NORTH CAROLINA REGISTER

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Contact List for Rulemaking Questions or Concerns

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

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

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NORTH CAROLINA REGISTER
Publication Schedule for January 2016 – December 2016

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270th day from publication in the Register
30:13	01/04/16	12/08/15	01/19/16	03/04/16	03/21/16	05/01/16	01/2017	09/30/16
30:14	01/15/16	12/21/15	01/30/16	03/15/16	03/21/16	05/01/16	01/2017	10/11/16
30:15	02/01/16	01/08/16	02/16/16	04/01/16	04/20/16	06/01/16	01/2017	10/28/16
30:16	02/15/16	01/25/16	03/01/16	04/15/16	04/20/16	06/01/16	01/2017	11/11/16
30:17	03/01/16	02/09/16	03/16/16	05/02/16	05/20/16	07/01/16	01/2017	11/26/16
30:18	03/15/16	02/23/16	03/30/16	05/16/16	05/20/16	07/01/16	01/2017	12/10/16
30:19	04/01/16	03/10/16	04/16/16	05/31/16	06/20/16	08/01/16	01/2017	12/27/16
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31:08	10/17/16	09/26/16	11/01/16	12/16/16	12/20/16	02/01/17	05/2018	07/14/17
31:09	11/01/16	10/11/16	11/16/16	01/03/17	01/20/17	03/01/17	05/2018	07/29/17
31:10	11/15/16	10/24/16	11/30/16	01/17/17	01/20/17	03/01/17	05/2018	08/12/17
31:11	12/01/16	11/07/16	12/16/16	01/30/17	02/20/17	04/01/17	05/2018	08/28/17
31:12	12/15/16	11/22/16	12/30/16	02/13/17	02/20/17	04/01/17	05/2018	09/11/17

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EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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NORTH CAROLINA
State Board *of* Elections

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KIM WESTBROOK STRACH
Executive Director

December 4, 2015

Mr. Michael Weisel
Bailey & Dixon, LLP
Post Office Box 1351
Raleigh, North Carolina 27602

Re: Request for Written Advisory Opinion pursuant to NC. Gen. Stat. § 163-278.23 on Questions Related to the Scope of Article 22A of Chapter 163 of the N.C. General Statutes ("G.S.")

Dear Mr. Weisel:

In your request for opinion of October 29, 2015, you seek guidance regarding the scope of Article 22A of Chapter 163 of the General Statutes concerning electioneering communications. The following opinion is provided in accordance with G.S. § 163-278.23 and is based narrowly upon the information provided in your request.

Your letter informs us that several of your clients are nonprofit North Carolina corporations (cited in your inquiry as "Entities") organized under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. You also note that you represent referendum committee(s) as defined by G.S. § 163-278.6(18b). You state that the "Entities" are:

> *not owned or controlled by a candidate, authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee (hereinafter referred to as "Candidate").*

(emphasis added). Your principal inquiry is not whether a candidate may own or control a referendum committee,[1] though I will address why North Carolina law would deem that impermissible.

G.S § 163-278.6(14) provides the definition of a "political committee."

> The term "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes,

[1] Instead, you state that "the Candidate will 'coordinate' with the Entities and the Committee(s)."

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or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:

a. Is controlled by a candidate;
b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or
d. Has the major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.

If the entity qualifies as a "political committee" under subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political ceases to exist when it winds up its operations, disposes of its assets, and files its final report.

The term "political committee" includes the campaign of a candidate who serves as his or her own treasurer.

Special definitions of "political action committee" and "candidate campaign committee" that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.[2]

A "referendum committee" is defined by G.S § 163-278.6(18b). All funds given to a referendum committee are contributions by definition.[3] All payments made by a referendum committee are expenditures.[4]

A committee that accepts contributions or makes expenditures and is controlled by a candidate is by definition a *political committee* prohibited by statute from accepting contributions from certain sources[5] or in amounts[6] otherwise available to a referendum committee. Accordingly, to permit a

[2] G.S. § 163-278.38Z(3) provides that a "candidate campaign committee" means any political committee organized by or under the direction of a candidate.
[3] G.S. § 163-278.6(6)
> The terms 'contribute' or 'contribution' mean any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, *made to, or in coordination with* a candidate . . . or to a referendum committee[.]

(emphasis added).
[4] G.S. § 163-278.6(9)
[5] G.S. § 163-278.15
[6] G.S. § 163-278.13

candidate (i.e. a political committee) to own or control a referendum committee would void statutory limitations on contributions.

Your letter states that for the remainder of the 2015 calendar year and through at least March 15, 2016, your client entities and referendum committees will

> *educate the general public about a proposed "Connect NC" $2 Billion bond debt package,* ***urging passage*** ***of the bond referendum on the 15 March 2016 North Carolina ballot****, by means of broadcast, cable, internet or satellite transmission, mass mailing and/or telephone calls ("Communication(s)").*

The timespan you describe falls within the electioneering communication period set out in G.S. § 163-278.6(8j). Your letter states further that both your client entities and referendum committees

> *will solicit and take unlimited amounts of contributions from the individuals, corporations (including the Entities to a Committee), labor unions, insurance companies, business entities, and/or professional associations. Expenditures for Communications, including electioneering communications, shall be made by the Committees or Entities from these solicited contributions.*

Bearing in mind the foregoing and with consideration of applicable law, I provide the following responses to your questions.

1. **If an Entities' or Committee Communication occurs within sixty (60) days of the 15 March 2016 primary day, is that Communication an "electioneering communication" as defined under G.S. § 163-278.6?**

Given the definition of an "electioneering communication," a referendum committee cannot make electioneering communications, because a communication that constitutes an expenditure for a referendum committee is not an electioneering communication.[7] As provided in G.S. § 163-278.6(9), an expenditure includes any payment or other transfer made by a referendum committee.

Your client entities would be making electioneering communications if

- their communications refer to a clearly identified candidate for elected office during the 60 days prior to the March 15, 2016 primary

and

- the communications are to be received by either:

[7] § 163-278.6. Definitions 8k) The term "electioneering communication" does not include any of the following:
b. A communication that constitutes an expenditure or independent expenditure under this Article.

a. 50,000 or more individuals in the State if the candidate mentioned is involved in a statewide election or 7,500 or more individuals in any other election if in the form of broadcast, cable or satellite communication, or

b. 20,000 or more households, cumulative per election, if the candidate mentioned is involved in a statewide election or 2,500 households, cumulative per election, in any other election if in the form of a mass mailing or telephone bank.

However, if your client entities are expressly advocating the passage of the bond referendum, as indicated in your letter, and if the communication(s) were made without coordination with a referendum committee, then the communications would not be considered electioneering communications; they would be "independent expenditures" under G.S. § 163-278-6(9a).

If the communications by these entities were coordinated with a referendum committee, the costs of the communications would be in-kind contributions to the referendum committee.

2. **If the answer to Question 1, is yes, the Communication is an electioneering communication, then:**
   a. **Is a clearly identified Candidate prohibited from appearing in, or referenced by, an Entities or a Committee electioneering communication, if the Committees or Entities have accepted contributions from a corporation, labor union, insurance company, business entity, or professional association?**
   b. **Has a clearly identified Candidate received a contribution (something of value) within the meaning of G.S. § 163-278.6(6) from appearing in, or referenced by, an Entities or Committee electioneering communication?**
   c. **May a clearly identified Candidate coordinate with the Entities and Committees regarding electioneering communications within the meaning of G.S. § 163-278.6(6g) and (6h)?**

The answer to Question 1 is two-fold. First, if the communication is made by the referendum committee(s), it is not an electioneering communication. Second, as discussed in Question 1, the communications made by your client entities may be electioneering communications if they meet the elements of an electioneering communication as defined above and do not expressly advocate for the passage of the bond referendum.

In the event the communications made by the entities in question do not expressly advocate for the passage of the bond referendum but do meet the definition of an electioneering communication, the question remains whether a clearly identified candidate is prohibited from appearing in or being referenced by these entities' electioneering communication(s). Bear in mind the entire definition of "contribution" as set forth in G.S. § 163-278.6(6). Specifically:

"*If:*

> a. *Any individual, person, committee, association, or any other organization or group of individuals, including but not limited to, a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) makes, or contracts to make, any disbursement for any electioneering communication, as defined in this section; and*
> b. *That disbursement is coordinated with a candidate, an authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party or committee*
>
> *that disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party."*

G.S. § 163-278.6(6). The definition states that if an electioneering communication is coordinated with a candidate, the disbursement for that electioneering communication shall be treated as a *contribution* to the candidate who is "supported" by the electioneering communication.

Since an electioneering communication cannot expressly advocate for a candidate—an electioneering communication simply "refers to a clearly identified candidate"[8]—it is assumed that in this instance the term "support" refers to the candidate who was coordinating with the entity making the electioneering communication.[9] Since your letter has confirmed that the candidate will be coordinating with your client entities with respect to the electioneering communication, the disbursements for those electioneering communications would be deemed contributions to the candidate.

Note that if the entity making the electioneering communication has received donations in excess of the contribution limitations and/or from sources that are prohibited from giving to candidate committees, the contribution to the candidate is prohibited.[10]

If your client entities are making communications that expressly advocate the passage of the bond referendum and the communications are not coordinated with a candidate or an agent of a candidate but they do mention or reference a candidate, the communication would be either an

[8] § 163-278.6(8j)(a)

[9] It appears the reason the statute uses the word "support" is to address the circumstance in which the candidate is not the individual coordinating with respect to the electioneering communication. It is possible that an electioneering communication could mention the opponent rather than the candidate represented by the agent. Therefore, the recipient of the contribution could not be the candidate mentioned in the electioneering communication.

[10] G.S. § 163-278.13(e1)

> No referendum committee which received any contribution from a corporation, labor union, insurance company, business entity, or professional association may make any contribution to another referendum committee, to a candidate or to a political committee.

independent expenditure or an *in-kind contribution* to a referendum committee. As long as the communication is not coordinated with a candidate, no contribution is made to a candidate.

If your client entities are making communications that expressly advocate the passage of the bond referendum and the communications are coordinated with a candidate or agent of a candidate, the communication would be considered a "coordinated expenditure"[11] and the cost would be an in-kind contribution to the candidate.

The question is whether a candidate may coordinate with the referendum committee regarding expenditures for communications.[12] It is clear that a candidate cannot coordinate with one of these entities regarding electioneering communications. It is also clear that a referendum committee that accepts contributions from sources that are prohibited for the candidate may not make contributions to the candidate.[13] A "coordinated expenditure" would be an in-kind contribution to the candidate coordinating with the referendum committee making the expenditure. Therefore, it would be impermissible for the candidate to coordinate with the referendum committee regarding expenditures for communications.

3. **If the answer to Question 1, is no, the Communication is not an electioneering communication, or the Communications are outside sixty (60) days and issue advocacy, then:**
    a. **Has a clearly identified candidate received a contribution (something of value) within the meaning of G.S. § 163-278.6(6) from appearing in, or referenced by, an Entities or Committee Communication?**
    b. **May a clearly identified Candidate coordinate with the Entities and Committees on Communications within the meaning of G.S. § 163-278.6(6g) and (6h)?**

If the entities in question disburse funds for communications that are not electioneering communications (because they are made outside the 60 day window and they do not expressly advocate for the candidate or the passage of the bond referendum), the funds spent are not considered an *expenditure* and are therefore not a contribution to the candidate.

---

[11] G.S. § 163-278.6(6g)
The term "coordinated expenditure" means an expenditure that is made in concert or cooperation with, or at the request or suggestion of, a candidate, a candidate campaign committee as defined in G.S. 163-278.38Z(3), the agent of the candidate, or the agent of the candidate campaign committee. An expenditure for the distribution of information relating to a candidate's campaign, positions, or policies, that is obtained through publicly available resources, including a candidate campaign committee, is not a coordinated expenditure if it is not made in concert or cooperation with, or at the request or suggestion of, a candidate, the candidate campaign committee, the agent of the candidate, or the agent of the candidate campaign committee.

[12] By definition, expenditures by referendum committees cannot be classified as *electioneering communications*.

[13] *See* G.S. § 163-278.13(e1) at note 9, *supra*.

If the communications do expressly advocate for the passage of the bond referendum and they are coordinated with the candidate, they would be coordinated expenditures and therefore considered prohibited contributions to the candidate. Again, if the candidate coordinates an expenditure with the referendum committee, that coordinated expenditure constitutes a prohibited contribution to the candidate.[14]

4. **If a Committee and/or Entities solicit and accept contributions from donors while identifying a purpose of the contributions as supporting the bond referendum, including educating the public through Communications, must those donors contributing over $1,000 to the Committee and Entities be disclosed on electioneering communications reports filed with the State Board of Elections, even if the donor contributed to the Entities, which in turn contributed to the Committee?**

Only donations to your client entities for communications that are deemed electioneering communications, independent expenditures or contributions to committees are required to be disclosed on disclosure reports. However, if the donor contributed to one of these entities with the purpose that the contribution be directed to the Committee, such an act would violate N.C.G.S. § 163-278.14, which prohibits contributions being made in the name of another.[15] As noted earlier, communications made by referendum committees would not be considered electioneering communications, but any contributions made to the referendum committee must be disclosed on required disclosure reports.

If the communications were deemed electioneering communications, your client entities would be required to disclose any donor that made a donation of $1,000 (one thousand dollars) or more if the donor made the donation for the purpose of making these communications or if your client entities solicited donations for the purpose of making communications. However, if the communications in question were deemed to be independent expenditures by these entities, donations of more than $100 (one hundred dollars) would require disclosure.

Further, if the communication were coordinated with a referendum committee, the cost of the communication would be an in-kind contribution to the referendum committee; any donations given to your client entities to further the communication that exceeded $100 would require disclosure by those entities.

This opinion is based upon the information provided in your request for opinion. If any information in that letter should change, please consult with our office to ensure that this opinion is still binding.

[14] This conclusion is based on the information that the contributions to the referendum committee would likely be in excess of contribution limitations to candidate committees and from sources that cannot contribute to a candidate committee.

[15] If the donation was earmarked for the purpose of being contributed to the referendum committee, the donor would be giving in the name of the Entity.

This opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina register and the North Carolina Administrative Code. If you should have any questions, please do not hesitate to contact me or Amy Strange, Deputy Director.

Sincerely,

Kim Westbrook Strach

cc: Mollie Masich, Codifier of Rules

Amy Strange, Deputy Director-Campaign Finance and Operations

BAILEY B&D DIXON

Michael L. Weisel

mlweisel@bdixon.com

October 29, 2015

VIA HAND DELIVERY AND ELECTRONIC MAIL

Ms. Kimberly Westbrook Strach
Executive Director
State Board of Elections
P.O. Box 27255
Raleigh, North Carolina 27611-7255

RECEIVED
OCT 29 2015
STATE BOARD OF ELECTIONS

Re: Request for Written Advisory Opinion pursuant to N.C. Gen. Stat. §163-278.23 on Questions Related to the Scope of Articles 22A of Chapter 163 of the N.C. General Statutes ("G.S.")

Dear Ms. Strach,

This is a request for a formal written advisory opinion from you pursuant to G.S. §163-278.23 on questions related to the scope of Articles 22A of Chapter 163 concerning the North Carolina State Board of Election's ("Board") opinion concerning electioneering communications. All specific terms utilized in this request shall have the meaning as defined in G.S. §163-278.6. Given the urgent nature of the timing involved, we respectfully request an expedited review and advisory opinion.

Facts

We represent several nonprofit North Carolina corporations ("Entities") organized under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, respectively. We also represent referendum committee(s) ("Committee(s)") organized or in formation as defined in G.S. §163-278.6(18b).

A board of directors comprised of individual citizens governs each of the Entities and Committees.

The Entities are not owned or controlled by any candidate, authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee (hereinafter referred to as "Candidate").

However, the Committees may or may not be owned or controlled by the Candidate. In any event, the Candidate will "coordinate" with the Entities and Committees.

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During the remaining calendar year 2015 through at least 15 March 2016 (the "Relevant Time Period"), the Entities and Committees will educate the general public about a proposed "Connect NC" $2 Billion bond debt package, urging passage of the bond referendum on the 15 March 2016 North Carolina ballot, by means of broadcast, cable, internet or satellite transmission, mass mailing and/or telephone calls ("Communication(s)").

During the Relevant Time Period, the Entities and Committees will initiate and/or transmit Communications within sixty (60) days prior to 15 March 2016 (the primary election date).

The Committees and Entities plan to solicit and take unlimited amounts of contributions from the individuals, corporations (including the Entities to a Committee), labor unions, insurance companies, business entities, and/or professional associations. Expenditures for Communications, including electioneering communications, shall be made by the Committees or Entities from these solicited contributions.

Advisory Questions

1. If an Entities' or Committee Communication occurs within sixty (60) days of the 15 March 2016 primary day, is that Communication an "electioneering communication" as defined under G.S. §163-278.6?

2. If the answer to Question 1, is yes, the Communication is an electioneering communication, then:

   (a) Is a clearly identified Candidate prohibited from appearing in, or referenced by, an Entities or a Committee electioneering communication, if the Committees or Entities have accepted contributions from a corporation, labor union, insurance company, business entity, or professional association?

   (b) Has a clearly identified Candidate received a contribution (something of value) within the meaning of G.S. §163-278.6(6) from appearing in, or referenced by, an Entities or Committee electioneering communication?

   (c) May a clearly identified Candidate coordinate with the Entities and Committees regarding electioneering communications within the meaning of G.S. §163-278.6(6g) and (6h)?

3. If the answer to Question 1, is no, the Communication is not an electioneering communication, or the Communications are outside sixty (60) days and issue advocacy, then:

(a) Has a clearly identified Candidate received a contribution (something of value) within the meaning of G.S. §163-278.6(6) from appearing in, or referenced by, an Entities or Committee Communication?

(b) May a clearly identified Candidate coordinate with the Entities and Committees on Communications within the meaning of G.S. §163-278.6(6g) and (6h)?

4. If a Committee and/or Entities solicit and accept contributions from donors while identifying a purpose of the contributions as supporting the bond referendum, including educating the public through Communications, must those donors contributing over $1,000 to the Committee and Entities be disclosed on electioneering communications reports filed with the State Board of Elections, even if the donor contributed to the Entities, which in turn contributed to a Committee?

Analysis and Applicable Statues

G.S. §163-278.6(6) – "The terms "contribute" or "contribution" mean any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, made to, or in coordination with, a candidate to support or oppose the nomination or election of one or more clearly identified candidates, to a political committee, to a political party, or to a referendum committee, whether or not made in an election year, and any contract, agreement, or other obligation to make a contribution.

G.S. §163-278.6(6g) defines "coordinated expenditure" as an expenditure that is made in concert or cooperation with, or at the request or suggestion of, a candidate, a candidate campaign committee as defined in G.S. 163-278.38Z(3), the agent of the candidate, or the agent of the candidate campaign committee.

G.S. §163-278.6(6h) defines "coordination," as "in concert or cooperation with, or at the request or suggestion of."

G.S. §163-278.6 (8j) – The term "electioneering communication" means any broadcast, cable, or satellite communication, or mass mailing, or telephone bank that has all the following characteristics:

a. Refers to a clearly identified candidate for elected office.

b. In the case of the general election in November of the even-numbered year is aired or transmitted after September 7 of that year, and in the case of any other election is aired or transmitted within 60 days of the time set for absentee voting to begin pursuant to G.S. 163-227.2 in an election for that office.

c. May be received by either:

1. 50,000 or more individuals in the State in an election for statewide office or 7,500 or more individuals in any other election if in the form of broadcast, cable, or satellite communication.
2. 20,000 or more households, cumulative per election, in a statewide election or 2,500 households, cumulative per election, in any other election if in the form of mass mailing or telephone bank.

G.S. §163-278.6(9) defines "expenditure." By definition, an "expenditure" is anything of value given "to support or oppose the nomination, election, or passage of one or more clearly identified candidates, or ballot measure."

§ 163-278.13. Limitation on contributions.

...

(e1) No referendum committee which received any contribution from a corporation, labor union, insurance company, business entity, or professional association may make any contribution to another referendum committee, to a candidate or to a political committee.

§ 163-278.12C. Special reporting of electioneering communications.

(a) Every individual or person that incurs an expense for the direct costs of producing or airing electioneering communications aggregating in excess of five thousand dollars ($5,000) shall file the following reports with the appropriate board of elections in the manner prescribed by the State Board of Elections:

...

(5) The names and addresses of all entities that donated, to further an electioneering communication or electioneering communications, funds or anything of value whatsoever in an aggregate amount of more than one thousand dollars ($1,000) during the reporting period. If the donor is an individual, the statement shall also contain the principal occupation of the donor. The "principal occupation of the donor" shall mean the same as the "principal occupation of the contributor" in G.S. 163-278.11.

...

(c) For the purposes of subdivision (a)(5) of this section, a donation to the person or entity making the electioneering communication is deemed to have been donated to further the electioneering communication if any of subdivisions (1) through (4) of this subsection apply. For purposes of this subsection, the "filer" is the person or entity making the electioneering communication and responsible for filing the report, or an agent of that person or entity. For purposes of this subsection, the "donor" is the person or entity donating to the filer the funds or other thing of value, or an agent of that person or entity.

(1) The donor designates, requests, or suggests that the donation be used for an electioneering communication or electioneering communications, and the filer agrees to use the donation for that purpose.

(2) The filer expressly solicited the donor for a donation for making or paying for an electioneering communication.

(3) The donor and the filer engaged in substantial written or oral discussion regarding the donor's making, donating, or paying for an electioneering communication.

(4) The donor or the filer knew or had reason to know of the filer's intent to make electioneering communication with the donation.

I am available to discuss this request at your convenience.

As always, thank you for your consideration.

Very truly yours,

BAILEY & DIXON, LLP

Michael L. Weisel

Michael L. Weisel

MLW/lm

Codifier's Note: The italicized information below was inadvertently missing from the notice published in the NC Register, Volume 30, Issue 12, published on December 15, 2015, page 1279. OAH apologizes for the error.

TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02B - SURFACE WATER AND WETLAND STANDARDS

SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 02B .0227.

Comments may be submitted to: *Elizabeth Kountis, DEQ/DWR Planning Section, 1611 Mail Service Center, Raleigh, NC 27699-1611, phone (919) 807-6418, fax (919) 807-6497, email elizabeth.kountis@ncdenr.gov*

Comment period ends: *February 15, 2016*

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.*

NOTICE
CHANGE IN PUBLIC HEARING

The Criminal Justice Education and Training Standards Commission changed the location and date for the public hearing set for February 11, 2016. The new date and time is February 10 at 10:30 a.m., and the new location is:

Wake Technical Community College
Public Safety Training Center
321 Chapanoke Road
Raleigh, NC 27603

The following rules are set for public hearing on that date:
12 NCAC 09B .0303 – Published in Vol. 30, Issue 8, Pages 894-896
12 NCAC 09F .0106 - Published in Vol. 30, Issue 7, Pages 727-728

NARROW THERAPEUTIC INDEX DRUGS DESIGNATED BY THE NORTH CAROLINA SECRETARY OF HUMAN RESOURCES

Pursuant to N.C.G.S. §90-85.27(4a), this is a revised publication from the North Carolina Board of Pharmacy of narrow therapeutic index drugs designated by the North Carolina Secretary of Human Resources upon the advice of the State Health Director, North Carolina Board of Pharmacy, and North Carolina Medical Board.

Carbamazepine: all oral dosage forms

Cyclosporine: all oral dosage forms

Digoxin: all oral dosage forms

Ethosuximide

Levothyroxine sodium tablets

Lithium (including all salts): all oral dosage forms

Phenytoin (including all salts): all oral dosage forms

Procainamide

Theophylline (including all salts): all oral dosage forms

Warfarin sodium tablets

Tacrolimus: all oral dosage forms

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 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 18 - BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the State Board of Examiners of Electrical Contractors intends to amend the rules cited as 21 NCAC 18B .0209, .0211, .0406, and .0502.*

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

Proposed Effective Date: *May 1, 2016*

Public Hearing:
Date: *January 22, 2016*
Time: *8:30 a.m.*
Location: *State Board of Examiners of Electrical Contractors, 3101 Industrial Drive, Suite 206, Raleigh, NC*

Reason for Proposed Action: *The Board proposes to refund the examination fee if the applicant does not qualify to take the exam, but retain the application fee. The Board also proposes to reduce the waiting period for persons to retake a failed examination. On renewal of license after a period of lapse, the Board proposes to reduce the amount of required experience and eliminate and education component separate from the usual continuing education requirements. Finally the Board seeks to clarify the process by which qualified individuals may move from one firm to another. The purpose of these changes is to reduce impediments to licenses due to a growing shortage of electrical contractors, particularly younger people.*

Comments may be submitted to: *Tim Norman, 3101 Industrial Drive, Suite 206, Raleigh, NC 27619, phone (919) 733-9042, fax (919) 733-6105*

Comment period ends: *March 4, 2016 at 5:00 p.m.*

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

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

SUBCHAPTER 18B - BOARD'S RULES FOR THE IMPLEMENTATION OF THE ELECTRICAL CONTRACTING LICENSING ACT

SECTION .0200 - EXAMINATIONS

21 NCAC 18B .0209 FEES

(a) The application and examination fee for qualifying examinations is ninety dollars ($90.00) for all classifications.

(b) The fee for review of a failed examination is twenty-five dollars ($25.00). All reviews are supervised by the Board or staff.

(c) The examination fees for examinations in all classifications and the fees for examination reviews may be in the form of cash, check, money order, Visa or Mastercard made payable to the Board and must accompany the respective applications when filed with the Board.

(d) Examination fees received with applications filed for qualifying examinations shall be retained by the Board unless:

(1) an application is not filed as prescribed in Rule .0210 of this Section, in which case the examination fee of sixty dollars ($60.00) shall be returned and application shall be returned; or

(2) the applicant does not take the examination during the period for which application was made, files a written request for a refund, setting out extenuating circumstance, and the Board finds extenuating circumstances.

(e) Examination review fees are non-refundable unless the applicant does not take the review, files a written request for a refund, setting out extenuating circumstance, and the Board finds extenuating circumstances.

(f) Any fee retained by the Board shall not be creditable toward any future examination fee or examination review.

(g) Extenuating circumstances for the purposes of Paragraphs (d)(2) and (e) of this Rule are the applicant's illness, bodily injury

or death, or death of the applicant's spouse, child, parent or sibling, or a breakdown of the applicant's transportation to the designated site of the examination or examination review.

Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44.

21 NCAC 18B .0211 WAITING PERIOD BETWEEN EXAMINATIONS

(a) A person who fails a qualifying examination must wait three months from the date of the failed examination before being eligible to take another examination in the same classification. ~~The waiting period depends on the score on the failed examination, as follows:~~

~~Failed Examination Grade~~	~~Waiting Period~~
~~74-65~~	~~3 months~~
~~64 and below~~	~~6 months~~

~~(b) A person who fails an examination in the same license classification three times must satisfactorily complete a minimum of 16 hours classroom education on the electrical code provided by a board approved continuing education sponsor before retaking the examination.~~

~~(c)~~(b) A person shall be considered a new applicant each time he applies to take an examination and must file an application on the standard application form and pay the required application and examination fee.

Authority G.S. 87-42; 87-43.3; 87-43.4.

SECTION .0400 - LICENSING REQUIREMENTS

21 NCAC 18B .0406 RENEWAL AFTER EXPIRATION OF ANNUAL LICENSE

(a) Subject to Rule .0906 of this Subchapter, any licensee whose license has expired solely because of failure to apply for renewal may apply and have the license renewed without further examination, and in compliance with the provisions contained in G.S. 87-44, if the applicant makes application within a period of 12 months immediately following the date the license expired.

(b) If the renewal application is filed more ~~later~~ than 12 months immediately following the date the license expired, the applicant may have the license renewed if, during the 12 month period immediately preceding the date the application is filed with the Board, the applicant's listed qualified individual has obtained ~~engaged for~~ at least 500 ~~1,000~~ hours ~~in an occupation of~~ primary experience as defined in Rule .0202 of this Subchapter within the most recent 12 months, is current on the fee requirements of Rule .0404 of this Section, pays the late fee of Rule .0405 of this Section, and meets the continuing education requirements of Rule .1101 of this Subchapter.~~or completed 16 contact hours of approved continuing education .~~

(c) An applicant failing to meet the requirements of Paragraphs (a) or (b) of this Rule may obtain a new license in accordance with Section .0200 of this Subchapter and Rule .0401 of this Section.

(d) The provisions of Section .0600 of this Subchapter apply to applicants whose last license expired on or before June 30, 1970.

Authority G.S. 87-44; 87-44.1.

SECTION .0500 - LICENSING OPTIONS

21 NCAC 18B .0502 LISTED QUALIFIED INDIVIDUAL CHANGING FROM ONE LICENSE TO ANOTHER

A listed qualified individual indicated on a current active license may have his name removed from that license and added to another current active license by submitting to the Board:

(1) his written request to remove his name from the license on which he is currently listed;
(2) the license certificate on which he is currently listed;
(3) a written request from the licensee on whose license the listed qualified individual is to be indicated, co-signed by the listed qualified individual being added; ~~and~~
(4) the current license certificate on which the listed qualified individual is to be ~~indicated.~~ indicated; and payment of a processing fee of twenty-five dollars ($25.00).

Authority G.S. 87-42; 87-43.

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CHAPTER 25 – INTERPRETER AND TRANSLITERATOR LICENSING BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Interpreter and Transliterator Licensing Board intends to amend the rule cited as 21 NCAC 25 .0205.*

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

Proposed Effective Date: *July 1, 2016*

Public Hearing:
Date: *February 5, 2016*
Time: *9:00 a.m.*
Location: *Paragon Bank, 3535 Glenwood Avenue, Raleigh, NC 27612*

Reason for Proposed Action: *According to N.C. Gen. Stat. 90D-7 (requirements for Licensure), which is a governing statute of the North Carolina Interpreter and Transliterator Licensing Board (NCITLB), a full licensee (as opposed to a provisional licensee) must be "nationally certified by the Registry of Interpreters for the Deaf, Inc., (RID). "To obtain certification, the provisional licensee must pass an examination provided by RID. However, RID has recently placed a moratorium on providing such examinations, so provisional licensees are unable to obtain certification and, thus, full licensure. The proposed amended rule allows a provisional licensee time to remain provisionally licensed until the moratorium is lifted and certification can be obtained through the examination. It is proposed as a permanent rule to provide for possible future additional moratoriums. Further, the NCITLB is proposing a change to allow an extension where the birth or adoption of a child has delayed the applicant's progress towards full licensure.*

Comments may be submitted to: *Caitlin Schwab, P.O. Box 20963, Raleigh, NC 27619, phone (919) 779-5709, fax (919) 779-5642, email ncitlb@caphill.com*

Comment period ends: *March 4, 2016*

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 .0200 – LICENSING

21 NCAC 25 .0205 RENEWAL OF A PROVISIONAL LICENSE

(a) An application for the renewal of a provisional license is not timely filed unless it is received by the Board on or before the expiration date of the license being renewed.

(b) If a licensee does not timely file an application for the renewal of a provisional license, the licensee shall not practice or offer to practice as an interpreter or transliterator for a fee or other consideration, represent himself or herself as a licensed interpreter or transliterator, or use the title "Licensed Interpreter for the Deaf", "Licensed Transliterator for the Deaf", or any other title or abbreviation to indicate that the person is a licensed interpreter or transliterator until he or she receives either a renewed provisional license, as described in Paragraph (c) of this Rule, or an initial full license.

(c) An application to renew an expired provisional license shall be approved by the Board if it is received by the Board within one year after the provisional license expired and if the application demonstrates that the applicant continues to qualify for a provisional license. A provisional license cannot be renewed after it has expired a second time.

(d) If the license being renewed has been suspended by the Board, any renewal license issued to the applicant shall be suspended as well until the term of the suspension has expired.

(e) The Board shall renew a provisional license as many as three times upon receipt of timely applications that demonstrate that the applicant continues to qualify for a provisional license. The Board may, in its discretion, ~~renew~~ extend a provisional license ~~a fourth or fifth time~~ on an annual basis after the third renewal if the applicant timely files an application prior to the expiration of the third renewal, and on an annual basis thereafter if further extension is sought by the applicant, that demonstrates to the Board's satisfaction that the applicant's progress toward full licensure was delayed by:

(1) a life-altering event, such as the birth or adoption of a child to the applicant or the applicant's spouse or an acute or chronic illness suffered by either the applicant or a member of the applicant's immediate family;
(2) active military service; ~~or~~
(3) a catastrophic natural event, such as a flood, hurricane, or ~~tornado.~~ tornado; or
(4) the certifying organization identified in G.S. 90D-7 having imposed a moratorium on testing or certification that has reasonably prevented the applicant from sitting for the qualifying examination and obtaining the results thereof prior to the expiration of the provisional license or any annual extension thereof. Provided, however, that a provisional license that has been extended because of a moratorium may be extended one additional time following the end of the moratorium to allow sufficient time for the applicant to take the qualifying examination and to receive the results thereof, but it shall not be extended thereafter on the basis of a moratorium.

~~(f) The Board shall not for any reason renew a provisional license for a sixth time.~~

~~(g)~~(f) The Board shall not issue an initial provisional license to anyone who has previously held a provisional license.

~~(h)~~(g) The Board shall extend the deadline for filing a license renewal application for any individual who currently holds a provisional license and is in good standing with the Board if the individual is serving in the armed forces of the United States and if G.S. 105-249.2 grants the individual an extension of time to file a tax return. The extension shall be in effect for any period that is disregarded under Section 7508 of the Internal Revenue Code in determining the taxpayer's liability for a federal tax.

Authority G.S. 90D-6; 90D-8; 90D-11; 90D-12; 93B-15.

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CHAPTER 33 – MIDWIFERY JOINT COMMITTEE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Midwifery Joint Committee intends to adopt the rule cited as 21 NCAC 33 .0110.*

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

Proposed Effective Date: *May 1, 2016*

Public Hearing:
Date: *February 26, 2016*
Time: *9:00 a.m.*
Location: *North Carolina Board of Nursing, 4516 Lake Boone Trail, Raleigh, NC 27607*

Reason for Proposed Action: *In accordance with Session Law 2013-152 Section 3, in order to receive reports from the Department of Health and Human Services (DHHS) of data from the Controlled Substance Reporting System, the Committee is required to adopt rules setting criteria for DHHS to provide reports. The report encompasses inappropriate or excessive prescribing of opioids by licensees as part of a concerted statewide effort to stem prescription drug abuse, addiction and deaths due to overdose.*

Comments may be submitted to: *Chandra Graves, NC Midwifery Joint Committee, P.O. Box 2129, Raleigh, NC 27602-2129, phone (919) 782-3211 ext. 232, fax (919) 781-9461, email chandra@ncbon.com*

Comment period ends: *March 4, 2016*

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 – MIDWIFERY JOINT COMMITTE

21 NCAC 33 .0110 REPORTING CRITERIA

(a) The Department of Health and Human Services ("Department") may report to the North Carolina Midwifery Joint Committee ("MJC") information regarding the prescribing practices of those Certified Nurse Midwives ("prescribers") whose prescribing:

(1) falls within the top one percent of those prescribing 100 milligrams of morphine equivalents ("MME") per patient per day; or

(2) falls within the top one percent of those prescribing 100 MME's per patient per day in combination with any benzodiazepine and who are within the top one percent of all controlled substance prescibers by volume.

(b) In addition, the Department may report to the MJC information regarding prescribers who have had two or more patient deaths in the preceding 12 months due to opioid poisoning.

(c) The Department may submit these reports to the MJC upon request and may include the information described in G.S. 90-113.73(b).

(d) The reports and communications between the Department and the MJC shall remain confidential pursuant to G.S. 90-113.74.

Authority G.S. 90-113.74.

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on November 19, 2015.

		REGISTER CITATION TO THE NOTICE OF TEXT
CHILD CARE COMMISSION		
Contested Cases: Record	10A NCAC 09 .2006	n/a G.S. 150B-21.5(b)
Contested Cases: Exceptions to Recommended Decision	10A NCAC 09 .2007	n/a G.S. 150B-21.5(b)
ONSITE WASTEWATER CONTRACTORS AND INSPECTORS CERTIFICATION BOARD		
Definitions	21 NCAC 39 .0101*	30:02 NCR
Schedule of Certification Fees	21 NCAC 39 .0301*	30:02 NCR
Onsite Wastewater Contractor or Inspector Examinations	21 NCAC 39 .0401*	30:02 NCR
Requirements	21 NCAC 39 .0601*	30:02 NCR
Approval of Continuing Education Courses	21 NCAC 39 .0602*	30:02 NCR
Revocation, or Suspension of Certification	21 NCAC 39 .0701*	30:02 NCR
Code of Ethics	21 NCAC 39 .0801*	30:02 NCR
General Requirements	21 NCAC 39 .1002*	30:02 NCR
General Exclusions of an Inspection	21 NCAC 39 .1004*	30:02 NCR
Minimum On-Site Wastewater System Inspection	21 NCAC 39 .1006*	30:02 NCR
PHARMACY, BOARD OF		
Remote Medication Order Processing Services	21 NCAC 46 .1417*	30:02 NCR
VETERINARY MEDICAL BOARD		
Fees	21 NCAC 66 .0108	30:03 NCR

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 09 .2006 CONTESTED CASES: RECORD
10A NCAC 09 .2007 CONTESTED CASES: EXCEPTIONS TO RECOMMENDED DECISION

History Note: Authority G.S. 143B-10; 143B-10(j)(3); 150B-11; 150B-23(e); 150B-29(b); 150B-36; 150B-37;
Eff. November 1, 1989;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015;
Repealed Eff. December 1, 2015.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

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

21 NCAC 39 .0101 DEFINITIONS

In addition to the terms defined in Article 5 of Chapter 90A of the General Statutes, the following definitions apply to the rules in this Chapter:

(1) "Ancillary" means an on-site wastewater system that is included in a primary construction project.

(2) "Building being constructed" means primary construction of a site-built single family residence.

(3) "College course" means a semester unit or quarter unit based instruction given at a college or university that is relevant to on-site wastewater contractor or inspector activities,

and is pre-approved by the board as set out in Rule .0603 of this Chapter.

(4) "Course or Activity" means any course or activity with a clear purpose and objective that will maintain, improve, or expand skills and knowledge relevant to the practice of on-site wastewater contractor or inspector activities and pre-approved by the board.

(5) "Personally supervise" means to direct and control all on-site wastewater contractor or inspector activities during the time those activities are being conducted.

(6) "Professional development hour" or "PDH" means an hour of instruction or presentation and is the basic unit of credit for all courses or activities related to satisfying continuing education requirements.

(7) "Repair" means construction activity or alteration to an existing on-site wastewater system that is necessary to comply with a Construction Authorization for a repair permit issued by the Local Health Department.

(8) "Wastewater Treatment Facility" as defined in G.S. 90A-71(8).

History Note: Authority G.S. 90A-71; 90A-72; 90A-74;
Eff. February 1, 2011;
Amended Eff. January 1, 2016; January 1, 2013.

21 NCAC 39 .0301 SCHEDULE OF CERTIFICATION FEES

(a) Application fees are:

Grade Level	Initial Fee	Renewal Fee
I	$150.00	$75.00
II	$200.00	$75.00
III	$250.00	$75.00
IV	$300.00	$75.00
Inspector Certificate	$200.00	$75.00
Combination Contractor Certification Grade Level and Inspector Certificate	Sum of individual fees	$125.00

(b) Application fees shall not be pro-rated.

(c) The fee for re-instatement of a revoked or suspended certification is five hundred dollars ($500.00).

(d) The fee for certificate replacement or duplication is twenty-five dollars ($25.00).

(e) The fee for late renewal is twenty-five dollars ($25.00). This fee is charged if the renewal request is received after December 31.

(f) The fee for each returned check is twenty-five dollars ($25.00).

(g) All fees are non-refundable.

History Note: Authority G.S. 25-3-506; 90A-72(a); 90A-74; 90A-75; 90A-77(f); 90A-78(b);
Eff. February 1, 2011;
Amended Eff. January 1, 2016.

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

(a) On-site wastewater contractor or inspector examinations shall be comprehensive examinations that are standardized statewide.

(b) The exam questions shall be based on the grade levels.

(c) Combination certification shall require taking and passing the individual component exams.

(d) A grade on the examination of 70 percent or more shall be passing. Results of the examination shall be reported as either passing or failing.

History Note: Authority G.S. 90A-72; 90A-74; 90A-77;
Eff. February 1, 2011;
Amended Eff. January 1, 2016.

21 NCAC 39 .0601 REQUIREMENTS

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

Level	Annual PDH Units Required
I	3
II	3
III	6
IV	6
Inspector	6
Combination Contractor Grade Level and Inspector	6

(b) The certified on-site wastewater contractor or inspector shall select courses and activities that have been approved as set out in 21 NCAC 39 .0602.

(c) Professional Development Hours (PDH) shall be accepted by the Board for approved courses pursuant to 21 NCAC 39 .0603. Hours for all other courses shall be submitted by providers to the Board for approval pursuant to 21 NCAC 39 .0602. If not approved, no PDH shall be granted for the course.

(d) The class provider or authorized representative of the class provider shall certify that each class attendee was present for at least 85 percent of the class. Any attendee present for less time shall not receive credit for the class.

History Note: Authority G.S. 90A-72; 90A-74; 90A-77; 90A-78; 90A-79;
Eff. February 1, 2011;
Amended Eff. January 1, 2016; January 1, 2013.

21 NCAC 39 .0602 APPROVAL OF CONTINUING EDUCATION COURSES

(a) All continuing education courses shall be approved by the Board before PDH can be granted.

(b) All continuing education courses shall be approved on an annual basis.
(c) The Board shall approve courses that instruct on on-site wastewater contractor or inspector activities and the use of on-site wastewater contractor or inspector equipment, products, and materials. The Board shall determine that courses and activities contain a clear purpose and objective and result in the maintenance, improvement, or expansion of skills and knowledge related to the practice of on-site wastewater contractor or inspector activities. Providers may request approval of courses or activities from the Board by obtaining and completing a form available on the Board's website (www.ncowcicb.info) or by a written request to the Board that provides the following information:

(1) Course content;
(2) Course schedule;
(3) Level of instruction provided (Level 1, 2, 3, 4, Inspector, or level 4/Inspector); Combination Contractor Grade Level and Inspector);
(4) Qualifications of instructors (including both education and experience); and
(5) Materials provided, field experiences, and other activities available in connection with the course(s).

History Note: Authority G.S. 90A-72; 90A-74; 90A-77; 90A-78; 90A-79;
Eff. February 1, 2011;
Amended Eff. January 1, 2016.

21 NCAC 39 .0701 REVOCATION, OR SUSPENSION OF CERTIFICATION

(a) The Board may revoke or suspend the certification of an on-site wastewater contractor or inspector in accordance with the provisions of G.S. 90A-80, 90A-81 and Article 3A of Chapter of 150B of the NC General Statutes. For holders of the Combination Contractor Grade Level and Inspector certifications, the Board may revoke or suspend either or both certifications.
(b) A certificate holder may relinquish a certificate by submission to the Board of the original certificate and a notarized statement of relinquishment.
(c) The Board may restrict the certificate of an on-site wastewater contractor or inspector. Written notice of the restriction shall be delivered in accordance with the provisions of service in G.S. 150B-42. A copy of the letter shall be kept in the on-site wastewater contractor or inspector's file. The on-site wastewater contractor or inspector shall be given the opportunity to put a letter of rebuttal into the file. The letter shall be received by the Board within 30 days of receipt of the written notice.

History Note: Authority G.S. 90A-72; 90A-74; 90A-80; 90A-81;
Eff. February 1, 2011;
Amended Eff. January 1, 2016.

21 NCAC 39 .0801 CODE OF ETHICS

(a) Contractors and inspectors shall at all times recognize their primary obligation is to protect the public in the performance of their professional duties and shall conduct the practice of those duties in a manner that protects the public health, safety and welfare.
(b) Opinions expressed by contractors and inspectors in the discharge of their duties shall only be based on their education and experience.
(c) Neither a contractor nor an inspector shall disclose any information about the results of an inspection without the approval of the client for whom the inspection was performed, or the client's designated representative, except as required by law.
(d) No contractor or inspector shall accept compensation or any other consideration from more than one interested party for the same service without the consent of all interested parties.
(e) No contractor or inspector shall accept or offer commissions or allowances, directly or indirectly, from or to other parties dealing with the client in connection with work for which the licensee is responsible.
(f) No contractor or inspector shall provide an appraisal nor express an opinion of the market value of the inspected property during an inspection or in the inspection report.
(g) Before the execution of a contract to perform an on-site wastewater system inspection, an inspector shall disclose to the client any interest the inspector has in a business that may affect the client. No licensee shall allow his or her interest in any business to affect the quality or results of the inspection work that the inspector may be called upon to perform.
(h) Before the execution of a contract to perform an on-site wastewater system installation, a contractor shall disclose to the client any interest a contractor has in a business that may affect the client. No licensee shall allow his or her interest in any business to affect the quality or results of the installation work that the contractor may be called upon to perform.
(i) Contractors shall not knowingly or willfully install a non-permitted system.
(j) Contractors shall not knowingly or willfully install a system or any part of a system other than what is specified in the permit by the local health department.
(k) Contractors and inspectors shall not engage in false or misleading advertising, documentation, and reporting or otherwise misrepresent any matters to the public.
(l) Contractors and inspectors shall discharge their duties in accordance with Article 5 of Chapter 90A of the North Carolina General Statutes and the rules of the Board.
(m) No inspector shall subcontract with another inspector for an on-site wastewater system inspection without the knowledge and signed consent of the client.
(n) The contractor of record shall be the responsible party for the on-site wastewater system installation or repair.

History Note: Authority G.S. 90A-72; 90A-74;
Eff. November 1, 2011;
Amended Eff. January 1, 2016.

21 NCAC 39 .1002 GENERAL REQUIREMENTS

Inspectors shall:

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

(a) States that the on-site wastewater system inspection is conducted in accordance with Rules .1004, .1005, and .1006 of this Section; and
(b) Describes what services shall be provided and their cost.

(2) Obtain written permission from the owner or owner's representative to perform the inspection.

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

(4) Submit a written report to the client or client representative within 10 business days of the inspection that:
(a) Describes those systems and components required to be described in Rules .1005 through .1006 of this Section;
(b) States which systems and components designated for inspection in this Section have been inspected, and state any systems or components designated for inspection that were not inspected, and the reason for not inspecting. Failure to locate the system or components for inspection or "could not locate" shall not be the same as "not visible." If the system or component is not located, the written report shall state the failure to locate the system or components for inspection or "could not locate;"
(c) States any systems or components inspected that do not function as intended or harm the wastewater treatment system;
(d) States whether the condition reported requires repair or subsequent observation, or warrants further evaluation by the local health department. The statements shall describe the component or system and how the condition is defective, explain the consequences of the condition, and refer the recipient to the local health department or a certified on-site wastewater contractor; and
(e) States the name, license number, and signature of the certified inspector.

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

History Note: Authority G.S. 90A-71; 90A-72; 90A-74;
Eff. October 1, 2011;
Amended Eff. January 1, 2016; April 1, 2014.

21 NCAC 39 .1004 GENERAL EXCLUSIONS

(a) Inspectors shall not be required to report on:
(1) Life expectancy of any component or system;
(2) The causes of the need for a repair;
(3) The methods, materials, and costs of corrections;
(4) The suitability of the property for any specialized use;
(5) The market value of the property or its marketability;
(6) The advisability or inadvisability of purchase of the property; or
(7) Normal wear and tear to the system.

(b) Inspectors shall not be required to:
(1) Identify property lines;
(2) Offer warranties or guarantees of any kind;
(3) Calculate the strength, adequacy, or efficiency of any system or component;
(4) Operate any system or component that does not respond to normal operating controls;
(5) Move excessive vegetation, structures, personal items, panels, furniture, equipment, snow, ice, or debris that obstruct access to or visibility of the system and any related components;
(6) Determine the presence or absence of any suspected adverse environmental condition or hazardous substance, including toxins, carcinogens, noise, and contaminants in the building or in soil, water, and air;
(7) Determine the effectiveness of any system installed to control or remove suspected hazardous substances;
(8) Predict future condition, including failure of components;
(9) Project operating costs of components;
(10) Evaluate acoustical characteristics of any system or component; or
(11) Inspect equipment or accessories that are not listed as components to be inspected in this Section.

(c) Inspectors and Contractors shall not:
(1) Offer or perform any act or service contrary to Article 5 of G.S. 90A or the rules of this Chapter; or
(2) Offer or perform engineering, architectural, plumbing, electrical, pesticide or any other job function requiring an occupational license in the jurisdiction where the inspection, installation, or repair is taking place, unless the on-site wastewater system inspector or contractor holds a valid occupational license in that field, in which case the inspector or contractor shall inform the client that the inspector or contractor is so licensed.

History Note: Authority G.S. 90A-72; 90A-74;
Eff. October 1, 2011;
Amended Eff. January 1, 2016.

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

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

(1) Advertised number of bedrooms as stated in the realtor Multiple Listing Service information or by a sworn statement of owner or owner's representative; and

(2) Designed system size (gallons per day or number of bedrooms) as stated in available local health department information, such as the current operation permit or the current repair permit.

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

(1) Requirement for a certified subsurface water pollution control system operator pursuant to G.S. 90A-44, current certified operator's name, and most recent performance, operation and maintenance reports (if applicable and available);

(2) Type of water supply, such as well, spring, public water, or community water;

(3) Location of septic tank and septic tank details:

(A) Distance from house or other structure;

(B) Distance from well, if applicable;

(C) Distance from water line, if applicable and readily visible;

(D) Distance from property line, if said property lines are known;

(E) Distance from finished grade to top of tank or access riser;

(F) Presence and type of access risers;

(G) Condition of tank lids;

(H) Condition of tank baffle wall;

(I) Water level in tank relative to tank outlet;

(J) Condition of outlet tee;

(K) Presence and condition of outlet filter, if applicable;

(L) Presence and extent of roots in the tank;

(M) Evidence of tank leakage;

(N) Evidence of inflow non-permitted connections, such as from downspouts or sump pumps;

(O) Connection present from house to tank;

(P) Connection present from tank to next component;

(Q) Date tank was last pumped, if known; and

(R) Percentage of solids (sludge and scum) in tank;

(4) Location of pump tank and pump tank details:

(A) Distance from house or other structure;

(B) Distance from well or spring, if applicable;

(C) Distance from water line, if applicable;

(D) Distance from property line, if said property lines are known;

(E) Distance from finished grade to top of tank or access riser;

(F) Distance from septic tank;

(G) Presence and type of access risers;

(H) Condition of tank lids;

(I) Location of control panel;

(J) Condition of control panel;

(K) Audible and visible alarms (as applicable) work;

(L) Pump turns on, and effluent is delivered to next component; and

(M) Lack of electricity at time of inspection prevented complete evaluation;

(5) Location of dispersal field and dispersal field details:

(A) Type of dispersal field;

(B) Distance from property line, if said property lines are known;

(C) Distance from septic tank and also pump tank if a pump tank exists;

(D) Number of lines;

(E) Length of lines;

(F) Evidence of past or current surfacing at time of inspection;

(G) Evidence of traffic over the dispersal field;

(H) Vegetation, grading, and drainage with respect only to their effect on the condition of the system or system components; and

(I) Confirmation that system effluent is reaching the drainfield; and

(6) Conditions that prevented or hindered the inspection or determination of Subparagraph (b)(1) through (b)(5) of this Rule.

(c) If a client declines to allow a tank to be pumped, the inspection form shall contain the statement:

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

(d) The inspector shall not:

(1) Insert any tool, probe, or testing device inside pump system control panels; or

(2) Dismantle any electrical device or control other than to remove the covers of the main and auxiliary control panels.

History Note: *Authority G.S. 90A-72; 90A-74;*

Eff. October 1, 2011;
Amended Eff. January 1, 2016; April 1, 2014.

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CHAPTER 46 – BOARD OF PHARMACY

21 NCAC 46 .1417 REMOTE MEDICATION ORDER PROCESSING SERVICES

(a) Purpose. The purpose of this Rule is to set out requirements under which health care facility pharmacies may contract for the provision of remote medication order processing services.

(b) Definitions of terms in this Rule:

(1) "Remote medication order processing services" consists of the following:
  (A) receiving, interpreting, or clarifying medication orders;
  (B) entering data and transferring medication order information;
  (C) performing drug regimen review;
  (D) interpreting clinical data;
  (E) performing therapeutic interventions; and
  (F) providing drug information concerning medication orders or drugs.

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

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

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

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

(e) Access.

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

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

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

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

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

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

(1) outline the responsibilities of each of the pharmacies;

(2) include a list of the name, address, telephone numbers, and all permit numbers of the pharmacies involved in remote order processing; and

(3) include policies and procedures for:
  (A) protecting the confidentiality and integrity of patient information;
  (B) maintaining records to identify the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist who performed any processing;
  (C) complying with federal and state laws and regulations;

(D) operating a quality improvement program for pharmacy services designed to objectively and systematically monitor and evaluate the quality and appropriateness of patient care, pursue opportunities to improve patient care, and resolve identified problems;

(E) annually reviewing the written policies and procedures and documenting such review; and

(F) annually reviewing the competencies of pharmacists providing the remote order review service.

(j) Nothing in this Rule shall be construed to relieve a health care facility pharmacy of the need to provide on-site pharmacy services required for licensure as specified in the Pharmacy Practice Act and rules promulgated thereunder.

History Note: Authority G.S. 90-85.6; 90-85.21; 90-85.21A; 90-85.26; 90-85.32; 90-85.34;
Eff. February 1, 2006;
Amended Eff. December 1, 2015; March 1, 2013.

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CHAPTER 66 – VETERINARY MEDICAL BOARD

21 NCAC 66 .0108 FEES

The following fees established by the Board shall be paid in advance to the Executive Director of the Board:

(1) Veterinary License
  (a) Issuance or Renewal $150.00
  (b) North Carolina License Examination $250.00
  (c) Late Renewal Fee $50.00
  (d) Reinstatement $100.00
(2) Veterinary Technician Registration
  (a) Issuance or Renewal $50.00
  (b) North Carolina Veterinary Technician Examination $50.00
  (c) Late Renewal Fee $50.00
  (d) Reinstatement $100.00
(3) Professional Corporation Certificate of Registration
  (a) Issuance or Renewal $160.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(4) Limited Veterinary License
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(5) Veterinary Faculty Certificate
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(6) Zoo Veterinary Certificate
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(7) Temporary Permit: Issuance $150.00
(8) Veterinary Student Intern Registration: Issuance $25.00
(9) Veterinary Student Preceptee Registration: Issuance $25.00
(10) Veterinary Practice Facility Inspection $125.00
(11) Copies of Board publications, rosters, or other materials available for distribution from the Board shall be free or at a minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

History Note: Authority 90-185(6); 90-186(6); 90-187(b); 90-187.5; 132-6.2;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. January 1, 2016; January 1, 2015; May 1, 1996; May 1, 1989.

This Section contains information for the meeting of the Rules Review Commission January 21, 2016 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate	**Appointed by House**
Jeff Hyde (1st Vice Chair)	Garth Dunklin (Chair)
Robert A. Bryan, Jr.	Stephanie Simpson (2nd Vice Chair)
Margaret Currin	Anna Baird Choi
Jay Hemphill	Jeanette Doran
Jeffrey A. Poley	Danny Earl Britt, Jr.

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

January 21, 2016	February 18, 2016
March 17, 2016	April 21, 2016

AGENDA
RULES REVIEW COMMISSION
THURSDAY, JANUARY 21, 2016 10:00 A.M.
1711 New Hope Church Rd., Raleigh, NC 27609

I. Ethics reminder by the chair as set out in G.S. 138A-15(e)

II. Approval of the minutes from the last meeting

III. Follow-up matters
- A. 911 Board – 09 NCAC 06C .0101, .0102, .0103, .0104, .0105, .0106, .0107, .0108, .0109, .0110, .0111, .0112, .0113, .0114, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209, .0210, .0211, .0212, .0213, .0214, .0215, .0216, .0301, .0302, .0303, .0304, .0305, .0306, .0401, .0402, .0403, .0404, .0405 (Reeder)
- B. Child Care Commission – 10A NCAC 09 .2001, .2002, .2003, .2004, .2005 (Reeder)
- C. Environmental Management Commission - 15A NCAC 02L .0501, .0502, .0503, .0504, .0505, .0506, .0507, .0508, .0509, .0510, .0511, .0512, .0513, .0514, .0515 (Hammond)
- D. Property Tax Commission – 17 NCAC 11 .0216, .0217 (Hammond)

IV. Review of Log of Filings (Permanent Rules) for rules filed between November 23, 2015 and December 21, 2015
- DHHS – Division of Health Service Regulation (Thomas)
- Criminal Justice Education and Training Standards Commission (Thomas)
- Sheriffs Education and Training Standards Commission (Thomas)
- Private Protective Services Board (Reeder)
- Marine Fisheries Commission (May)
- Coastal Resources Commission (May)
- Board of Certified Public Accountant Examiners (Hammond)
- Board of Chiropractic Examiners (Reeder)
- Board of Dental Examiners (Reeder)
- Board of Examiners of Electrical Contractors (Reeder)
- Interpreter and Transliterator Licensing Board (Reeder)
- Board of Examiners of Fee-Based Practicing Pastoral Counselors (Reeder)

- State Human Resources Commission (Reeder)

V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days prior to the RRC Meeting

VI. Existing Rules Review
- Review of Reports
  1. 01 NCAC 01 – Department of Administration (Hammond)
  2. 01 NCAC 03 – Department of Administration (Hammond)
  3. 01 NCAC 04 – Department of Administration (Hammond)
  4. 01 NCAC 25 – Department of Administration (Hammond)
  5. 01 NCAC 26 – Veterans' Affairs Commission (Hammond)
  6. 10A NCAC 13P - N.C. Medical Care Commission & Department of Health & Human Services/Secretary (Reeder)
  7. 10A NCAC 26E – DHHS – Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (May)
  8. 10A NCAC 26F - DHHS – Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (May)
  9. 15A NCAC 04 – Sedimentation Control Commission (Thomas)
  10. 21 NCAC 18 – Board of Examiners of Electrical Contractors (Reeder)
  11. 21 NCAC 29 – Locksmith Licensing Board (Reeder)

VII. Review of the 2016 State Medical Facilities Plan (May)

VIII. Commission Business
- Commission Election of Officers
- Next meeting: Thursday, February 18, 2016

Commission Review

Log of Permanent Rule Filings
November 23, 2015 through December 21, 2015

HHS - HEALTH SERVICE REGULATION, DIVISION OF

The rules in Chapter 14 concern services provided by the Division of Health Service Regulation.

The rules in Subchapter 14C are Certificate of Need regulations including general provisions (.0100); applications and review process (.0200); exemptions (.0300); appeal process (.0400); enforcement and sanctions (.0500); and criteria and standards for nursing facility or adult care home services (.1100), intensive care services (.1200), pediatric intensive care services (.1300), neonatal services (.1400), hospices, hospice inpatient facilities, and hospice residential care facilities (.1500), cardiac catheterization equipment and cardiac angioplasty equipment (.1600), open heart surgery services and heart-lung bypass machines (.1700), diagnostic centers (.1800), radiation therapy equipment (.1900), home health services (.2000), surgical services and operating rooms (.2100), end stage renal disease services (.2200), computed tomography equipment (.2300), immediate care facility/mentally retarded (ICF/MR) (.2400), substance abuse/chemical dependency treatment beds (.2500), psychiatric beds (.2600), magnetic resonance imaging scanner (.2700), rehabilitation services (.2800), bone marrow transplantation services (.2900), solid organ transplantation services (.3000), major medical equipment (.3100), lithotriptor equipment (.3200), air ambulance (.3300), burn intensive care services (.3400), oncology treatment centers (.3500), gamma knife (.3600), positron emission tomography scanner (.3700), acute care beds (.3800), gastrointestinal endoscopy procedure rooms in licensed health service facilities (.3900), and hospice inpatient facilities and hospice residential care facilities (.4000).

Information Required of Applicant Repeal/*	10A	NCAC	14C	.1101
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1202

Support Services Repeal/*	10A	NCAC	14C	.1204
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1205
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1302
Support Services Repeal/*	10A	NCAC	14C	.1304
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1305
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1402
Support Services Repeal/*	10A	NCAC	14C	.1404
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1405
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1502
Support Services Repeal/*	10A	NCAC	14C	.1504
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1505
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1602
Support Services Repeal/*	10A	NCAC	14C	.1604
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1605
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1702
Support Services Repeal/*	10A	NCAC	14C	.1704
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1705
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1803
Support Services Repeal/*	10A	NCAC	14C	.1805
Staffing and Staff Services Repeal/*	10A	NCAC	14C	.1806
Information Required of Applicant Repeal/*	10A	NCAC	14C	.1902
Support Services Repeal/*	10A	NCAC	14C	.1904
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.1905
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2002
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2005
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2102

Support Services Repeal/*	10A	NCAC	14C	.2104
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2105
Facility Repeal/*	10A	NCAC	14C	.2106
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2202
Scope of Services Repeal/*	10A	NCAC	14C	.2204
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2205
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2302
Support Services Repeal/*	10A	NCAC	14C	.2304
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2305
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2402
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2405
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2502
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2505
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2602
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2605
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2702
Support Services Repeal/*	10A	NCAC	14C	.2704
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2705
Information Required by Applicant Repeal/*	10A	NCAC	14C	.2802
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2805
Information Required of Applicant Repeal/*	10A	NCAC	14C	.2902
Support Services Repeal/*	10A	NCAC	14C	.2904
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.2905
Definitions Repeal/*	10A	NCAC	14C	.3001
Information Required of Applicant Repeal/*	10A	NCAC	14C	.3002
Support Services Repeal/*	10A	NCAC	14C	.3003

Additional Requirements for Heart, Heart/Lung or Lung Tra... 10A NCAC 14C .3004
Repeal/*

Additional Requirements for Liver Transplantation Services 10A NCAC 14C .3005
Repeal/*

Additional Requirements for Pancreas Transplantation Serv... 10A NCAC 14C .3006
Repeal/*

Additional Requirements for Kidney Transplantation Services 10A NCAC 14C .3007
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3008
Repeal/*

Accessibility 10A NCAC 14C .3009
Repeal/*

Information Required of Applicant 10A NCAC 14C .3103
Repeal/*

Support Services 10A NCAC 14C .3105
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3106
Repeal/*

Information Requirement of Applicant 10A NCAC 14C .3202
Repeal/*

Support Services 10A NCAC 14C .3204
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3205
Repeal/*

Information Required of Applicant 10A NCAC 14C .3402
Repeal/*

Support Services 10A NCAC 14C .3404
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3405
Repeal/*

Information Required of Applicant 10A NCAC 14C .3602
Repeal/*

Support Services 10A NCAC 14C .3604
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3605
Repeal/*

Information Required of Applicant 10A NCAC 14C .3702
Repeal/*

Support Services 10A NCAC 14C .3704
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3705
Repeal/*

Information Required of Applicant 10A NCAC 14C .3802
Repeal/*

Support Services 10A NCAC 14C .3804
Repeal/*

Staffing and Staff Training 10A NCAC 14C .3805
Repeal/*

Information Required of Applicant 10A NCAC 14C .3902
Repeal/*

Support Services 10A NCAC 14C .3904
Repeal/*

Staffing and Staff Training Repeal/*	10A	NCAC	14C	.3905
Information Required of Applicant Repeal/*	10A	NCAC	14C	.4002
Support Services Repeal/*	10A	NCAC	14C	.4004
Staffing and Staff Training Repeal/*	10A	NCAC	14C	.4005
Facility Repeal/*	10A	NCAC	14C	.4006

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs).

The rules in Subchapter 9A cover the Commission organization and procedure (.0100) and enforcement of the rules (.0200).

Definitions Amend/*	12	NCAC	09A	.0103
Summary Suspensions Amend/*	12	NCAC	09A	.0206

The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200); criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

Documentation of Educational Requirements Amend/*	12	NCAC	09B	.0106
Admission of Trainees Amend/*	12	NCAC	09B	.0203
Specialized Subject Control Arrest Techniques Instructor ... Amend/*	12	NCAC	09B	.0232
Specialized Physical Fitness Instructor Training Amend/*	12	NCAC	09B	.0233
General Instructor Certification Amend/*	12	NCAC	09B	.0302
Certification of School Directors Amend/*	12	NCAC	09B	.0501
Terms and Conditions of School Director Certification Amend/*	12	NCAC	09B	.0502

The rules in Subchapter 9C concern the administration of criminal justice education and training standards including responsibilities of the criminal justice standards division (.0100); forms (.0200); certification of criminal justice officers (.0300); accreditation of criminal justice schools and training courses (.0400); minimum standards for accreditation of associate of applied science degree programs incorporating basic law enforcement training (.0500); and equipment and procedures (.0600).

Certification of Criminal Justice Schools Amend/*	12	NCAC	09C	.0401

The rules in Subchapter 9E relate to the law enforcement officers' in-service training program.

In-Service Training Coordinator Requirements	12	NCAC	09E	.0109
Amend/*				

The rules in Subchapter 9G are the standards for correction including scope, applicability and definitions (.0100); minimum standards for certification of correctional officers, probation/parole officers, and probation/parole officers-intermediate (.0200); certification of correctional officers, probation/parole officers, probation/parole officers intermediate and instructors (.0300); minimum standards for training of correctional officers, probation/parole officers, and probation/parole officers-intermediate (.0400); enforcement of rules (.0500); professional certification program (.0600); and forms (.0700).

Education	12	NCAC	09G	.0204
Amend/*				
General Instructor Certification	12	NCAC	09G	.0308
Amend/*				
Certification of School Directors	12	NCAC	09G	.0405
Amend/*				

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Rules in Subchapter 10B are from the N. C. Sheriffs' Education and Training Standards Commission. These rules govern the commission organization and procedure (.0100); enforcement rules (.0200); minimum standards for employment as a justice officer (deputy or jailer) (.0300); certification of justice officers (.0400); standards and accreditation for justice officers schools, training programs, and the instructors (.0500-.0900); certificate and awards programs for sheriffs, deputies, justice officers, jailers, reserve officers, and telecommunicators (.1000-.1700); in-service training (.2000); and firearms in-service training and re-qualification (.2100).

Minimum Training Requirements	12	NCAC	10B	.2005
Amend/*				

PRIVATE PROTECTIVE SERVICES BOARD

The rules in Chapter 16 are from the Private Protective Services Board and cover organization and general provisions (.0100); licenses and trainee permits (.0200); security guard patrol and guard dog service (.0300); private investigator: electronic countermeasures (.0400); polygraph (.0500); psychological stress evaluator (PSE) (.0600); unarmed security guard registration (.0700); armed security guard firearm registration permit (.0800); trainer certificate (.0900); recovery fund (.1000); training and supervision for private investigator associates (.1100); continuing education (.1300); and armed armored car service guards firearm registration permit (.1400).

Training Requirements for Armed Security Guards	14B	NCAC	16	.0807
Amend/*				
Authorized Firearms	14B	NCAC	16	.0809
Amend/*				
Requirements for Firearms Trainer Certificate	14B	NCAC	16	.0901
Amend/*				

MARINE FISHERIES COMMISSION

The rules in Subchapter 3J concern the use of nets in general (.0100) and in specific areas (.0200); the use of pots, dredges, and other fishing devices (.0300); fishing gear (.0400); and pound nets (.0500).

Gill Nets, Seines, Identification, Restrictions	15A	NCAC	03J	.0103
Amend/*				

The rules in Subchapter 3R specify boundaries for various areas (.0100); and fishery management areas (.0200).

Mechanical Methods Prohibited to Take Oysters Amend/*	15A	NCAC	03R	.0108
Attended Gill Net Areas Amend/*	15A	NCAC	03R	.0112

COASTAL RESOURCES COMMISSION

The rules in Chapter 7 are coastal management rules.

The rules in Subchapter 7B are land use planning guidelines including introduction (.0600); land use planning (.0700); CAMA land use plan review and CRC certification (.0800); and CAMA land use plan amendments (.0900).

Authority Amend/*	15A	NCAC	07B	.0601
Planning Options Readopt with Changes/*	15A	NCAC	07B	.0701
Elements of Cama Core and Advanced Core Land Use Plans Adopt/*	15A	NCAC	07B	.0702
State Review and Comment on Draft Plan Adopt/*	15A	NCAC	07B	.0801
Public Hearing and Local Adoption Requirements Readopt with Changes/*	15A	NCAC	07B	.0802
Certification and Use of the Plan Readopt with Changes/*	15A	NCAC	07B	.0803
Required Periodic Implementation Status Reports Adopt/*	15A	NCAC	07B	.0804

The rules in Subchapter 7L concern local planning and management grants including purpose and authority (.0100); general standards (.0500); application process (.0600); and grant administration.

Purpose Amend/*	15A	NCAC	07L	.0102
Consistency with Plans and Rules Amend/*	15A	NCAC	07L	.0502
Priorities for Funding Land Use Plans and Implementation ... Amend/*	15A	NCAC	07L	.0503
Eligible Projects Amend/*	15A	NCAC	07L	.0504
Scoping of Planning Needs Repeal/*	15A	NCAC	07L	.0505
Public Participation Repeal/*	15A	NCAC	07L	.0506
Minimum CAMA Land Use Planning and Funding Requirements Repeal/*	15A	NCAC	07L	.0507
State Technical Assistance, Review and Comment on Prelimi... Repeal/*	15A	NCAC	07L	.0508
Intergovernmental Coordination Repeal/*	15A	NCAC	07L	.0509
Public Hearing and Local Adoption Requirements Repeal/*	15A	NCAC	07L	.0510

Required Periodic Implementation Status Reports 15A NCAC 07L .0511
Repeal/*

Sustainable Communities Component of the Planning Program 15A NCAC 07L .0512
Repeal/*

Project Duration 15A NCAC 07L .0513
Repeal/*

Relation to Other Funding 15A NCAC 07L .0514
Repeal/*

Application Form 15A NCAC 07L .0601
Repeal/*

Assistance in Completing Applications and Submittal 15A NCAC 07L .0602
Repeal/*

Procedure for Approval and Disapproval 15A NCAC 07L .0603
Repeal/*

Contract Agreement 15A NCAC 07L .0701
Repeal/*

Progress Reports and Grant Monitoring 15A NCAC 07L .0702
Repeal/*

Payment 15A NCAC 07L .0703
Repeal/*

Project Completion Report 15A NCAC 07L .0704
Repeal/*

Accountability 15A NCAC 07L .0705
Repeal/*

CERTIFIED PUBLIC ACCOUNTANT EXAMINERS, BOARD OF

The rules in Chapter 8 are from the N C State Board of Certified Public Accountant Examiners.

The rules in Subchapter 8A are departmental rules including organizational rules (.0100), board procedures (.0200), and definitions (.0300).

Definitions 21 NCAC 08A .0301
Readopt with Changes/*

Public Practice of Accountancy or Accounting 21 NCAC 08A .0307
Readopt without Changes/*

Holding Out to the Public 21 NCAC 08A .0308
Readopt without Changes/*

Concentration in Accounting 21 NCAC 08A .0309
Readopt without Changes/*

The rules in Subchapter 8B are rules concerning rule-making procedures including petitions for rule-making (.0100), notice (.0200), hearings (.0300), emergency rules (.0400), declaratory rulings (.0500) and fees (.0600).

Requests for Informal Opinions 21 NCAC 08B .0508
Readopt without Changes/*

The rules in Subchapter 8F are the requirements for CPA examination and certificate applicants including general provisions (.0100), fees and refunds (.0200), educational requirements (.0300), experience (.0400), and applications (.0500).

Filing of Examination Applications and Fees 21 NCAC 08F .0103
Readopt with Changes/*

Conditioning Requirements Readopt without Changes/*	21	NCAC	08F	.0105
Ineligibility Due to Violation of Accountancy Act Readopt without Changes/*	21	NCAC	08F	.0111
Education and Work Experience Required Prior to CPA Exam Readopt without Changes/*	21	NCAC	08F	.0302
Work Experience Required of Candidates for CPA Certification Readopt without Changes/*	21	NCAC	08F	.0401
Education Required of Candidates for CPA Certification Readopt without Changes/*	21	NCAC	08F	.0410
Application for CPA Certificate Readopt without Changes/*	21	NCAC	08F	.0502

The rules in Subchapter 8G are the continuing professional education requirements including general provisions (.0100); responsibilities to clients and colleagues (.0200); and other responsibilities and requirements (.0300 and .0400).

CPE Requirements for CPAS Readopt without Changes/*	21	NCAC	08G	.0401
Qualification of CPE Sponsors Readopt without Changes/*	21	NCAC	08G	.0403
Requirements for CPE Credit Readopt without Changes/*	21	NCAC	08G	.0404
Compliance with CPE Requirements Readopt without Changes/*	21	NCAC	08G	.0406
Professional Ethics and Conduct CPE Readopt without Changes/*	21	NCAC	08G	.0410

The rules in Subchapter 8I concern revocation of certificates and other disciplinary action.

Modification of Discipline Readopt without Changes/*	21	NCAC	08I	.0104

The rules in Subchapter 8J concern renewals and registrations.

Annual Renewal of Certificate, Forfeiture, and Reapplication Readopt without Changes/*	21	NCAC	08J	.0101
Inactive Status; Change of Status Readopt without Changes/*	21	NCAC	08J	.0105
Mailing Addresses of Certificate Holders and CPA Firms Readopt without Changes/*	21	NCAC	08J	.0107
Compliance with CPA Firm Registration Readopt without Changes/*	21	NCAC	08J	.0111

The rules in Subchapter 8M relate to the State Quality Review program including general requirements (.0100), duties of the reviewed firm (.0200), review team qualifications and duties (.0300), and advisory committee (.0400).

Peer Review Requirements Readopt without Changes/*	21	NCAC	08M	.0105
Compliance Readopt with Changes/*	21	NCAC	08M	.0106

The rules in Subchapter 8N are professional ethics and conduct rules including scope and applicability (.0100); rules applicable to all CPAs (.0200); rules applicable to CPAs who use the CPA title in offering or rendering products or services to clients (.0300); and rules applicable to CPAs performing attest services (.0400).

Scope of These Rules Readopt without Changes/*	21	NCAC	08N	.0101
Applicability and Organization of Rules Readopt without Changes/*	21	NCAC	08N	.0102
Responsibility for Compliance by Others Readopt without Changes/*	21	NCAC	08N	.0103
Integrity Readopt without Changes/*	21	NCAC	08N	.0201
Deceptive Conduct Prohibited Readopt without Changes/*	21	NCAC	08N	.0202
Discreditable Conduct Prohibited Readopt without Changes/*	21	NCAC	08N	.0203
Discipline by Federal and State Authorities Readopt without Changes/*	21	NCAC	08N	.0204
Confidentiality Readopt without Changes/*	21	NCAC	08N	.0205
Cooperation with Board Inquiry Readopt without Changes/*	21	NCAC	08N	.0206
Violation of Tax Laws Readopt without Changes/*	21	NCAC	08N	.0207
Reporting Convictions, Judgements, and Disciplinary Actions Readopt with Changes/*	21	NCAC	08N	.0208
Accounting Principles Readopt with Changes/*	21	NCAC	08N	.0209
Responsibilities in Tax Practice Readopt with Changes/*	21	NCAC	08N	.0211
Competence Readopt without Changes/*	21	NCAC	08N	.0212
Other Rules Readopt without Changes/*	21	NCAC	08N	.0213
Outsourcing to Third-Party Service Providers Readopt with Changes/*	21	NCAC	08N	.0214
International Financial Accounting Standards Readopt with Changes/*	21	NCAC	08N	.0215
Professional Judgement Readopt without Changes/*	21	NCAC	08N	.0301
Forms of Practice Readopt with Changes/*	21	NCAC	08N	.0302
Objectivity and Conflicts of Interest Readopt without Changes/*	21	NCAC	08N	.0303
Consulting Services Standards Readopt without Changes/*	21	NCAC	08N	.0304
Retention of Client Records Readopt without Changes/*	21	NCAC	08N	.0305
Advertising or Other Forms of Solicitation Readopt without Changes/*	21	NCAC	08N	.0306

CPA Firm Names Readopt with Changes/*	21	NCAC	08N	.0307
Valuation Services Standards Readopt with Changes/*	21	NCAC	08N	.0308
Personal Financial Planning Services Adopt/*	21	NCAC	08N	.0309
Public Reliance Readopt with Changes/*	21	NCAC	08N	.0401
Independence Readopt without Changes/*	21	NCAC	08N	.0402
Auditing Standards Readopt with Changes/*	21	NCAC	08N	.0403
Accounting and Review Services Standards Readopt with Changes/*	21	NCAC	08N	.0404
Governmental Accounting Standards Readopt with Changes/*	21	NCAC	08N	.0405
Attestation Standards Readopt with Changes/*	21	NCAC	08N	.0406
Peer Review Standards Readopt without Changes/*	21	NCAC	08N	.0408
Government Auditing Standards Readopt with Changes/*	21	NCAC	08N	.0409
International Standards on Auditing Adopt/*	21	NCAC	08N	.0410

CHIROPRACTIC EXAMINERS, BOARD OF

The rules in Chapter 10 include organization of the Board (.0100); the practice of chiropractic (.0200); rules of unethical conduct (.0300); rule-making procedures (.0400); investigation of complaints (.0500); contested cases and hearings in contested cases (.0600-.0700); and miscellaneous provisions (.0800).

Conflicts of Interest Adopt/*	21	NCAC	10	.0106
Acupuncture Amend/*	21	NCAC	10	.0208
Random Office Inspections Adopt/*	21	NCAC	10	.0214

DENTAL EXAMINERS, BOARD OF

The rules in Subchapter 16W concern public health hygienists.

Direction Defined Amend/*	21	NCAC	16W	.0101

ELECTRICAL CONTRACTORS, BOARD OF EXAMINERS OF

The rules in Chapter 18 are from the State Board of Examiners of Electrical Contractors.

The rules in Chapter 18B are from the Board of Electrical Contractors including general provisions (.0100); examinations and qualifications (.0200); terms and definitions applicable to licensing (.0300); licensing requirements (.0400); reciprocal licensing agreements with other states (.0700); special restricted licenses (.0800); violations and

contested case hearings (.0900); forms, certificates, and publications of the board (.1000); and continuing education courses and requirements (.1100).

Principal Office: Mailing Address: Office Hours 21 NCAC 18B .0101
Amend/*

INTERPRETER AND TRANSLITERATOR LICENSING BOARD

The rules in Chapter 25 are from the Interpreter and Transliterator Board including general provisions (.0100); licensing (.0200); moral fitness for licensure (.0300); reporting and disclosure requirements (.0400); continuing education (.0500); administrative procedure (.0600); and sanctions (.0700).

Contact Information 21 NCAC 25 .0103
Amend/*

EXAMINERS OF FEE-BASED PRACTICING PASTORAL COUNSELORS, BOARD OF

The rules in Chapter 45 concern the Board of Examiners of Fee-Based Practicing Pastoral Counselors including general provisions (.0100); application for certification(.0200); examination (.0300); certification renewal (.0400); continuing education (.0500); definitions (.0600); temporary certificates (.0700); and supervision (.0800.

Address 21 NCAC 45 .0101
Amend/*

STATE HUMAN RESOURCES COMMISSION

The rules in Subchapter 1D are the rules dealing with compensation and include administration of the pay plan (.0100); new appointments (.0200); promotion (.0300); demotions or reassignments (.0400); separation (.0500); reallocation (.0600); salary range revision (.0700); initial classification (.0800); transfer (.0900); reinstatement (.1000); longevity pay (.1200); holiday premium pay (.1300); shift premium pay (.1400); emergency call-back pay (.1500); foreign service pay (.1600); employment of physicians for extended duty (.1800); hours of work and overtime compensation (.1900); unemployment insurance (.2000); special salary adjustments (.2100); comprehensive compensation system (.2500); and in-range salary adjustments (.2600).

Severance Salary Continuation 25 NCAC 01D .2701
Amend/*

Severance Salary Continuation 25 NCAC 01D .2702
Adopt/*

Effects of Reemployment on Severance Pay 25 NCAC 01D .2703
Adopt/*

Amount and Method of Payment for Severance 25 NCAC 01D .2704
Adopt/*

The rules in Subchapter 1H concern recruitment and selection including general provisions (.0600); general provision for priority consideration (.0700); promotional priority (.0800); reduction-in-force-priority reemployment (.0900); exempt priority consideration (.1000); and veteran's preference (.1100).

Promotional Priority Consideration for Current Employees 25 NCAC 01H .0801
Amend/*

Relationship to Other Employment Priority Considerations 25 NCAC 01H .0802
Repeal/*

Requirements for Reduction in Force Priority Consideration 25 NCAC 01H .0902
Amend/*

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

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

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STATE OF NORTH CAROLINA	IN THE OFFICE OF
	ADMINISTRATIVE HEARINGS
COUNTY OF MCDOWELL	15 DHR 01519
STRATEGIC INTERVENTIONS, INC.,	
Petitioner,	
v.	
SMOKY MOUNTAIN CENTER AREA AUTHORITY LME/MCO,	
Respondent.	

FINAL DECISION GRANTING SMOKY MOUNTAIN CENTER AREA AUTHORITY LME/MCO's MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the undersigned Selina M. Brooks, Administrative Law Judge, upon Respondent Smoky Mountain Center Area Authority LME/MCO's ("Smoky") Motion for Summary Judgment (the "Motion") filed May 8, 2015.

Having considered Smoky's Motion, Strategic Interventions, Inc.'s ("Petitioner") Brief in Opposition to Respondent's Motion for Summary Judgment and In Support of Petitioner's Motion for Attorneys' Fees ("Petitioner's Motion"), the affidavits and supporting documentation filed by Petitioner and Smoky, the briefing of the parties and other matters of record and having heard the arguments of counsel at a hearing conducted on July 27, 2015 in High Point, North Carolina, the Undersigned enters this decision granting Smoky's Motion for Summary Judgment:

SUMMARY OF UNDISPUTED FACTS

1. Smoky is an area authority and local management entity/managed care organization ("LME/MCO"), governed by an area board pursuant to N.C. Gen. Stat. § 122C-117(b). Pursuant to a contract with the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"), Smoky operates the 1915(b)/(c) Medicaid Waiver within its twenty-three (23) county catchment area.

2. The 1915(b)/(c) Medicaid Waiver is a Medicaid managed care program approved by the federal Centers for Medicare and Medicaid Services ("CMS") which waives certain provisions of North Carolina's traditional fee-for-service Medical Assistance Program, also known as the "NC Medicaid Program."

3. Smoky does not itself provide behavioral healthcare services to eligible enrollees, but rather is "responsible for the management and oversight of the public system of mental

developmental disabilities, and substance abuse services at the community level." N.C. Gen. Stat. § 122C-115.4(a).

4. In the operation of the 1915(b)/(c) Medicaid Waiver managed care program and pursuant to its contract with DMA, Smoky is charged with selecting and maintaining its own closed network of providers to serve the behavioral healthcare needs of eligible consumers in Smoky's catchment area. By the authority of its contract with DMA, Smoky is also charged with conducting program integrity activities and routine monitoring of providers in its closed provider network, including monitoring all fraud and abuse investigations and conducting post-payment reviews of providers in accordance with 42 C.F.R. § 456.1, *et seq.* *See also* 42 C.F.R. § 455.1, *et seq.* The Code at 42 C.F.R. § 438.608 further requires that: "The MCO or PIHP must have administrative and management arrangements or procedures, including a mandatory compliance plan, that are designed to guard against fraud and abuse."

5. Program integrity activities are conducted by a specific team at Smoky made up of individuals who have received training on identifying potential fraud and abuse and provider overpayments. Routine monitoring is conducted by a separate team at Smoky and utilizes a specific monitoring tool mandated by DMA. The two functions are distinct activities under the DMA contract and provider contracts.

6. Smoky's Program Integrity Unit does not undertake routine monitoring or Gold Star Reviews of its providers. Instead, the Program Integrity Unit conducts targeted reviews which are often based upon reports received from third-parties involving fraud and/or abuse on the part of the provider in question. This function is a specific requirement of Smoky's contract with DMA.

7. Petitioner Strategic Interventions, Inc. ("Petitioner") is a provider of behavioral healthcare services operating throughout central and western North Carolina. Among other services, Strategic provides Assertive Community Treatment Team ("ACTT") services to its consumers.

8. At all times relevant to the issues presented in this matter, Petitioner delivered behavioral healthcare services to Smoky enrollees.

9. Effective July 1, 2012, Petitioner entered into a one-year Procurement Contract for the Provision of Services with Smoky (the "2012 Provider Contract"). The 2012 Provider Contract included the provision of ACTT services. (Resp't. Ex. 1)

10. Effective July 1, 2013, Petitioner entered into another Procurement Contract for the Provision of Services with Smoky (the "2013 Provider Contract"). The 2013 Provider Contract also included the provision of ACTT services. (Resp't. Ex. 2)

11. Both the 2012 and 2013 Provider Contracts required Petitioner to comply with DMA Clinical Coverage Policy No. 8A and all relevant service definitions. (*See* Resp't. Exs. 1 and 2)

12. The 2012 Contract specifically required that "SERVICES are to be provided consistent with the requirements of the SMC Operations Manual, the Innovations Manual, the General Conditions of the Agency Procurement Contract, in its most recent and subsequent versions, and all…**Service Definitions**." (Resp't. Ex. 1) (emphasis added)

13. The 2013 Contract required providers to be governed by certain "Controlling Authority," which is defined to include "Medical or clinical coverage policies promulgated by the Department [of Health and Human Services] in accordance with N.C.G.S. § 108A-52.2." (Resp't. Ex. 2)

14. By letter dated March 22, 2013, Smoky provided notice by personal service of its intention to conduct a post-payment review. This letter specifically identified certain consumer records and dates of service involving ACTT services which would be the subject of the post-payment review. (Duggins Aff., Ex. 7)

15. Smoky's Program Integrity Unit conducted a post-payment review of certain Medicaid reimbursements made by Smoky to the Petitioner for ACTT services provided by Petitioner for dates of service from 7/1/2012 to 12/31/2013. The preliminary results of the post-payment review identified potential provider abuse in several areas.

16. By letter dated January 16, 2014, Smoky requested additional records from Petitioner. Based on this letter, ACTT services would be reviewed based on "adherence to requirements as outlined in applicable clinical coverage policies and provider participation agreements…and documentation of staff qualifications and credentials." (Duggins Aff., Ex. 8)

17. By letter dated October 22, 2014, Smoky sent a Notice of Overpayment to Petitioner in the amount of $242,247.12, with a detailed spreadsheet identifying the reason(s) each claim was found to have been improperly paid. The results of the post-payment review revealed program abuse involving Petitioner's Marion, Morganton and Yadkinville ACT Teams. (Kumar Aff., Ex. 5)

18. Petitioner timely requested a Reconsideration Review of Smoky's Notice of Overpayment on November 20, 2014, at which time it provided a letter from Donna Duggins, Petitioner's Director of Operations, along with additional documentation in support of its attempt to rebut the preliminary results of Smoky's review. (Resp't. Ex. 6)

19. On December 18, 2014, representatives from Petitioner, including its President, Director of Operations, and Quality Management Director, met with Smoky's independent Program Integrity Reconsideration Panel, the members of which had no prior involvement with Smoky's investigation into ACTT services provided by Petitioner which led to the Notice of Overpayment. Petitioner was invited to submit any and all additional documentation to the Reconsideration Panel that it believed supported its position that it did not owe Smoky a payback for the overpayments.

20. As a result of the additional documentation submitted by Petitioner and information presented by Petitioner at the December 18, 2014 meeting, the independent Reconsideration Panel

Reconsideration Panel overturned Smoky's Notice of Overpayment as to several of the claims. However, the additional information submitted by Petitioner either failed to rebut, or in some circumstances confirmed, certain overpayments.

21. By letter dated December 29, 2014, Smoky informed Petitioner of the results of its independent reconsideration process and issued its final Notice of Decision in the amount of $104,449.68, which amount Smoky determined was improperly billed to, and paid by, Smoky with Medicaid funds. (Resp't. Ex. 3)

22. Based on documentation identified during the post-payment review and provided by Petitioner during reconsideration, Smoky determined that Petitioner's Marion ACT Team did not employ the required number of nurses during August 2012. (Resp't. Ex. 3)

a. Pursuant to the 2011 DMA Clinical Coverage Policy No. 8A, ACT Team sizing depends upon the number of consumers being served by that Team. For example, "Mid-size teams serving 51-75 recipients shall employ a minimum of 8 to 10 FTE multidisciplinary clinical staff person…" (Resp't. Ex. 4 at 70)

b. Petitioner's Marion ACT Team was comprised of fifty-five (55) consumers during August 2012, and therefore, was considered mid-size under the 2011 Clinical Coverage Policy. (Resp't. Ex. 5)

c. The 2011 DMA Clinical Coverage Policy No. 8A requires that mid-size ACT Teams must employ a *minimum* of "2 FTE registered nurses (RNs)." (Resp't. Ex. 4 at 70)

d. The documentation produced by Petitioner during the Reconsideration Review showed that it staffed the Marion ACT Team with only 1.0 FTE RN during August 2012. (Resp't. Ex. 6)

e. Petitioner does not dispute that it employed only 1.0 FTE RN during August 2012 for its Marion ACT Team or that the 2011 DMA Clinical Coverage Policy No. 8A "required 2 FTE nurses." (Petitioner's Motion at 24)

23. Based on documentation identified during the post-payment review and provided by Petitioner during reconsideration, Smoky determined that Petitioner's Marion ACT Team did not employ the required number of nurses during August 2013. The documentation produced by Petitioner during the Reconsideration Review showed it only staffed the Marion ACT Team with 2.0 FTE nurses during August 2013. (Resp't. Ex. 6)

a. Pursuant to the 2013 DMA Clinical Coverage Policy No. 8A, "Large [ACT] Teams" are defined as serving 75-120 beneficiaries and require 3.0 FTE RN staffing. (Resp't. Ex. 7 at 70)

b. Petitioner's Marion ACT Team was comprised of eighty-two (82) consumers during August 2013, and at no point during 2013 did the Marion ACT Team drop below seventy-nine (79) consumers. (Resp't. Ex. 8)

c. Petitioner's Marion ACT Team was considered a large Team in August 2013.

d. The documentation produced by Petitioner during the Reconsideration Review showed that it staffed the Marion ACT Team with only 2.0 FTE RN during August 2013. (Resp't. Ex. 6)

e. Petitioner does not dispute that it employed only 2.0 FTE registered nurses on its Marion ACT Team for the month of August 2013, "though due to team size 3.0 FTE nurses were required." (Petitioner's Motion at 24)

24. Based on documentation identified during the post-payment review and provided by Petitioner during reconsideration, Smoky determined that Petitioner's Morganton ACT Team did not have a properly licensed Team Leader from August 1, 2013 through September 29, 2013. (Resp't. Ex. 3)

a. The 2013 DMA Clinical Coverage Policy No. 8A requires that each ACT Team shall have exactly one Team Leader. (Resp't. Ex. 7 at 71, 73) Moreover, the Team Leader must be a mental health professional holding any of the following licenses: Licensed Psychologist, Licensed Psychological Associate, Licensed Clinical Social Worker, Licensed Professional Counselor, Licensed Marriage and Family Therapist, Licensed Pediatric Nurse Practitioner, Clinical Nurse Specialist certified as an advanced practice psychiatric nurse specialist. (Resp't. Ex. 7 at 73)

b. Petitioner's Morganton ACT Team Leader was formerly Ms. Nina Hightower. Ms. Hightower was licensed as a Licensed Clinical Social Worker (LCSW). However, Ms. Hightower left Petitioner's employ on or about August 22, 2013. (Resp't. Ex. 6) Following the departure of Ms. Hightower, Ms. Marybeth Hermann was staffed as the "interim Team Lead" for the Morganton ACT Team. (Resp't. Ex. 6)

c. Ms. Hermann did not receive her license as a Licensed Professional Counselor Associate until September 30, 2013. (Resp't. Ex. 11)

d. At the time of her appointment to "interim Team Lead" until September 29, 2013, Ms. Hermann was not a licensed mental health professional. There is no evidence to suggest that Ms. Hermann was properly licensed to serve as an ACT "Team Lead" under the 2013 DMA Clinical Coverage Policy No. 8A until September 30, 2013.

e. The documentation submitted by Petitioner during Reconsideration demonstrated that no one other than Ms. Hermann served as "Team Lead" for the Morganton ACT Team from August 22, 2013 through September 29, 2013. (Resp't. Ex. 6)

f. Smoky only sought payback for Petitioner's failure to properly staff its Morganton ACT Team Leader position from September 1, 2013 through September 29, 2013. (Resp't. Ex. 3)

g. Petitioner does not dispute that Ms. Hermann lacked the proper license to serve as an ACT Team Leader until September 30, 2013. (Petitioners' Motion at 25)

25. Based on documentation identified during the post-payment review and provided by Petitioner during reconsideration, Smoky determined that Petitioner's Yadkinville ACT Team did not have a properly licensed Team Leader for August 2013 and from October through December 2013. (Resp't. Ex. 3)

a. Again, the 2013 DMA Clinical Coverage Policy No. 8A requires that each ACT Team shall have exactly one Team Leader. (Resp't. Ex. 7 at 71, 73)

b. At all times relevant, Ms. Janell Jordan served as Petitioner's Yadkinville ACT Team Leader.

c. Ms. Jordan received her licensed as a Licensed Professional Counselor Associate on May 30, 2014. (Resp't. Ex. 14)

d. Petitioner does not dispute that Ms. Jordan lacked the proper license to serve as an ACT Team Leader in August and October through December 2013. (Petitioners' Motion at 25-26)

26. On March 2, 2015, Petitioner filed the instant Contested Case Petition, contesting the overpayment identified in Smoky's notice of December 29, 2014.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Calallen Indep. Sch. Dist.*, 835 F. Supp. 340 (1993).

3. Petitioner is an aggrieved person under Chapter 150B of the North Carolina General Statutes and is entitled to commence a contested case. Petitioner has satisfied all conditions precedent and all timeliness requirements for initiating this contested case.

4. Petitioner bears the burden of proof in this case pursuant to N.C. Gen. Stat. § 108C-12.

5. The burden of proof which a petitioner must meet in order to prevail in a contested case is set forth in N.C. Gen. Stat. § 150B-23(a).

6. Applying N.C. Gen. Stat. § 150B-23(a) the Court of Appeals has explained the petitioner's burden of proof as follows:

> The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used an improper procedure, or failed to act as required by law or rule.

Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995) (emphasis omitted).

7. Administrative Law Judges may rule on all prehearing motions authorized under the North Carolina rules of Civil Procedure, including motions for summary judgment. *See* N.C. Gen. Stat. §§ 150B-33(b)(3a), 34(3); 26 N.C.A.C. 3.0105(1) and (6).

8. Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. N.C. R. Civ. P. 56(c); *see also Patmore v. Town of Chapel Hill NC*, ___ N.C. App. ___, 757 S.E.2d 302, 304 (2014), *disc. rev. denied*, 367 N.C. 519, 758 S.E.2d 874 (2014)).

9. Here, there are no genuine issues of material fact, and Smoky is entitled to judgment as a matter of law.

10. A court need not make findings as to every fact that arises from the evidence and need only find those facts that are material to the settlement of the dispute. *See Flanders v. Gabriel,* 110 N.C. App. 438, 449, 429 S.E.2d 611, 612 (1993).

11. At all times relevant to this matter, Smoky had the authority to conduct audits, post-payment reviews, program integrity and other monitoring activities, including unannounced audits, through its role as the state-contracted LME/MCO for its catchment area. Routine, scheduled audits are distinct from targeted audits that are prompted by an allegation of fraud or abuse.

12. Smoky has the authority to conduct unannounced audits as needed. Pursuant to N.C. Gen. Stat. § 108C-5 governing payment suspensions and audits of providers, "[n]othing in this Chapter shall be construed to prevent the Department from conducting unannounced or targeted audits of providers." N.C. Gen. Stat. § 108C-5(s).

13. The "Department" is defined to include LME/MCOs like Smoky: the "North Carolina Department of Health and Human Services, its legally authorized agents, contractors, or

vendors, who acting within the scope of their authorized activities, assess, authorize, manage, review, audit, monitor. . . the North Carolina State Plan of Medical Assistance." N.C. Gen. Stat. § 108C-2(3).

14. Reviews of allegations of fraud and/or abuse by a provider are handled in accordance with the requirements of federal regulations, the contracts between providers and LME/MCOs, and Smoky's contract with DMA to operate the 1915(b)/(c) Medicaid Waiver.

15. Following an investigation by the LME/MCO into an allegation of fraud or abuse, contracted providers such as Petitioner are required to remit any and all improper payments identified by the LME/MCO.

16. Federal Medicaid regulations define "abuse" to mean:

> Provider practices that are inconsistent with sound fiscal, business, or medical practices, and result in an unnecessary cost to the Medicaid program, or in reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care.

42 C.F.R. § 455.2.

17. North Carolina has further defined Medicaid provider abuse to include:

> Any incidents, services, or practices inconsistent with accepted fiscal or medical practices which cause financial loss to the Medicaid program or its beneficiaries, or which are not reasonable or which are not necessary including, for example, the following:
>
> (1) Overutilization of medical and health care and services.
> (2) Separate billing for care and services that are:
> (a) part of an all-inclusive procedure,
> (b) included in the daily per-diem rate.
> (3) Billing for care and services that are provided by an unauthorized or unlicensed person.
> (4) Failure to provide and maintain within accepted medical standards for the community:
> (a) proper quality of care,
> (b) appropriate care and services, or
> (c) medically necessary care and services.
> (5) Breach of the terms and conditions of participation agreements, or a failure to comply with requirements of certification, or failure to comply with the provisions of the claim form.
>
> The foregoing examples do not restrict the meaning of the general definition.

10A N.C.A.C. 22F.0301.

18. In conducting post payment review audits pursuant to an allegation of fraud or abuse, no specific monitoring tool is mandated by federal or state law, rule or regulation or the contract between Smoky and DMA to operate the 1915(b)/(c) Waiver.

19. Further, the 2012 and 2013 Provider Contracts make clear the distinction between targeted or fraud investigatory audits and other types of audits: "At a minimum of once every two (2) years, the CONTRACTOR [Petitioner] will participate in an audit of paid claims conducted by LME/PIHP. . . . Audits shall be arranged with the CONTRACTOR in advance, *except when the LME/PIHP has received a credible allegation of fraud.*" *See, e.g.,* 2013 Provider Contract, Resp. Ex. 2, Article II, Section 4(i).

20. Smoky's Program Integrity Department conducted an investigation and review of Petitioner upon receipt of a credible report of fraud or abuse utilizing appropriate procedures as outlined above. Smoky was under no obligation to provide Petitioner with advance notice of its targeted investigation audit, nor was it required to use the Gold Star Monitoring or any other specified tool when conducting such a review. Moreover, the Gold Star Monitoring Tool is not applicable to the review of ACT Team services.

21. The 2012 Provider Contract required Petitioner to document all services provided in compliance with the Division of Mental Health, Developmental Disabilities and Substance Abuse Services ("DMH/DD/SAS") Records Management and Documentation Manual as well as applicable DMA Clinical Coverage Policies. The 2013 Provider Contract further required Petitioner to maintain necessary records and accounts related to the Contract, including medical, personnel and financial records, "to assure a proper accounting of all funds." (*See* Article II, Section 4 of Resp't Ex. 2) Further, all Medicaid providers are required to "keep and maintain all Medicaid financial, medical, or other records necessary to fully disclose the nature and extent of services furnished to Medicaid recipients and claimed for reimbursement." 10A N.C.A.C. 27F.0107. Thus, the burden was on Petitioner to provide records necessary for review.

22. Petitioner is required to comply with: 1) DMA Clinical Coverage Policy No. 8A and corresponding service definitions; 2) all directives and policies promulgated by DHHS and its Divisions applicable to Medicaid-reimbursable services; and 3) all other applicable federal or state laws, rules, or regulations, in effect at the time the service is rendered and concerning the provision or billing of Medicaid-reimbursable or State-funded services. (*See* Resp't Ex. 2)

23. DMA Clinical Coverage Policy No. 8A, including its service definitions, meets the definition of "medical coverage policy" as defined and authorized by N.C. Gen. Stat. § 108A-54.2.

24. As discussed below, the plain language of DMA Clinical Coverage Policy No. 8A and all attached service definitions detail what is required of Petitioner as a provider in Smoky's catchment area.

25. DMA promulgated, and at various times has revised, Clinical Coverage Policy No. 8A setting forth the requirements for the eligibility and provision of Medicaid behavioral health care services, including ACTT services.

26. According to the plain terms of the 2012 Provider Contract, Petitioner agreed to comply, *inter alia*, with the Clinical Coverage Policies promulgated by DMA. These Clinical Coverage Policies are promulgated by DMA and set forth the requirements for eligibility, staffing and the provision of Medicaid behavioral healthcare services, including ACTT services. The "General Conditions" section of the 2012 Contract specifically holds that Petitioner "shall comply with all applicable . . . State laws/rules/regulations; and (b) implement services in accordance with applicable laws/rules/regulations." (Resp't. Ex. 1)

27. According to the plain terms of the 2013 Provider Contract, Petitioner agreed to comply, *inter alia*, with the Clinical Coverage Policies promulgated by DMA. The 2013 Contract required Petitioner "to operate and provide services in accordance with Controlling Authority," which is defined in the Contract to specifically include "Medical or clinical coverage policies promulgated by the Department [of Health and Human Services] in accordance with N.C.G.S. § 108A-54.2" (Resp't. Ex. 2)

28. During the 2012 Contract, the provision of ACTT services was governed by DMA Clinical Coverage Policy No. 8A, revised effective August 1, 2011 (the "2011 DMA Clinical Coverage Policy No. 8A").

29. Beginning in August 2013, under the 2013 Contract, the provision of ACTT services was governed by DMA Clinical Coverage Policy No. 8A, revised effective August 1, 2013 (the "2013 DMA Clinical Coverage Policy No. 8A").

30. Clinical Coverage Policy No. 8A requires that ACT teams consist of "a community-based group of medical, behavioral health, and rehabilitation professionals who use a team approach to work together to meet the needs of beneficiaries with severe and persistent mental illness." (Resp't. Ex. 7 at 68)

31. Accordingly, ACTT services are considered to be provided by not one staff member or individual staff members, but by the team as a whole. If the team, or any member of the team, is noncompliant with a requirement of DMA Clinical Coverage Policy No. 8A, then the services billed by the team are noncompliant.

32. National Program Standards for ACT Teams do not serve as a replacement for the requirements of DMA Clinical Coverage Policy No. 8A and the corresponding ACTT service definition. By its own terms, the National Program Standards for ACT Teams "is written to provide an **archetype** for departmental of [sic] mental health to use in writing and promulgating their own [ACT] program standards. These standards can be customized to address a particular client group and to meet individual state mental health laws and policies." (Aff. Duggins, Ex. 4) (emphasis added)

33. To the extent that the National Program Standards for ACT Teams provide any guidance for ACTT providers within the State of North Carolina, such guidance is intended to be construed as instructive, but not as a replacement for the plain language requirements of DMA Clinical Coverage Policy No. 8A and the attached ACTT service definition. Specifically, the 2011 DMA Clinical Coverage Policy No. 8A demonstrates that the National Program Standards for ACT Teams are merely instructive when it states that "ACT Teams **should** make every effort to meet critical standards contained in the most current edition of the National Program Standards for ACT Teams as established by the National Alliance for the Mentally Ill or US Department of Health and Human Services, Center for Mental Health Services." (Resp't. Ex. 4 at 68) (emphasis added)

34. Pursuant to the August 2012 *Olmstead* settlement between the State of North Carolina and the U.S. Department of Justice, all ACT Teams in North Carolina are required to operate consistent with standardized fidelity measures. Such fidelity is monitored by DHHS using the Tool for Measurement of Assertive Community Treatment ("TMACT").

35. Fidelity measures for ACT Teams using TMACT are separate and distinct from the other requirements found in the ACT service definition of DMA Clinical Coverage Policy No. 8A. Specifically, the 2013 DMA Clinical Coverage Policy No. 8A states that "[a]long with the fidelity evaluation rating, teams must meet all the minimum requirements for an ACT team as outlined in this service definition." (Resp't. Ex. 7 at 70)

36. Fidelity scores produced by a TMACT review do not excuse a provider's failure to strictly follow the plain language requirements of the ACTT service definition as found in DMA Clinical Coverage Policy No. 8A.

37. The 2011 and 2013 DMA Clinical Coverage Policies impose minimum requirements on ACTT service providers such as Petitioner, including, but not limited to, team composition and staffing, team size, staff-to-beneficiary ratio, staff licensure, and service type and setting. (Resp't. Exs. 4 and 7)

MARION ACT TEAM 2012

38. The documentation and testimony provided during the Reconsideration Review showed that Petitioner's ACT Team based in Marion, NC did not meet the 2011 DMA Clinical Coverage Policy No. 8A Service Definition requirements for Team Composition during August 2012.

39. The 2011 DMA Clinical Coverage Policy No. 8A was in full force and effect during August 2012. (Resp't. Ex. 4)

40. Petitioner was required to comply with the 2011 DMA Clinical Coverage Policy No. 8A.

41. Pursuant to the plain language of the 2011 DMA Clinical Coverage Policy No. 8A, ACT Team sizing depends on the number of consumers being served by that Team. For example,

"Mid-size teams serving 51-75 recipients shall employ a minimum of 8 to 10 FTE multidisciplinary clinical staff person…" (Resp't. Ex. 4 at 70)

42. Petitioner's Marion ACT Team was comprised of fifty-five (55) consumers during August 2012. (Resp't. Ex. 5) Therefore, this team was considered "mid-size" based on the requirements of the 2011 DMA Clinical Coverage Policy No. 8A.

43. The 2011 DMA Clinical Coverage Policy No. 8A requires that mid-size ACT Teams must employ a *minimum* of "2 FTE registered nurses (RNs)." (Resp't. Ex. 4 at 70)

44. Petitioner employed only one (1) FTE RN on its Marion ACT Team during the month of August 2012. Accordingly, all services provided by the Marion ACT Team in August of 2012 were noncompliant with the plain language requirements of the 2011 DMA Clinical Coverage Policy No. 8A.

45. The 2011 DMA Clinical Coverage Policy No. 8A makes no mention of aggregating staff overtime hours in order to create new RN FTEs. As such, Petitioner's argument that other members of its Marion ACT Team staff worked twenty-four (24) overtime hours does not excuse its failure to provide the required level of RN staffing for a "mid-size" team during August of 2012. (Resp't. Ex. 6)

MARION ACT TEAM 2013

46. The 2013 DMA Clinical Coverage Policy No. 8A was in full force and effect during August 2013. (Resp't. Ex. 7)

47. Petitioner was required to comply with the 2013 DMA Clinical Coverage Policy No. 8A.

48. Pursuant to the plain language of 2013 DMA Clinical Coverage Policy No. 8A, "Large [ACT] Teams" are defined as serving 75-120 beneficiaries and require 3.0 FTE RN staffing. (Resp't. Ex. 7 at 70)

49. Petitioner staffed its Marion ACT Team with only 2.0 FTE RNs in August 2013.

50. The 2013 DMA Clinical Coverage Policy No. 8A provides additional guidance for team sizing related to consumers moving onto and off of ACT Teams. Specifically, the 2013 DMA Clinical Coverage Policy No. 8A states that "[m]ovement on to (admissions) and off of (discharges) the team may temporarily result in breaches of the maximum caseload. Therefore, teams will be expected to maintain an annual average not to exceed 50, 74, and 120 beneficiaries respectively." (Resp't. Ex. 7 at 73)

51. Taking into account the average number of consumers found on the Marion ACT Team for 2013, the Marion ACT Team was determined to be a "Large" size ACT Team.

52. By staffing its Marion ACT Team with only 2.0 FTE Nurses during August of 2013, Petitioner failed to comply with the plain language requirements of the 2013 DMA Clinical Coverage Policy No. 8A for the staffing of Nursing for the month of August 2013. Accordingly, all services provided by the Marion ACT Team in August of 2013 were noncompliant with the 2013 DMA Clinical Coverage Policy No. 8A.

53. The 2013 DMA Clinical Coverage Policy No. 8A expressly allows for the "[p]rorating of FTE" for Nurses, but "[n]o more than two individuals can share a 1.0 FTE." Additionally, Large Teams must staff at least two Nurses as RNs or APRNs, "with at least one having a minimum of 1 year experience working with adults with serious mental illness and working knowledge of psychiatric medications. The remaining 1.0 nurse can be an RN or LPN." (Resp't. Ex. 7 at 71-72)

54. While Petitioner argues that staff overtime on the Marion Team in August of 2013 amounted to a total of thirteen (13) hours, again this is insufficient to meet the 2013 DMA Clinical Coverage Policy No. 8A Nurse staffing requirements. (Resp't. Ex. 6) Not only is thirteen (13) hours short of the hours required to account for 1.0 FTE, but Petitioner failed to specify which or how many employees accounted for the aggregation of the purported thirteen (13) hours of overtime.

55. Petitioner's argument that its ACT Teams enjoyed a superior Staff-to-Beneficiary Ratio, and therefore, it was not required to strictly comply with the language of DMA Clinical Coverage Policy No. 8A and corresponding service definition for ACTT services, is unsupported and unconvincing. Staff-to-Beneficiary Ratio is considered a different requirement than Team Leader or Nurse Staffing levels in both the 2011 and 2013 versions of DMA Clinical Coverage Policy No. 8A. (Resp't. Ex. 4 at 70; Ex. 7 at 70)

56. Meeting the required Staff-to-Beneficiary Ratio does not excuse Petitioner's failure to comply with all other requirements of DMA Clinical Coverage Policy No. 8A.

MORGANTON ACT TEAM

57. Effective August 1, 2013, DMA Clinical Coverage Policy No. 8A and ACTT Service Definitions were amended ("2013 DMA Clinical Coverage Policy No. 8A"). (Resp't. Ex. 7) At all times relevant, Petitioner was aware of these amendments, and it understood that such amendments would require that the ACT Team Lead would need to be "Masters Level with a minimum of a Licensed Professional Counselor Associate (LPCA) License. . . The date for ACT Team leaders to have a minimum of an Associate LPC license was after 8/1/2013." (Resp't. Ex. 6)

58. Petitioner was required to comply with the 2013 DMA Clinical Coverage Policy No. 8A as it relates to the credentialing requirements of Team Leaders.

59. The 2013 DMA Clinical Coverage Policy No. 8A very specifically requires that each ACT Team shall have one Team Leader and "[t]his position is to be occupied by only one person." (Resp't. Ex. 7 at 71) Moreover, the Team Leader must be a mental health professional

holding any of the following licenses: Licensed Psychologist, Licensed Psychological Associate, Licensed Clinical Social Worker, Licensed Professional Counselor, Licensed Marriage and Family Therapist, Licensed Pediatric Nurse Practitioner, Clinical Nurse Specialist certified as an advanced practice psychiatric nurse specialist. (Resp't. Ex. 7 and 73)

60. At the time of her appointment to "interim Team Lead" until September 29, 2013, Ms. Hermann was not a licensed mental health professional. Petitioner acknowledges that there is no evidence to suggest that Ms. Hermann was properly licensed to serve as an ACT Team Leader under the 2013 DMA Clinical Coverage Policy No. 8A until September 30, 2013.

61. From August 22, 2013 through September 29, 2013, Petitioner's Morganton ACT Team did not have a properly licensed Team Leader pursuant to 2013 Clinical Coverage Policy 8A. Accordingly, all services provided by the Morganton ACT Team during this time were noncompliant with the 2013 DMA Clinical Coverage Policy No. 8A.

YADKINVILLE ACT TEAM

62. Petitioner was required to comply with the 2013 DMA Clinical Coverage Policy No. 8A as it relates to the credentialing requirements of Team Leaders.

63. At all times relevant, Petitioner was aware that its current Yadkinville Team Leader, Ms. Janell Jordan, lacked the requisite licensure as required by the 2013 DMA Clinical Coverage Policy No. 8A. (Resp't. Ex. 6)

64. Despite the fact that Ms. Jordan previously served as Team Lead for Petitioner's Yadkinville ACT Team, from August 1, 2013 through May 29, 2014, Ms. Jordan was not properly licensed to serve as Petitioner's ACT Team Lead pursuant to the requirements of the 2013 DMA Clinical Coverage Policy No. 8A.

65. Petitioner argues that Dr. Shah, a psychiatrist, "provided Clinical Team Lead duties" while Ms. Jordan awaited the receipt of her licensure. Further, Petitioner claims that "Dr. Shah worked on [the Yadkinville ACT Team] approximately 50% more than was required of a doctor on the Team. This time was used to provide the ACT Team Lead duties supporting [Ms. Jordan]." (Resp't. Ex. 6) However, Dr. Shah was not authorized to serve as an ACT Team Lead.

66. The 2013 DMA Clinical Coverage Policy No. 8A provides an exhaustive list of mental health professional licenses permitted to be held by the Team Lead employee. (Resp't. Ex. at 73) Psychiatrist, the license held by Dr. Shah, is not part of this exhaustive list. As such, Dr. Shah was not among the categories of professionals properly licensed and authorized to serve as ACT Team Lead.

67. Further, the 2013 DMA Clinical Coverage Policy No. 8A states that the Team Leader position shall "be occupied by only one person." (Resp't. Ex. 7 at 71) Petitioner's claim that Dr. Shah "supported [Ms. Jordan]" therefore demonstrates that Dr. Shah's assistance to the Team Leader, Ms. Jordan, would have caused the Yadkinville Team Leader position to be staffed

by two employees. Assigning more than one Team Leader per ACT Team is strictly prohibited by the plain language of 2013 DMA Clinical Coverage Policy No. 8A. (Resp't. Ex. 7 at 71)

68. From August 2013 and October through December 2013, Petitioner's Yadkinville ACT Team did not have a properly licensed Team Lead pursuant to 2013 Clinical Coverage Policy 8A. Accordingly, all services provided by the Yadkinville ACT Team during this time were noncompliant with the 2013 Clinical Coverage Policy 8A.

RECOVERY OF THE OVERPAYMENT

69. A significant part of the issue in this contested case is whether Smoky has the authority to recover the identified overpayment from Petitioner via recoupment from claims or other collection mechanism when services have been rendered by Petitioner but Petitioner did not comply with the requirements set forth in the ACTT service definition found in DMA Clinical Coverage Policy No. 8A.

70. Petitioner is required to maintain proper documentation of all services provided. See paragraph 21, above.

71. The 2012 and 2013 Provider Contracts clearly contemplate that Smoky must recover any identified final overpayment, and that any failure by the Petitioner to remit a final overpayment may result in the assessment of penalty and interest. (*See* Article VI, Section 3 of Resp't Ex. 1 and Article II, Section 5 of Resp't. Ex. 2)

72. Through its contract with DMA in operation of the 1915(b)/(c) Medicaid Waiver, Smoky is required to conduct post-payment reviews and identify overpayments in accordance with 42 C.F.R. § 455.1, *e seq.*, 456.1, *et seq.*, and 42 C.F.R. § 438.608.

73. N.C.G.S. §108C-2(5) defines "final overpayment" to mean: "[t]he amount the provider owes after appeal rights have been exhausted, which shall not include any agency decision that is being contested at the Department or the Office of Administrative Hearings...." Accordingly, unless Petitioner timely appeals and obtains a stay from a Superior Court, Petitioner shall be required to remit the final overpayment to Smoky within thirty (30) days from the date of this Order, or be subject to assessment of penalty and interest in accordance with the terms and conditions of the 2012 and 2013 Provider Contracts.

74. Petitioner's failure to abide by the plain language requirements enunciated in DMA Clinical Coverage Policy No. 8A, and corresponding ACTT service definitions constitutes provider abuse as that term is defined at 42 C.F.R. § 455.2 and 10A N.C.A.C. 22F.0301.

75. Petitioner billed Smoky for Medicaid reimbursement for the aforementioned services and was paid for such services with Medicaid funds.

76. Smoky has demonstrated that there are no genuine issues of material fact and that Smoky is entitled to judgment as a matter of law that the services delivered to Medicaid consumers by Petitioner as set forth herein and paid by Smoky through Medicaid funds were in fact not

appropriately billed to Medicaid due to Petitioner's noncompliance with DMA Clinical Coverage Policy No. 8A and the ACTT service definition and that such overpayment for those noncompliant services by Smoky constituted abuse as defined at 42 C.F.R. § 455.2 and 10A N.C.A.C. 22F.0301.

77. Smoky did not act erroneously, exceed its authority, fail to use proper procedure, act arbitrarily or capriciously, fail to act as required by law or rule, or otherwise substantially prejudice Petitioner's rights when it issued its December 29, 2014 Notice of Decision outlining its finding of overpayment against Petitioner in the amount of $104,449.68.

FINAL DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent Smoky Mountain Center LME/MCO did not substantially prejudice Petitioner's rights nor act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by rule or law when it determined that Petitioner owed a payback of $104,449.68.

NOTICE

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

Under the provisions of 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 the Office of Administrative Hearings' Rule 26, N.C. Admin. Code 03.0102, the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, *et. seq.*, **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 the Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires proper service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

The 26th day of August, 2015.

Selina M. Brooks
Administrative Law Judge

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FILED
OFFICE OF ADMINISTRATIVE HEARINGS
10/15/2015 2:43 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15DOJ00053

Shenikwa Janay Barefield Petitioner v. NC Criminal Justice Education and Training Standards Commission Respondent	**PROPOSAL FOR DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward on July 28, 2015 in Raleigh, North Carolina, upon Respondent's request, pursuant to N.C. Gen. Stat. § 150B-40(e), for designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Mr. Howard A. Marsilio, Attorney
La Mantia & Marsilio, PLLC
Raleigh, North Carolina

Respondent: Ms. Lauren Tally Earnhardt, Asst. Attorney General
Ms. Whitney Belich, Asst. Attorney General
N.C. Department of Justice
Raleigh, North Carolina

ISSUES

Whether Respondent may revoke Petitioner's correctional officer certification on the grounds that she performed the acts necessary to satisfy the elements of the specified offense of felonious "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury" on May 28, 2012.

STATUTES and ADMINISTRATIVE RULES AT ISSUE

N.C. Gen. Stat. §§ 8C-803, Rule 803(6) & (8); 14-32(a); 150B-41(a); 12 NCAC 09G .0102(1); 26 NCAC 03 .0122; and 12 NCAC 09G .0504(a).

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner	Exhibit 1 – Verdict sheet from the Superior Court of Wake County in Case Number 12 CRS 211942
Respondent	Exhibit 1 – Probable Cause Committee Memorandum w/ Attachments (admitted for a limited purpose, see below)
	Exhibit 2 – Proposed Revocation of Correctional Officer Certification (admitted for a limited purpose, see below)

WITNESSES

Petitioner	Correctional Officer Shenikwa Janay Barefield
	Mr. Richard Squires, Dep. Director, N.C. Criminal Justice Education and Standards Commission
Respondent	Ofc. Eric Wegner, Raleigh Police Department
	Ofc. Mick Styers, Raleigh Police Department
	Ofc. Daniel Twiddy, Raleigh Police Department

MOTIONS

The parties stipulated to admission into evidence of the jury's verdict in Petitioner's trial in Wake County Superior Court, which appears in the record as Petitioner's Exhibit 1 and again as pages 6-8 of Respondent's Exhibit 1. Otherwise, Petitioner objected to the admission of Respondent's exhibits.

Initially, Petitioner filed a motion *in limine* to prohibit admission of statements made by the victim of Petitioner's alleged crime to a police officer and recorded in his report, and the ruling on this matter was deferred until the hearing. At the hearing, this and other statements taken by the police officers were received into evidence, in the form of the original police reports. Additionally, excerpts from these reports were included in the synopsis of the incident prepared for the Commission's consideration. These documents were admitted into evidence for the limited purpose of putting into the record the facts that the officers and the Commission relied upon in making their decisions to arrest Petitioner and to propose revocation of her certification, respectively.

However, the undersigned declined to treat them as proof of the matters declared by the witnesses, as conditionally permitted under appropriate circumstances by the exceptions to the hearsay rule codified at N.C. Gen. Stat. § 8C-803, Rule 803(8) of the N.C. Rules of Evidence,

"Public Records and Reports," and Rule 803(6), "Records of Regularly Conducted Activity." See, *Wentz v. Unifi, Inc.*, 89 N.C.App. 33, 365 S.E.2d 198, *disc. rev. denied*, 322 N.C. 610, 370 S.E.2d 257 (1988) (highway accident report recording "first hand" witness statements accepted as proof of driver's fault). Evidence Rule 803(8), "as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." *Official Commentary* on Rule 803(8)[1]. The hearsay statements in these documents – standing alone without the support of testimony by any of the witnesses on which the police and the Commission relied, and contradicted by the verdict of a Superior Court jury, as well as exculpatory testimony of Petitioner at the hearing – could not be considered trustworthy enough to receive as evidence that it was Petitioner who committed the crime.

Respondent's Exhibit 2 is the document constituting agency action. This document, dated December 3, 2014, is titled "Proposed Revocation of Correctional Officer Certification." It was admitted as Respondent's statement of its action and the required notice to Petitioner of her right to a contested case hearing pursuant to Article 3A of Chapter 150B.

Petitioner also filed a prehearing Motion for Summary Judgment on the grounds that the State should be collaterally estopped from revoking Petitioner's certification for committing a crime for which she was acquitted in a criminal trial. This Motion was denied for the reasons set forth in the undersigned's Order of July 24, 2015.

UPON DUE CONSIDERATION of the arguments of counsel; the exhibits admitted; and the sworn testimony of each of the witnesses in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. Respondent North Carolina Criminal Justice Education and Training Standards Commission (hereinafter, "the Commission") has authority granted under Chapter 17C of the North Carolina General Statutes and Title 12, Chapter 9G, of the North Carolina Administrative Code to certify correctional officers, juvenile justice officers, criminal justice instructors, and law enforcement officers, and to revoke, suspend, or deny such certification.

2. Petitioner Shenikwa Barefield attained probationary Correctional Officer certification on July 21, 2008. She received general Correctional Officer certification on July 21, 2009, and she has retained that status during all times pertinent hereto.

3. On November 12, 2014, the Commission's Probable Cause Committee considered the police reports, the arrest warrant and indictment, and Petitioner's written statement

[1] "Public…reports that are not admissible under Exception 8 are not admissible…under Exception 6." *Official Commentary* on Rule 803(8).

concerning allegations that she committed the crime of felonious "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury" (hereinafter, "AWDWIKISI"), N.C. Gen. Stat. § 14-32(a), on May 28, 2012. On December 12, 2014, the Committee gave Petitioner notice that it found probable cause to believe that she had committed this crime and that it proposed that the Commission should revoke her Correctional Officer certification.

4. Three officers of the Raleigh Police Department who responded to the first report and investigated the assault credibly testified to gathering evidence showing probable cause to arrest Petitioner.

5. Petitioner testified that she did not assault the victim; that she saw the victim after the victim was bloodied by the assault; and that she was herself assaulted and fled to avoid further injury.

6. Each of the witnesses at the hearing testified to the assault occurring in an open outdoor area where numerous people had gathered. Counsel represented to the undersigned in open court that the victim and other witnesses named in the police reports had been subpoenaed for the hearing. However, no person present at the time of the assault appeared at this hearing to give testimony contradicting Petitioner's exculpatory testimony.

7. Petitioner was tried in the Superior Court of Wake County and, on September 6, 2013, was found "not guilty" by the jury of the charge of AWDWIKISI and five lesser included offenses, including "Simple Assault." Additionally, she was found "not guilty" of "Assault Inflicting Serious Bodily Injury."

8. The evidence adduced at the hearing failed to make out a *prima facie* case that Petitioner committed the acts necessary to satisfy the elements of the specified offense of felonious "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury" on May 28, 2012.

9. Petitioner received Respondent's Proposed Revocation of Correctional Officer Certification, which included due notice of her right to appeal, on December 10, 2014. Petitioner timely requested a contested case hearing, and, on January 6, 2015, Respondent requested designation of an administrative law judge to hear the case and recommend a disposition of the matter. The parties were timely served with notice of this hearing on June 26, 2015.

Upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that the Conclusions of Law below are findings of fact, they should be so considered without

regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. The parties are properly before the Office of Administrative Hearings, which has jurisdiction over the parties and the cause.

3. The North Carolina Rules of Evidence, as found in Chapter 8C of the General Statutes, shall govern in all contested case proceedings, except as provided otherwise in Title 26, Chapter 3 of the North Carolina Administrative Code and N.C. Gen. Stat. § 150B-29. 26 NCAC 03 .0122.

4. The "Commission shall revoke the certification of a correctional officer or probation/parole officer when the Commission finds that the officer has committed or been convicted of a felony offense." 12 NCAC 09G .0504(a). For the purpose of this regulation, a person has committed an offense when (s)he has been found by Respondent or an administrative body to have "performed the acts necessary to satisfy the elements of a specified offense." 12 NCAC 09G .0102(1).

5. The party with the burden of proof in a contested case must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a). Respondent has the burden of proof when proposing to revoke a certification. *Leiphart v. North Carolina School of the Arts*, 80 N.C.App. 339, 348, 342 S.E.2d 914, 921-22 (1986).

6. The preponderance of the evidence produced at the hearing failed to substantiate the allegation that Petitioner committed the specified offense of felonious "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury" on May 28, 2012.

Upon the foregoing Conclusions of Law, the undersigned makes the following:

PROPOSAL FOR DECISION

As the evidence submitted at the hearing will not support a finding that Petitioner committed the specified offense, it must be recommended that her certification not be revoked.

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

This the 15th day of October, 2015.

J.Randolph Ward
Administrative Law Judge

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STATE OF NORTH CAROLINA	FILED IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	2015 SEP 11 PM 2:42 **15 DOJ 00211**
MICHAEL GLENN DAVIS,	OFFICE OF ADMIN HEARINGS
Petitioner,	
v.	**PROPOSAL FOR DECISION**
N.C. CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION,	
Respondent.	

In accordance with North Carolina General Statute § 150B-40(e), Respondent requested the designation of an Administrative Law Judge to preside at an Article 3A, North Carolina General Statute § 150B contested case hearing of this matter. On June 4, 2015, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. The parties filed their proposed Proposals for Decision with the Office of Administrative Hearings on July 30, 2015, and August 19, 2015.

APPEARANCES

For Petitioner: Rita Henry, Attorney at Law, 4924B Windy Hill Drive, Raleigh, North Carolina 27609

For Respondent: J. Joy Strickland, Assistant Attorney General, Department of Justice, 9001 Mail Service Center, Raleigh, North Carolina 27699-9001

ISSUE

Did Respondent properly propose to suspend Petitioner's correctional officer certification for the commission of the DAC misdemeanor offense of "Resisting a Public Officer?

STATUTE AND RULES AT ISSUE

N.C. Gen. Stat. § 14-223
12 NCAC 09G .0102(9)(cc)
12 NCAC 09G .0504(b)(3)
12 NCAC 09G .0505 (b)(1)

FINDINGS OF FACT

Procedural Background

1. On November 19, 2014, Respondent notified Petitioner by Notice of Proposed Suspension that Respondent's Probable Cause Committee had found probable cause to suspend Petitioner's correctional officer certification for committing the "DAC Misdemeanor" offense of "Resisting Public Officer," in violation of N.C. Gen. Stat. § 14-223. On November 21, 2014, Petitioner received Respondent's Notice of Proposed Suspension of Correctional Officer Certification (Respondent's Exhibit 5).

2. On January 8, 2015, Respondent requested designation of an Administrative Law Judge to preside at a contested case hearing after Petitioner advised Respondent that he wished to appeal Respondent's proposed suspension of his correctional officer certification. (Petition)

Contested Case Hearing

3. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

4. Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G authorize Respondent to certify correctional officers, and to revoke, suspend, or deny such certification.

5. On November 18, 1992, Respondent issued Petitioner a general certification to serve as a correctional officer. Petitioner held this certification without interruption until November 19, 2014. (Respondent's Exhibit 1)

6. Petitioner was employed by North Carolina Department of Public Safety as a correctional officer for twenty-three (23) years without any reprimands or disciplinary action before the current matter. In February 2013, Petitioner was promoted to Correctional Assistant Unit Manager at Tabor Correctional Institution, and worked in that position until his termination from employment on February 5, 2015.

7. On September 19, 2013, Petitioner was charged criminally with "Resisting Public Officer" on September 18, 2013 in violation of N.C. Gen. Stat. § 14-223. The magistrate's Order charged Petitioner as follows:

> . . . the defendant named above unlawfully and willfully did resist, delay and obstruct S. PEREZ OF THE NAVASSA POLICE DEPARTMENT, a public officer holding the office of PATROL OFFICER, by REFUSING TO DROP AN AXE WHEN INSTRUCTED TO DO SO AND REFUSING TO ALLOW HIMSELF TO BE HANDCUFFED.

(Emphasis in original, Respondent's Exhibit 2)

8. On December 13, 2013, Petitioner was represented by an attorney, and entered into a deferred prosecution agreement in Brunswick County, file number 13 CR 54944, for the "Resisting Public Officer" charged offense. That agreement required Petitioner to be on unsupervised probation for 3 months, complete 18 hours of community service, and pay $180.00 in costs. (Respondent's Exhibit 3) On March 14, 2014, the District Court dismissed the above criminal charge against Petitioner. (Respondent's Exhibit 3A)

9. Respondent's investigator, Michelle Schilling, investigated the allegation whether Petitioner committed the offense of "Resisting a Public Officer." Schilling obtained a certified copy of the magistrate's order, the deferred prosecution agreement, and a copy of the Navassa Police Department report concerning the allegation of Petitioner "Resisting a Public Officer." (Respondent's Exhibits 3-4) She submitted and presented such information to Respondent's Probable Cause Committee.

Contested Case Hearing

10. Crystal Freeman is Petitioner's sister, and one of eight siblings. Freeman, Petitioner, and their six siblings all live near one another on land they inherited from their parents in Leland, North Carolina. Seven houses of family live within walking distance of each other. On September 18, 2013, Petitioner, his brother, and his sister, Crystal Freeman, lived in separate homes on approximately 2 acres of such land. Petitioner lived at 10166 Davis Way NE, Leland, North Carolina, while Freeman lived in their parents' home at 10180 Davis Way NE, Leland, North Carolina. Freeman and Petitioner's homes were less than 100 feet apart. Petitioner and Freeman's parents are deceased.

11. Petitioner and his father had built a shed on the property line that divided Petitioner's property and his parents' property, and both had used the shed. After Petitioner's father died three years ago, Petitioner continued to use the shed to store his tools, lawn mower, and lawn equipment as the shed belonged to Petitioner. Freeman acknowledged at hearing that the shed belonged to Petitioner. After Petitioner and Freeman's father died, Petitioner and his other siblings agreed to let Freeman live in their parents' home, because of necessity. Petitioner and his siblings also paid the mortgage and bills for their parents' home, but Freeman did not. On or about September 18, 2013, Freeman placed a dog kennel in the shed without speaking with Petitioner first.

12. On September 18, 2013, Petitioner arrived home around 11:30 or 11:45 pm after working a ten-hour shift at Tabor Correctional Institution. Petitioner saw his equipment and tools had been removed from the storage shed, the shed door was open, and a dog kennel was in the shed. Petitioner thought someone might have broken into his shed. Petitioner's brother Fredrick came outside, and told Petitioner that he did not move Petitioner's tools, but their sister (Freeman) might have moved Petitioner's tools.

13. Petitioner became angry, walked to his sister's (Freeman's) house, and knocked on the door. Petitioner awakened Freeman, and told Freeman not to pull his stuff out of the shed. Freeman told Petitioner she wanted to put a dog in the shed. Petitioner told Freeman, "No," he did not agree with her, and told her she should not move his things out of the shed without telling him. Freeman slammed the door in Petitioner's face. Freeman called the police. Petitioner walked away from Freeman's house, removed the doghouse from the shed, and started putting his tools back into the shed. Petitioner picked up the axe to put back into the shed. He also used the axe to destroy the dog kennel.

14. On September 18, 2013, Navassa Police Sgt. Barry S. Perez was dispatched to 10180 Davis Way in response to a disturbance call. Perez was driving an unmarked car that was equipped with police lights and a siren. Perez was wearing a polo shirt with a police badge, and khaki pants. When he arrived at the residence, it was extremely dark. Sgt. Perez saw a man in front of the shed, approximately 30 feet from the back of the property, coming around the porch of the house holding an item. Perez observed a truck parked near the shed, but the truck was not running, and the lights were not on.

15. Perez turned on the blue lights on his patrol car, which are located across the windshield. The headlights on Perez' unmarked car shone on Petitioner. Perez immediately identified himself as a police officer, and ordered Petitioner to put the weapon down. When Perez realized Petitioner was holding an axe, he told Petitioner to put the axe down, but Petitioner failed to do so. Perez drew his sidearm, and again requested Petitioner to put down the axe. Perez told Petitioner at least 3 times to put the axe down. Petitioner did not comply with Perez's requests, but replied, "This is my house," and "I am not putting down [nothing]."

16. Eventually, Petitioner put down the axe, and Perez instructed him to get down on the ground on his knees. Instead of getting on his knees, Petitioner replied, "I know my rights," and that he was a correctional officer. Perez told Petitioner to get down on his knees again, and Petitioner complied with this order. Perez approached Petitioner, and told him to put his hands behind his back to be handcuffed. Petitioner responded, "You are not putting cuffs on me, and you [Perez] are going to need backup to cuff me." Perez backed away from Petitioner, held him at gunpoint, and waited for a deputy from the Brunswick County Sheriff's office to arrive on the scene.

17. When Sgt. Perez first arrived, Ms. Freeman walked out on her porch to greet him. She heard the police officer say, "Put down the weapon," and "Put the axe down." She also heard Petitioner respond, "This is my house," and "This is my shed." She heard Petitioner say that he did not want to get on the ground, that he was a corrections officer, and that the officer would have to call for back up to put handcuffs on him. Freeman walked back inside her home after Perez asked her to go back inside.

18. Once Leland Police arrived as backup, Perez and the police officer approached Petitioner, and told Petitioner him that he would be "tased" if he did not

comply with being handcuffed. Petitioner was handcuffed, placed in Perez' patrol car, and taken to the magistrate.

19. Sgt. Perez never advised Petitioner why Petitioner was being arrested. Petitioner did not understand why he was being arrested until the magistrate told him the charges against him. The magistrate charged Petitioner with "Resisting a Public Officer" in violation of N.C. Gen. Stat. § 14-223.

20. Since this incident, Sgt. Perez has seen Petitioner on more than one occasion, and Petitioner apologized to Perez for how he acted on the night in question.

21. In Sgt. Perez' Incident Report of this matter, Perez noted:

> I approached [sic] the Black Male, and I explained that he was not under arrest, but that I was cuffing him for my safety and his. The Black Male then stated, "You [sic] not going to put those cuffs on me." I then released the Black Male, because I did not have the scene secure, and felt that he was going to resist.

(Respondent's Exhibit 4)

22. The next day, September 19, 2013, Petitioner reported his arrest and criminal charge to his employer as required.

23. On or about October 1, 2013, Petitioner completed and signed an "Employee/Witness Statement Form" for his employer. (Respondent's Exhibit No. 2) On that form, Petitioner indicated that while he was putting his tools back into the storage building:

> [S]omeone pulled up with High Beam lights, No Siren on, No Blue Lights on, Saying, Hay [sic] put the axe down. I said I'm my [sic] building at my property. He never acknowledged who he was and yelling and I said I live there. He said get down on the ground. I said for what, I haven't done anything. . . So I had my hands up in the air when I seen the [sic] had a gun drawn at me. . . . The officer wasn't listening to what I was saying so other officer came and they handcuff me. . . [I] asked what is the problem.

(Respondent's Exhibit 2)

24. Petitioner's testimony at the contested case hearing was inconsistent with his written "Employee/Witness Statement" and Petitioner's Response to Respondent's First Set of Request for Admissions, Interrogatories, and Requests for Production.

a. In the "Employee/Witness Statement," and in Petitioner's response to Respondent's discovery documents, Petitioner admitted that after a car pulled up, he heard someone tell him to put the axe down. Petitioner responded by

telling Perez that he was in his building on his own property. (Respondent's Exhibits 2, p. 6) In his response to Respondent's First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents, Petitioner admitted that he actually heard what Perez was saying when Perez drove up, and questioned Sgt. Perez. Petitioner admitted he did not comply with Perez' orders, but questioned Perez as follows:

> . . . He told me to put the axe down and I told [him] I was in my building on my own property. He began yelling and I told him I lived there. He told me to get down on the ground and I asked what for. I told him I haven't done anything wrong. When I saw he had a gun, I put my hands up in the air."

(Respondent's Exhibit 6)

b. However, at the contested case hearing, Petitioner said he could not hear the person, whom he later realized was an officer, at all, because Perez was 30 to 50 feet away from him. Later in his testimony, Petitioner added that he could not hear Sgt. Perez, because Petitioner's truck was running, and it was loud. In contrast, Perez opined that Petitioner's truck was not running when Perez pulled onto Petitioner's property.

20. Petitioner's additional responses to Respondent's First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents were also inconsistent with Sgt. Perez's testimony, and the court documentation.

a. In his Responses to the Requests for Admissions, Petitioner denied being told on more than one occasion (whether by an identified law enforcement officer or other person) to put the axe down, to get down on the ground, to turn around, and get down on his knees. Yet, Sgt. Perez was clear in his testimony that he instructed Petitioner multiple times to comply with these instructions. In responding to the Interrogatories, Petitioner contradicted his answer in his "Responses" by admitting he did not comply with Perez' order, but responded that he lived there and that he was on his own property.

b. At hearing, Petitioner denied being obligated to perform community service, pay court costs, and be on unsupervised probation pursuant to the deferred prosecution agreement. Yet, the certified copy of the deferred prosecution agreement in Brunswick County file number 13 CR 054944 showed that community service, paying court costs, and unsupervised probation were all conditions of Petitioner's deferred prosecution. (Respondent's Exhibit 3)

21. Further, Petitioner's testimony at hearing that he did not commit the offense of "Resisting a Public Officer" is not credible given Petitioner's own contradictory statements.

a. At hearing, Petitioner claimed that Investigator Schilling advised him that he could not, and did not need to attend the Probable Cause hearing. However, on rebuttal, Investigator Schilling denied telling Petitioner he could not have an attorney represent him at the Probable Cause hearing, and denied telling Petitioner he did not need to attend such hearing. Petitioner's allegation makes no sense given that Respondent's letter to individuals, whose cases are presented to the Probable Cause Committee, strongly encourages officers to attend such meeting.

b. Petitioner changed his testimony regarding when he realized that Perez was a police officer. At first, Petitioner indicated that his brother told him that the person at the house with the gun was the police. However, later in his testimony, Petitioner indicated that it was not until much later that he realized that Perez was a police officer, and he then put the axe on the ground.

c. The testimony of Sgt. Perez that Petitioner repeatedly failed to follow his instructions to put down the weapon, get down on his knees and allow himself to be handcuffed is credible, and is corroborated by Crystal Freeman's testimony that she heard Perez and Petitioner's statements to each other during the incident.

22. The evidence at hearing showed that the September 18, 2013 incident between Petitioner and his sister was one of many arguments among Petitioner, Ms. Freeman, and Petitioner's family members. The police have been called to their homes several times since September 18, 2013 due to arguments among Petitioner and his siblings, and Ms. Freeman.

23. The evidence at hearing established that Petitioner never threatened Sgt. Perez or Crystal Freeman, nor attempted to flee from the police on September 18, 2013. Sgt. Perez acknowledged at hearing that while Petitioner did not immediately get on the ground when asked, he also didn't think Petitioner understood why he was being arrested or held at gunpoint during the incident.

24. Petitioner committed the DAC misdemeanor of "Resisting a Public Officer" on September 18, 2013 when he failed to follow the instructions of Officer Perez by failing to put down the axe, and refusing to be handcuffed in violation of N.C.G.S. § 14-223.

CONCLUSIONS OF LAW

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

2. Respondent is authorized by Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9G, to certify correctional officers and probation/parole officers, and revoke, suspend, or deny such certification.

3. Pursuant to 12 NCAC 09G .0504(b)(3), Respondent may suspend, revoke, or deny certification of a correctional officer when the Respondent finds the applicant for certification or the certified officer ... has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification.

4. 12 NCAC 09G .0102(9) defines "misdemeanor" as:

> [T]hose criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Respondent as the following as set forth in G.S. Or other state or federal law
>
> (cc) . . . 14-223 Resisting officers.

5. 12 NCAC 09G .0505(b) states:

> When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three years; however, the Respondent may substitute a period of probation in lieu of suspension of certification following an administrative hearing where the cause of sanction is:
>
> (1) commission or conviction of a misdemeanor as defined in 12 NCAC 09G .0102.

6. N.C. Gen. Stat. § 14-223 "Resisting a Public Officer" states:

> If any person shall willfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.

N.C.G.S. §14-223 (2013).

7. At hearing, Petitioner established that the September 18, 2013 incident was a domestic family dispute between Petitioner and his sister that has occurred before, and has reoccurred since September 18, 2013.

8. It was reasonable for Petitioner to be alarmed, cautious, and noncompliant when an unknown person, driving an unmarked car, pulls onto Petitioner's property at

midnight, and pulls a gun on Petitioner. Sgt. Perez agreed that it was extremely dark, and that Petitioner did not understand why he was being handcuffed and arrested.

9. Nevertheless, even if Petitioner could not hear Sgt. Perez, he admitted he heard his brother say the person who was there was the police. At that point, and given Petitioner's 23 years of correctional officer experience, Petitioner should have complied with Sgt. Perez' command to put the axe down.

10. A preponderance of evidence exists to support Respondent's conclusion that Petitioner committed the DAC misdemeanor offense of "Resisting a Public Officer" on September 18, 2013 when he refused to comply with Officer Perez' commands to put down the axe, and submit to being handcuffed. Therefore, the findings of the Probable Cause Committee of the Respondent are supported by substantial evidence, and are not arbitrary and capricious.

PROPOSAL FOR DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent suspend Petitioner's correctional officer certification for a period of not less than three (3) years based upon Petitioner's commission of the DAC misdemeanor of "Resisting a Public Officer." Nonetheless, given the circumstances surrounding the September 18, 2013 incident with Petitioner's sister, and Petitioner's 23 year career as a correctional officer with no prior disciplinary actions, the undersigned Respondent has the grounds to exercise its discretion under 12 NCAC 09G .0505(c), and impose a lesser sanction in lieu of suspension of Petitioner's certification.

NOTICE

The North Carolina Criminal Justice Education and Training Standards Commission will make the Final Decision in this contested case. 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. N.C.G.S. § 150B-40(e).

This 11th day of September, 2015.

Melissa Owens Lassiter
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
8/3/2015 4:41 P.M.

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**15 DOJ 00212**
RODRIGO ESTANOL,	
Petitioner,	
v.	**PROPOSAL FOR DECISION**
N.C. CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION,	
Respondent.	

On October 16, 2014, Respondent's Probable Cause Committee found probable cause to suspend Petitioner's certification as a probation/parole officer as a result of the commission of the DAC misdemeanor "Assault on a Female" in violation of N.C. Gen. Stat. § 14-33. In accordance with North Carolina General Statute § 150B-40(e), Respondent requested the designation of an Administrative Law Judge to preside at an Article 3A, North Carolina General Statute § 150B, contested case hearing of this matter.

Based upon the Respondent's request, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina on June 4, 2015. On June 19, 2015, Petitioner filed his proposed Proposal for Decision. On June 19, 2015, Respondent filed its proposed Proposal for Decision.

APPEARANCES

Petitioner: Sean P. Vitrano
Attorney for Rodrigo Estanol
Vitrano Law Offices, PLLC
Post Office Box 1498
Wake Forest, North Carolina 27588

Respondent: J. Joy Strickland
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
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ISSUE

Did Respondent properly propose to suspend Petitioner's probation/parole officer certification for the commission of the DAC misdemeanor offense of "Assault on a Female?"

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 14-33, 17C-6, 17C-10

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

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Facts:

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

Background

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and Petitioner received by certified mail, the notification of probable cause to suspend probation/parole officer certification letter mailed by Respondent on December 3, 2014. (Respondent's Exhibit 7)

2. Respondent, North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "Commission"), has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G, to certify correctional officers and probation/parole officers and to revoke, suspend, or deny such certification.

3. On November 1, 2011, Respondent issued a probationary certification as a correctional officer, and thereafter, issued Petitioner a general certification as a correctional officer on September 26, 2012. (Respondent's Exhibit 1)

4. From September 2011 until May 2013, Petitioner was employed as a correctional officer with North Carolina Department of Public Safety, Division of Adult Corrections. (Formerly NC Department of Corrections)

Adjudicated Facts

5. On May 4, 2013, Petitioner left his employment as a correctional officer at the North Carolina Correctional Institution for Women, and began employment as a Probation/Parole Office within the North Carolina Department of Public Safety's Division of Adult Corrections. ("NC DPS")

6. On May 16, 2013, Petitioner signed a Notice of Transfer form, Respondent's Form F-5D, advising Respondent that Petitioner was transferring from his correctional officer position to a probation/parole officer position. On May 21, 2013, the Division of Adult Correction's authorized representative, Lisa M. Murray, signed the Notice of Transfer/Form F-5D.

7. On August 28, 2013, Petitioner was charged criminally with the offense of "Assault on a Female" of victim Heather Estanol on August 26, 2013, in violation of N.C.G.S. § 14-33. Petitioner was found not guilty at the criminal trial of such charge in Wake County, file number 13 CR 221400. (Resp Ex 3)

8. On January 14, 2014, Respondent's Criminal Justice Coordinator at NC DPS, Tracy Gill, reported to Respondent that (1)Petitioner was charged on August 28 [sic] , 2013 with "Assault on a Female," and (2) on December 11, 2013, Petitioner was found not guilty in Wake County Court of that charged offense.

9. On February 4, 2014, Respondent received Petitioner's Form F-5D from May of 2013. The Form F-5D stops the correctional officer's certification before the effective date of the new certification, and appoints the employee to the second certification. When Pulley received Petitioner's first Form F-5D, Respondent had notice that Petitioner had been charged with an "Assault on a Female" charge in August of 2013.

10. While it was unusual to receive a Form F-5D nine months after the date such form was signed, that scenario has occurred before in other cases. When Respondent's Correctional Coordinator Kim Pulley received Petitioner's May 2013 Form F-5D, the Form F-5D was missing (1) the effective date of Petitioner's transfer to the probation/parole position, and (2) verification of Petitioner's college degree.

11. On February 18, 2014, Pulley received a Revised Form F-5D from NC DPS noting Petitioner's effective date of transfer was 6/10/13, and verifying Petitioner's

college degree. On February 26, 2014, Pulley received approval from Respondent's Richard Squires to approve Petitioner's request for probationary certification. Pulley notified NC DPS Tracy Gill that Petitioner's probation/parole officer certification had been approved, and that Respondent would issue Petitioner's probationary certification. "However, he is still under investigation with Kevin Wallace at this time." (Pet Ex 8)

12. On February 28, 2014, Pulley processed Petitioner's certification, and issued Petitioner a probationary certification as a probation/parole officer. Petitioner's probationary certification listed the effective date of such certification as February 27, 2014. Respondent's database system enters the day Pulley processed the certification as the effective date of certification. Pulley knew that Petitioner had been charged, and found not guilty of an "Assault on a Female." (Resp Ex 1, p 3) Petitioner's probationary certification expires one year after issuance. Respondent considered 6/10/13 as the effective date of Petitioner's transfer based upon NC DPS' notation of such transfer as 6/10/13, on the Form F-5D.

13. Respondent issued Petitioner's general certification as a probation/parole officer on June 10, 2014, with an effective date of June 10, 2014. (Pet Ex 10)

14. Kevin Wallace, an investigator with the Criminal Justice Standards Division, investigated the allegation of Petitioner's commission of the offense of "Assault on a Female." As part of his investigation, Wallace obtained a certified copy of the arrest warrant in this case, a copy of the Fuquay-Varina Police Department report concerning the allegation of "Assault On A Female" by Petitioner, and photographs of Ms. Estanol's injuries as documented by Officer Mindy Williams of the Fuquay Varina Police Department. (Resp Exs 3, 5-6)

15. Heather Estanol is Petitioner's ex-wife. She and Petitioner were married for 13 years, and have three children. In August of 2013, she and Petitioner were going through a separation, but no papers had been filed. Petitioner had bought a new home, but still came to the marital house sporadically. Sometimes, he would spend the night, though not on any set schedule. When Petitioner spent the night, Petitioner slept in the marital bedroom, while Ms. Estanol slept either on the couch, or in one of the children's rooms.

16. On August 26, 2013, Petitioner, his brother and sister, and the Estanol children ate dinner at the Estanol's marital home. Petitioner and Ms. Estanol argued before and after Petitioner's brother and sister left the home. After Petitioner's brother and sister left, Ms. Estanol went to her oldest daughter's room to sleep in order to minimize the arguing between she and Petitioner. She plugged her cell phone into the wall so that it could charge, and hid her phone underneath the pillow.

17. Around 11:00 pm that night, Petitioner came into her daughter's bedroom room, bent over Ms. Estanol, and kissed their daughter good night. Petitioner left the room, but re-entered about fifteen minutes later. Petitioner reached under Ms. Estanol's pillow, and placed his hand on top of Ms. Estanol's hand as Ms. Estanol held her cell

phone. Petitioner pulled on Ms. Estanol's hand as Ms. Estanol held onto her cell phone. Ms. Estanol told Petitioner, "No, you can't have my phone." Petitioner pulled Ms. Estanol out of the bed as they struggled for the phone. Their daughter awakened, sat up in bed, and looked around. Petitioner told her to "shhh" and to lie back down which she did. As they continued to struggle over the phone, Petitioner pulled Ms. Estanol through the doorway, and toward the hallway. Before pulling Ms. Estanol out of the bedroom, Ms. Estanol's knees hit the bedroom door, and Petitioner slammed the door on Ms. Estanol's right arm, between the door and the doorframe. Petitioner pulled Ms. Estanol down the hallway while still holding onto the phone. They continued to struggle for the phone until they reached the master bedroom. Petitioner tried to pry Ms. Estanol's fingers from the phone, and Ms. Estanol tried to pull the phone back. Petitioner finally stopped, and let go of the phone. Ms. Estanol went back to her daughter's room, locked the door, and slept in front of the door for the rest of the evening. Ms. Estanol's knuckles on her hands were bleeding. She developed bruises on her knees, arms, and legs. She took photos of her injuries that night, and the next day.

18. That night, Ms. Estanol contacted her mother to tell her that she had been assaulted, but did not call the police because she did not want to wake the children and cause a scene. She had planned to report the assault the next day on her lunch break but got scared. Instead, she developed the photos of her injuries she had taken that day and the night before. (Resp Exs 9a-9b)

19. On the second day after the incident, Ms. Estanol asked her boss for advice. She agreed to meet with the police at her workplace, and provided a statement to the police. Ms. Estanol just wanted the Petitioner to leave her alone.

20. At the time of the assault, Ms. Estanol was taking antibiotics and prednisone, and using an inhaler for bronchitis. Ms. Estanol was in a traffic accident, or "fender bender" on August 22, 2013 while driving her Hyundai. She was sitting in the left turn lane at a red light. When the light turned green, the car in front of her started to move, so she started to accelerate. When the car in front of her came to a sudden stop, she bumped into the back of that car. She did not receive any injuries from the accident, and the air bags did not deploy.

21. After the traffic accident, Ms. Estanol asked a male friend to come over and look at the damage to the vehicle. Petitioner was very upset about this, and argued about it with her in texts, calling her "loose" and other things. Petitioner had threatened to take away her phone, and that is why she had it close by the night of the assault. Petitioner had taken away her laptop, and turned off the internet so her cell phone was the only communication device that she had.

22. The August 22, 2013 traffic accident report indicated that Ms. Estanol's vehicle was traveling at approximately 5 mph at the time of impact, and neither party reported any injuries. The responding officer indicated that approximately $400 in

damage was estimated to Ms. Estanol's vehicle, and approximately $200 in damage to the other vehicle. (Petitioner's Exhibit 12)

23. Lieutenant Chris Gathman is an officer with the Fuquay Varina Police Department for seven years who has been a law enforcement officer for a total of 16 years. On August 28, 2013, Lt. Gathman was dispatched to Ms. Heather Estanol's place of work regarding a possible assault. Lt. Gathman, Lt. Hinton, and Officer Mindy Williams responded to Ms. Estanol's workplace. Lt. Gathman saw some of Ms. Estanol's injuries. Officer Mindy Williams photographed Ms. Estanol's injuries.

24. Based on his interview with Ms. Estanol concerning her account of the assault by Petitioner, and the documentation of her injuries, Lt. Gathman believed that he had probable cause for an arrest warrant for Petitioner for "Assault on a Female" of Ms. Estanol. After Lt. Gathman appeared before a magistrate, the magistrate issued a warrant for Petitioner for "Assault on a Female" for the incident involving Heather Estanol. At hearing, Gathman indicated that the portion of his report indicating that the assault occurred on August 28, 2013 was a typo.

25. Lt. Gathman has responded to, and investigated hundreds of traffic accidents in his career. He opined that Ms. Estanol's injuries were not consistent with her being in a "fender bender" type accident as alleged by Petitioner.

26. Petitioner testified at the contested case hearing. He and Ms. Estanol separated in February of 2013. After that, he began moving some of his things out of the marital home, and into a new house he had purchased. During the summer of 2013, Petitioner went to the marital home 3 to 4 times a week, and slept alone in the master bedroom. For the past 6 years, Ms. Estanol had been sleeping on the living room couch.

27. On August 25, 2013, Petitioner went to the marital home around 12:00 p.m. to pick up his kids to see a movie. When Petitioner returned home at 4:00 p.m., Ms. Estanol began talking with Petitioner about fixing their relationship. Petitioner testified that Ms. Estanol began screaming at him as he went toward the garage. He left through the garage, and closed the door behind him. After leaving the house, Petitioner went to meet his brother and sister at a soccer game. Petitioner returned to the marital home after the game with his brother and sister who stayed for dinner. Ms. Estanol did not eat with them. After dinner, Petitioner began sorting his clothes in the garage. After his brother and sister left, he went into the home around 10:30 p.m. to pray with his kids. The two youngest children share a room, while the oldest daughter has her own room.

28. When Petitioner walked into his oldest daughter's room, he saw his wife was sleeping on top of the covers next to their daughter. He bent over the bed, and put his hand on his daughter's forehead to pray with her. His wife was between he and his daughter at the time. He stated that his wife became crazy saying that he never listened to her so he left the room. He contended he walked back to the master

bedroom, and she followed him, but he shut the door behind him. Petitioner stated that he did not assault his wife, and there was no argument over Ms. Estanol's cell phone.

29. Petitioner alleged that Ms. Estanol received her injuries from a car accident on August 22, 2013 while she was driving their Hyundai SUV. He also stated that Ms. Estanol often had bruises on her, because she was clumsy.

30. After this incident occurred, Ms. Estanol obtained an ex-parte domestic violence protective order. Subsequently, Petitioner and Ms. Estanol, by and through their attorneys, entered into a Consent Domestic Violence Order of Protection (hereinafter Consent DV Order). The Consent DV Order included, but is not limited to, the following Finding of Fact:

> On 8/26/13, the defendant intentionally caused bodily injury to the plaintiff by attempting to grab her phone from under her pillow, pulling her by the arm. Plaintiff had multiple bruises following the altercation.

The Consent DV Order contained the following Conclusion of Law:

> The defendant has committed acts of domestic violence against the plaintiff.

(Resp Ex 8)

31. The Consent DV Order included, but was not limited to, the following paragraph:

> Defendant shall not turn off the electricity, water, gas, or cable, insurance or any other utilities to home until placed in Plaintiff's name and shall restore internet connection by 5:00 p.m. on today (9/5/13). . . Defendant shall return the laptop, modem, and all cords/accessories, etc. he removed from home on or about 8/25. All items shall be returned with SUV today. . .

(Resp Ex 8)

32. On or about September 3, 2013, Petitioner completed and signed an "Employee/Witness Statement Form" about the August 25 2013 incident, at his supervisor's request. This form contains the following language above the signature line:

> I understand this statement will be considered part of the official investigation and that I may be called on to testify or provide written or

verbal clarifying statements. The statement I have provided is an accurate account of the case to the best of my knowledge.

(Resp Ex 4) When Petitioner completed this form, he did not indicate that his wife had argued and screamed at him about getting back together, nor did he indicate that his wife's injuries were from a car accident that she had been involved in a few days before this incident, as Petitioner alleged at the contested case hearing. Instead, Petitioner indicated in his statement, that he believed "that the cause of the problem could be some medications that she [Ms. Estanol] was taking." (Resp Ex 4)

33. At the Respondent's probable cause hearing, Petitioner showed a picture of a wrecked pickup truck to the Probable Cause Committee. During his testimony at the subject hearing, Petitioner admitted that such photo was of a truck that Ms. Estanol wrecked after the alleged assault incident, not before. Respondent's counsel asked Petitioner why he showed that photo to the committee, when that was not the car involved in the accident that he said resulted in his wife's injuries. Petitioner said that he only showed the committee that photo, because the committee told him to give them all the documentation that he brought to the meeting. When asked why he thought the photo was significant to the committee's consideration, he again said that he only showed the committee, because the Committee said to give them all the documentation that he had brought to the meeting.

34. At the contested case hearing, Petitioner admitted that he signed the Consent DV Order, but noted that he did so at his attorney's advice, and he did not read it. When asked why the Judge would have ordered him to return the modem, computer, etc. and to restore the internet service, he claimed he did not understand why, because he had not done those things.

35. Respondent's counsel asked Petitioner why he did not include, in his statement to his supervisor, the information regarding the argument and the accident. Petitioner explained that he was frustrated, under a lot of stress, and he had a panic attack so he just wrote what was in his head. Furthermore, Petitioner indicated that no one assisted him in completing the witness statement for his supervisor. He walked into a room by himself and completed the statement.

36. Petitioner's testimony that he did not commit an assault on Heather Estanol, that Ms. Estanol's injuries were caused by a traffic accident she was involved in, and that her medication caused this problem was not credible in light of all of the evidence presented at the contested case hearing. First, Petitioner failed to present sufficient evidence to show that Ms. Estanol's August 22, 2013 traffic accident would have caused the type of injuries that she exhibited on August 28, 2013. Second, Petitioner failed to present sufficient evidence to establish that the medication Ms. Estanol was taking would have impaired her to any degree that would cause her to make a false allegation of assault. Third, Petitioner's statements were inconsistent, and refuted by Ms. Estanol's testimony. Ms. Estanol's statements were consistent with Lt. Gathman's statements. Finally, the documentation of Ms. Estanol's injuries taken the

night the incident occurred, the next day, and again by the police two days after the incident, reflect injuries consistent with Ms. Estanol's account of an assault.

37. At hearing, Petitioner argued that the alleged commission of the "Assault on a Female" on or about August 26, 2103 did not occur after his certification as a probation/parole officer, because his probationary certification form for probation/parole indicated an effective date of February 24, 2014.

38. Ms. Kim Pulley explained that while Petitioner's probationary certificate listed November 1, 2011 as the effective date of such certification, the November 1, 2011 date is actually the date that she entered Petitioner's information into the Division's computer system. She is unable to override the entry date. Ms. Pulley explained that the Division considers the "date of appointment," listed on the revised Notice of Transfer/Form F-5D with the Division of Adult Correction (Resp Ex 2b), as the effective date of probationary certification. The Division's records show Petitioner achieved certification as follows:

Probationary certification as a correctional officer- September 26, 2011
General certification as a correctional officer- September 26, 2012
Probationary certification as a probation/parole officer - June 10, 2013
General certification as a probation/parole officer -June 10, 2014

(Resp Exs 1 & 2c)

39. At hearing, Correctional Coordinator Kim Pulley explained that Petitioner has maintained certification by and through the Respondent since September 2011, but transferred from a correctional officer to a probation/parole officer in 2013. As noted above, on February 4, 2014, Respondent received the original Notice of Transfer/Form F-5D transferring Petitioner from a correctional officer to a probation/parole officer. Petitioner signed the original Notice of Transfer/Form F-5D on or about May 16, 2013. On February 18, 2014, Respondent received the revised Notice of Transfer/Form F-5D for Petitioner. On the revised Form F-5D, the effective date of June 10, 2013 had been added, as well as information verifying Petitioner's education. (Resp Ex 2b)

40. The preponderance of evidence supports the conclusion that Petitioner committed the DAC misdemeanor offense of "Assault on a Female" in violation of N.C.G.S. § 14-33, by assaulting Heather Estanol, Petitioner's estranged wife, on August 26, 2013, by grabbing Ms. Estanol's cell, slamming Ms. Estanol's arm in a door, pulling and wrestling with Ms. Estanol over a phone, leaving cuts and bruises on Ms. Estanol's knees, legs and arms.

CONCLUSIONS OF LAW

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

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

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

3. Pursuant to 12 NCAC 09G .0504(b)(3), the Commission "may suspend, revoke, or deny certification of a probation/parole officer when the Commission finds the applicant for certification or the certified officer ... has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification."

4. Pursuant to 12 NCAC 09G .0102(9), a "Misdemeanor" means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Commission as the following as set forth in G.S. Or other state or federal law . . . (g) 14-33(c) Assault, battery with circumstances.

5. 12 NCAC 09G .0102 "DEFINITIONS" states:

> The following definitions apply throughout this Subchapter only:
>
> (1) "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified offense.

6. Pursuant to 12 NCAC 09G .0505(b)(1), when the Commission suspends or denies the certification of a corrections officer (including probation/parole officers), the period of sanction shall be not less than three years; however, the Commission may substitute a period of probation in lieu of suspension of certification following an administrative hearing where the cause of sanction is ... commission or conviction of a misdemeanor as defined in 12 NCAC 09G .0102.

7. North Carolina General Statute § 14-33(c)(2) "Assault On A Female" states:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

Assaults a female, he being a male person at least 18 years of age.

N.C.G.S. §14-33(c) 2013.

8. In this case, the preponderance of evidence supports the conclusion that Petitioner committed the DAC misdemeanor offense of "Assault on a Female" in violation of N.C.G.S. § 14-33, by assaulting Heather Estanol, Petitioner's estranged wife, on August 26, 2013, by grabbing Ms. Estanol's cell, slamming Ms. Estanol's arm in a door, pulling and wrestling with Ms. Estanol over a cell phone, leaving cuts and bruises on Ms. Estanol's knees, legs and arms.

9. Based on the foregoing, findings of Respondent's Probable Cause Committee are supported by substantial evidence, and are not arbitrary and capricious.

10. 12 NCAC 09G .0303 "PROBATIONARY CERTIFICATION" provides:

> (e) The officer's Probationary Certification shall remain **valid for one year from the date the certification is issued** by the Standards Division unless sooner suspended or revoked pursuant to Rule .0503 of this Subchapter or the officer has attained General Certification.

(Emphasis added)

11. Pursuant to 12 NCAC 09G .0303(e), the effective date of Petitioner's probationary certification to serve as a probation/parole officer was the actual date Respondent issued Petitioner's probationary certification, i.e. February 27, 2014, not the date NC DPS indicated Petitioner's employment began as a probation/parole officer. Therefore, Petitioner was not certified as a probation/parole officer on August 26, 2013 when he committed the "Assault on a Female" on his estranged wife, but continued to hold a general certification by Respondent as a correctional officer.

12. The preponderance of the evidence sufficiently supported a decision by Respondent to deny Petitioner's probation/parole officer certification under 12 NCAC 12 NCAC 09G .0504(b)(3), and 12 NCAC 09G .0505(b)(1) for committing the DAC misdemeanor offense of "Assault on a Female" in violation of N.C.G.S. § 14-33.

13. Assuming arguendo, that Respondent determines Petitioner's probationary probation/parole officer certification was effective 6/10/13, instead of February 27, 2014, the preponderance of the evidence sufficiently supported a decision by Respondent, under 12 NCAC 12 NCAC 09G .0504(b)(3), and 12 NCAC 09G .0505(b)(1), to suspend Petitioner's probation/parole officer certification for committing the DAC misdemeanor offense of "Assault on a Female" in violation of N.C.G.S. § 14-33.

PROPOSAL FOR DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent deny Petitioner's probation/parole officer certification, or alternatively, suspend Petitioner's probation/parole officer certification for a period of not less than three (3) years based upon Petitioner's commission of the DAC misdemeanor of "Assault on a Female."

NOTICE

The North Carolina Criminal Justice Education and Training Standards Commission will make the Final Decision in this case. 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. N.C.G.S. § 150B-40(e).

This 3rd day of August, 2015.

Melissa Owens Lassiter
Administrative Law Judge

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OFFICE OF ADMIN HEARINGS

STATE OF NORTH CAROLINA	)	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF ROBESON	)	15 DOJ 01533
HARFEL CLEMENTA DAVIS,	)	
Petitioner,	)	
v.	)	**PROPOSAL FOR DECISION**
N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION,	)	
Respondent.	)	

On July 15, 2015, Administrative Law Judge Melissa Owens Lassiter heard this case in Fayetteville, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), the 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: Alan I. Maynard
Maynard Law Firm
Post Office Box 875
Elizabethtown, North Carolina 28337

Respondent: Matthew L. Boyatt, Assistant Attorney General
NC Department of Justice
Post Office Box 629
Raleigh, North Carolina 27699-0629

ISSUE

Has the Petitioner committed or been convicted of any combination of four (4) or more crimes or unlawful acts defined as either Class A or Class B misdemeanors pursuant to the Commissions' Rules, such that Petitioner's application for certification is subject to denial?

Pursuant to N.C.G.S. §150B-41, the parties do hereby stipulate to the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by mail the proposed Denial of Justice Officer's Certification letter mailed by Respondent Sheriffs' Commission on January 5, 2015.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or "Sheriffs' 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.

3. Petitioner is an applicant for justice officer certification through the Bladen County Sheriff's Office.

4. 12 NCAC 10B.0204(d)(5) states the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

> (5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

5. On April 12, 1997, Petitioner was convicted of misdemeanor simple worthless check in Bladen County, North Carolina; Case No. 97 CR 000654. This single conviction is classified as a Class A misdemeanor conviction pursuant to the Commission's rules.

6. On November 26, 2001, Petitioner was charged with the misdemeanor offense of assault on a female in violation of N.C.G.S. § 14-33(c)(2) in Bladen County, North Carolina; Case No. 01 CR 051439. Petitioner does not dispute that he committed the offense of assault on a female on November 26, 2001 within the meaning of N.C.G.S. § 14-33(c)(2), by grabbing Rosalind Davis' arm during a verbal argument, thereby leaving a bruise. However, Petitioner was not convicted of assault on a female in Case No. 01 CR 051439, as the matter was dismissed by the District Attorney. Assault on a female in violation of N.C.G.S. § 14-33(c)(2) is classified as a Class B misdemeanor pursuant to the Commission's Rules.

7. The Respondent found probable cause to believe that Petitioner committed two (2) other criminal offenses, an alleged assault on a female against

Petrina Chisholm on June 28, 2009, in addition to alleged communicating threats on the same date against Ms. Chisholm.

8. Petitioner denies ever communicating any threat to Ms. Chisholm and denies ever assaulting Ms. Chisholm. Petitioner was never charged criminally with assaulting or communicating a threat towards Ms. Chisholm.

9. A preponderance of the evidence supports a finding that Petitioner did not assault Petrina Chisholm on June 28, 2009.

10. A preponderance of the evidence supports a finding that Petitioner did not communicate a threat to Petrina Chisholm on June 28, 2009.

11. James A. McVicker is the Sheriff of Bladen County. Sheriff McVicker believes Petitioner is a reliable law enforcement officer that conducts himself professionally. Petitioner has the support of Sheriff McVicker, who would like to see Petitioner certified so that he may continue his service in Bladen County as a deputy sheriff. It is Sheriff McVicker's intent to continue to employ Petitioner should he be issued certification through the Respondent Commission.

12. Lieutenant David Shaw of the Bladen County Sheriff's Office appeared at the administrative hearing in support of Petitioner's application for certification. Lieutenant Shaw is of the opinion that Petitioner is a reliable and professional law enforcement officer. Lieutenant Shaw would like to see Petitioner issued certification so that he may continue to serve the citizens of Bladen County as a deputy sheriff.

13. Sergeant Warren Holder of the Bladen County Sheriff's Office also appeared at the administrative hearing in support of Petitioner's application for certification. Sergeant Holder is also of the opinion that Petitioner is a reliable and professional law enforcement officer. Sergeant Holder would like to see Petitioner issued certification so that he may continue to serve the citizens of Bladen County as a deputy sheriff.

14. Prentis Benston is the former Sheriff of Bladen County. Former Sheriff Benston has known Petitioner for over 10 years, and has characterized Petitioner as an outstanding law enforcement officer. Mr. Benston has observed that Petitioner is respected within the community for his professionalism and good work.

15. Petitioner does not dispute that he has been convicted of one (1) class A misdemeanor (simple worthless check) and that he committed one (1) Class B misdemeanor offense of assault on a female on November 26, 2001.

16. Petitioner has not committed or been convicted of any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor

regardless of the date of commission or conviction. Petitioner's application for certification is therefore not subject to denial pursuant to 12 NCAC 10B .0204(d)(5).

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. Pursuant to 12 NCAC 10B .0204(d)(5), the Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or certified officer has committed or been convicted of:

> (5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

3. Pursuant to 12 NCAC 10B .0103(2), "convicted" or "conviction" means and includes, for purposes of that Chapter, the entry of (a) a plea of guilty; (b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military; or (c) a plea of no contest, nolo contendere, or the equivalent.

4. Simple worthless check in violation of N.C.G.S. § 14-107(d)(1) is classified as a Class A misdemeanor pursuant to 12 NCAC 10B .0103 and the Class B Misdemeanor Manual adopted by Respondent. Petitioner has been convicted of one (1) count of misdemeanor worthless check in case number 97 CR 000654, in Bladen County, North Carolina.

5. The criminal offense of assault on a female under N.C.G.S. § 14-33 (c)(2) is classified as a Class B misdemeanor pursuant to 12 NCAC 10B .0103 and the Class B Misdemeanor Manual adopted by Respondent.

6. The record in this case establishes that Petitioner committed the offense of assault on a female on or about November 26, 2001, when Petitioner grabbed Rosalind Davis' arm during the course of an argument.

7. Petitioner did not communicate a threat to Petrina Chisholm on June 28, 2009.

8. Petitioner did not assault Pertina Chisholm on June 28, 2009.

9. Petitioner has not committed or been convicted of any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A

misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor. Petitioner's application for certification is therefore not subject to denial pursuant to 12 NCAC 10B .0204(d)(5).

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends the Respondent issue Petitioner's justice officer certification.

NOTICE

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to this Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C.G.S. § 150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This the 5th day of August, 2015.

Melissa Owens Lassiter
Administrative Law Judge