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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 DSC 02922

Timothy C Roper Petitioner, v. North Carolina Department of Public Safety Respondent.	**FINAL DECISION AND PERMANENT INJUNCTION**

THIS MATTER was heard virtually before the Administrative Law Judge Stacey Bice Bawtinhimer on February 23, 2021. After considering a hearing on the merits held on the above-mentioned date, arguments from counsel for both Parties, all documents in support of or in opposition to the parties' motions, all documents in the record, including the Proposed and Amended Proposed Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned **GRANTS** relief to the Petitioner except for Petitioner's North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1, *et seq*. which is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction. Petitioner's Motion for Permanent Injunction is **GRANTED.**

APPEARANCES

For Petitioner:
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Raleigh, North Carolina 27609

For Respondent:
Norlan Graves
North Carolina Department of Justice
Assistant Attorney General
P.O. Box 629
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ISSUES PRESENTED

1. Whether the Respondent violated North Carolina Taxpayers' Bill of Rights and the North Carolina Setoff Debt Collection Act. N.C. Gen. Stat. § 105A, *et seq*.[1]

2. Whether Respondent violated the North Carolina State Human Resources Act, N.C. Gen. Stat. §§ 126, *et seq*.

3. Whether Respondent violated the North Carolina Fair Debt Collection Practices Act, N.C. Gen. Stat. § 75-50, *et seq*.

4. Whether Respondent violated North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1, *et seq*.

WITNESSES

For the Petitioner: Timothy C. Roper, Petitioner

For the Respondent: Doris Martin, DPS' Payroll Specialist

Rebuttal for Petitioner: Melissa Earp, DPS' Deputy Secretary

EXHIBITS ADMITTED INTO EVIDENCE

PETITIONER'S EXHIBITS: Petitioner's exhibits ("Pet'r Ex."): 1-14. Bate stamped numbers are referenced as "p. ".

EX. #	DATE	EXHIBIT DESCRIPTION
1	March 7, 2016	Job Description—Water Treatment Plant Operator
2	April 21, 2016	Offer Letter—NC Department of Public Safety—Water Treatment Plant Operator
3	July 30, 2003	Application for Employment
4	March 11, 2016	Application for Employment
5	May 9, 2016	Statement of Prior Service
6	July 28, 2020	Petition for Contested Case Hearing
7	August 25, 2020	Petitioner's Prehearing Statement
8	September 2, 2020	Respondent's 1st Motion to Dismiss, captioned as Motion to Dismiss in Lieu of Prehearing Statement
9	September 15, 2020	Petitioner's Response to Respondent's 1st Motion to Dismiss

[1] For purposed of this decision, Issues 1 and 3 in the Prehearing Statement have been combined.

10	November 2, 2020	Respondent's 2nd Motion to Dismiss, captioned as Motion to Dismiss in Lieu of Prehearing Statement & Motion to Stay Pending Ruling (motion withdrawn)
10A	April 10, 2018	Ex. A – Certified Mail letter to Tim Roper (no appeal rights)
10B	August 12, 2019	Ex. B – Certified Mail letter to Tim Roper (no appeal rights)
10C	March 31, 2020	Ex. C – Letter to Tim Roper (not received by Roper)
11	November 17, 2020	Petitioner's Amended Response to Respondent's 2nd Motion to Dismiss
11A	October 26, 2020	Ex. A—Respondent's Answer to Petitioner's First Request for Admissions
12	November 9, 2020	Affidavit of Timothy C. Roper with Exhibits 1-6
13	November 17, 2020	Petitioner's Memorandum of Law in Support of Petitioner's Response and in Opposition to Respondent's 2nd Motion to Dismiss and Motion to Strike
13A	April 8, 2020	Ex. B – Notice of Individual Tax Adjustment from NCDOR
13B	June 5, 2020	Ex. C – Letter to Tim Roper from NCDOR
14	October 27, 2020	Respondent's Responses to Petitioner's First Set of Interrogatories and First Request for Production of Documents

RESPONDENT'S EXHIBITS: Some of Respondent's exhibits referenced in the transcript were duplicative of Petitioner's but otherwise Respondent offered no exhibits into evidence.

TRANSCRIPT ("Tr. p.[#]:[line]"): One volume with pages 1-86 was received into evidence on April 12, 2021.

PARTY REPRESENTATIVES

The Petitioner's party representative was Timothy C. Roper, Petitioner.
The Respondent's party representative was Melissa Earp.

STANDARD OF REVIEW

For this matter, Petitioner has the burden of proof by a preponderance of evidence. N.C.G.S. § 150B-25.1(a).

PARTY ADMISSIONS

Through the course of this case via admissions, authenticated letters in the record, testimonies of Respondent's witness and Petitioner's rebuttal witness, Melissa Earp, Respondent's representative; Respondent admitted the following:

1. The alleged overpayment was no fault of the Petitioner but solely the fault of Respondent. Tr. p. 47:16-19 (T of Doris Martin); *see also,* Pet'r Ex. 10A (Administrative Officer for DPS Michelle Yarbrough apologizing for this "error").

2. For the years 2016 to 2018, Petitioner was a full-time, permanent employee but he had been misclassified as full-time by Respondent and should have been classified as a part-time, permanent employee. Pet'r Ex. 11-A: Admissions of Respondent Nos. 1 & 5.

3. For the years 2016 to 2018, "Petitioner's salary was calculated according to his classification [as a full-time employee]." Pet'r Ex. 11-A: Admissions of Respondent No. 4.

4. On April 10, 2018, Petitioner was first notified of Respondent's failure to accurately calculation his salary and the miscalculation amount of $35,492.87.

5. The Water Treatment Operator position was posted as "full-time" permanent position and that Respondent's letter awarding the position to Petitioner stated it was a "full-time" permanent position. Pet'r Ex. 11- A: Admissions of Respondent nos. 3 & 6.

OFFICIAL NOTICE TAKEN

Without objection, official notice was taken of 15A NCAC 18C 03.1303, the rule for facility oversight. Rule .1303 required a certified Operator in Responsible Charge ("ORC") of a Water Treatment Facility as frequently as necessary to ensure compliance with the requirements of Section .1300 Operation of Public Water Supplies which references Rules .1301-1304 of Title 15A Subchapter 18C of the North Carolina Administrative Code.

Rule .1304 requires that water systems be operated and maintained in accordance with 15A NCAC 18D, Rules Governing Water Treatment Facility Operators, Rule .0206, and G.S. 90A-29. 15A NCAC 18C .1304

The Rules Governing Water Treatment Facility Operators in Title 15D requires all public water systems to have a certified operator responsible for each water treatment facility. Failure to do so results in noncompliance and potential penalties. 15A NCAC 18D .0206; *see also,* G.S. 90A-46; Tr. p. 38:14-39:3 (Roper testifying DPS could be fined for noncompliance).

Procedures for assessing administrative penalties are found in 15A NCAC 18C .1901-.1911.

A certified water treatment operator is to be on-call to handle emergency situations. 15A NCAC 18D .0206; Tr. p. 11:7-20 (Petitioner consistent testimony that from 2003-2009, 2009 to 2016, and 2016-2018 he had to be on-call 24 hours, 7 days a week). Any backup operators must have a valid certification for the system. 15A NCAC 18D .0206. No credible evidence was presented by DPS that they had any other certified backup operators at the Facility.

On April 30, 2021, the Undersigned formally notified the Parties that she intended to take Official Notice of the NC OSHR Policy governing On-Call Emergency and Callback Pay (the "Policy") and Policy History found at https://oshr.nc.gov/policies/salary-administrative/call-emergency-callback-pay.

In lieu of official notice, the Parties jointly stipulated to the Policy on May 7, 2021.

PROCEDURAL HISTORY

1. On April 8, 2020, Petitioner Timothy C. Roper ("Petitioner" or "Roper") received a letter from the North Carolina Department of Revenue notifying him that his taxes would be adjusted to compensate for the overpayment alleged by the Department. *See* Pet'r Ex. 13A.

2. On June 8, 2020, the Department of Revenue acknowledged the receipt of the Petitioners' objection to the tax adjustment, but informed Petitioner that he should contact Respondent "concerning any refund claims." *See* Pet'r Ex. 13B.

3. The June 8, 2020 letter from the Department of Revenue also stated that his refund had been applied to his "debts" with the Department pf Public Safety ("DPS" or "Respondent").

4. On July 28, 2020, the Petitioner filed a Petition for a Contested Hearing challenging the tax off-set and asserting DPS violated the Taxpayer Bill of Rights (G.S. Chapter 105); The State Human Resources Act (G.S. 126-1 through G.S. 126-95); G.S. 147-86.1(e)(4); the Set Off Debt Collection Act (G.S. 105A through G.S. 105A-16); and the N.C. Wage and Hour Laws (G.S. 95-25.1-95.21-25). Pet. pp. 2-3.

5. On August 3, 2020, the contested case was assigned to Administrative Law Judge Tenisha S. Jacobs and a Scheduling Order was issued requesting Prehearing Statements by September 2, 2020.

6. On August 25, 2020, Petitioner filed a Prehearing Statement.

7. On September 2, 2020, the Respondent filed a Motion to Dismiss in Lieu of Prehearing Statement and Motion to Stay Pending Ruling. The Motion to Dismiss by the Respondent asserted that the Office of Administrative Hearings ("OAH") did not have subject matter jurisdiction due to the Petitioner's failure to assert a claim to which relief can be granted by

OAH. Especially that, under N.C. Gen Stat. § 126-3402(b), there is no provision for disputing one's salary. Resp't First Mot. to Dis. p. 3.

8. The presiding administrative law judge did not rule on the first motion to dismiss.

9. On October 29, 2020, this case was re-assigned to Administrative Law Judge Stacey Bice Bawtinhimer.

10. On November 2, 2020, Respondent filed a second Motion to Dismiss asserting that this Tribunal lacked subject matter jurisdiction of the Petition because Petitioner failed to file his action within 30 days after being served the March 31, 2020 notification that his tax refund had been seized. Resp't Second Mot. to Dis. p. 2.

11. On December 21, 2020, the presiding judge issued an Order for a Status Report by December 29, 2020, noting that Respondent had indicated that it intended to withdraw its Motion to Dismiss for untimeliness considering Judge Mann's Emergency Waiver of filing deadlines and requested a Status Report by December 29, 2020.

12. On December 29, 2020, Petitioner filed a Status Report and moved for mediation.

13. On December 29, 2020, Respondent filed a Status Report and withdrew its Second Motion to Dismiss for the untimely filing of the Petition but objected to mediation.

14. An Order dated December 30, 2020, acknowledged that Respondent had withdrawn its Motion to Dismiss for untimeliness and that Petitioner filed his petition within the statutory deadline which had been extended for all contested case petitions until July 15, 2020, upon directive from Chief Administrative Law Judge Julian Mann due to the Covid-19 pandemic and upon revisions of N.C.G.S. § 150B-23(f) Section 4.26. (a)1.1.(c) of Senate Bill 704 (effective retroactively to March 10, 2020). Based on the foregoing a ruling on Respondent's Second Motion to Dismiss was unnecessary because the motion was moot.

15. However, as Respondent's First Motion to Dismiss for lack of subject matter jurisdiction was not adjudicated and this Final Decision denies Respondent's First Motion to Dismiss in part, but grants dismissal of Petitioner's N.C. Wage and Hour Act (G.S. 95-25.1, *et seq*.) claims for lack of subject matter jurisdiction as indicated below.

16. On January 6, 2021, the Parties conducted an unsuccessful mediation.

17. On January 15, 2021, Respondent filed a Prehearing Statement.

18. On January 20, 2021, the Parties filed a signed Prehearing Order. The Prehearing Order was entered into the record and the Undersigned signs it *nunc pro tunc* as of January 20, 2021 at 4:01 p.m.

19. On February 19, 2021, Petitioner submitted an objection to Respondent's proposed Exhibit 5, noting that this exhibit was not previously disclosed in discovery.

20. Petitioner presented the reasoning behind the objections previously addressed in the Petitioners' Status Report submitted February 4, 2021, and Petitioner's objections submitted on February 19, 2021. Tr pp. 6-9.

21. Prior to the beginning of the hearing, the Undersigned ruled in favor of Petitioner to exclude Respondent's Exhibits 5 & 15, and witness Adam Newsome. Tr. p. 8.

22. On February 23, 2021, the presiding Administrative Law Judge heard the case.

23. After the hearing, on February 23, 2021, the Undersigned issued a Post Hearing Order requiring the Parties to submit Proposed Decisions by March 31, 2021.

24. Because the hearing transcript was delayed and filed on April 12, 2021, which was received after the proposed decision deadline, upon request of the Parties for leave to amend Proposed Final Decisions, the deadline for Proposed Decisions was extended to April 21, 2021, so both Parties could provide citations to the hearing transcript.

25. Moreover, the original Proposed Final Decisions contained no legal authority in their Conclusions of Law, both Parties were ordered to submit revised Proposed Decisions with the applicable authority and the deadline for the Final Decision was extended to May 13, 2021.

26. On April 28, 2021, Petitioner filed a Motion for Preliminary Injunction with Exhibits. The Response deadline was May 11, 2021. After the hearing on February 23, 2021, DPS has twice made collection efforts on the alleged overpayment.

27. On April 28, 2021, as shown by the Affidavit filed by Petitioner with the Motion, DPS sent Petitioner a statement dated March 31, 2021, invoicing him for $24,219.46. Petitioner moved for a Preliminary and Permanent Injunction to enjoin the Department from future collection efforts.

28. After reviewing the revised Proposed Decisions and applicable law during preparation of the Final Decision, on April 30, 2021 the Undersigned notified the Parties that:

> pursuant to N.C.G.S. § 150B-30, the Undersigned intends to take Official Notice of the NC OSHR Policy governing On-Call Emergency and Callback Pay (the "Policy") attached hereto and Policy History available at https://oshr.nc.gov/policies/salary-administration/call-emergency-callback-pay.

29. The Parties were given an opportunity to be heard as required by G.S. 150B-30. Subsequently, after a Notice of Intent to Take Official Notice of the OSHR Policy Governing On-Call Emergency and Callback Pay (the "Policy") was served on the Parties, in lieu of a hearing, they filed a Joint Stipulation to the Policy on May 7, 2021.

30. Again, during research and review of the facts in preparation of the Final Decision, factual questions arose which necessitated further communications with the Parties for clarification and, to avoid a potential remand of the contested case by a reviewing court.

31. A conference call was held on May 11, 2021 to clarify the legal arguments of the Parties and additional factual stipulations were to be entered by May 27, 2021. The deadline for Respondent's Response to the Motion for Preliminary Injunction was extended to May 18, 2021.

32. On May 18, 2021, Respondent responded to the Preliminary Injunction Motion on May 18, 2021, stating that "Petitioner must be required to repay amounts he was overpaid."

33. Also, on May 21, 2021, Respondent filed its Objection to Stipulations and Further Evidence.

34. Petitioner filed a Supplemental Affidavit of Timothy C. Roper on May 21, 2021. Because of Respondent's objection, this supplemental affidavit was not considered by the Undersigned in rendering this Final Decision and was converted into an Offer of Proof for any reviewing court.

35. As of May 31, 2021, the record was closed in this case.

36. By consent of the Parties, the Final Decision deadline was extended to June 4, 2021 and it was filed on that date.

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 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 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.

BASED UPON the foregoing and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be 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). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, disc. rev. den., 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v Rockingham Co. Department of Social Services*, COA17-1176 (2 October 2018).

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

Petitioner's Employment History with the Department of Public Safety:

3. Although the recoupment for overpayment was sought in 2018, the relevant facts in this matter began long before that date.

4. In 2003, Timothy C. Roper ("Petitioner") began working for the North Carolina Department of Public Safety ("Respondent" or "DPS") as a Boiler Operator at Central Regional Maintenance Yard. In that capacity, he was employed in a full-time, permanent position. Tr. pp. 17:3-21; 20:12-14; 24:2-15; Pet'r Ex. 12, ¶ 2; Pet'r Ex. 3.

5. While in that position, between 2005 and 2006, Petitioner, *at his own expense*, became certified as a Water Treatment Operator (also known as an Operator Responsible in Charge "ORC"). Tr. p. 19:17-21.

6. The Water Treatment Plant at Central Region Maintenance Yard (the "Facility" or "Water Treatment Plant") provides drinking water to the inmates and staff at that facility as well as parts of the Township of Raeford in Hoke County. Tr. pp. 18:1-7; 37:22-38:5. Hoke County contracted with DPS to supply water to that portion of the Township. Tr. p. 38:6-8. This was a unique situation for a correctional facility.

7. If at any time the water pump at the Facility became dysfunctional, DPS could be subject to adverse consequences, including administrative penalties. Tr. p. 38:14-24. For that reason and to ensure potable water to the Facility and adjacent residents, an ORC had to be on-call twenty-four hours, seven days a week ("24/7") at the Facility. Tr. pp. 38:25-39:4.

8. Beginning approximately March of 2006, DPS began utilizing Petitioner's services as the ORC[2], which required him to be available and on-call seven (7) days a week, twenty-four (24) hours a day. Petitioner continued to work five days a week as a boiler operator.

9. Because Petitioner was the only person on-site that was certified to be a Water Treatment Operator, he also was the ORC for the Facility 24/7. Pet. Ex. 12, ¶ ¶ 2, 3; Pet'r Ex. 4, p. 177. However, Petitioner was not paid as such which led to his resignation in 2009. DPS offered no opposing evidence to this fact.

10. According to Petitioner, his prior work duties as a Water Plant ORC for DPS as a full-time employee were the same as the duties required for the 2016 position at issue in this case. *Compare* Pet'r Ex. 4 p. 177 *to* Pet'r Ex. 1, pp. 182-83.

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[2] Petitioner's affidavit mistakenly cites the Operator Responsible in Charge as "OCR" rather than "ORC".

11. Despite his persistent on-call status during his prior employment with DPS, Petitioner was not compensated for this extended availability but instead was paid as a full-time employee as a boiler operator. Tr pp. 37-40.

12. Because he was unable to take vacation and was not being compensated in his dual roles, in 2009 Petitioner resigned from his position with DPS. Tr. p. 20:16-25.

13. However, after his resignation in that same year, DPS asked him to return as a contract ORC for the Facility. From 2009 to 2016, Petitioner was the State contractor ORC for DPS at the Facility's Water Treatment Plant. Tr. pp. 17:17-18:11. Petitioner worked 28 hours, four hours a day, seven days a week with 24/7 emergency callback coverage. This was the same work schedule Petitioner had when he eventually was rehired as a full-time, permanent State employee in 2016.

14. On April 1, 2008 before Petitioner's resignation, the BEACON payroll system went "live". Tr. p. 53:13. Time is entered into the BEACON system and it automatically calculates salary payments and leave quotas.

15. Apparently, BEACON did apply to Petitioner while he was in his independent contractor position from 2009 to 2016. Tr. p. 53:14-24.

16. In early 2016, DPS contacted Petitioner and asked him to re-apply for State employment. Tr. p. 21:5-13.

17. On March 7, 2016, Respondent posted a permanent, **full-time** position titled Water Treatment Plant Operator at the Central Regional Maintenance Yard. *See* Pet'r Exs. 1&2 (emphasis added); Tr. pp. 21:17-21; 22:4-17.

18. On March 9, 2016, Petitioner applied for the position of Water Treatment Plant Operator position with DPS as a "permanent full-time employee". *See* Pet'r Ex. 4; Tr. pp. 22:15-19; 22:16-25; 23:1-2.

19. It is uncontroverted that the position was advertised as full-time, permanent and that DPS' offer to Petitioner was for full-time, permanent employment as a State employee.

20. As an Operator Responsible in Charge ("ORC"), pursuant to 15A NCAC 18D .0206, Petitioner was required to have a North Carolina C-Well License. *See* Pet'r Ex. 4, p. 179. Petitioner had previously obtained, at his own expense, his C-Well License approximately eight years ago. Pet'r Ex. 4, p. 179.

21. On April 21, 2016, Petitioner was offered the Water Treatment Plant Operator position (the "Offer Letter") with a salary of $43,680.00. *See* Pet'r Ex. 2. This was the same amount of pay that DPS had previously paid Petitioner as an ORC State contractor. Pet'r Ex. 12, ¶ 5.

22. According to DPS' Offer Letter and consistent with the job posting from March 7, 2016, the position in question was again described as "permanent full-time." *Id*.; Tr. pp. 22:22-25; 23:1-25.

23. The $43,680.00 salary "[was] subject to approval by the Office of State Personnel in accordance with State Personnel Policy governing salary administrative and the availability of funds in accordance with G.A. § 143C-6-8." Pet'r Ex. 2 (emphasis in original).

24. The Office of State Personnel must have approved the salary because on May 9, 2016, Petitioner accepted DPS' offer of employment and resumed working as a State employee for DPS as the ORC and Water Treatment Plant Operator. *See* Pet'r Ex. 2; Tr p. 25:23-25.

25. Petitioner regularly worked at least four hours per day, seven days per week in this position. Pet'r Ex. 12, ¶ 6. Petitioner was paid for emergency callback overtime, but not for his 24/7 on-call time.

26. Petitioner was told that he was being paid in an unusual matter because he worked seven days a week rather than the normal five days a week. Pet'r Ex. 12, ¶ 6.

27. Petitioner applied and received credit for his previous service from August 11, 2003 - September 1, 2009. Respondent gave him credit as a full-time employee for working 28 hours a week and was on-call for seven (7) days a week for twenty-four (24) hours a day. *See* Pet'r Ex. 5; Tr. p. 25:16-22. With this credit, Petitioner became a career State employee subject to the protections of the State Personnel Act.

On-Call Emergency and Callback Policy

28. Again in 2016, as he had as a contract employee from 2009 to 2016, Petitioner worked 28 hours, four hours a day, seven days a week, and was on-call 24/7.

29. As before, Petitioner was paid as a full-time permanent employee and received no additional compensation for his on-call time although he did receive overtime for any emergency callbacks. Over a period of two (2) years, Petitioner was on-call 24/7 without the opportunity to take vacation. Tr. pp. 26:16-25; 27:1-20.

30. In his capacity as an ORC, Petitioner was the only one that was certified to add chemicals into the water (Tr. p. 39:4-10) and respond to line breakages or other emergency situations. Tr. p. 39:12-22. Petitioner was the "go-to person" 24 hours a day, 7 days a week for any emergencies with the water system including damages due to natural disasters such as hurricanes. Tr. p. 39:4-40:5.

31. Since 1987[3], the North Carolina Office of State Human Resources ("OSHR") has a policy governing On-Call Emergency and Callback Pay (the "Policy"). State Human Resources Manual, pp. 94-100 (rev. April 1, 2009) available at: https://oshr.nc.gov/policies/salary-administration/call-emergency-callback-pay.

32. The statutory authority for the On-Call and Emergency Callback Policy is found in N.C. Gen. Stat. § 126-4(2). However, the administrative rules for that Policy, 25 NCAC 01D.1501, 1502, 1504 expired effective January 1, 2016 pursuant to G.C. 150B-21.3A because they were not renewed.[4]

33. Petitioner resumed working for DPS in May 2016, after the expiration of the rules. However, the Policy and statute were still in effect, and based on Petitioner's work hours, he was eligible for On-Call Emergency and Callback Pay.

34. In fact, consistent with the Policy, Petitioner was paid overtime for any Emergency Callback times he worked. However, contrary to the Policy, Petitioner was not paid separately for being On-Call 24/7. Instead, he was paid a lump salary for his regular and on-call hours.

35. DPS elected to pay Petitioner for full-time pay in the amount of $43,680.00 in addition to any overtime callback pay. This compensation package was based on the same salary amount and schedule he had as a contractor ORC for DPS. However, this type of compensation did not "fit" well into the BEACON payroll program and ultimately caused problems for both DPS and Petitioner.

36. Based on his position as an ORC, instead of paying Petitioner a lump sum salary amount for his 28 hours and his on-call time, according to the Policy, Petitioner should have been paid for 28 hours of regular pay, overtime for all Emergency Callbacks he worked, as well as $2.00 an hour for being On-Call. The Policy has a formula for On-Call compensation which the regular and overtime hours are deducted from the On-Call pay.

37. The BEACON payroll system detected this discrepancy. Otherwise, this issue would not have been a problem and Petitioner would have continued to be paid the agreed upon salary and additional overtime for his callback services.

38. Petitioner was not being "overpaid" according to the terms of his employment and salary arrangement with DPS; Petitioner was only "overpaid" because of a glitch in the BEACON system which DPS could have but chose not to fix.

39. This "overpayment" dispute could not have come at a worse time for Petitioner.

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[3] The Emergency Call-Back Pay Policy was enacted on August 1, 1984. *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs22.pdf.

[4] 25 NCAC 01D.1503 was repealed effective August 1, 2004 but was applicable for only administrative or executive employees who could not receive callback pay.

Petitioner's Cancer Diagnosis and Period out of Work for Recovery and Treatment

40. In September 2017, the Petitioner was diagnosed with right eye carcinoma, at which point he applied for Short-Term Disability under the Family Medical Leave Act ("FMLA"). Tr. pp. 28:14-17; 31:19- 22; 33:17-23.

41. Because of his diagnosis, Petitioner was out of work on paid sick leave between September 2017 to January 2018 to recover from his eye surgery and cancer treatment. Pet'r Ex. 12, ¶ 8; Tr. p. 28:14-17.

42. Beginning in November of 2017, DPS inexplicably began deducting $1,000.00 per month from Petitioner's wages. DPS also began denying him sick and vacation leave pay and required him to pay for his own health insurance. Although Petitioner was already on sick leave, he asked for an explanation for the deductions, but he was never provided one or told how to challenge the offsets. Pet'r Ex. 12, ¶ 9.

43. Although no explanation was given to Petitioner, DPS knew why Petitioner's wages were being offset. Ms. Earp testified that the BEACON system recognized the overpayment sometime in the fall of 2017. Tr. p. 73:18-21.

44. Since the deductions started in November 2017, DPS knew at least by November 2017 about this discrepancy but Petitioner was not notified until April 2018. Tr. p. 74:1-11.

45. Ms. Earp, DPS's Deputy Secretary, admitted that the delay in notification was "a little bit excessive." Tr. p. 74:6-7. The Undersigned finds not only was the notification "excessive" it was unreasonable and done intentionally solely for the benefit of DPS.

46. Doris Martin, Payroll Director for DPS, testified that overpayments are automatically taken out of any money the employee receives by the BEACON payroll system. Tr. p. 48:3-6.

47. BEACON notifies DPS' payroll director (Ms. Martin) when an employee had been overpaid. Tr. p. 49:1-6. After receiving notification, Ms. Martin did not contact Petitioner directly but instead would have contacted Petitioner's supervisor or administrative officer where Petitioner worked. Tr. p. 49:12-21.

48. From November 2017 through April 6, 2018, DPS was aware of the overpayment but intentionally and arbitrarily failed to advise Petitioner.

49. During this time, DPS could have corrected the overpayment and/or lessened the burden on Petitioner. DPS could have:

a. applied to the State Human Resources Office for retroactive approval of Petitioner's employment status as full-time and Petitioner would not have owed the State any money (Tr. pp. 54:21-58:5 (T of Martin)); or,

b. reinstated Petitioner and paid the overpayment back to the BEACON payroll system and Petitioner would have received his full month's pay minus 10% payable to DPS for the reimbursement of the overpayment until satisfied (Tr. p. 62:4-18. (T of Martin)); or,

c. granted Petitioner's Short-Term Disability request and the Office of State Controller ("OSC") could not deduct any overpayments from Petitioner salary or sick and vacation leave. Tr. pp. 60:4-61:7 (T of Martin).

50. Despite, admittedly being at fault, DPS did none of this but rather placed the entire burden of its mistake on the Petitioner while he was on leave for cancer treatments.

51. DPS' Human Resources/Personnel Office was responsible for determining whether Petitioner was granted Short-Term Disability. Tr. p. 61: 8-12 (T of Martin).

52. On April 6, 2018, the Petitioner received a notification that he was ineligible for Short-Term Disability because he "must be a full-time employee contributing to the State Retirement Plan to be eligible for the Disability program." Pet'r Ex. 12, ¶ 12; Aff. Ex. 4; Tr. p. 31:19-20.

53. Because his Short-Term Disability request was denied, Petitioner attempted to use vacation and sick leave time that he had accrued during his employment with Respondent. However, DPS did not allow Petitioner to use this time either. Tr. p. 28:18-24. DPS' rationale for this denial and its other adverse actions towards Petitioner became clearer during the hearing.

54. Had DPS granted Petitioner his request for Short Term Disability leave, then the Office of State Controller ("OSC") would not have been allowed to take overpayments from his salary nor could it have deducted the overpayments from the Petitioner's sick and vacation leave during that time. Tr. pp. 60:4-61:7 (T of Martin).

55. DPS' Payroll Specialist Doris Martin knew that allowing Petitioner to take Short Term Disability leave would have stopped the overpayment deductions.

56. On or about April 11, 2018, Petitioner submitted a Leave of Absence Request for an extended illness from September 10, 2017, with an expected return date of May 23, 2018. Pet'r Ex. 12, ¶ 11.

57. Petitioner had surgery on September 13, 2017. Petitioner was out of work until January 2018. As a result, Petitioner was on unpaid leave from September 2017 to January 2018. Tr. p. 28:22-24.

58. On August 18, 2018, Petitioner submitted a second FMLA form for his extended illness requesting leave from September 10, 2017 through September 12, 2018 which was approved. Pet'r Ex. 12, ¶ 13. However, Petitioner did not receive any of the FMLA funds because of the 2017 wage garnishment. Pet'r Ex. 12, ¶ 13.

59. On or about August 31, 2018, Petitioner received an invoice from DPS reflecting a balance due for alleged salary overpayment totaling $26,135.81 to be deducted from his future salary. Pet'r Ex. 12, ¶ 14. This letter, like the prior April 6, 2018 letter, contained no appeal rights.

60. Petitioner never went back to work for the State of North Carolina, and after his FMLA expired, he resigned on September 12, 2018. Tr. pp. 28:24-25; 29:1-4. This was an involuntary resignation.

Unexplained Garnishment of Petitioner's Wages and Tax Refund Offset

61. During this difficult period and while Petitioner was on unpaid leave, DPS *without explanation* garnished different amounts of money every month, which resulted in $11,000.00 being garnished from Petitioner's wages for the alleged overpayment. Tr. pp. 30:24-25; 31:1-14. No advance warning or appeal rights were given for DPS' action.

62. By letter dated April 10, 2018, Petitioner was notified by DPS that he had been allegedly overpaid in the amount of $35,493.87. Petitioner was advised that "the system will *apply your full gross pay toward the overpayment until is recouped in full*. No deductions of retirement, taxes, insurance, credit union deductions, or any other scheduled payment will be paid on your behalf." This letter did not include any appeal rights. *See* Pet'r Ex. 10A pp. 112-13 (emphasis added).

63. On behalf of DPS, the scrivener of the April 10, 2018 letter, Michelle Yarbrough, apologized for DPS' $35,493.87 "error". Pet'r Ex. 10A, p. 113.

64. Despite the "apology", Petitioner was never notified that he could appeal the purported overpayment of $35,493.87, challenge the $11,000.00 garnishment of his wages, or other options available which could mitigate the overpayment. Tr. p. 35:8-20.

65. By reducing Petitioner's salary and changing Petitioner's status from a full-time permanent State employee to a part-time permanent State employee, DPS essentially demoted him without just cause or appropriate notice. This was not a disciplinary demotion but it was a demotion none-the-less for insufficient cause.

66. Almost one year after DPS' apologized, on August 12, 2019, DPS notified the Petitioner that the outstanding salary overpayment in the amount of $24,984.46 was in arrears and was subject to litigation and collection by the Office of Attorney General. *See* Pet'r Ex. 10. No lawsuit was ever filed against Petitioner. Tr. pp. 29:9-30:17.

67. Like the other letters from DPS, the August 12, 2019 letter did not inform Petitioner that he had any appeal rights or could challenge the alleged overpayment. Tr. p. 30:11-17.

68. On April 8, 2020, Petitioner was notified by the Department of Revenue that $770.00 had been deducted from his 2019 tax refund against debts owed to the North Carolina Department of Public Safety. Pet'r Ex. 12; Aff. Ex. 6. This Notice was the first notice that *did* advise Petitioner of his appeal rights to OAH. Pet'r Ex. 12; Aff. Ex. 5, p. 2.

69. Petitioner then retained M. Jackson Nichols of Nichols Choi & Lee to advise him in contesting the overpayment assertion by DPS. Tr. p. 43:24-25.

Petitioner Was Not at Fault for the Overpayment

70. DPS' witnesses testified that DPS made a mistake with respect to Petitioner's job classification during his tenure as Water Treatment Plant Operator. The witnesses further conceded that this mistake was not attributable to Petitioner. DPS conceded this point during the contested case hearing and in its pleadings.

71. DPS admitted that for the years 2016 to 2018, Petitioner was a full-time permanent employee but that he had been misclassified as full-time by DPS. Pet'r Ex. 11-A: Admissions of Respondent Nos. 1 & 5.

72. DPS also admitted that for the years 2016 to 2018, "Petitioner's salary was calculated according to his classification [as a full-time employee]." Pet'r Ex. 11-A: Admissions of Respondent No. 4.

73. Moreover, DPS admitted that on April 10, 2018, Petitioner was first notified of DPS' failure to accurately calculate Petitioner's salary and the miscalculation amount of $35,492.87. Pet'r Ex. 11- A: Admissions of Respondent Nos. 3 & 6.

74. DPS characterizes its adverse action as a "misclassification" but in reality, this purported misclassification became a demotion without sufficient cause.

DPS Was Solely at Fault and Could Have Fixed the Overpayment Problem

75. According to Doris Martin, the overpayments are "…the fault of the agency a lot of times. It's due to miscommunication sometime." Tr. p. 47:16-19.

76. By its own admissions, in this case the overpayment was clearly the fault of the DPS.

77. DPS knew about the problem in November 2017 since the "overpayment" problem began on November 16, 2017, as evidenced by the email from Willene Davis to Michelle Yarborough which stated:

> I am no longer able to key Timothy Roper's sick leave hours for this month in [B]eacon for 7 days/4 hours each day. His target hours have been changed to 5 days/4 hours each day, Monday thru Friday." Pet'r Ex. 14, p. 8.

78. DPS offered no evidence as to who changed Petitioner hours or why Petitioner's target hours were arbitrarily changed from 7 days/4 hours a day, a period of 28 hours, to 5 days/4 hours a day, a period of 20 hours.

79. Even though DPS was aware of the overpayment in November 2017, prior to March 2020, DPS never attempted to provide Petitioner with any appeal or grievance rights to challenge the alleged overpayment. Instead, DPS garnished Petitioner's wages and threatened litigation.

80. In March 2020, DPS contends that it mailed a letter (Pet'r Ex. 10C) to Petitioner which did contain his appeal rights. Had Petitioner received it the letter would have notified Petitioner of his appeal rights to "contest this collection by filing a petition with the Office of Administrative Hearings…". Pet'r Ex. 10C p. 106; Tr. p. 42:9-21.

81. In both his affidavit and his live testimony, Petitioner creditably testified that he never received the March 2020 notification letter. *See* Pet'r Ex. 12; Tr. p. 42:18-21. A copy of the unsigned, undelivered certified return receipt was still attached to the March 2020 envelope corroborating that it was not mailed. Pet'r Ex. 10A p. 114.

82. Even if this letter had been mailed to and received by Petitioner, which the Undersigned does not find as fact, the statute of limitations was tolled during this period until July 31, 2021 by Directive of the Chief Administrative Law Judge due to the COVID-19 pandemic.

DPS Could Have Mitigated or Fixed the Overpayment Problem

83. Melissa Earp was the Assistant Director of Administrative Services for DPS when the relevant documents were signed pertaining to Petitioner's position and during the period of the overpayment issue.

84. Ms. Earp was not involved in Petitioner's hiring in 2003 or his return as a contract employee in 2009. Tr. p. 68:8-13.

85. Although Ms. Earp was not the hiring manager (Tr. p. 66:20-25), she served as the hiring manager and signed off on approval of Petitioner's employment in 2016. Tr. p. 68:14-18. All the Human Resources ("HR") matters were handled centrally for final approval with the Office of HR for DPS. Tr. p. 67:17-23.

86. According to Ms. Earp, the position should have been posted as "part-time" at 28 hours per week but was incorrectly posted as permanent, full-time. Tr. p. 70:9-20.

87. Even if the posting was inaccurate and should have been for a part-time permanent position, none of DPS' witnesses testified that the $43,680.00 salary posted and offered to Petitioner was incorrect.

88. Ms. Earp could not recall DPS ever having this same situation occur previously, but that "it was always the agency's stance to err on the side of the employee and to try to mitigate any situation that we find to be in error so that we do not negatively impact the employee." Tr. pp. 72:24-73:4.

89. Although several other options were available to DPS, there was no evidence in the record that DPS attempted to "mitigate" the situation or "not negatively impact" the Petitioner. Instead, the opposite was true.

90. DPS could have submitted a retroactive reclassification request to the Office of State Human Resources which would have fixed the overpayment problem. Tr. pp. 54:1-25; 71:5-25 (T Earp).

91. DPS could have reinstated Petitioner and repaid the overpayment and deducted ten percent (10%) from Petitioner's payroll. Tr. pp. 59:22-60:3 (T of Martin).

92. Moreover, overpayments cannot be deducted from short-term disability. (Tr p. 60:4-9 (T of Martin). If DPS allowed Petitioner to take short-term disability as he requested due to his cancer treatments, the overpayments could not have been deducted from his payroll, sick leave, or vacation time. Tr. p. 61:2-7.

93. Allowance for short-term disability is solely determined by the agency employer, in this case – DPS. Tr p. 61:8-16.

94. The Undersigned finds Ms. Earp's statement that DPS tried to "err on the side of the employee" disingenuous and self-serving because, at least in Petitioner's situation, there was no evidence that DPS even attempted to "err" on the side of Petitioner despite several opportunities.

95. Had DPS "erred" on the side of Petitioner, it would have given him timely notice in November 2017 about the discrepancies and afforded him an opportunity for due process to resolve the issue before deducting money from his payroll.

96. Had DPS "erred" on the side of Petitioner, it would have approved his short-term disability request so no moneys could be deducted from his paycheck or leave balances.

97. Had DPS "erred" on the side of Petitioner, it would have advised him about the reinstatement option and 10 % payroll deduction.

98. Had DPS "erred" on the side of Petitioner, it would have sought retroactive reclassification.

99. DPS did none of these things and, instead, opted to, without explanation, garnish $11,000.00 of Petitioner's wages, offset his taxes, and threatened collection litigation. All during the time Petitioner was on Family Medical Leave with no income and dealing with cancer treatments.

100. Ms. Earp admitted that had Petitioner been paid shift premium pay, he would have been entitled to earn an additional $2.00 per hour for his time spent On-Call for DPS. Tr pp. 75:13-25; 76:1-18.

101. Her testimony is consistent with the State policy regarding On-Call and Emergency Callback pay which required necessary employees such as Petitioner to be paid On-Call. Her testimony was also consistent with the fact that Petitioner was paid overtime for Emergency Callback.

102. Although Ms. Earp admitted that the ORC position was subject to On-Call and Emergency Callback pay, Ms. Earp stated that Petitioner was never approved to be on-call because there were other employees available to be called whenever there was an emergency. Tr. pp. 76:22-77:7.

103. Ms. Earl speculated that there were other certified operators nearby who could have also responded to any emergency, but she did not know their "exact names." Tr. p. 77:12-16. As this was mere speculation with no evidence, this testimony was given no weight. Petitioner's testimony that no other certified ORC was available was more credible due to his long-term familiarity with the Facility and the availability of any other ORC in the area.

104. DPS could have fixed the overpayment by submitting a retroactive reclassification request to the Office of State Human Relations.

105. On cross-examination, Melissa Earp admitted that she, Doris Martin, and others had seen an email by Twyla Philyaw, Assistant Director of Administration for DPS (Pet'r Ex. 14, p. 20) which would have allowed Respondent to submit a retroactive reclassification request to the Office of State Human Resources. Tr. pp. 54:1-25; 71:5-25.

106. In the email, Ms. Philyaw asked:

> …if there is a procedure or way to approach OSHR and request a retroactive approval for placing Mr. Roper into his position as PMPT employee? After all this would be accurate as it relates to the conditions of employment that he was told about during the hiring process. From all indications, the agency understood Mr. Roper was going into a part-time position, but it looks like we dropped the ball and I think it is therefore inherent on us to clean up and correct our error without, what I see, as unjustly holding the employee accountable. Tr p. 72:5-23.

100. Ms. Earp reluctantly acknowledged that this had not been done. Had the request been submitted and approved, Petitioner would have owed no money to the DPS. Tr. pp. 58:1-11; 72:23-25.

101. Ms. Earp also admitted that DPS determines on-call status and that DPS may owe Petitioner money if he was on emergency callback in the amount of $2.00 per hour. Tr. p. 75:12-25.

102. Petitioner was hired as a permanent full-time State employee to work four (4) hours a day, seven days a week, was on-call 24 hours a day, seven days a week, and paid for emergency callback time. Petitioner was not paid for his on-call work time but instead paid a lump salary for both his regular and on-call hours.

103. This "lump salary" may equate to the amount that Petitioner would be entitled if he had been paid a salary for 28 hours as well as $2.00 an hour for the 24/7 On-Call period.

104. The Parties Jointly Stipulated to the On-Call Emergency and Callback Pay Policy (the "Policy"). *See* Joint Stipulation dated May 7, 2021 which attached the Policy.

105. According to the Policy, "On-Call" is when an employee must remain available to be called back to work on short notice if the need arises. "Emergency Callback" is when an employee has left the worksite and is requested to respond on short notice to an emergency work situation.

106. Petitioner was notified that he was subject to being on-call and emergency callback. Petitioner received overtime compensation for emergency callbacks. Petitioner was not, however, compensated separately for being on-call but instead received a lump salary.

107. DPS chose to compensate Petitioner in that manner and that compensation was approved by the Office of State Human Resources. This compensation package did not comply with the Policy and DPS failed to submit Petitioner's position as eligible for on-call compensation.

108. The on-call rate for Petitioner's ORC position was $2.00 an hour.[5]

109. The Policy contains examples of how on-call and emergency callback pay should be calculated. Based on those examples, Petitioner was on-call for 168 hours a week (7 days x 24 hours). After deducting his normal 28-hour work per week, 140 hours of on-call time remains. At $2.00 an hour, 140 hours of on-call compensation is $280 a week and roughly $1,120.00 a month (based on a 4-week month), an approximate total of $13,440.00 a year. Over a period of 2 years, Petitioner would be entitled to approximately $26,880.00 on-call compensation. This amount is for demonstrative purposes only and Petitioner may have been entitled to more or less.

110. If the 28-hourly compensation amount[6] is deducted from Petitioner's lump sum salary, the difference would equate to the amount of on-call compensation paid to Petitioner.

111. For some unknown reason, this solution was not considered by DPS. Instead, demotion to a part-time position was the tract DPS took.

112. Petitioner was hired as a permanent full-time State employee, but the Department failed to process the appropriate paperwork to make him a permanent full-time State employee or notify the Office of State Human Resources that Petitioner's position was eligible for on-call pay as required by the Policy.

113. The mistake in classification of Petitioner was entirely the fault of Respondent, and Petitioner in no way contributed to the mistake.

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[5] Medical/health care, IT, and skilled trades are intitled to $3.00 an hour on-call compensation.

[6] This amount would have to take into consideration all leave and other benefits.

114. Due DPS' mistakes, BEACON erroneously determined that Petitioner was overpaid.

115. Prior to March of 2020, DPS never provided Petitioner with his appeal or grievance rights.

116. In March of 2020, DPS supposedly mailed a letter which Petitioner never received. That letter did notify Petitioner of his appeal rights to "…contest this collection by filing a petition with the Office of Administrative Hearings." While Petitioner did not receive the letter, it does establish that DPS conceded that Petitioner had an appeal right.

117. As an emergency on-call State employee, Petitioner was entitled to be paid $2.00 an hour for every on-call hour in excess of his regular hours or overtime callback hours.

118. Due to DPS' mistake in classification of Petitioner's employment and his on-call status, DPS must calculate the amount of on-call compensation that Petitioner would have been entitled to during the "overpayment period" and deduct that amount from his lump salary for that same time period. This may eliminate the purported overpayment or significantly reduce DPS' liability. But in any event the overpayment is the liability of DPS, not Petitioner. DPS shall repaid any monies owed back to the BEACON program so as to make Petitioner whole in this matter.

119. DPS shall also repay Petitioner the following:

a) $11,000 mistakenly garnished from Petitioner's wages; and
b) $1,783.00 mistakenly offset from Petitioner's 2019 and 2020 North Carolina income tax refunds.

120. Due to the mistake in classification, Petitioner's full-time permanent status was disallowed which prevented him from using his sick and annual leave during his illness.

121. Due to the mistake in classification, Petitioner was denied State Health Plan insurance and had to pay for his own health insurance and contributions were not made to is retirement account.

122. DPS shall correct the misclassification of Petitioner's employment status back to a full-time, permanent employee.

123. Based upon the above, the North Carolina Department of Public Safety has prejudiced the Petitioner's rights; exceeded its authority; acted erroneously; failed to use proper procedure; acted arbitrarily and capriciously; and failed to act as by law or rule.

BASED UPON the foregoing Findings of Fact, stipulations, sworn testimony, relevant laws, legal precedent and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

General Legal Framework

1. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be 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). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den*., 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v Rockingham Co. Department of Social Services*, COA17-1176 (2 October 2018).

2. The Parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

3. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case except as to the issue dismissed without prejudice in the first motion to dismiss. The Parties received proper notice of the hearing in this matter.

4. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).

5. This Final Decision incorporates and reaffirms the conclusions of law contained in its previous Orders entered in this litigation.

6. In addition to the legal issues presented, the Undersigned was faced with credibility determinations. The credibility of the witness and the resolution of conflicting testimony is a matter for the administrative law judge to resolve. *Huntington Manor of Murphy v. N.C. Dep't of Human Res.*, 99 N.C. App. 52, 57, 393 S.E.2d 104, 107 (1990) (citing *State ex rel. Comm'r of Ins.*, 300 N.C. at 406, 269 S.E.2d at 565 (other citations omitted)); *See also Charter Pines Hosp., Inc. v. N.C. Dep't of Human Res.*, 83 N.C. App. 161, 177-78, 349 S.E.2d 639, 650 (1986). The Undersigned finds and concludes that the Petitioner was a credible witness, but Doris Martin and Melissa Earp were less credible witnesses and reluctant to testify against DPS' interests.

ON-CALL AND EMERGENCY CALLBACK COMPENSATION

7. The standard workweek for employees subject to the Personnel Act is 40 hours per week. The normal daily work schedule is five days per week, eight hours a day plus a meal period. Other schedules apply to part-time employees and some shift employees; agencies are responsible for determining the appropriate schedules for these employees. Because of the nature of the various state activities, some positions require a workweek other than five days. The normal daily work

schedule may not apply to educational, hospital, and similar institutions with schedules geared to round-the-clock service. 25 NCAC 01C .0501.

8. However, some employees due to the nature of their work, must work more than the standard workweek and have variable hours. An Operator in Responsible Charge ("ORC") at a water treatment facility like Petitioner is one such employee. *See* Rules .1301 - .1303 of Title 15A Subchapter 18C of the North Carolina Administrative Code; N.C. Gen. Stat. §§ 90A-29 and 130A-315.

9. DPS knew Petitioner had a variable schedule to allow for On-Call and Emergency Callback because its failure to have an ORC at the Facility would have subjected DPS to administrative penalties. N.C. Gen. Stat. § 130A-324.

10. After being rehired by DPS as an ORC in 2016, rather than being paid $2.00 an hour for On-Call service, Petitioner was paid for his On-Call service in the lump sum salary amount.

11. Why DPS chose to pay Petitioner a "lump sum" salary rather than a fixed salary for 28 hours and On-Call compensation is unknown other than the fact that Petitioner's schedule was geared to round-the-clock service and this was how Petitioner was paid as a contract OCR. Regardless of DPS' reason, the 24/7 on-call service Petitioner provided to DPS has a monetary value.

12. DPS was responsible for this payment schedule and Petitioner was at no fault. To the extent that any overpayment may have resulted from DPS' error, then DPS, not Petitioner, is responsible for paying back to the State any debt owed.

13. DPS may not owe any monies to the State or a minimal amount because the difference from the amount actually paid to Petitioner in the lump sum salary versus the amount DPS would have paid for a 28-hour work week with 24/7 On-Call compensation may be the same.

TAXPAYER BILL OF RIGHTS

14. N.C. Gen. Stat. § 105A, Article was enacted by the N.C. General Assembly as the Set-off Debt Collection Act. N.C. Gen. Stat. § describes its legislative Purpose:

> The purpose of this Chapter is to establish as policy that all claimant agencies and the Department of Revenue shall cooperate in identifying debtors who owe money to the State or to a local government through their various agencies and who qualify for refunds from the Department of Revenue. It is also the intent of this Chapter that procedures be established for setting off against any refund the sum of any debt owed to the State or to a local government. Furthermore, it is the legislative intent that this Chapter be liberally construed so as to effectuate these purposes as far as legally and practically possible.

15. The Setoff Debt Collection Act, N.C. Gen. Stat. § 105A, authorizes garnishment when a person owes a debt to a state agency. Conn. Gen. Stat. §§ 105A-2, 105A-3 (2003).

16. Our courts have held that "'money paid to another under the influence of a mistake of fact . . . may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund.'" *Bank v. McManus*, 29 N.C. App. 65, 70, 223 S.E.2d 554, 557 (1976) (citations omitted).

17. As our Supreme Court noted in Guaranty Co., "'as a general rule, it is no defense to an action for the recovery of a payment made under mistake of fact that the money or property has been paid over to another or spent by the payee.'" *United States Fidelity & Guaranty Co. v. Reagan,* 256 N.C. 1, 10, 122 S.E.2d 774, 781 (1961).

18. The North Carolina Constitution mandates that "no person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32.

19. Our courts have construed this provision to prevent gifts or gratuities of public money and have held that "additional compensation . . . beyond that due for services rendered" is not constitutionally permissible. *Leete v. County of Warren,* 341 N.C. 116, 121, 462 S.E.2d 476, 479 (1995).

20. Further, our statutes require that money due to a state agency, including overpayments, must be "promptly billed, collected and deposited." N.C. Gen. Stat. § 147-86.11(e)(3) (2003), *see also* N.C. Gen. Stat. §§ 147-86.21 and 147-86.20 (2003).

21. The Act also allowed a taxpayer to object to a proposed denial of a refund by requesting Departmental review of the proposed action. *See* N.C. Gen. Stat. § 105A-8.

22. Petitioner filed an objection to the proposed action. The Department of Revenue acknowledged his objection and after review, it responded that:

> We have received your objection and request for Departmental review regarding the Notice of Individual Income Tax adjustment for the above-referenced tax year [2019].
>
> As outlined in the North Carolina Taxpayers' Bill of Rights, the application of a refund against debts owed to State or local agencies or to the Internal Revenue Service is not subject to review.
>
> Your refund has been applied against your indebtedness to NC Department of Public Safety. You will need to contact directly NC Department of Public Safety concerning any refund claims remitted to that agency.

See Pet. Ex. 13B, June. 5, 2020 letter to Petitioner from NCDOR.

23. The Taxpayer Bill of Rights allows a taxpayer to challenge the underlying debt. *See*. N.C. Gen. Stat. § 105A-8(b). To challenge the alleged underlying debt, Petitioner filed a Petition for Contested Case Hearing. DPS acknowledged this right when it sent Petitioner a letter informing him of his right to file a Petition in the Office of Administrative Hearings. *See* Pet'r Ex. 10C.[7]

24. The Taxpayer Bill of Rights provides that the hearing must determine "…whether a debt is owed to the State agency and the amount of the debt." N.C. Gen. Stat. § 105A-8(c).

25. Based on the evidence presented, the Undersigned finds that the alleged overpayment was improperly assessed, and the amounts withheld and collected by DPS were erroneous. Such amounts must be repaid to Petitioner. *See Mayo v. NCSU*, 168 N.C. App. 503, 510, 608 S.E.2d 116, 122 (2005).

26. To the extent that DPS has both a constitutional and statutory obligation to recoup the overpayment of salary to Petitioner, DPS can repay the State any moneys owed.

STATE HUMAN RESOURCES ACT VIOLATIONS

27. The incontrovertible evidence that Petitioner was hired as a full-time permanent State employee. DPS failed to follow the proper procedures to establish Petitioner's position as permanent full-time employee and failed to advise the State Office of Human Resources that Petitioner was an employee eligible for on-call compensation which was included in his salary of $43,680.00.

28. The alternative argument is that DPS hired Petitioner as a full-time permanent State employee then without "just cause" demoted him to part-time status. N.C.G.S.A. § 126-34.02(b)(3). Petitioner also involuntarily resigned his position.

29. As a threshold matter, the statutory provisions of N.C.G.S. § 126–35 apply in this instance. No career State employee may be demoted without just cause. N.C. Gen. Stat. § 126–35(a). While Petitioner was not demoted for a disciplinary reason. DPS demoted Petitioner's position from full-time to part-time and reduced his pay without following the proper procedures outlined in N.C.G.S. § 126–35. *Nix v. Dep't of Admin*., 106 N.C. App. 664, 667, 417 S.E.2d 823, 826 (1992).

30. Even if the action precipitating this lawsuit were not disciplinary in nature, it is clear that DPS' action was taken "in response to the vicissitudes of a department's personnel needs" not the Petitioner's. *Batten v. North Carolina Dep't of Correction*, 326 N.C. 338, 345, 389 S.E.2d 35, 40 (1990).

[7] Even though Petitioner never received the letter, it does not diminish Respondent's acknowledgment of his right to appeal to OAH.

31. As DPS has not followed the proper procedures in G.S. § 126-35, Petitioner may have a separate personnel case. In this case, Petitioner has not raised this issue, although he did ask for his job back. The facts in this case lean more towards DPS' sloppiness in following proper personnel procedures than a *de facto* disciplinary action.

32. The State Human Resources Act, N.C. Gen. Stat. Chapter 126, establishes the State Human Resources System. N.C. Gen. Stat. § 126-1 prescribes the Purpose of the Chapter. It provides:

> It is the intent and purpose of this Chapter to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry. It is also the intent of this Chapter that this system of personnel administration shall apply to local employees paid entirely or in part from federal funds, except to the extent that local governing boards are authorized by this Chapter to establish local rules, local pay plans, and local personnel systems. It is also the intent of this Chapter to make provisions for a decentralized system of personnel administration, where appropriate, and without additional cost to the State, with the State Human Resources Commission as the policy and rule-making body. The Office of State Human Resources shall make recommendations for policies and rules to the Commission based on research and study in the field of personnel management, develop and administer statewide standards and criteria for good personnel management, provide training and technical assistance to all agencies, departments, and institutions, provide oversight, which includes conducting audits to monitor compliance with established State Human Resources Commission policies and rules, administer a system for implementing necessary corrective actions when the rule, standards, or criteria are not met, and serve as the central repository for State Human Resources system data. The agency, department, and institution heads shall be responsible and accountable for execution of Commission policies and rules for their employees.

33. It is undisputed that Petitioner is subject to this law. N.C. Gen. Stat. § 126-2 establishes the State Human Relations Commission ("SHRC"). By statute and regulation, the definition of a "permanent State employee" is established. In N.C. Gen. Stat.§ 126-5(a),[8] the statute provides:

> (a) For the purposes of this Chapter, unless the context clearly indicates otherwise, "career State employee" means a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:
>
> (1) Is in a permanent position with a permanent appointment, and

[8] Previously, similar language was in N.C. Gen. Stat. § 126-139.1(1); see also, *Saunders v. State Personnel Commission,* 183 N.C. App. 15, 644 S.E.2d 10 (2007). Although both statutes have changed the length of time to be a Career State. Employee, that length of time is irrelevant here given Petitioner's length of service and reinstatement.

(2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.

34. Pursuant to its rule making authority in N.C. Gen. Stat. § 126-4, the SHRC has adopted policies and rules relating to position classification, compensation, qualification requirements, and holiday, vacation, and sick leave.

35. SHRC has adopted 25 N.C. Admin. Code. 01C .0402 Permanent and Time-Limited Appointment; since 1976, this Rule has provided that:

(a) An appointment to an established position shall be a permanent appointment if:

(1) the requirements of the probationary period have been satisfied in accordance with G.S. 126-1.1, or

(2) a time-limited appointment extends beyond three years of continuous employment.

(b) An appointment to an established position shall be a time-limited appointment if it is an appointment to:

(1) a permanent position that is vacant due to the incumbent's leave of absence and the replacement employee's services will be needed for a period of one year or less, or

(2) a time-limited position. If an employee is retained in a time-limited position beyond three years, the employee shall be designated as having a permanent appointment.

36. Based upon the evidence presented, Petitioner meets the definition of serving in a full-time permanent position because numerous exhibits show that the position was advertised as full-time permanent; he applied to be a full-time permanent employee; he was offered and accepted a full-time permanent position. He had served past his probationary period and when he was re-hired, his prior State service was reinstated. *See* Pet'r Ex. 5.

37. Moreover, even if Petitioner served in a less than a full-time permanent position, after three years, the rules require his position be designated as permanent. Finally, DPS admitted that Petitioner was hired as a full-time permanent employee. Therefore, Petitioner is a State employee serving full time in a full-time permanent position.

38. In addition, SHRC has adopted 25 NCAC 01C .0502 "Variable Work Schedule"; it provides:

> Agencies may choose to utilize a variable work schedule, that allows employees to choose a daily work schedule and meal period which, subject to agency necessities, is most compatible with their personal needs. Supervisors are responsible for arranging operating procedures that are consistent with the needs of the agency and the public it serves, and at the same time can accommodate, as far as possible, the employee's choice of daily work schedules within the established limits. If any adjustments of employee work schedules are necessary, this should be done as fairly and equitably as possible.

39. Clearly, this rule allowed the DPS to "utilize a variable work schedule" but DPS claims it did not. Despite Petitioner's clear status as a full-time permanent employee, the adoption of the BEACON Payroll system ultimately prevented an inaccurate accounting of Petitioner's time served in his "variable work schedule." Based on the information provided by DPS, this software erroneously assumed that he was part-time and then calculated an erroneous overpayment of salary in the amount of $35,493.87.

40. Even though DPS had the responsibility "…for execution of Commission policies and rules for their employees" under N.C. Gen. Stat. § 126-1, and the opportunity to correct their acknowledged mistake, DPS refused to do so. This combination of mistakes and abuse of discretion resulted in the calculation of an erroneous overpayment of salary in the amount of $35,493.87.

41. The SHRC also has rule making authority over holiday, vacation, and sick leave.[9] Pursuant to this authority, the SHRC has promulgated 25 N.C. Admin. Code. 01E .0101; it provides:

> Administration of the leave program within the scope of established policy shall be the responsibility of the agency head. Paid leave for absences during scheduled working hours shall be charged to the appropriate leave account of the employee.

42. The Commission has also adopted 25 NCAC 01E .0216 Accounting for Creditable Service; it provides:

> The employing agency shall be responsible for informing each employee of the types of prior service which are eligible to be counted as total state service. If the employee fails to produce evidence of prior service at the time of employment and later produces such evidence, credit shall be allowed for the service and the earnings rate shall be adjusted; however, retroactive adjustments shall only be allowed for the previous 12 months. Exceptions shall be made if the agency is at fault or fails to properly detect prior service.

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[9] *See* N.C. Gen. Stat.§ 126-4 & 126-8.

43. Clearly, the responsibility for tracking leave is on the agency. The evidence presented is uncontroverted that the mistake in tracking leave was due to the DPS' failures and that Petitioner was not in fault in any way.

44. Because of DPS' erroneous determination that Petitioner was not a permanent employee, Petitioner was denied leave to which he was rightfully entitled.

STATE RETIREMENT BENEFITS

45. DPS' erroneous determination that Petitioner was not a full-time permanent employee also resulted in his denial of membership in the Teachers & State Employee Retirement System.

46. Under G.S. 135-2, the Retirement System for Teachers and State Employees was established for the purpose of providing retirement allowances and other benefits under the provisions of G.S. 135-1 et seq., for teachers and State employees of *the State of North Carolina. State Emples. Ass'n of N.C., Inc. v. State,* 154 N.C. App. 207, 573 S.E.2d 525 (2002). The intent of this chapter is not to exclude, but to include, State employees under an umbrella of protections designed to provide maximum security in their work environment and to afford a measure of freedom from apprehension of old age and disability. *Stanley v. Retirement & Health Benefits Div.,* 55 N.C. App. 588, 286 S.E.2d 643, *cert. denied*, 305 N.C. 587, 292 S.E.2d 571 (1982).

47. Petitioner served as a full-time permanent employee of DPS, but DPS' erroneous reporting to the State Retirement System of his status as part-time rather than full-time permanent precluded his qualifying for retirement benefits.

48. Until June 30, 2021, the current statute provides that an employee is eligible when "[e]mployees of State agencies, departments, institutions, boards, and commissions who are employed in permanent job positions on a recurring basis must work at least 30 hours per week for nine or more months per calendar year in order to be covered by the provisions of this subdivision."[10]

49. However, to determine Petitioner's eligibility for "membership," one must go back to the period that he was first employed by the State. N.C. Gen. Stat. § 135-3 defines membership. The plan began on July 1,1947 and applies to State Employees and Teachers employed after that date; other persons have been added over time. In N.C. Gen. Stat. § 135-3 the statute defines membership as: "The membership of this Retirement System shall be composed as follows (1) All persons who shall become teachers or State employees after the date as of which the Retirement System is established."

50. Petitioner was first employed in July of 2003; he resigned his employment in August of 2008. He worked for DPS for five (5) years and eleven (11) days. After resignation from DPS, Petitioner worked as a contractor from 2009 to 2013. Petitioner was again hired by DPS in 2016. After which he worked for DPS for two (2) years, four (4) months, and twenty-two (22) days. He resigned his employment with the State in September 2018. Therefore, Petitioner worked

[10] N.C. Gen. Stat. § 135-1(10).

for the State a total of seven (7) years, five (5) months, and three (3) days for which he could have participated in the Retirement System.

51. N.C. Gen. Stat. § 135-3(3) provides that: "A member shall cease to be a member only if the member withdraws his or her accumulated contributions, or becomes a beneficiary, or dies." Despite his resignation, Petitioner has not withdrawn any contributions.

52. Moreover, N.C. Gen. Stat. § 135-3 allows a former State employee to make contributions to reinstate his retirement status. For example, N.C. Gen. Stat. § 135-3(4) allows a former State Employee who left State service but wished to return to reinstate his retirement status and the statute establishes a formula for "earnable compensation"[11] to calculate the retirement contribution amount.

53. Petitioner contends that to repair the damage caused by DPS' failure to compensate him as a full-time permanent employee, including payment of his retirement contributions, is for DPS to pay the Employee's share of his compensation for those months and years in question.

54. Normally, the employer would have paid the Employee share of retirement. Petitioner proposes that the DPS should also be required to pay the Petitioner's share of benefits as a form of restitution for their mistake. However, prior to his rehire in 2016, Petitioner did not seek payment of his retirement benefits and those claims are now barred to him.

55. The Restatement of Restitution § 1 lays down the general principle that"[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Cited and followed, Booe v. Shadrick,* 322 N.C. 567, 369 S.E.2d 554, (1988). Restitution has been used by courts in employment cases. *Morris v. Scenera Research, LLC,* 229 N.C. App. 31, 747 S.E.2d 362, 2013 N.C. App. LEXIS 878, (2013), *aff'd in part, rev'd in part and remanded*, *Morris v. Scenera Research, LLC*, 368 N.C. 857, 788 S.E.2d 154 (2016).

56. N.C. law has previously required the State to pay restitution. In taxpayer cases, the Court said: "…once the State is put on notice that a tax provision is being challenged, not every taxpayer seeking restitution under N.C. Gen. Stat. § 105-267 must comply with the statute. Moreover, when the State has impermissibly collected taxes from a group of individuals, public policy makes it unjust to limit recovery only to those taxpayers with the advantage of technical knowledge and foresight to have filed a formal protest and demand for refund. Such a result would clearly elevate form over substance*." Dunn v. State*, 179 N.C. App. 753, 758, 635 S.E.2d 604, 607, (2006).

57. In criminal cases, the trial court has the discretion to impose restitution in addition to criminal liability. "Criminal and civil liability are not synonymous. A criminal conviction does not necessarily establish the existence of civil liability. Civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition." *Shew v. Southern Fire &*

[11] "Earnable compensation" shall mean the full rate of the compensation that would be payable to a teacher or employee if he worked in full normal working time. In cases where compensation includes maintenance, the Board of Trustees shall fix the value of that part of the compensation not paid in money.

Casualty Co., 307 N.C. 438, 443, 298 S.E.2d 380, 383 (1983) quoting *People v. Heil*, 79 Mich. App. 739, 748, 262 N.W. 2d 895, 900 (1977).

58. In personnel cases, the State Human Resources Commission has adopted 25 NCAC 01J .1307 FRONT PAY, which is tantamount to restitution. It provides for Front Pay in a variety of situations.

59. In grievances:

(1) Front pay may be awarded in all cases in which front pay is warranted by law.

(2) "Front pay" is the payment to an employee above his or her regular salary, the excess amount representing the difference between the employee's salary in his or her current position and a higher salary determined to be appropriate due to a finding of discrimination. (3) Front pay may also result from an order of reinstatement to a position of a particular level that the agency is unable to accommodate at the time of the order. Front pay shall be paid for such period as the agency is unable to hire, promote, or reinstate the employee to a position at the appropriate level and as warranted by law.

(4) Front pay shall terminate upon acceptance or rejection of a position to which the employee has been determined to be entitled.

(5) Front pay shall be available as a remedy in cases involving hiring, promotion, demotion, or dismissal.

(6) Front pay shall be payable under the same conditions as back pay except that the only deductions from front pay shall be for usual and regular deductions for State and federal withholding taxes and the employee's retirement contribution. There may also be a deduction for other employment earnings, whether paid by the State or another employer, so as to avoid unjust enrichment of the grievant.

25 NCAC 01J .1307

60. Therefore, DPS shall be required to pay retirement contributions as a form of front pay.

STATE HEALTH PLAN

61. Similarly, DPS' erroneous determination that Petitioner was not a permanent employee resulted in his denial of membership in the State Health Plan. Effective June 30, 2021, N.C. Gen. Stat. § 135-1 (10) provides that: "Employees of State agencies, departments, institutions, boards, and commissions who are employed in permanent job positions on a recurring basis must work at least 30 hours per week for nine or more months per calendar year in order to be covered by the provisions of this subdivision."[12]

[12] This language was adopted effective June 30, 2021.

62. Prior to that date, a State employee was eligible based on N.C. Gen. Stat. § 135-48.43 which provides:

> (a) Eligible Employees and Retired Employees. -- Employees and retirees who otherwise satisfy the eligibility requirements set forth in G.S. 135-48.40 will be offered coverage with the following effective dates:
>
> (1) Employees and retired employees covered under the Predecessor Plan will continue to be covered, subject to the terms hereof.

63. N.C. Gen. Stat. § 135-48.40(b) states that: "[e]mployees of State agencies, departments, institutions, boards, and commissions not otherwise covered by the Plan who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision." The evidence, including the testimony of Petitioner, and the Findings of Fact show that Petitioner regularly worked more than 30 hours per week as he was on-call 24/7 even day. Therefore, he meets the minimum qualifications for coverage.

64. If Petitioner's coverage for the State Health Plan had been properly processed, then Petitioner would have had his coverage transfer to the new State Health Plan. Because the DPS failed to properly classify his position, the DPS also failed to make contributions for Petitioner to be covered by the State Health Plan. To the extent that Petitioner's medical expenses were not covered during the period of his FMLA due to DPS' error, DPS shall reimburse Petitioner for his medical bills which should have been covered under the State Health Plan.

PRELIMINARY AND PERMANENT INJUNCTION

65. Petitioner moved the Court for an injunctive relief pursuant to Rule 65(a) of the N.C. Rules of Civil Procedure, based upon Respondent's continued collection efforts.

66. DPS responded on May 18, 2021, conceding that the mistake in classification of Petitioner's position that resulted in the alleged overpayment was "…not attributable to Petitioner."

67. DPS' Objection also cited cases; however, DPS did not address *Mayo v. NCSU*, 168 N.C. App. 503, 510, 608 S.E.2d 116, 122 (2005), which has been previously submitted by Petitioner. *Mayo* holds that if alleged amount was improperly assessed by the State Agency, and the amounts that were withheld and collected by Respondent were erroneous, then such amounts must be repaid to the Petitioner.

68. The Undersigned finds that Petitioner has a likelihood of success in determining that the alleged overpayment was erroneous and in fact was successful as determined in this Final Decision and especially since DPS conceded that the mistake was not attributable to Petitioner.

69. The evidence of record in this case establishes that DPS repeatedly failed to provide Petitioner notice of his appeal rights, which is a violation of his due process rights. *See Luck v. ESC,* 50 N.C. App. 192, 272 S.E.2d 607 (1980).

70. The Undersigned finds that DPS' continued collection efforts without proper notice of due process is a violation of Petitioner's constitutional rights, and therefore such omission must be construed as irreparable harm. "The denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction." *Ross v. Meese*, 818 F.2d 1132 (4th Cir. 1987).

71. Since Petitioner has shown both a likelihood of success on the merits as demonstrated by a favorable ruling in this Final Decision and irreparable harm, a Preliminary and Permanent Injunction may properly issue. In addition, DPS' continued collection efforts, despite the statements questioning the overpayment by the Undersigned during the pendency of this hearing, establishes that the injury to Petitioner is continuous and recurring. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 302 SE.2d 754 (1983).

72. Both a preliminary and permanent injunction is appropriate and shall be entered in this case due to DPS' erroneous, arbitrary, and capricious actions.

ORDERS REGARDING PRELIMINARY MOTIONS TO DISMISS

As indicated above in the Procedural History, Respondent filed two Motions to Dismiss. The first motion sought dismissal of the salary dispute under G.S. 126-34.02(b). The second motion sought dismissal of the entire case for untimeliness. Respondent withdrew its second motion to dismiss, and the second motion is moot. Although not raised by Respondent, the Undersigned, *sua sponte*, dismisses without prejudice one claim below.

The Petition states multiple claims and asserts that Respondent violated the Taxpayer Bill of Rights (G.S. Chapter 105); The State Human Resources Act (G.S. 126-1 through G.S. 126-95); G.S. 147-86.1(e)(4); the Set Off Debt Collection Act (G.S. 105A through G.S. 105A-16); and the N.C. Wage and Hour Laws (G.S. 95-25.1-95.21-25). Pet. pp. 2-3. Respondent only challenges the State Human Resources Act claims.

FIRST MOTION TO DISMISS

The First Motion to Dismiss ("First Motion") was filed on September 2, 2021, and Petitioners responded on September 15, 2021.[13] In its First Motion Respondent asserted that this Tribunal lacked subject matter and personal jurisdiction over salary disputes under G.S. 126-34.02(b). Furthermore, Respondent claimed that "Petitioner has never mediated this action, nor are there any documents which constitute agency action." Resp't First Mot. p. 2.

Respondent did not issue a document constituting agency action before: garnishing Petitioner's wages, denying his access to sick and personal leaves, denying him short-term disability, denying him FMLA funds, and offsetting his taxes. Nor did Respondent advise Petitioner of his appeal rights to these adverse actions.

[13] While the Frist Motion was pending before Judge Jacobs, the case was reassigned to the Undersigned without adjudication of the motion.

While Respondent did not properly generate a document constituting agency action with appeal rights, it generated other documents notifying Petitioner, after the fact, of the alleged salary overpayment. This was not the proper procedure.

While it is true that Petitioner did not engage in mediation before filing this action, perhaps in part because of Respondent's failure to give proper notice, Petitioner did move for a settlement conference on December 30, 2020 to which DPS objected. Over the objection of DPS, an Order for Settlement Conference was issued on January 6, 2021. Mediation was unsuccessful. DPS has repeatedly stated that DPS cannot "settle" a debt owed to the State. Even though DPS may not be able to "forgive" a debt owed to the State under N.C. Gen. Stat. § 147-86.11(e)(3); DPS offered no legal authority which forbids an agency from "settling" a disputed debt.

The standard of review for a motion to dismiss is that the allegations set forth in the Petitioner's Petition and Prehearing Statement must be taken as true and all inferences must be liberally construed in Petitioner's favor. *See Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 600-01 (2007). With that standard in mind, Petitioner raises sufficient facts to allege that he was adversely affected because of DPS' actions; therefore, DPS' First Motion to Dismiss is **DENIED** except for one claim not raised by DPS.

***Sua Sponte* Dismissal of N.C. Wage and Hour Act Claims**

Respondent does not challenge Petitioner's N.C. Wage and Hour Act claims for lack of subject matter jurisdiction. However, "[w]henever it appears that the court lack jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, 12(h).

The North Carolina Wage and Hour Act states that:

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due.

(a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

(b) Action to recover such liability may be maintained in the General Court of Justice by any one or more employees. (c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected.

N.C. Gen. Stat. § 95-25.22(a)(a1)&(b).

According to N.C. Gen. Stat. § 95-25.22(b) actions for wage and hour act violations shall be commenced in the General Court of Justice. In addition, this Act affords Petitioner remedies not available in this Tribunal such as liquidated damages and interest. As indicated in this decision, DPS acted in bad faith and, if liquidated damages and interest were available, the Undersigned would have awarded them to Petitioner.

At this juncture, however, the Undersigned has no authority to do so and instead, by *sua sponte* **DISMISSES WITHOUT PREJUDICE** Petitioner's N.C. Wage and Hour Act claims to the extent that Petitioner wishes to raise them in another legal action in the correct jurisdiction.

SECOND MOTION TO DISMISS

On November 2, 2020, DPS filed a Second Motion to Dismiss the Petition for being untimely filed. After the hearing on December 11, 2020, on December 29, 2020, DPS withdrew its motion due to the extension of the filing deadline necessitated by the COVID-19 pandemic. (*See* Resp't Status Report dated Dec. 29, 2020) That same day, the Undersigned issued a Ruling on Withdrawn Motion to Dismiss as Moot.

To the extent it is unclear in the record, DPS' Second Motion to Dismiss is **DENIED** for **MOOTNESS.**

FINAL DECISION

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the conclusions of law noted above and it is hereby **ORDERED, ADJUDGED,** and **DECREED** that:

1. Petitioner does not owe any money to the State.

2. DPS is permanently enjoined from further collection efforts in this matter.

3. DPS shall repay Petitioner the $11,000 garnished from his wages.

4. DPS shall repay Petitioner the $1,783.00 taken from Petitioner's 2019- and 2020-income tax refund, which included a total of $10.00 for administrative fees.

5. DPS shall ensure that Petitioner is classified as a full-time permanent employee and, if necessary, to accomplish this, submit a retroactive reclassification request to the Office of State Human Resources.

6. DPS shall pay Petitioner the salary to which he was entitled from September 2017 to January 2018 when the Department erroneously denied him sick leave and required him to take unpaid leave.

7. DPS shall pay to the Department of State Treasurer, Retirement Systems Division the total amounts necessary as both Employer and Employee payments to reinstate Petitioner's retirement status; DPS shall report the exact calculation of this amount which shall include the unpaid on-call compensation, to the Undersigned within twenty-five (25) days of this Final Decision.

8. DPS shall pay to the Department of State Treasurer, State Health Plan Division the total amounts necessary to establish Petitioner's eligibility as a participant in the State Health Plan; DPS shall report the exact calculation of this amount to the Undersigned within twenty-five (25) days of this Final Decision.

9. After determining the value of Petitioner's on-call compensation from Petitioner's lump sum salary, if it is less than the moneys owed, DPS shall repay any monies owed to the State Office of the Controller.

10. DPS shall pay the fees and costs associated with this hearing, including the transcript fees and shall reimburse Petitioner for any amounts he may have incurred.

11. Petitioner's counsel is directed to submit an Affidavit of Fees and Costs within twenty-five (25) days of this Final Decision, so that the Undersigned may consider an award of attorney fees and costs; and,

12. The Undersigned reserves its authority to assess other fees owed to the Petitioner as it determines just and fair and allowed by law.

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.

IT IS SO ORDERED.

This the 4th day of June, 2021.

Stacey Bice Bawtinhimer
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 4th day of June, 2021.

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