Murder case was still pending. Petitioner knew or should have known that he had a duty to disclose the specifics of such a relationship, especially when asked directly by prosecutors.

97. While some of these conversations regarding the relationship between Petitioner and Alicia Hatzianoglou may have been informal, that does not change or alter the Petitioner's duty to disclose discoverable and/or exculpatory information, especially in response to direct inquiry.

98. A lead detective's sexual contact and personal relationship with a victim's sister in a criminal case is exculpatory evidence that must be disclosed to prosecutors.

99. Petitioner was intentionally untruthful, deceptive, and misleading to Newton and Thompson several times between January 24, 2014 and March 12, 2014 in order to conceal the sexual contact and a personal relationship he had with Alicia Hatzianoglou.

100. Petitioner was intentionally untruthful, deceptive, and misleading to Newton and her staff because, as the Petitioner stated to Newton, had he disclosed this information, his employment at the Sheriff's Department would be terminated.

101. Petitioner's repeated denials of a sexual relationship to the District Attorney and the District Attorney's staff were untruthful, and the Petitioner knew the denials were untruthful at the time they were made.

102. The Petitioner believes Newton had Petitioner fired from the Hoke County Sheriff's Department so her husband could take Petitioner's position in that agency.

103. Petitioner's claim that Newton caused him to be fired or conspired to have him fired is without merit, and demonstrates Petitioner's continued refusal to be honest and forthright about his behavior.

104. Petitioner was terminated because he engaged in a sexual relationship with a victim's sister during the pendency of a criminal prosecution, and he was repeatedly and intentionally untruthful, deceptive, and misleading to the District Attorney and the District Attorney's staff on a matter that was related to an ongoing criminal prosecution.

105. Petitioner's continued attempts to minimize and explain away his conduct and his continued refusal to accept responsibility is further indicative of Petitioner's lack of credibility and lack of good moral character. Petitioner continues to shift the blame away from his own misconduct.

106. Petitioner has exhibited a pattern of untruthfulness which directly impacted a criminal prosecution and the pursuit of justice for the victim's family and the State of North Carolina. In addition to being directly responsible for delay in hearing the motion regarding discovery violations, the Petitioner's behavior caused the State of North Carolina to cease pursuit of the First Degree Murder charge and offer a plea to Second Degree Murder in the Perez case.

107. Petitioner's misconduct has directly and negatively affected numerous criminal prosecutions in Hoke County. Prosecutors have been forced to offer and/or accept plea deals in cases the Petitioner investigated because of his conduct and lack of credibility.

108. Substantial evidence exists that Petitioner lacks the good moral character that is required of a sworn justice officer in this State. The evidence presented in this case demonstrates that the Petitioner lacks honesty and integrity.

109. Petitioner was intentionally and repeatedly untruthful, deceptive, and misleading with the District Attorney and members of the District Attorney's Office in order to conceal his sexual relationship with the decedent's sister in the Perez case.

110. Petitioner's behavior caused the District Attorney to prepare for a Motion for Sanctions hearing, and to make certain representations to the Court based on the untruthful information provided by Petitioner regarding his relationship with the decedent's sister.

111. Petitioner's actions during the pendency of the Perez case demonstrate Petitioner's disregard for the pursuit of justice and the rights of the accused. Petitioner intentionally concealed his sexual relationship with the decedent's sister despite Petitioner's knowledge and understanding that he had a duty to disclose this information to the District Attorney due to its potential impact on the Perez case.

112. For the reasons set out above, Petitioner's actions and conduct during the pendency of the Perez murder case, including his sexual interactions with the decedent's sister, failure to document and disclose this relationship, and his repeated false statements to the District Attorney and her staff, demonstrate that Petitioner does not possess the good moral character that is required of all sworn law enforcement officers in this State.

113. Furthermore, for the reasons set out above, Petitioner willfully failed to discharge his duties in violation of North Carolina General Statute § 14-230, insofar as Petitioner failed to document and disclose information, and intentionally lied to and misled the District Attorney regarding a matter related to the Perez criminal case. This misconduct forced the District Attorney

to accept a reduced plea in the Perez case and has also compromised numerous other criminal prosecutions involving Petitioner.

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. Both parties received proper notice of hearing, and the Petitioner received by certified mail the Notification of Probable Cause to Revoke Justice Officer Certification letter, mailed by Respondent on September 16, 2014.

3. The North Carolina Sheriffs' Education and Training Standards Commission has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

4. 12 NCAC 10B .0301(a)(8) provides that all justice officers employed or certified in the State of North Carolina shall be of good moral character.

5. 12 NCAC 10B .0204(d)(1) provides the Sheriffs' Commission may revoke the certification of a justice officer when the Commission finds that the certified officer has committed or been convicted of:

(1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor which occurred after the date of initial certification.

6. Willful failure to discharge duties in violation of N.C. Gen. Stat. § 14-230 is classified as Class B Misdemeanor pursuant to 12 NCAC 10B .0103 (10)(b) and the Class B Misdemeanor Manual adopted by Respondent.

7. N.C. Gen. Stat. § 14-230 provides that it is unlawful for a public official to willfully fail to discharge the duties of his office.

8. The record establishes that Petitioner willfully failed to discharge his duties within the meaning of N.C. Gen. Stat. § 14-230 because the Petitioner failed to document and disclose exculpatory information, and intentionally lied to the District Attorney on numerous occasions regarding a matter related to the Perez criminal case. Petitioner concealed his relationship with the decedent's sister knowing this information could have a potential impact on the Perez case. Petitioner was fully aware that his relationship with the decedent's sister was an issue that would be addressed in the Motion for Sanctions. Despite this knowledge, Petitioner continued to be untruthful to the District Attorney and her staff. Petitioner's actions caused Newton to accept a reduced plea in the Perez case. Furthermore, Petitioner's actions have also compromised numerous other criminal prosecutions involving Petitioner and have thwarted justice.

9. 12 NCAC 10B .0204(b)(2) further provides the Sheriffs' Education and Training Standards Commission shall revoke, deny, or suspend a justice officer's certification when the Commission finds that the justice officer no longer possesses the good moral character that is required of all sworn justice officers.

8. Good moral character has been defined as honesty, integrity, 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).

9. Given the totality of the evidence presented at the administrative hearing, the undersigned concludes Petitioner no longer possesses the good moral character that is required of all sworn justice officers in this State for the reasons set out herein. This includes, but is not limited to Petitioner meeting the sister of a victim in a capital murder case and engaging in sexual relations with her during the pendency of the criminal case, failing to document and disclose the relationship, and intentionally and repeatedly being untruthful, dishonest, deceptive, and misleading to the elected District Attorney, an Assistant District Attorney, and other staff of the District Attorney's Office in order to conceal Petitioner's behavior and to avoid being fired by the Sheriff.

10. Pursuant to 12 NCAC 10B .0205, the period of revocation or denial shall be for an indefinite period based on Petitioner's lack of good moral character.

11. Based on the evidence presented and the testimony of the witnesses at the administrative hearing, the Respondent's proposed revocation or denial of Petitioner's certification due to Petitioner's lack of good moral character and failure to maintain the minimum standards required of all sworn justice officers under 12 NCAC 10B .0301, is supported by a preponderance of the evidence.

PROPOSAL FOR DECISION

Based upon the foregoing findings of fact and conclusions of law, the undersigned recommends the Respondent revoke Petitioner's certification for an indefinite period due to Petitioner's failure to maintain the good moral character that is required of sworn justice officers under 12 NCAC 10B .0301, in addition to Petitioner's commission of the Class B Misdemeanor offense of willful failure to discharge duties.

NOTICE

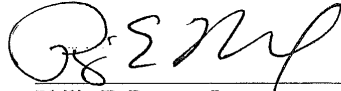
The Agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed findings of fact and to present oral and written arguments to the Agency. N.C. Gen. Stat. § 150B-40(e).

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 his attorney of record. G.S. 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This the 28th day of May, 2015.



Philip E. Berger, Jr.
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA
COUNTY OF DARE

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DST 06380

STEPHANIE T. TREJO,
Petitioner,

Office of
Administrative Hearings

v.

NC DEPARTMENT OF STATE
TREASURER,
RETIREMENT SYSTEMS DIVISION,

Respondent.

**ORDER
GRANTING SUMMARY JUDGMENT
FOR RESPONDENT**

Respondent's Motion For Summary Judgment came on to be heard and was heard before the undersigned Chief Administrative Law Judge on 17 December 2014 in the Dare County Courthouse, Manteo, North Carolina. Petitioner was present and represented by counsel, Branch W. Vincent, III, and Respondent was present and was represented by Assistant Attorney General Susannah P. Holloway.

Before ruling on Respondent's Motion, the undersigned appointed a temporary administrative law judge to conduct an in-person settlement conference. The temporary administrative law judge conducted an in-person settlement conference, but the parties were not able to reach agreement. Subsequent informal settlement negotiations also failed.

After reviewing the pleadings, affidavits, memoranda, discovery responses, submissions and oral arguments of counsel, the undersigned has determined that there are no genuine issues of material fact and that, as a matter of law, judgment must be granted for Respondent.

It is undisputed and uncontroverted that Petitioner qualified for and received long-term disability benefits in the Disability Income Plan of North Carolina ("DIPNC") with an effective date of December 12, 2004 and that, thereafter, Petitioner did not receive Social Security disability benefits.

Under the authority of N.C.G.S. § 135-106, Respondent did not err in its calculations that after the expiration of the 36 months of long-term disability, the hypothetical Social Security offset was required to be applied to reduce Petitioner's monthly long-term disability benefit in the DIPNC. However, this hypothetical Social Security offset was not applied to reduce Petitioner's long-term disability as required by law. G.S. § 135-106. Petitioner continued to receive DIPNC benefits without reduction or setoff. The Respondent subsequently became aware of the excess payments, and Respondent sought to recover the amounts paid to Petitioner which Petitioner was not entitled to receive from the DIPNC. N.C.G.S. §147-68.

The DIPNC is a statutorily created and a statutorily governed trust fund. N.C.G.S. § 135-110. The statutes governing the DIPNC determine the eligibility of and amounts payable to beneficiaries under the Plan. Under N.C.G.S. § 135-106, the hypothetical Social Security offset must be applied after thirty-six months of benefits unless the beneficiary produces evidence of actual receipt of a Social Security

- 2 -

Disability benefit and then the actual amount of the Social Security benefit must be offset. N.C.G.S. § 135-106.

The undersigned has no authority to create an individualized long-term disability benefit to allow Petitioner to retain these excess benefits under any statutory construction or even under any theory of equitable principles or equitable defenses, even if applicable. The State Treasurer cannot write warrants payable from the DIPNC fund to pay Petitioner funds in excess of the statutory benefits allowed.

Respondent paid funds to Petitioner in excess of what Petitioner was entitled by law to receive. To permit Petitioner to retain these monetary benefits in excess of what was statutorily allowed, and as acknowledged by Petitioner, would be to allow Petitioner to be enriched beyond what Petitioner was statutorily permitted to receive, notwithstanding Respondent's overpayment, until such time as the erroneous overpayment to Petitioner was lawfully terminated.*

FINAL DECISION

Judgment is properly granted on Respondent's Motion for Summary Judgment and Respondent is entitled to recoup from Petitioner the asserted amount of overpayment, without interest, or in the alternative, an amount that is mutually determined and agreed upon by the parties.

NOTICE

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

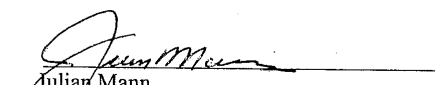
Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case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

*The overpayment of funds to Petitioner for an extended period of time created Petitioner's present dilemma. Respondent is admonished to provide Petitioner with a repayment schedule that reduces this hardship for Petitioner in making these repayments in any future repayment schedule.

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IT IS SO ORDERED.

This the 6th day of May, 2015.


Julian Mann
Chief Administrative Law Judge

NORTH CAROLINA

Filed
OFFICE OF ADMINISTRATIVE HEARINGS

WAKE COUNTY

2015 MAR -2 PM 7:37
14 OSP 7804

RAYMOND GENE GONZALES)

Petitioner)

v)

ORDER FOR SUMMARY
JUDGMENT

NORTH CAROLINA DEPARTMENT)
OF HEALTH AND HUMAN SERVICES)
DIVISION OF VOCATIONAL)
REHABILITATION SERVICES)

Respondent)

This matter coming on pursuant to the Respondent's Motion for Summary Judgment filed February 10, 2015, and it appearing to the undersigned that the Petitioner filed a Response to Respondent's Motion for Summary Judgment on February 18, 2015. The Petitioner appears in this action pro se, and the Respondent is represented by Assistant Attorney General Joseph E. Elder. Neither party requested hearing on the Motion for Summary Judgment, and this Order is entered after reviewing the filings of the parties, including the documents and exhibits filed pursuant to this motion.

Although a final decision granting summary judgment "need not include findings of fact or conclusions of law" NCGS §150B-34(e), certain undisputed facts are relevant to disposition of this matter.

UNDISPUTED FACTS

1. Petitioner filed a Petition for Contested Case Hearing with the Office of Administrative Hearings on October 9, 2014, alleging discrimination and retaliation by the Respondent in violation of the Whistleblower Act.
2. Petitioner, a career state employee, worked as a Vehicle Modification Specialist (position number 60054305).
3. During the course of his employment, the Petitioner reported to his superiors instances which he contended demonstrated violations of state and federal law, rules, and regulations; fraud; danger to the public; mismanagement; and abuse of authority.

4. On December 12, 2013, a budget directive requesting budget reductions was sent by the Office of State Budget and Management to department heads of all state departments and agencies. OSBM was seeking, among other things, elimination of duplicative or underperforming programs, consolidation of programs and services, and reductions through service efficiencies and streamlining layers of management and administration.

5. Respondent reviewed job descriptions, functions, costs, and other factors in an effort to address the budget directive.

6. Respondent determined that a Reduction in Force (RIF) was an appropriate mechanism to comply with the budget directive. Fourteen vacant administrative positions were identified for RIF.

7. Seven filled positions were identified for elimination under the RIF, including the Petitioner's Raleigh-based Vehicle Modification Specialist position (number 60054305).

8. Position number 60054305 is titled Vehicle Modification Specialist/Vehicle Modification Engineer/Vehicle Modification Project Manager, and involves duties associated with vehicle modification, ensuring compliance with relevant guidelines and specifications, and consulting with rehabilitation engineers, counselors, and management regarding vehicle modification projects.

9. Position 60054305 was paid out of the department's administrative funds.

10. By letter dated June 23, 2014, Petitioner was formally notified of the RIF for position 60054305. The RIF was effective July 4, 2014.

11. Respondent had a vacant engineer position (position number 60054778) which was paid out of direct service funds.

12. Position 60054778 is an Engineer position, and duties associated with that position included vehicle modifications, monitoring and managing projects, and consulting with agencies, businesses, and consumers on, among other things, vehicle modifications.

13. A formal placement offer was made to Petitioner for position 60054778 on June 23, 2014.

14. Petitioner was to be paid the same salary, have the same career banding, and the same benefits in position 60054778 as he was in position 60054305.

15. Petitioner initially rejected this placement offer as the Respondent instructed Petitioner that position 60054305 would be based out of Greensboro.

16. On July 10, 2014, a subsequent offer was made, indicating that Raleigh would be the primary duty station for position 60054778.

17. Petitioner accepted position 60054788 on July 10, 2014, with an effective date of July 1, 2014.

18. The Respondent's RIF plan was ultimately approved.

Based upon the foregoing undisputed facts, the undersigned concludes the following as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.
2. The Petitioner is a career state employee under the terms and conditions of N.C. Gen. Stat. § 126-1.1 (2010).
3. The burden of establishing a lack of any triable issue resides with the movant. *Nicholson v. American Safety Util. Corp.*, 488 S.E.2d 240, 244 (N.C. 1997).
4. In order to establish a prima facie case under the Whistleblower Act, Petitioner must show he suffered adverse employment action which was caused by his participation in protected activities. *Newberne v Department of Crime Control and Public Safety*, 359 NC 782 (2005).
5. While employment decisions such as dismissal, demotion, and/or pay cuts are recognized as adverse employment actions because of the inherent negative impact on the employee's employment, other actions such as transfers and reassignments do not, on their own, establish an adverse employment action. *DeMurry v. N.C. Department of Corrections*, 195 NCApp 485 (2009).
6. Petitioner's position was eliminated through an approved RIF plan. Petitioner has not and cannot show the RIF affecting position 60054305 was in retaliation for any activity of the Petitioner. In fact, Respondent has proven a legitimate non-retaliatory reason for eliminating Petitioner's position through the RIF and the Petitioner has not shown that reason to be pretextual.
7. Petitioner has not suffered an adverse employment action.
8. There is no genuine issue of material fact and the Respondent is entitled to judgment as a matter of law.

For the reasons set forth herein, the Respondent's Motion for Summary Judgment is granted.

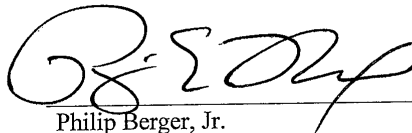
NOTICE AND ORDER

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

Under N.C. Gen. Stat. § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with 26 N.C. Admin. Code 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.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the Judicial Review. Consequently, the party appealing a Final Decision must send a copy of the Petition for Judicial Review. Consequently, the party appealing a Final Decision must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when it initiates its appeal to ensure the timely filing of the record.

This 27TH day of February, 2015.



Philip Berger, Jr.
Administrative Law Judge

Filed

NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS
2015 MAR -4 PM 3:02
WAKE COUNTY 14 OPS 7804

Office of
Administrative Hearings

RAYMOND GENE GONZALES)
)
 Petitioner)
 v)
)
 NORTH CAROLINA DEPARTMENT)
 OF HEALTH AND HUMAN SERVICES)
 DIVISION OF VOCATIONAL)
 REHABILITATION SERVICES)
)
 Respondent)

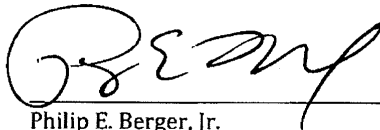
AMENDED NOTICE

The undersigned issued a final decision in the above-captioned matter on March 2, 2015. Said final decision contained an incorrect notice provision. The correct notice is set forth below and the Order entered March 2, 2015 is modified to reflect the proper notice below. Save and except the amendment to the notice provision, the final decision entered March 2, 2015 remains in full force and effect.

NOTICE

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

This the 4th day of March, 2015.


Philip E. Berger, Jr.
Administrative Law Judge