

STATE OF NORTH CAROLINA
COUNTY OF GATES

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 DOJ 03449

Robert Erick Jordan Petitioner, v. NC Sheriffs Education and Training Standards Commission Respondent.	PROPOSAL FOR DECISION
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On February 17, 2021, Administrative Law Judge Melissa Owens Lassiter heard this matter, remotely via Microsoft Teams, pursuant to N.C. Gen. Stat. § 150B-40(e) and Respondent's request for designation of an Administrative Law Judge to preside at a contested case hearing under Article 3A, Chapter 150B of the North Carolina General Statutes and Chapter 17E of the North Carolina General Statutes to hear Petitioner's appeal of Respondent's proposed revocation of Petitioner's justice officer certification.

APPEARANCES

Petitioner: Robert Jordan, *Pro Se*
Gates, North Carolina

Respondent: Ameshia A. Cooper
Assistant Attorney General
Attorney for Respondent
North Carolina Department of Justice
Special Prosecution and Law Enforcement Section
Raleigh, North Carolina

ISSUES

1. Whether there was sufficient evidence presented at hearing to support Respondent's proposed revocation of Petitioner's justice officer certification for commission of the felony offense of "Obtaining Property by False Pretenses," in violation of N.C. Gen. Stat. § 14-100, from the Gates County Board of Education?

2. Whether there was sufficient evidence presented at hearing to support Respondent's proposed revocation of Petitioner's justice officer certification for failing to maintain the minimum standards required for justice officer certification under 12 NCAC

10B .0204(a)(1) and for lack of good moral character in violation of 12 NCAC 10B .0301(a)(8) and 12 NCAC 10B .0204(b)(2)?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 14-100
12 NCAC 10B .0204(a)(1) & (b)(2)
12 NCAC 10B .0205(1)(a) & (3)(b)
12 NCAC 10B .0301(a)(8)

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner: 1 - 7

Respondent: 1 - 5

FINDINGS OF FACT

Based upon careful consideration of the exhibits admitted into evidence, the entire record in this proceeding, and the credibility and believability of witness testimony at hearing including the witnesses' credibility, demeanor, any interests, biases or prejudices, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case, the undersigned finds as follows:

Procedural Background

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

2. Respondent Commission ("the 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 revoke, suspend, or deny such certification under appropriate circumstances with valid proof of a rule violation.

3. Petitioner has been certified as a justice officer through the Gates County Sheriff's Office since July 2, 2007. By 2017, Petitioner had achieved the rank of Sergeant.

4. On July 30, 2020, Respondent Commission notified Petitioner, via certified mail, that its Probable Cause Committee had found that probable cause exists to revoke Petitioner's justice officer certification for two reasons:

(1) Commission of the felony offense of "Obtain Property by False Pretenses," in violation of N.C. Gen. Stat. § 14-100, by providing security for the Gates County Public School System and as a School Resource Officer, through the Gates County Sheriff's Office. Time records from the school system and the Gates County Sheriff's office indicated that Petitioner worked a total of two hours at the same time and was compensated by both agencies for those two hours worked.

(2) No longer possessing the good moral character required of a justice officer based on the facts and circumstances surrounding the commission of the above-referenced felony offense, and the totality of Petitioner's actions, while holding a justice officer certification.

Respondent's Exhibit 1.

5. In late 2017, the Gates County Sheriff's Office was investigated by the North Carolina State Bureau of Investigation (SBI) for general corruption, mishandling of drug evidence, engaging in illicit behavior with detainees and double dipping, among other things. On January 22, 2018, Petitioner was appointed Interim Sheriff of Gates County. Petitioner's Exhibit 2.

6. Special Agent Steven Norman was one of several SBI agents who participated in the investigation of the Gates County Sheriff's Office. Agent Norman testified at the administrative hearing and credibly established the following:

a. On December 4, 2017, Norman obtained a search warrant for scheduling documents pertaining to several Gates County Sheriff's Office employees from the Sheriff's Office, the Gates County Finance Office, and the Gates County Emergency Communications Center. Respondent's Exhibit 2. Petitioner was one of the employees listed in the search warrant.

b. In addition to obtaining various documents pursuant to the search warrant, Norman and other SBI agents interviewed each member of the Gates County Sheriff's Office staff.

c. At the conclusion of the SBI investigation, Petitioner was charged with "Obtaining Property by False Pretenses" in violation of N.C. Gen. Stat. § 14-100 based on the contention that he had obtained \$80.00 from the Gates County Board of Education by signing up to provide security for the public school system at the same time he was to be working as a school resource officer. Petitioner was paid for performing both duties. Respondent's Exhibit 3.

d. On January 7, 2019, Norman testified before the grand jury regarding the "Obtaining Property by False Pretenses" charge against Petitioner. The grand jury did not indict Petitioner. Respondent's Exhibit 3.

7. Sheriffs' Standards Division Field Representative Christopher Batten was assigned to investigate possible Commission rule violations by Petitioner. A summary of Batten's investigation was entered into evidence as Respondent's Exhibit 4. Batten testified at the administrative hearing and credibly established that:

a. Pursuant to his investigation, Batten interviewed Petitioner via telephone on March 25, 2020. During the interview, Petitioner told Batten that he believed the Gates County District Attorney, Andrew Womble, was trying to frame him. Petitioner stated that he was appointed Interim Sheriff after the former sheriff and several other officers from the office were charged with criminal offenses. Petitioner indicated that at some point after being appointed Interim Sheriff, he ran for the office and lost the election. Petitioner met with Womble following the election. During this meeting, Womble told Petitioner that he should step down from the Interim Sheriff's position and allow the individual who won the election to take over. Petitioner told Batten that Womble charged him with "Obtaining Property by False Pretenses" to retaliate against Petitioner for refusing to leave the Office of Sheriff before the expiration of his appointment.

b. Petitioner also told Batten that he was an active member of his community, served as pastor to a church, values his reputation, and would never do anything intentionally to cast doubt on his character. Petitioner informed Batten that he is still employed by the Gates County Sheriff's Office, and he believes this fact speaks volumes about him as a person.

c. Pursuant to his investigation, Batten interviewed SBI Agent Norman on March 3, 2020, via telephone. Norman advised Batten that after his investigation into Petitioner, he concluded that Petitioner had an overlap in time on two different occasions. Norman learned that Petitioner worked as a School Resource Officer (SRO) and school security and was paid separately for those services. Norman also told Batten that Petitioner was the main suspect in his investigation because Petitioner was responsible for the timesheets of all Gates County Sheriff's Office employees who worked school security. According to Norman, records showed that Petitioner worked 1.5 hours on one occasion, .5 (30 minutes) hours on another occasion, and was paid by both the county and the school board on both occasions.

d. Norman told Batten that he presented Petitioner's case to the grand jury, but they found no true bill of indictment. Despite this outcome, Norman told Batten that he felt the evidence proved that Petitioner had committed the charged offense.

e. Batten was assigned to investigate another Gates County Sheriff's Office employee, Glynda Parker, for allegations similar to those made against Petitioner. His report summarizing that investigation was admitted into evidence as Respondent's Exhibit 5.

8. Petitioner testified at the administrative hearing. His testimony credibly established that:

a. Petitioner has worked for the Gates County Sheriff's Office since 2007. Petitioner was aware that some employees of the office were engaged in immoral behaviors, such as infidelity. However, he came to work, performed his duties, and did not associate with anyone who was involved in those types of behaviors.

b. Before being appointed Interim Sheriff in January 2018, Petitioner was the only officer permanently assigned as an SRO. Deputies who wished to work in the schools were required to sign-up on a sheet in the office. Pursuant to his role, Petitioner was responsible for confirming that each deputy's listed time worked on the sign-up sheet was correct. In doing this, Petitioner did not compare the time worked against any other record. He only asked the deputy if he or she worked the time listed on the sign-up sheet, signed off on the sheet, and turned it over to the individual responsible for payroll.

c. Petitioner may have made a mistake while recording his hours worked but would never intentionally take money that he had not earned, and he did not intend to deceive the school board.

d. Petitioner has many sources of income, including a pilot car business, an auto detailing business, and working as a driver's education instructor.

e. Petitioner feels that Womble believed that he had called Womble racist, and, as a result, Womble was out to get him and charged him with a felony.

f. Petitioner has served as pastor of a local church for about thirteen years. The church has approximately 30 members, the majority of whom are senior citizens. He serves as a spiritual leader, visits the sick, provides food to those in need, and broadcasts church services from outside of a local nursing home every Sunday (due to the COVID-19 pandemic).

g. Petitioner has been married to his wife for twenty-three years. He has three grown children and three grandchildren. Petitioner's family depends on the income he earns as a justice officer to support and sustain their household.

h. Petitioner enjoys his work and would like to continue working in the law enforcement profession. The students at the schools where he is an SRO affectionately call him "OJ," and the teachers and students rely on him. Petitioner also serves as a football and volleyball referee.

i. Six months before the administrative hearing, Petitioner was written up for an incident that occurred between him and another officer and received a written warning as a result. Prior to this, Petitioner had never been subjected to any disciplinary action.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings in that the Office of Administrative Hearings has subject matter and personal jurisdiction in this matter, and each party received proper notice of hearing.

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).

3. Respondent Commission has the authority 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 suspend, revoke, or deny certification under appropriate circumstances with substantial proof of a rule violation.

Burden of Proof

4. From its inception, the North Carolina Administrative Procedure Act, ("APA"), N.C. Gen. Stat. § 150B, has contained two separate and distinct provisions for administrative hearings. Although many similarities exist, they are decidedly different. Throughout the APA's history, the General Assembly has had the ability to change this process, making one type of procedure, but has not. Therefore, the distinction between the two is important and must be acknowledged.

5. Article 3 of the NC APA applies to administrative hearings conducted by OAH before an administrative law judge, while Article 3A applies to "other administrative hearings" which are conducted by state agencies enumerated in § 150B-38(a). Each article contains separate provisions governing all aspects of the administrative hearings to which they apply. *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996).

6. Unlike Article 3, Article 3A does not require that a petition be filed to commence a contested case, but simply provides in N.C. Gen Stat. 150B-38(b) that "prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing." In Article 3A, the Agency initiates the process, not a petitioner. Generally, in Article 3A cases, the petitioner does not file any responsive pleadings at all, which is quite different from Article 3 cases. See *McLendon*, 64 N.C. L. Rev. 852, 859-60 (1986).

7. A critical distinction between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is adverse to the interests of the petitioner and the petitioner thus files the contested case petition. In Article 3A contested cases, the agency is proposing to take an action and the agency decision will be made based upon the Article 3A contested case. In Article 3A cases, the agency

decision has not yet been made.

8. In Article 3A cases, OAH, through an ALJ, is to sit and preside over the hearing in the place of the agency and makes a “proposal for decision” back to the agency. N.C. Gen. Stat. § 150B-40. At the time of the initiation of the process, the agency has not yet made a final decision which is the springboard for commencing a contested case under Article 3. This distinction is even more significant now that OAH has final decision-making authority in Article 3 cases.

9. That a distinction exists between Article 3 and Article 3A cases is made clear in N.C. Gen. Stat. § 150B-40: “The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.” (Emphasis added) Therefore, any attempt to use the standards of Article 3 within an Article 3A proceeding is without merit.

10. Article 3 and Article 3A both contain provisions which are the same or similar, such as provisions governing venue, conduct of hearing, depositions and discovery, evidence, and designation and power of an ALJ or presiding officer. *Homoly v. N. Carolina State Bd. of Dental Examiners*, 121 N.C. App. 695, 696, 468 S.E.2d 481, 482 (1996).

11. Again, if the legislature had intended Article 3 provisions to be read into Article 3A, it would not have been necessary to include the same or similar provisions in each article. Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. *Homoly*, 121 N.C. App. at 698, 468 S.E.2d at 483.

12. There are also distinctions between the two. Article 3A provides a party who has been served with a notice of hearing the opportunity to file a written response with the agency prior to hearing, while Article 3 does not provide parties with a similar opportunity. If Article 3 applied to hearings before agencies listed in Article 3A, these and other provisions would conflict. *Id.*

13. N.C. Gen. Stat. § 150B-40(e) provides that “[w]hen a majority of an agency is unable or elects not to hear a contested case,” the agency is to apply to the OAH for designation of an ALJ. In such case, “[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case” N.C. Gen. Stat. § 150B-40(e). If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing. *Id.*

14. Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). “It is a well-established principle of statutory construction

that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.*, 236 N.C. 583, 73 S.E.2d 562). Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely. *Homoly*, 121 N.C. App. at 699, 468 S.E.2d at 484.

15. In this case, hearings conducted by Respondent are governed exclusively by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NC APA. *Homoly*, 121 N.C. App. at 697, 468 S.E.2d at 482.

16. Article 3 is titled “Administrative Hearings,” and governs administrative hearings which are conducted by the Office of Administrative Hearings (OAH) and are heard by an administrative law judge (ALJ). Article 3A of the NC APA is entitled “Other Administrative Hearings,” and governs hearings involving specifically identified agencies. *Homoly*, 121 N.C. App. at 696, 468 S.E.2d at 482.

17. N.C. Gen. Stat. § 150B-38(h) provides that “[e]very agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.” The article which is referred to is Article 3A.

18. Respondent’s rule for its administrative hearing procedures is found at 12 NCAC 10B .0105. That rule specifically states that:

Administrative hearings in contested cases conducted by the Commission or an administrative law judge (as authorized in G.S. 150B-40) shall be governed by:

- (1) procedures set out in Article 3A of G.S. 150B.

(Emphasis added).

19. 12 NCAC 10B .0105(b) further says that the “rules establishing procedures for contested cases . . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference. . . .” Many of the rules contained within Title 26, Chapter 3 of the North Carolina Administrative Code are not consistent with Article 3A but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N.C. Gen. Stat. § 150B, Article 3A, those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute are paramount and shall control.

20. In *Peace v. Employment Sec. Comm’n of N. Carolina*, the North Carolina State Supreme Court addressed the burden of proof. Although *Peace* is an Article 3 case, the discussion of burden of proof is instructive in this instant case. The Supreme Court recognizes that neither the North Carolina Constitution nor the North Carolina General Assembly has specifically addressed the proper allocation of the burden of proof in “just

cause” termination cases. This instant case is not a “just cause” case, but likewise neither the Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases.

21. *Peace* states:

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be “judicially allocated on considerations of policy, fairness and common sense.” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. *Id.*

Peace v. Employment Sec. Comm’n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).

22. Neither the North Carolina Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases. Applying the statutory law along with “considerations of policy, fairness and common sense,” the Undersigned determines that Respondent should bear the burden of proof in an action where Respondent proposes to take some action against a license/certificate holder or application based upon its investigation into that individual.

Commission of a Felony

23. 12 NCAC 10B .0204 provides that:

(a) The Commission shall revoke, or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

(1) a felony; . . .

24. N.C. Gen. Stat. § 14-100 provides in pertinent part:

(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony

25. To sustain a conviction for "Obtaining Property by False Pretenses," the State must establish:

- (1) false representation of past or subsisting fact or future fulfillment or event,
- (2) which is calculated and intended to deceive,
- (3) which does in fact deceive, and
- (4) by which the defendant obtains or attempts to obtain anything of value from another person.

State v. Saunders, 485 S.E.2d 853, 126 N.C. App. 524 (1997). This is a felony offense. See also Jessica Smith, *North Carolina Crimes: A Guidebook on the Elements of Crime* 417 (7th ed. 2012).

26. A key element of the offense of "Obtaining Property by False Pretenses" is that the representation be intentionally false and deceptive. *State v. Braswell*, 225 N.C. App. 734, 738 S.E.2d 229. The gist of "Obtaining Property by False Pretenses" is the false representation of a fact intended to and which does deceive one from whom property is obtained; the state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. *Id.*

27. A preponderance of the evidence presented at the administrative hearing established that Petitioner did not commit the offense of "Obtaining Property by False Pretenses." Although Petitioner may have received \$80.00 that he did not earn, there is no evidence that he intended to deceive the school board. Therefore, the facts of this case do not satisfy the elements of the offense.

Good Moral Character

28. 12 NCAC 10B .0301(a)(8) states that:

(a) Every Justice Officer employed or certified in North Carolina shall:

- (8) be of good moral character as defined in: *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and later court decisions that cite these cases as authority . . .

29. 12 NCAC 10B .0204(b)(2) states that:

(b) The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer:

(2) fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300 . . .

30. The term good moral character “by itself, is unusually ambiguous,” however, it has been defined as “honesty, fairness, and respect for the rights of others and for the law of the state and nation.” *In re Willis*, 288 N.C. 1, 10, 215 S.E.2d 771, 775-77 (1975).

31. “Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.” *In re Rogers*, 297 N.C. 58, 253 S.E.2d 912, 918 (1979) (explaining that character encompasses both a person’s past behavior and the opinion of his community arising from it).

32. “Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. However, *if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places of clear and especially severe misconduct.*” *Id.* at 59, 253 S.E.2d at 920 (emphasis added).

33. Given its distinct purpose, the Commission has a particular interest in protecting the public from dishonest law enforcement and preserving the integrity of the criminal justice system which largely rests upon the actions of law enforcement. It is imperative that those certified by the Commission possess the ability to accept responsibility for their actions and perform basic law enforcement functions competently as this is a functional attribute of good moral character. *See In re Legg*, 325 N.C. 658, 673, 386 S.E.2d 174, 182 (1989) (recognizing that “fundamental attributes of good moral character include the maturity and professional discipline necessary to accept responsibility and perfect the actions required” to carry out professional responsibilities properly).

34. As recognized in *Legg*, the purpose of withholding certifications is not to punish the candidate but to protect the public and preserve the integrity of the profession subject to licensure. *Id.*

35. A preponderance of the evidence presented at the administrative hearing establishes that Petitioner possesses the good moral character required of every justice officer in North Carolina.

a. Petitioner has been in law enforcement since 2007 and was appointed Interim Sheriff in 2018 when the Gates County Sheriff’s Office was in the midst of a scandal. To this day, Petitioner remains in the employ of the Gates County

Sheriff's Office under the leadership of Sheriff Campbell, whom he campaigned against in 2018.

b. Petitioner is active in his community, owns several businesses, and has pastored a church for approximately thirteen years.

c. Additionally, Petitioner enjoys his work as a justice officer and desires to remain in the profession. Petitioner is respected and valued by the students and staff at the schools where he acts as an SRO.

PROPOSAL FOR DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that Respondent **GRANT** Petitioner's justice officer certification.

NOTICE

The **North Carolina Sheriffs' Education and Training Standards Commission** 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).

The undersigned hereby orders that agency to serve a copy of its Final Decision in this case on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6700.

This the 22nd day of April, 2021.



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:

Robert Erick Jordan
34 Will Lane
Gates NC 27937
Petitioner

Ameshia Cooper
North Carolina Department of Justice
acooper@ncdoj.gov
Attorney For Respondent

This the 22nd day of April, 2021.



Jerrod Godwin
Administrative Law Judge Assistant
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000