

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
19 WTO 07049

<p>Travis Clarke Petitioner,</p> <p>v.</p> <p>North Carolina Water Treatment Facility Operators Certification Board Respondent.</p>	<p><b>FINAL DECISION</b></p>
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This contested case was heard by Michael C. Byrne, Administrative Law Judge, on June 25, 2020, at the Office of Administrative Hearings in Raleigh, North Carolina.

**APPEARANCES**

Mr. Travis Clarke  
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Pro Se

Ms. Elly S. Young  
Assistant Attorney General  
N.C. Department of Justice  
Post Office Box 629  
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Attorney for Respondent

**EXHIBITS**

Respondent's Exhibits A through I were admitted into evidence.

**WITNESSES**

For Petitioner: Petitioner, Joel Clarke

For Respondent: Wendell Pickett, Steven Reid, Lynn Primm

## ISSUE

Whether Petitioner's certification as a water treatment facility operator should be revoked because Petitioner committed one or more of the acts in N.C.G.S. 90A-26 permitting the reprimand of an operator or the suspension or revocation of an operator's certification.

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

## FINDINGS OF FACT

1. Petitioner Travis Clarke ("Petitioner"), a resident of Raleigh, Wake County, North Carolina, holds a North Carolina water treatment facility operation certification issued by Respondent North Carolina Water Treatment Facility Operator Certification Board ("Respondent") issued February 28, 2019. At the time of the events at issue, Petitioner was 23 years old and had held a "Grade C Well Certificate" for approximately three months.
2. Petitioner's former employer, Aqua North Carolina, Inc. ("Aqua") operates water systems. At the time of the events at issue, Petitioner had worked for Aqua as an "Operator in Responsible Charge" ("operator") for less than one year.
3. Aqua monitors water at customer residences to comply with the "Lead and Copper Rule," a program enacted under Federal rules and incorporated in North Carolina rules. See 40 C.F.R. Part 141, Subpart I; 15A NCAC 18C .1507(c). This program tracks lead and copper levels in the piping systems of structures, including residences, built during certain years.
4. The Lead and Copper Rule requires that a "first draw tap sample" be taken from cold water at the kitchen tap. If the kitchen tap has a filter, the sample is taken from the nearest frequently used bathroom. Id. Aqua instructed operators on the sampling procedure. Petitioner knew that proper Lead and Copper sampling requires water from the kitchen tap or bathroom.
5. Aqua operator duties relevant to the Lead and Copper Rule are to leave labeled bottles for residential customers. The customer takes the sample and then leaves the filled bottle and completed (and signed) label for the operator, who returns it to Aqua for testing. Aqua maintains a "pool" of residences for this program; however, Respondent was unable to determine that Aqua had procedures in place for dealing with customers who failed to comply with the program. T. 41-42.

6. In July 2019, Petitioner had difficulty getting a sample from a specific customer. Petitioner attempted multiple times to retrieve a filled sample bottle, without success. In frustration, Petitioner sought advice from an experienced (20 plus years) Aqua operator who had serviced the same customers. This operator (and possibly others) advised Petitioner to take the sample from an outside spigot. Petitioner did so.
7. In the case of the sample he took at the outside spigot, Petitioner included a falsified customer signature on the bottle's label when he gave the bottle to Aqua for testing.
8. Aqua did not submit Petitioner's improperly taken sample for testing as the bottle's label was not fully filled out. Aqua contacted the customer and learned that the customer did not take the sample Petitioner submitted.
9. Petitioner admitted to Aqua that he took the sample from the outside spigot "due to not having customers give them back" and stated that "I shouldn't have taken matters into my own hands." Res. Ex. B.
10. Initially Aqua seemed to take the matter lightly; Petitioner was told by his supervisor not to engage in such conduct again and was sent about his work. T. 87. However, a more senior Aqua manager fired Petitioner the next day. Id.
11. On July 30, 2019, Aqua submitted a complaint about Petitioner (but not the operator who advised him) to Respondent. Res. Ex. A. Respondent's Chairman, Wendell Pickett ("Pickett"), began an investigation. On August 13, 2019, Steven Reid, who supervises Respondent's certification program, informed Petitioner of the complaint and invited him to respond. Res. Ex. G.
12. Petitioner responded to the complaint. Res. Ex. H. Petitioner wrote, "I realize I made a mistake with the lead and copper sampling process and now fully comprehend the extent of those consequences." Petitioner wrote that he gave the customer multiple opportunities to provide a sample and that in discussing his resulting frustration with other operators, "I was then told, 'Just take the sample yourself'." Petitioner "learned a great lesson from my mistake and regret my decision deeply. I wish nothing but to continue my career as an Operator." Petitioner closed with, "I hope the Board sees my apology to be humble and true." Id.
13. Through Petitioner's response to the complaint, Respondent had a credible allegation that one or more experienced certified operators advised Petitioner to take the tap sample from an outside spigot.
14. By letter dated September 20, 2019, Respondent informed Petitioner of its intention to revoke Petitioner's Grade C Well Certificate. Res. Ex. I. This letter included a "Proposed Decision" to revoke Petitioner's certification. Id.

15. The “Proposed Decision” concluded (a) Petitioner practiced fraud or deception in both taking the first draw tap sample from an outside spigot and by “submitting a sample certification form that contained a falsified signature and false or missing responses,” and (b) Petitioner failed to use reasonable care, judgment, knowledge, or ability in the performance of his duties by the same actions. Id. The ‘Proposed Decision’ also concluded that Petitioner “increased the risk of harm to public health, safety, or welfare.” Id.
16. Revocation of a certification is for a minimum of two years, upon which Petitioner could seek recertification. This would require Petitioner re-attending a school and retaking all the relevant examinations. See 15A N.C.A.C. 18D.0307.
17. Petitioner asked for an administrative hearing. Respondent requested OAH to conduct the hearing pursuant to N.C.G.S. 150B-40(e).
18. Petitioner admitted that he took a Lead and Copper water sample from an outside spigot and submitted that sample for testing along with a falsified customer signature. Petitioner consistently admitted that his actions were wrong.
19. Petitioner credibly expressed remorse for his actions in following the advice of a more experienced operator to take the sample from an outside spigot after a customer repeatedly failed to provide a sample from the proper location. T. 88. Petitioner credibly expressed additional remorse for submitting the falsified signature and agreed that he deserves some disciplinary action from the Board for his actions. Id. Petitioner did not agree that his operator’s certification should be revoked. Id. Petitioner’s testimony was credible.
20. Petitioner did not identify at hearing the operator who advised him to take a sample from an outside spigot. “I wouldn’t like to throw under -- other people under the bus to benefit me.” T. 90. However, Petitioner testified without contradiction that the specific operator who advised him to take the sample from the outside spigot was “the main one who had the system before me, and he’s been there 20 years.” T. 90.
21. Despite his termination from Aqua, Petitioner remains employed in the industry. His former supervisor from Aqua served as a reference for Petitioner in his new job. T. 89-90.
22. Petitioner’s witness, Mr. Joel Clarke, testified to Petitioner’s general good character. Mr. Clarke has been in the sanitation industry for 34 years. T. 92. Petitioner worked for Mr. Clarke in the water treatment business while enrolled at N.C. State University. While Mr. Clarke was generally credible, he is also Petitioner’s uncle. T. 95.
23. Respondent’s witness Ms. Lynn Primm manages Lead and Copper testing for Aqua. She testified that if an operator has repeated difficulty getting a first draw tap sample from a customer, the operator should report it and another residence is assigned from the pool of customers used for testing. While Ms. Primm’s testimony was credible, neither Aqua’s complaint (Res. Ex. A) nor its Proposed Decision (Res. Ex. I) reference this option to address uncooperative customers in the Lead and Copper sampling process. The sampling

bottle label used by Aqua contains no provision for noting that a sample cannot be obtained. Res. Ex. C.

24. Petitioner's actions had no actual impact on public health and safety. The sample turned in by Petitioner was not tested. Due to the customer's lack of action, a sample for that customer's residence would not have otherwise existed at all. Given the size of and scope of the Lead and Copper monitoring program under the evidence, there was no showing of any detrimental effect from Petitioner's conduct.
25. Pickett, Respondent's Board Chairman, reiterated at the hearing his reasoning why Petitioner's certification should be revoked. Pickett was credible and appeared sincere. He admitted that Respondent did not pursue information that other, more senior operator(s) engages in similar practices to Petitioner in Lead and Copper sample collections and that this information caused him concern. T. 36-37. Pickett regrets that Respondent did not pursue those allegations. T. 41.
26. The preponderance of the evidence did not show that Petitioner lacks the skills, knowledge, and abilities to function as an operator.

Based on these findings, the undersigned makes the following:

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to N.C.G.S. 150B, Article 3A, following a request from Respondent under N.C.G.S. 150B-40(e). In such cases, the administrative law judge sits in place of the agency and has the authority of the presiding officer in a contested case under Article 3A. The administrative law judge makes a proposal for decision, which contains findings of fact and conclusions of law. Respondent makes the final agency decision in the case. N.C.G.S. 150B-42.
2. All parties are properly before the Office of Administrative Hearings and there is no question as to joinder or misjoinder.
3. Notice of hearing was provided to all parties in accordance with N.C.G.S. 150B-23(b).
4. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).
5. In this contested case, subject to Article 3A of N.C.G.S. 150B, the facts must be established upon consideration of the entire record by a preponderance of the evidence.
6. This case involves a proposal to revoke an occupational license or certification. It thus affects the substantive rights of the Petitioner, and he is entitled to both notice and

opportunity to be heard. Scroggs v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991).

7. Respondent is organized under Article 2A of Chapter 90A of the General Statutes. See N.C.G.S. 90A-21. The purpose of that Article is to protect the public health and to conserve and protect the water resources of the State; to protect the public investment in water treatment facilities; to provide for the classifying of public water treatment facilities; to require the examination of water treatment facility operators and the certification of their competency to supervise the operation of water treatment facilities, and to establish the procedures for such classification and certification. N.C.G.S. 90A-20.
8. Respondent may reprimand an operator or suspend or revoke an operator certificate when it finds: (1) The operator has practiced fraud or deception; (2) The operator failed to use reasonable care, judgment, knowledge, or ability in the performance of an operator's duties; (3) The operator is incompetent or unable to properly perform the duties of an operator; or (4) The operator has failed to comply with the requirements for certification or renewal of certification. N.C.G.S. 90A-26.
9. Accordingly, it must be shown by a preponderance of the evidence that Petitioner committed one of the acts set forth in N.C.G.S. 90A-26 before Petitioner's certification may be suspended or revoked.
10. Respondent's finding (Res. Ex. G, "Conclusion of Law #5") that Petitioner practiced fraud or deception is supported by a preponderance of the evidence. Petitioner admitted taking a first draw tap sample from an outside spigot and turning that sample in for testing with the representation that the sample was provided by a customer. Petitioner also admitted enlisting a third party to falsify that customer's signature. This conduct was deceptive. Respondent thus established grounds under N.C.G.S. 90A-26(2) where it may reprimand Petitioner or suspend or revoke his certification.
11. Respondent's finding (Res. Ex. G, "Conclusion of Law #4") that Petitioner practiced fraud or deception by submitting a sample with "missing" responses on the label is unsupported by a preponderance of the evidence and is error of law; there is no showing or governing regulation that this conduct, standing alone, justifies disciplinary action against an operator.
12. Respondent's finding (Res. Exh. G, "Conclusion of Law #5") that Petitioner failed to use reasonable care, judgment, knowledge, or ability in the performance of his duties is supported by a preponderance of the evidence. Petitioner admitted taking a first draw tap sample from an outside spigot and turning that sample in for testing with the representation that the sample was provided by a customer. Petitioner also admitted enlisting a third party to forge that customer's signature. This conduct was not reasonable care or judgment. Respondent thus established grounds under N.C.G.S. 90A-26(2) where it may reprimand Petitioner or suspend or revoke his certification.
13. Respondent's finding (Res. Ex. G, "Conclusion of Law #5") that Petitioner failed to use reasonable care, judgment, knowledge, or ability in the performance of his duties by

submitting a sample with “missing” responses is unsupported by a preponderance of the evidence and is error of law; there is no showing or governing regulation that this conduct, standing alone, justifies disciplinary action against an operator.

14. Respondent’s finding (Resp. Ex. G, Conclusion of Law #8) that Petitioner’s conduct increased the risk of harm to the public health, safety, or welfare is unsupported by a preponderance of the evidence and is error of law. The sample Petitioner turned in was not tested. Given the size and scope of the Lead and Copper program, the absence of a single sample (or hypothetical testing of one sample from an outside spigot), cannot foreseeably result in harm to the public health, safety, or welfare. While it is easily inferred that if most operators acted as Petitioner did the public health, safety, and welfare would be affected, cases are decided on evidence, not hypothesis. N.C.G.S. 150B-41.
15. Respondent’s finding (Res. Ex. G, Conclusion of Law #8) that Petitioner’s increase of the risk of harm to the public health, safety, or welfare gives cause to revoke his certification is unsupported by a preponderance of the evidence and is error of law. N.C.G.S. 90A-26 has four specific grounds to revoke/suspend a certification. Harm to public health, safety, or welfare is not one of them. Neither Respondent nor the undersigned can create a fifth, as such statutes are strictly construed: “The portion of our Act which empowers the Board to revoke [a professional license] is penal in its nature and should not be construed to include anything as a ground for revocation which is not embraced within its terms.” Elliott v. N. Carolina Psychology Bd., 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998), citing In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).
16. Petitioner submitted a falsified customer signature on a professional document. This was dishonest. Falsifying a signature is stealing that individual’s name. Petitioner’s youth and inexperience are immaterial here; anyone of adult age should know that submitting a falsified signature in a professional obligation is wrong.
17. Respondent should suspend, not revoke, Petitioner’s certification. The reasons for suspension instead of revocation are numerous:
  - a. Under 90A-26, when one of the four grounds for action exist, Respondent “may” suspend or revoke a certification. Black’s Law Dictionary defines “may” as “permitted to.” Lane v. City of Kinston, 142 N.C. App. 622, 628, 544 S.E.2d 810, 815 (2001). It is thus different from “must,” “shall,” or even “should.”
  - b. This statutory “may,” as opposed to the “shall” contained in other licensing statutes, demonstrates a legislative intent to act with thoughtfulness and discretion, as opposed to mechanistically, on operator misconduct. “As used in statutes, the word ‘shall’ is generally imperative or mandatory.” Silver v. Halifax Cty. Bd. of Commissioners, 371 N.C. 855, 863–64, 821 S.E.2d 755, 761 (2018). “May,” by contrast, is intended to convey that the power granted should be exercised with discretion. Id.

- c. The initial problem of the missing first draw tap sample was created by the customer, not by Petitioner. Petitioner made reasonable efforts to obtain a sample from the customer without success.
- d. An experienced Aqua operator advised Petitioner, who was newly certified, to take the sample from an outside spigot. While as a professional Petitioner must know right from wrong when he hears it, his reliance on the advice of a senior, seasoned colleague does not shock the conscience.
- e. This case arose from a complaint submitted by Aqua. If Aqua had information that one of its senior employees counseled a very junior one to take this action, why did Aqua only submit a complaint about Petitioner? The undersigned takes notice of Respondent's Exhibit E, which indicates the customer in question "wanted [Aqua] to look into who signed her signature and would be going to authorities if [Aqua] did not figure it out." This suggests Aqua was trying to cover itself as opposed to being concerned about professional integrity.
- f. Both prior to and at the hearing Petitioner credibly and consistently expressed remorse for his conduct and agreed some disciplinary action was warranted.
- g. Petitioner's conduct, while wrongful, was not part of a pattern. It was an act by an inexperienced and frustrated employee who (in part) unwisely relied on an experienced colleague. While moral character is not a statutory factor in this case, in general terms isolated instances of conduct are insufficient to show lack of good character. See In Re Rogers, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents."); Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission, 09 DOJ 4364 (March 15, 2010; May, ALJ).
- h. Revocation bars Petitioner from the profession for a minimum of two years. To be recertified, Petitioner would have to again complete an operator school and pass Respondent's examinations. 15A NCAC 18D.0307(c). There was no showing Petitioner lacks general or technical knowledge as an operator; revocation thus imposes unnecessary punitive requirements in addition to the loss from revocation itself. "Loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation." Johnson v. Bd. of Governors of Registered Dentists of State of Okl., 1996 OK 41, 913 P.2d 1339, 1345 (May 2, 1996).
- i. Respondent had credible information regarding similar conduct by experienced operator(s) but took no action. Failing to pursue the seasoned wrongdoer while revoking the inexperienced operator who takes their counsel is arbitrary and capricious. Teague v. W. Carolina Univ., 108 N.C. App. 689, 692, 424 S.E.2d 684, 686 (1993). See N.C. Const. art. I, Section 19; see also "It is fundamental that both unfairness and the appearance of unfairness should be avoided." American Cyanamid Company v. F.T.C., 363 F.2d 757, 767 (6th Cir.1966); Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit, 326 N.C. 603, 624, 392 S.E.2d 579, 590 (1990).



- j. In closing argument, Respondent’s counsel suggested that an example be made of Petitioner. T. 101. Revocation of Petitioner’s license would indeed set an example, but of the wrong kind: inexperienced operators receive maximum punishment; seasoned operators engaging in and encouraging similar misconduct escape any sanction at all.
  - k. Such a result is contrary to both law and fairness. “An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand, and courts will strike it down.” Tully v. City of Wilmington, 370 N.C. 527, 536, 810 S.E.2d 208, 215 (2018) In cases where the governing statute calls for discretion on the proper disciplinary sanction, that agency discretion must be “exercised in good faith and in accordance with law.” Burton v. City of Reidsville, 243 N.C. 405, 407, 90 S.E.2d 700, 703 (1956).
18. Based on the above, the appropriate sanction is suspension of Petitioner’s “Grade C Well Certificate” for one (1) year. This emphasizes the seriousness of Petitioner’s conduct on the falsification issue and permits Petitioner some time for reflection and growth, but does not wholly bar him from a profession in which, but for the incident here, he shows promise of becoming a useful member.
19. By contrast, revoking Petitioner’s certification under the facts of this case is legal error and is arbitrary and capricious.

**PROPOSAL FOR DECISION**

WHEREFORE, Respondent should suspend Petitioner’s “Grade C Well Certificate” for one (1) year.

**NOTICE AND ORDER**

The North Carolina Water Treatment Facility Operator Certification Board 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.G.S 150B-40(e).

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

**IT IS SO ORDERED.**

This the 27th day of August, 2020.



Michael C. Byrne  
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:

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This the 27th day of August, 2020.



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