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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF EDGECOMBE, LENOIR AND HARNETT

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Edgecombe County Board of Education Petitioner, v. Retirement Systems Division Department of State Treasurer, Respondent.	**18 DST 07191**
Lenoir County Board of Education Petitioner, v. Retirement Systems Division Department of State Treasurer, Respondent.	**18 DST 07194**
Harnett County Board of Education Petitioner, v. NC Department of State Treasurer, Retirement Systems Division, Respondent.	**18 DST 07337**

FINAL DECISION

Upon consideration of the parties' Motions for Summary Judgment, their responses thereto, and for good cause shown, the undersigned hereby **GRANTS** Summary Judgment for Petitioners as follows:

APPEARANCES

For Petitioners: Lindsay Vance Smith
Attorney for Petitioner
Tharrington Smith, LLP

Deborah R. Stagner
Attorney for Petitioner
Tharrington Smith, LLP

For Respondent: Joseph A. Newsome
Attorney for Respondent
N.C. Department of Justice

ISSUE

Whether Petitioners are entitled to a refund of the additional contribution-based benefit cap payments for their employees in light of the North Carolina Court of Appeals' decision in *Cabarrus County Bd. of Educ. v. Department of State Treasurer, Retirement Syst. Div.*, 821 S.E.2d 196 (N.C. App. 2018) that the basis for calculating those contributions had been adopted unlawfully?

BACKGROUND

1. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil,* 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971).

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

3. Petitioners are the governing bodies of the public school systems in their respective counties of Edgecombe County, Lenoir County, and Harnett County. Under N.C. Gen. Stat. §§ 115C-40 and 115C-44, Petitioners have general control and supervision of their school administrative units and are responsible for instituting all actions on behalf of the unit.

4. In 2014, the North Carolina General Assembly enacted a contribution-based benefit cap ("CBBC") for members of the Teachers' & State Employees' Retirement System ("T&SERS") as follows:

a. Members who retire on or after January 1, 2015, and who have an average final compensation of $100,000 or more, are subject to the CBBC. N.C. Gen. Stat. § 135-5(a3);

b. The T&SERS Board of Trustees must adopt a "cap factor" that will allow no more than three quarters of one percent of retirement allowances to be capped. N.C. Gen. Stat. § 135-5(a3);

c. If a retiree's allowance is capped, the T&SERS Board of Trustees must "compute and notify the member and the member's employer of the total additional amount the member would need to contribute in order to make the member not subject to the [CBBC]." N.C. Gen. Stat. § 135-4(jj); and

d. For all retirees who were members before January 1, 2015, the retirees' last employer will be responsible for paying the "lump sum payment . . . that would have been necessary in order for the retirement system to restore the member's retirement allowance to the pre-cap amount." N.C. Gen. Stat. § 135-8(f)(2)(f).

(2014 N.C. Sess. Laws 88)

5. The purpose of this legislation was to control the practice of "pension spiking" in which a retirement member's compensation significantly increased during his or her four-year average final compensation (AFC) period, thus creating a monthly retirement benefit significantly greater than the member and employer contributions had funded. (2014 N.C. Sess. Laws 88)

6. In October 2014, the T&SERS Board of Trustees adopted a cap factor of 4.8 to implement the CBBC, and in October 2015, adopted a new cap factor of 4.5.

7. Respondent sent Notices of Contribution-Based Benefit Cap Liability to school boards across North Carolina, including Petitioners, requesting payments of additional CBBC payments from the school boards for certain retired employees.

8. Between August 2015 and April 2017, Petitioners received notifications of their responsibilities to pay additional contributions pursuant to N.C. Gen. Stat. §§ 135-5(a3), 135-4(jj), and 135-8(f) based upon the retirement of Karen H. Dameron, Associate Superintendent of Edgecombe County Public Schools; Stanley P. Williams, Superintendent of Harnett County Public Schools; and Dr. Larry S. Mazingo, Superintendent of Lenoir County Public Schools. The assessments for these four retirees were: Dameron: $93,894.42; Williams: $197,805.61; and Mazingo: $65,370.37. Petitioners paid all the additional contributions they were assessed.

9. In 2016, four other school boards—Johnston, Wilkes, Union, and Cabarrus County Boards of Education—requested a declaratory ruling from Respondent that the

cap factor, as adopted, was void because of Respondent's failure to follow the rulemaking procedures of the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat., Chapter 150B. Those four school Boards also petitioned the T&SERS to adopt a cap factor rule. Both requests were denied.

10. Johnston, Wilkes, Union, and Cabarrus County Boards of Education filed petitions for judicial review in Superior Court asserting that the APA required the T&SERS Board of Trustees to follow the rulemaking procedures of the APA in adopting the cap factor; that the Board of Trustees had failed to do so; and that the additional contribution assessments against the school boards should be declared unlawful and void.

11. In May 2017, Superior Court Judge James E. Hardin, Jr. ruled in favor of the four school boards. Respondent appealed the decision to the Court of Appeals.

12. In September 2018, the Court of Appeals affirmed the decision of the trial court, holding that the cap factor is a "rule" as that term is defined by N.C. Gen. Stat. § 150B-2; that the T&SERS Board of Trustees had failed to follow the rulemaking procedures of the APA in adopting the cap factor in 2014 and 2015; and that, therefore, the additional contribution assessments imposed against the four county school systems of Johnston, Wilkes, Union, and Cabarrus, pursuant to N.C. Gen. Stat. §§ 135-5(a3), 135-4(jj) and 135-8(f), were void and unlawful. *Cabarrus*, 821 S.E.2d at 196.

13. On March 29, 2019, the North Carolina Supreme Court granted Respondent's Petition for Discretionary Review of the Court of Appeal's decision in *Cabarrus*.

14. After the Court of Appeals issued its decision in *Cabarrus,* Petitioners requested a refund of the CBBC amounts that Respondent had assessed Petitioners for their employees Dameron, Williams, and Mazingo and for which Petitioners had paid under the unlawfully adopted cap factor. Petitioner Harnett County Board of Education requested a refund within one year of paying the assessment for Stanley Williams. Respondent declined to make a decision on those requests until the Court of Appeals had an opportunity to consider the question in *Cabarrus.* (Pet. Mot. Exs. 4-6)

15. On October 29, 2018, Respondent denied Petitioner Edgecombe County Schools' request for a refund of its $93,894.42 payment for employee Karen H. Dameron's retirement. (Petition, Document Constituting Agency Action - 18 DST 07191) On November 8, 2018, Respondent denied Petitioner Lenoir County Schools' request for a refund of its $65,370.37 payment for employee Larry S. Mazingo's retirement. (Petition, Document Constituting Agency Action - 18 DST 07194) On November 28, 2018, Respondent denied Petitioner Harnett County Schools' request for a refund of its $197,805.61 payment for employee Stanley P. Williams II's retirement. (Petition, Document Constituting Agency Action - 18 DST 07337)

16. The basis for Respondent's denials of Petitioners' requests for refunds was that the funds transmitted by Edgecombe, Lenoir and Harnett County schools were

placed in the Pension Accumulation Fund upon receipt by the Retirement System, and N.C. Gen. Stat. § 135-2 precluded Respondent from making refunds to Petitioners "because more than a year has passed since the funds were transmitted to the Pension Accumulation Fund." (Documents Constituting Agency Action)

17. On November 28, 2018, Petitioners Edgecombe and Lenoir County Boards of Education appealed Respondent's denials of Petitioners' request for refunds of the contribution-based benefit cap payments on behalf of their retired employees by filing their respective petitions with this Tribunal. On December 3, 2018, Petitioner Harnett County Board of Education filed its petition of Respondent's denial of its request for refund of the contribution-based benefit cap payments on behalf of its retired employee.

18. There are no facts in dispute and the parties agree there are no genuine issues of material facts.

19. The only question of law is whether Petitioners are entitled to a refund of the funds paid to Respondent based upon Respondent's assessments under the Anti-Pension-Spiking Laws enacted by the General Assembly in 2014 N.C. Sess. Law 88.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has jurisdiction over the parties and subject matter of these contested cases.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *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). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. An Administrative Law Judge may grant judgment on the pleadings, pursuant to a motion made in accordance with N.C. Gen. Stat. § 1A-1, Rule 12(c), or summary judgment, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, that disposes of all issues in the contested case. N.C. Gen. Stat. §§ 150B-33(b)(3a) and -34(e); 26 NCAC 03 .0105. *See, e.g.*, *Cayette v. DOR*, 2016 NC OAH LEXIS 6; *Furlow v. DPS*, 2015 NC OAH LEXIS 140.

4. While a summary judgment ruling is not required to contain Findings of Facts and Conclusions of Law, the undersigned finds that the better practice is to make such findings and conclusions to show the clear basis for this Final Decision.

Standard of Review

5. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 of the N.C. Rules of Civil Procedure; 26 NCAC 03 .0101(a).

6. To be entitled to summary judgment, the moving party must bear the burden to show that no questions of material fact remain to be resolved. *Floraday v. Don Galloway Homes, Inc.*, 340 N.C. 223, 225-26, 456 S.E.2d 303, 305 (1995).

7. A factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to find for the opposing party. *Anderson v. Liberty Lobby*, 477 US 242, 247-48 (1986); *Kessing v. National Mortgage Corp.,* 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

8. In ruling on such motion, the judge must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, as well as all reasonable inferences that may be drawn from those alleged facts. *See Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994); *Robinson v. Acker*, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (1996).

9. Once the moving party has met its burden, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. When attacking the credibility of the moving party's affiants, the non-moving party must produce "sufficient evidence to cast doubt on defendant's credibility and to establish a genuine issue" of fact. *Locklear v. Langdon,* 129 N.C. App. 513, 518, 500 S.E.2d 748, 751 (1998).

10. When an issue can be resolved by determining a question of law, and the question is decided against the moving party, it is appropriate to render summary judgment against the moving party. N.C. Gen. Stat. § 1A-1, Rule 56(c).

Petitioners Are Entitled to Refund to Recover Funds

11. Respondent argues that N.C. Gen. Stat. § 135-2 precludes Respondent from making refunds to Petitioners because "more than a year has passed since the payments were made." (Resp. Motion, p. 6)

12. N.C. Gen. Stat. § 135-2 states in part:

> Neither the trust corpus nor income from this trust can be used for purposes other than the exclusive benefit of members or their beneficiaries, except that employer contributions made to the trust under a good faith mistake of fact may be returned to an employer, where the refund can occur within less

> than one year after the mistaken contribution was made, consistent with the rule adopted by the Board of Trustees.

N.C. Gen. Stat. § 135-2.

13. The North Carolina Constitution requires that " . . . every person for an injury done . . . shall have remedy by due course of law." N.C. Const. art. I, § 18

14. While the North Carolina Constitution places limitations on the purposes for which funds in the Retirement System may be used, it expressly provides that permissible purposes include: "retirement system benefits and purposes, administrative expenses, and refunds." N.C. Const. art. V, § 6(2).

15. The purpose of both N.C. Gen. Stat. § 135-2 and its constitutional counterpart, N.C. Constitution, art. V, § 6(2), is to protect funds in the retirement system from being redirected for purposes entirely unrelated to the system, and that is how these provisions historically have been invoked. *See State Emps. Ass'n of N.C., Inc. v. State,* 154 N.C. App. 207, 208, 573 S.E.2d 525, 527 (2002), *rev'd*, 357 N.C. 239, 580 S.E.2d 693 (2003) (involving litigation "to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement systems").

16. To conclude that the limitations in N.C. Gen. Stat. § 135-2 prohibit the return of payments made voluntarily by employers—payments central to the purpose of the retirement system—as a result of the T&SERS' own misinterpretation of law would nullify the *Cabarrus* judgment by the Court of Appeals and deprive Petitioners of the remedy at law to which they are constitutionally entitled.

17. Under Respondent's interpretation of N.C. Gen. Stat. § 135-2, Respondent would effectively allow T&SERS to insulate itself from unlawful conduct and to hijack local tax dollars appropriated for the operation of public schools. To apply N.C. Gen. Stat. § 135-2 in such a manner would be fundamentally inequitable. *See, e.g.*, Bailey, 348 N.C. at 166-67, 500 S.E.2d at 75 (1998) (determining that it would be "unjust to limit recovery" of a statutory refund to state retirees that had formally protested, and finding that a "more expansive, inclusive determination would seem to comport with the language and spirit" of the statute under which refunds could be obtained).

18. In *Cabarrus*, the Court of Appeals was clear that Respondent assessed additional pension contributions on the county public school systems under a "misinterpretation of law" as Respondent's "cap factor" was a "rule" as defined by the APA, and Respondent's adoption of the cap factor identified in the CBBC legislation should have been adopted through the APA formal rulemaking process. The Court further explained that:

> An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of

> a rule contained in G.S. 150B-2(8a) if [it] has not been adopted as a rule in accordance with this Article. N.C.G.S. § 150B-18.

Id. at 17.

19. Applying the logic in *Cabarrus* to these contested cases, Petitioners are entitled to a refund of the CBBC amounts they paid Respondent because Respondent assessed Petitioners under the same cap factor and under the same "misinterpretation of law" as Respondent assessed the four school systems in *Cabarrus. See Bunn v. Maxwell*, 199 N.C. 557, 155 S.E. 250, 251-52 (1930) (holding that analogous precursor statute required repayment "whenever taxes of any kind have been collected through clerical error, or misinterpretation of law, or otherwise, and paid into the state treasury in excess of the amount legally due the state"); *cf*. *Dart Indus., Inc. v. Clark,* 657 A.2d 1062, 1067 (R.I. 1995) (holding that an analogous Rhode Island statute required a refund of taxes paid "pursuant to a statute that is later found to be unconstitutional or otherwise illegal").

20. Petitioners are also entitled to refunds of their CBBC payments under N.C. Gen. Stat. § 147-84. N.C. Gen. Stat. § 147-84 provides that:

> Whenever taxes or other *receipts of any kind* are or have been by clerical error, *misinterpretation of the law*, or otherwise, collected and paid into the State treasury in excess of the amount found legally due the State.

N.C. Gen. Stat. § 147-84 (emphasis added). Under N.C. Gen. Stat. § 147-84, and the *Cabarrus* decision, Respondent lacked the authority to assess additional CBBC contributions to Petitioners without a properly adopted rule, and Petitioners are entitled to a refund for their payments of those unlawfully assessed contributions.

21. Moreover, Petitioners need not rely on the availability of funds directly from the trust to make them whole as "[i]t is within the State's power to return funds in the amount seized from [a party], regardless of whether the *exact* cash seized can be returned." *State v. King,* 218 N.C. App. 384, 393, 721 S.E.2d 327, 333 (2012) (emphasis in original). Respondent has conceded as much, in its Responses to discovery and in its own Motion for Summary Judgment. *See, e.g.*, Pet. Mot., Ex. 11 (stating that funds received pursuant to CBBC invoices "are not treated differently than regular employer . . . contributions"); Resp. Mot. at 7 (noting that "Petitioners' prior payments [could be] credited to their respective accounts").

Whether Respondent Can Apply the New Cap Factor Rule Retroactively is Not Before This Tribunal

22. Respondent's second contention is that Petitioners "are not entitled to a refund" because Respondent intends to enforce the new rule setting the cap factor "as to *all* retirements that occurred" after January 1, 2015. Resp. Mot. at 6-7 (emphasis added). Not only is this contention irrelevant to the question of whether Petitioners are entitled to

a refund as a matter of law, but it is an improper issue for this Tribunal to address at this time.

23. This Tribunal hears "contested cases" that have not been settled through informal means employed by the agency and the complaining party. N.C. Gen. Stat. § 150B-22; *See, e.g.*, *Metro. Sewerage Dist. of Buncombe Cty. v. N.C. Wildlife Res. Comm'n*, 100 N.C. App. 171, 174, 394 S.E.2d 668, 670 (1990) (OAH's jurisdiction stems from "agency action giving rise to a 'dispute between an agency and another person").

24. In this case, following the Court of Appeals' *Cabarrus* decision, Petitioners requested refunds from Respondent and were denied those refunds *solely* on the grounds that N.C. Gen. Stat. § 135-2 precluded a refund from the trust. (Pet. Mot. Exs. 8-10). Petitioners' requests for contested case hearings thus centered around the "dispute" arising from Respondent's refusal to provide refunds.

25. This case does not stem from assessments that Respondent may make to Petitioners (for the same retirees) in the future under the new cap factor rule, nor could it. Respondent has taken no such agency action, there has not been any opportunity for Petitioners to dispute such assessments, no opportunity for the parties to engage in informal dispute resolution mechanisms, or any opportunity for Respondent to provide Petitioners with a Final Decision. Because this issue has not yet given rise to a live "dispute" between Respondent and Petitioner, this Tribunal has no jurisdiction over it.

26. As a broader matter, Respondent's argument simply does not present a justiciable question. North Carolina courts have repeatedly recognized that "[j]udicial resources should be focused on problems which are real and present rather than dissipated . . . , hypothetical [,] or remote questions[.]" *Anderson v. N.C. State Bd. of Elections*, 788 S.E.2d 179, 184 (N.C. App. 2016) (quoting *Crumpler v. Thornburg,* 92 N.C. App. 719, 722, 375 S.E.2d 708, 710 (1989) (alterations in original)). Courts should not, therefore, "entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples,* 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). Hence, where an issue presents no "real and present" questions, that issue is not justiciable by a court. *Sunamerica Fin. Corp. v. Bonham,* 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991).

27. Here, Respondent's argument omits the legal question presented—whether Petitioners are entitled to a refund (they are)—and skips ahead to a hypothetical future in which Petitioners are re-assessed for these retirements under the newly adopted cap factor rule. Respondent's argument cannot be supported by this hypothetical because it asks this Tribunal to determine what is, at this moment, an "abstract position of law," entirely untethered from real question in this case. For those reasons, Respondent's contention that Petitioners' refund should be withheld as a credit against future lawful assessments is entirely speculative, unsupported by the record, and unripe for a determination by this Tribunal.

28. Even if the Tribunal considered Respondent's abstract question, this Tribunal would not grant summary judgment for Respondent as there are no facts in the

record showing that (1) Petitioners have been assessed under the new cap factor rule; and (2) Respondent has denied refunds based on its ability to retroactively apply the rule. This type of speculation is an inappropriate basis for summary judgment. *See, e.g., Home Indem. Co. v. Hoechst Celanese Corp.,* 128 N.C. App. 189, 205, 494 S.E.2d 774, 784 (1998) (denying summary judgment where party "failed to forecast anything more than speculative evidence were on the issue").

29. There is no genuine issue of material fact that Petitioners made CBBC payments for retired employees to comply with Respondent's assessments under N.C. Gen. Stat. §§ 135-5(a3), 135-4(jj) and 135-8(f).

30. There is no genuine issue of fact that in September 2018, our Court of Appeals ruled that Respondent's assessments, imposed pursuant to N.C. Gen. Stat. §§ 135-5(a3), 135-4(jj) and 135-8(f), were void and unlawful because Respondent failed to follow the rulemaking procedures in the APA in adopting the "cap factor" by which those assessments were calculated in the *Cabarrus* decision.

31. There is no genuine issue of material fact, and the Undersigned hereby concludes as a matter of law, that Respondent, in denying Petitioners' requests for refunds of their CBBC payments, deprived Petitioners of property and otherwise substantially prejudiced Petitioners' rights AND exceeded its authority, acted erroneously, failed to use proper procedure, and failed to act as required by law or rule.

32. Based upon the foregoing reasons, Petitioners are entitled to a refund of the funds they paid to Respondent based upon Respondent's assessments under N.C. Gen. Stat. §§ 135-5(a3), 135-4(jj), and 135-8(f).

33. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law.

SUMMARY JUDGMENT – FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the undersigned Administrative Law Judge hereby **GRANTS** Petitioners' Motion for Summary Judgment and DENIES Respondent's Motions for Summary Judgment.

NOTICE OF APPEAL

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

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The**

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

This the 7th day of May, 2019.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Joseph A Newsome
N.C. Department of Justice-Attorney General's Office
jnewsome@ncdoj.gov
Attorney For Respondent

Deborah R Stagner
Tharrington Smith LLP
dstagner@tharringtonsmith.com
Attorney For Petitioner

Lindsay Vance Smith
Tharrington Smith, LLP
lsmith@tharringtonsmith.com
Attorney For Petitioner

This the 7th day of May, 2019.

Jerrod Godwin
Administrative Law Judge Assistant
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000