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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EHR 02739, 19 EHR 02740, 19 EHR 02741

North Carolina Farm Bureau Federation Inc Petitioner, v. NC Department of Environmental Quality, Division of Water Resources Respondent.	**FINAL DECISION ON SUMMARY JUDGMENT**

This matter comes for hearing on the parties' Motions for Partial Summary Judgment pursuant to N.C.G.S. 1A, Rule 56(e). Petitioner's Motion and Brief in Support were filed July 31, 2020. Respondent's Motion and Brief in Support were filed July 31, 2020. Following reassignment of this case to the undersigned on September 21, 2020, the Undersigned held a motion hearing on December 4, 2020 at the Office of Administrative Hearings. At the request of the Tribunal, both parties submitted supplemental memoranda on the issue of remedies. The matter is now ripe for disposition.

APPEARANCES

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PROCEDURAL HISTORY

Petitioner N.C. Farm Bureau Federation, Inc. ("Petitioner" or "Farm Bureau") filed three contested case petitions on 10 May 2019. They center on three general agricultural permits issued by Respondent North Carolina Department of Environmental Quality, Division of Water Resources ("Respondent" or "DEQ"). The petitions are 19 EHR 2739 (swine permit), 19 EHR 2740 (cattle permit) and 19 EHR 2741 (poultry permit). On June 7, 2019 the Hon. Julian Mann, III, Chief Administrative Law Judge and Director of the Office of Administrative Hearings ("OAH"), issued an order consolidating the three contested cases.

On June 25, 2019, the North Carolina Environmental Justice Network and the North Carolina State Conference of the National Association for the Advancement of Colored People ("First Intervenors") moved to intervene pursuant to N.C.G.S 150B-23(d), N.C.G.S 1A-1, Rule 24, and 26 N.C.A.C. 3.0117. On June 28, 2019, the Board of Agriculture for the State of North Carolina ("Second Intervenor") moved to intervene pursuant to N.C.G.S. 150B-23(d) and 26 NCAC 03 .0117(a) for the limited purpose of filing an *amicus curiae* brief. On September 6, 2019, the Hon. Donald W. Overby, Administrative Law Judge ("Judge Overby"), issued an order denying the First Intervenors' and granting the Second Intervenor's motion. On October 2, 2019, First Intervenors made various filings, including a Motion for Preliminary Injunction, via a Petition for Judicial Review in the Superior Court of Wake County. On November 7, 2019, the Superior Court of Wake County denied First Intervenors' Motion for Preliminary Injunction in its entirety and dismissed First Intervenors' Petition for Judicial Review. There is no evidence that First Intervenors appealed further.

On July 2, 2019, Respondent filed a Motion for Judgment on the Pleadings, to which Petitioner responded in opposition. Following a delay in the progress of this case, apparently caused by First Intervenors' multiple unsuccessful attempts to become a party, Judge Overby denied Respondent's Motion for Judgment on the Pleadings on January 27, 2020.

On September 13, 2019, Petitioner filed a "Motion for a Declaration of Order Confirming Stay" related to the various agriculture permits, pursuant to N.C.G.S. 1A-1, Rule 65, N.C.G.S. 150B-33, and N.C.G.S 150B-3(a). Petitioner sought (preliminary) injunctive and declaratory relief. On September 23, 2019, Respondent filed in opposition to the motion. On May 8, 2020, Judge Overby denied Petitioner's Motion for Declaration, finding N.C.G.S 150B-3(a) does not authorize declaratory judgments by OAH. Judge Overby granted a preliminary injunction staying the agricultural permits pending the outcome of this contested case. In so doing, Judge Overby found that Petitioner had demonstrated a likelihood of success on the merits and that failure to stay the agricultural permits would cause irreparable harm or loss to the Petitioner. See "Preliminary Injunction and Order Allowing Stay," May 8, 2020.

In the interim, on March 20, 2020, both parties filed Motions for Partial Summary Judgment under N.C.G.S. 1A-1, Rule 56(e) ("First Summary Judgment Motions"). Various filings followed, including by Second Intervenor North Carolina Board of Agriculture. On May 8, 2020, Judge Overby issued his "Order on Motions for Partial Summary Judgment," which forms the basis for much of the discussions below.

Following Judge Overby's "Order on Motions for Partial Summary Judgment," the parties on July 7, 2020 filed "Joint Stipulation Regarding the Issues to Be Resolved on Summary Judgment," representing their agreement on the remaining issues in this contested case. On July 31, 2020, Petitioner and Respondent again filed for summary judgment ("Second Motion for Summary Judgment"). In July and August 2020, the parties made various filings in support of their Second Motions for Summary Judgment.

On September 21, 2020 this contested case was reassigned to the undersigned Administrative Law Judge. November 12, 2020, the Undersigned issued Notice of Hearing for the Second Motions for Summary Judgment. That hearing was held December 4, 2020. Following, per the request of the Tribunal, the parties on December 18, 2020 submitted supplemental legal memoranda on remedies.

STIPULATED ISSUES FOR SUMMARY JUDGMENT

1. Whether Respondent violated the APA when it developed and issued animal waste general permits for cattle, swine, and wet waste poultry farms that contained certain permit conditions that first appeared, in either substance or concept, in a draft swine general permit that was negotiated between Respondent and several non-profit organizations as part of a Title VI settlement agreement (Issue 1).

2. Whether Respondent violated 15 N.C.A.C. 2T .0111(b) when it did not notice for public comment a draft swine general permit that was negotiated between Respondent and several nonprofit organizations as part of a Title VI settlement agreement (Issue 2).

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Singleton v. Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, "all inferences of fact ... must be drawn against the movant and in favor of the party opposing the motion." Caldwell v. Deese, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (internal quotation marks omitted); Forbis v. Neal, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007). "The party moving for summary judgment bears the burden of establishing the lack of a triable issue of fact." Purcell v. Downey, 162 N.C. App. 529, 531-32, 591 S.E.2d 556, 558 (2004); Stevens v. Heller, 268 N.C. App. 654, 836 S.E.2d 675, 679 (2019). An administrative law judge may grant summary judgment for either party under appropriate circumstances. Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs, 791 S.E.2d 904 (2016); N.C.G.S. 150B-33(3a).

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Findings of fact are generally not appropriate at the summary judgment stage because issues of fact may not be resolved. However, they may be used to set out undisputed facts. In re Estate of Pope, 192 N.C. App. 321, 666 S.E.2d 140 (2008) ("While it is true that a trial court may not, on summary judgment, make findings of fact resolving disputed issues of fact, when—as here—the material facts are undisputed, an order may include a recitation of those undisputed facts."), disc. review denied, 363 N.C. 126, 673 S.E.2d 129 (2009); see also Krueger v. N. Carolina Criminal Justice Educ. & Training Standards Comm'n, 198 N.C. App. 569, 578, 680 S.E.2d 216, 222 (2009).

2. All parties are properly before the Office of Administrative Hearings and there are no questions as to joinder or misjoinder. The issue of who and what is a proper party to this contested case was resolved by Judge Overby's prior orders, which were affirmed by the Superior Court of Wake County and not appealed further.

3. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946). A court, or in this case an administrative Tribunal, need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. In ruling on these motions, two additional matters make the setting out of extensive factual findings by the Tribunal particularly unnecessary. First, the parties have long since stipulated that no genuine issues of material fact exist. See Order on Motions for Partial Summary Judgment, May 8, 2020 (afterwards, "Overby Summary Judgment Order"). Second, the Overby Summary Judgment Order makes mixed findings of fact and conclusions of law largely sufficient to resolve the present motion. The Tribunal has carefully reviewed the Overby Summary Judgment Order findings with respect to factual issues and finds them both well-supported and appropriate.

5. Accordingly, those findings are hereby incorporated in this Order by reference as if fully set forth. See Barbour v. Vance Trucking Co., No. CIV.A. 87-78-CIV-3, 1988 WL 72793, at 2 (E.D.N.C.1988): "Rather than re-invent the wheel or attempt to condense and paraphrase the Judge's discussion, I simply incorporate the relevant portions." Certain relevant undisputed facts are restated below in order to provide a coherent narrative.

6. The gravamen of this dispute is the legality or otherwise of three "special provisions" Respondent included in the General Permits. On September 3, 2014, advocacy groups (the North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help, and the Waterkeeper Alliance, afterwards "Advocacy Groups") filed a Title VI complaint ("Title VI Complaint) with the United States Environmental Protection Agency's Office of Civil Rights regarding Respondent's issuance of its 2014 Swine Permit.

The Advocacy Groups did not file a contested case petition in OAH regarding the Swine Permit or any of the other permits at issue.

7. On May 3, 2018, Respondent and the Advocacy Groups entered into a settlement agreement ("Settlement Agreement") with the Advocacy Groups on the Title VI complaint. The Settlement Agreement contained a draft permit incorporating the three "special provisions" that prompted the present case. The "special provisions" are described in Respondent's filings[1] as:

   a. For each field with a phosphorus index ("P-index") above a certain threshold, the permittee would be required to conduct a phosphorus loss assessment tool ("PLAT") analysis and, depending on the results of the PLAT analysis, might have to take certain remedial steps;

   b. All permittees must submit annual reports to the [Respondent]; and,

   c. The [Respondent] must require groundwater monitoring if there was evidence of groundwater impacts to off-site wells, or evidence of migrated off-site groundwater contamination or surface water contamination via groundwater.

8. Following the Settlement Agreement, DEQ noticed and accepted public comment on two draft permits for swine, cattle, and wet waste poultry operations; the "Stakeholder Draft Permit" and the "Public Comment Draft Permit." Petitioner's Brief in Support of Petitioner's Motion for Partial Summary Judgment, July 31, 2020, pp. 10-11. Both drafts contained language related to the "special provisions" that first appeared in substance or concept in the Settlement Agreement. Id.

9. Respondent issued final versions of the General Permits on April 12, 2019. Id.

10. It is undisputed that the "special provisions" did not go through rulemaking before appearing in the draft or General permits.

11. In summary form, the Overby Summary Judgment Order held, citing Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, Ret. Sys. Div., 374 N.C. 3, 8, 839 S.E.2d 814, 818 (2020), that:

   a. The "special provisions" to be included in the General Permits are of "general applicability" and meet the statutory definition of a "rule," see N.C.G.S. 150B-2(8), and, accordingly, they are "rules" for purposes of the Administrative Procedure Act N.C.G.S. 150B et. seq., ("APA").

   b. Respondent is not exempt from the APA either explicitly or by implication, and, accordingly, the General Assembly did not intend to relieve Respondent from the necessity to comply with the rulemaking provisions of the APA.

[1] See "Fourth Affidavit of Christine Lawson," July 31, 2020.

c. The process used by Respondent in issuing the General Permits with the "special provisions" does not suffice to provide those who may be affected by them with the substantive and procedural protections that are inherent in APA-compliant rulemaking proceedings.

d. The rulemaking provisions of the APA apply to Respondent, and before any conditions meeting the definition of "rules" (including without limitation the "special provisions") may be added to the General Permits, the Respondent must submit such conditions to rulemaking pursuant to the Administrative Procedure Act.

12. The Tribunal is in complete accord with Judge Overby's findings and adopts the Overby Summary Judgment Order in this Final Decision in its entirety, incorporating it by reference as if fully set forth herein.

13. Well before the Cabarrus County case discussed by Judge Overby, the Court of Appeals ruled that Respondent is not exempt from the Administrative Procedure Act. N. Buncombe Ass'n of Concerned Citizens, Inc. v. Rhodes, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990), rev. denied, 327 N.C. 484, 397 S.E.2d 215 (1990), stated (with commendable clarity), "DEHNR [the former name of Respondent] is indisputably a state agency. DEHNR is not among those agencies which the APA specifically exempts from its provisions. N.C.G.S. § 150B–1(d)."

14. N. Buncombe cited Vass v. Bd. of Trustees of Teachers' & State Employees Comprehensive Major Med. Plan, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989) for the premise, "It is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly." N. Buncombe adds weight to Judge Overby's conclusions regarding the "special provisions" and Respondent's duty to comply with the APA.

15. A rule is "not valid" unless it is adopted in substantial compliance with the APA. N.C.G.S. 150B-18. See Frederick M. and Anne C. Morris, et. al v. North Carolina Department of Environment and Natural Resources, Division of Air Quality, 2002 WL 31962670, 02 EHR 0068 (2002).

16. Morris involved an "Air Permit" under the Air Pollution Control Act, N.C.G.S. 143, Art. 21. In circumstances reminiscent of the "special provisions" in this case, "neither the eligibility criteria nor the standardized terms, conditions, and requirements" on which the Air Permit was based were adopted in accordance with the requirements of the APA." Morris reiterated the Court of Appeals' ruling that "an administrative agency may not act outside the mandates of the NCAPA, G.S. §§ 150B et seq.; specifically, 'a rule is not valid unless it is adopted in substantial compliance with this Article." N.C. Gen. Stat. § 150B–18 (1995).' Duke Univ. Med. Ctr. v. Bruton, 134 N.C. App. 39, 51, 516 S.E.2d 633, 640 (1999)." While Morris was decided when administrative law judges did not make final

agency decisions, Respondent's final decision, found the matter moot, did not quarrel with the ALJ's reasoning. See "Final Order," May 12, 2003.

17. N. Buncombe, Morris, and Bruton all involved Respondent. Respondent was thus informed by appellate courts and administrative tribunals, well before this contested case, that it is subject to the APA and that it may not issue unpromulgated rules, including (in Morris) in the permit context. Yet, throughout this contested case, Respondent appears to defend a purported right to do exactly that. See Respondent's Brief in Support of Summary Judgment: "The APA establishes procedures for rulemaking and adjudications, i.e., contested cases. Permitting is neither."

18. The Tribunal further concludes as a matter of law that Petitioner is a "person aggrieved" under the APA. A "person aggrieved" is "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N. Carolina Forestry Ass'n v. N. Carolina Dep't of Env't & Nat. Res., Div. of Water Quality, 357 N.C. 640, 644, 588 S.E.2d 880, 883 (2003); Empire Power Co. v. North Carolina Dep't of Env't, Health and Nat. Resources, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994).

19. In general, those "adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." FEC v. Akins, 524 U.S. 11, 25, 118 S.Ct. 1777, 1786, 141 L.Ed.2d 10, 23 (1998). "In North Carolina, disputes between a state government agency and another person may be formally resolved with the filing of an administrative proceeding referred to as a 'contested case.' N.C.G.S. 150B–22 (2001). A contested case is intended 'to determine the person's rights, duties, or privileges'." N. Carolina Forestry, Id.

20. Both independently and with respect to review of the Overby Summary Judgment Order, the Tribunal considered what deference, if any, is appropriate to Respondent's interpretation of the statutes involved. Our Supreme Court has explained:

> Although the interpretation of a statute by an agency **created to administer that statute** is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, **the validity of its reasoning, its consistency with earlier and later pronouncements**, and all those factors which give it power to persuade, if lacking power to control (emphasis supplied).

In re Appeal of N.C. Sav. & Loan League, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981).

21. Here, the statutory scheme at issue is the APA, which Respondent was not created to administer. Prior decisions of both appellate courts and administrative tribunals (N. Buncombe, Cabarrus County, and Morris) militate against the validity of Respondent's reasoning and its consistency with earlier pronouncements. The Tribunal thus concludes

that no enhanced level of deference is appropriate on Respondent's interpretation of whether it was required to engage in rulemaking with the "special provisions."

22. In addition to the specific burden on summary judgment, "Except as otherwise provided by law or by this section, the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence. N.C.G.S. 150B-25.1(a).

23. In order for a petitioner to be entitled to relief, it must comply with N.C.G.S. 150B–23(a), which requires that the petitioner allege and prove that an agency has "ordered the petitioner to pay a fine or civil penalty, or has otherwise **substantially prejudiced the petitioner's rights**," and that "the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995) (emphasis supplied).

24. Petitioner has met its burden of proof. Respondent violated the APA with respect to the "special provisions," and this violation is found to have substantially prejudiced Petitioner's rights in that (at least) Petitioner was excluded from the rulemaking process that Respondent unlawfully avoided on the "special provisions." Judge Overby found, and the Tribunal agrees, that "The process used by Respondent in issuing the General Permits with these special conditions does not suffice to provide those who may be affected with the substantive and procedural protections that are inherent in APA-compliant rulemaking proceedings." Overby Summary Judgment Order.

25. Petitioner further established by a preponderance of the evidence that Respondent acted erroneously, failed to use proper procedure, and failed to act as required by law or rule with respect to inclusion of the "special conditions" in the General Permits without engaging in the rulemaking process, in violation of the APA. The Tribunal has no difficulty making this determination. Simply put, "Agency action is unauthorized if made upon unlawful procedure." See Rate Bureau, below. The governing provisions of the APA require that rules go through rulemaking, and Respondent's position to the contrary regarding the "special provisions" was erroneous. Given these conclusions, there is no need to determine whether Respondent additionally "exceeded its authority or jurisdiction."

26. In issuing this Final Decision that Respondent violated the APA with respect to including the "special provisions" in the General Permits in their entirety, the issue of whether Respondent additionally violated 15 N.C.A.C. 2T .0111(b) when it did not notice for public comment the draft swine general permit is moot. To lawfully include such provisions in a permit, Respondent must subject these and any other relevant "special provisions" to rulemaking. Rulemaking, of course, includes public comment requirements. "A case [here, an issue] is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." Anderson v. N. Carolina State Bd. of Elections, 248 N.C. App. 1, 4–5, 788 S.E.2d 179, 183 (2016).

27. The final ground for error under N.C.G.S. 150B-23(a), "acted arbitrarily and capriciously," is less clear. An early extensive treatment of "arbitrary and capricious" in the

administrative context occurs in State ex rel. Com'r of Ins. v. N. Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, pet. for reh'g denied, 301 N.C. 107, 273 S.E.2d 300 (1980). (abrogated on other grounds by Matter of Redmond by & through Nichols, 369 N.C. 490, 797 S.E.2d 275 (2017).

28. Rate Bureau "Deals extensively with certain provisions of the North Carolina Administrative Procedure Act and the powers of State administrative agencies generally, as well as with our general insurance laws." Id. at 386, 554. This includes the critical point that, "The powers and authority of administrative officers and agencies are derived from, defined **and limited by** constitution, statute, or other legislative enactment." Id. at 399, 561 (emphasis supplied). Moreover, "The rulemaking power of an administrative agency is restricted by law apart from the statute conferring power and an agency having authority to effectuate the policies of a particular statute may not effectuate such policies so single-mindedly that it wholly ignores other and equally important legislative objectives." Id. at 409, 566. It continues, of significant application here, "Our Legislature, in providing **that agency action is unauthorized if "made upon unlawful procedure"** was clearly sensitive to the potential abuse mentioned above." Id. (emphasis supplied).

29. Rate Bureau cites an Alabama case, Board of Education v. Phillips, 264 Ala. 603, 89 So.2d 96 (1956), for the premise that "Agency decisions have been found arbitrary and capricious, inter alia, when such decisions are 'whimsical' because they indicate a lack of fair and careful consideration; when they fail to indicate 'any course of reasoning and the exercise of judgment,' or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements." Rate Bureau at 420, 573. Rate Bureau continues, "the ultimate purpose of rulemaking review is to insure 'reasoned decision-making'." Id.

30. Subsequent appellate decisions to Rate Bureau hold that, "The arbitrary or capricious standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment." Lewis v. N.C. Dep't. of Human Res., 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989); ACT-UP Triangle v. Comm'n for Health Services for the State of North Carolina, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997). "In determining whether an agency decision is arbitrary or capricious, the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." Mann Media, Inc. v. Randolph County Planning Bd., 356 N.C. 1, 565 S.E.2d 9 (2002).

31. While the burden for demonstrating arbitrary and capricious agency action is high, it has been met. Cape Med. Transp., Inc. v. N. Carolina Dep't of Health & Human Servs., Div. of Facility Servs., 162 N.C. App. 14, 24, 590 S.E.2d 8, 15 (2004) (revoking ambulance service provider license for minor violations when the agency had no guidelines for revocation actions). Rector v. N. Carolina Sheriffs' Educ. & Training Standards Comm'n, 103 N.C. App. 527, 541, 406 S.E.2d 613, 622 (1991) (Commission denied certification to officers because they were 'handicapped'). Scroggs v. N. Carolina Criminal Justice Educ.

& Training Standards Comm', 101 N.C. App. 699, 702, 400 S.E.2d 742, 745 (1991) (arbitrary and capricious to deny certification based on information disclosed and ignored years before).

32. OAH decisions have found agency actions arbitrary and capricious under a variety of circumstances:

    a. Awarded State contract to an exclusive entity when there was no evidence that this was beneficial to the State and would cost an additional $1.7 million yearly. Corporate Express Office Products, Inc., v. N.C. Division of Purchase and Contract, Office Depot, Inc. (Intervenor), 2006 WL 219500, 06 DOA 0112.

    b. Issued citation in a trucking overweight case with a penalty the agency knew was based on an incorrect gross weight listed on the vehicle's registration card, Harris v. North Carolina Dept. of Crime Control and Public Safety, 2009 WL 4912687; accord, Spencer's Incorporated of Mount Airy, NC, d/b/a Ararat Rock Products Company and Jim Crossingham, III v. North Carolina Highway Patrol, 2009 WL 3047444, 08 CPS 3399 (incorrect measurement).

    c. Failed to consider lesser sanctions in light of a licensed facility operator's remedial actions, overall compliance rate, and past history without violations. Marion Lynnette Garner v. Division of Child Development and Early Education Department of Health and Human Services, 2017 WL 6261650.

    d. Withheld $6,300.00 in scholarship funds from a teacher charged with criminal offenses, while not sanctioning another scholarship recipient charged with more serious offenses. Elizabeth Danial Dominque v. North Carolina Teaching Fellows Commission, 2010 WL 4356882 09 TFC 6833.

    e. Terminated mental and behavioral services provider in violation of the contracting agency's own policies and procedures, Fidelity Community Support Group, Inc., v. Alliance Behavioral Healthcare as Legally Authorized Contractor and agent for the North Carolina Department of Health and Human Services, 2015 WL 3813967, 14 DHR 1594.

    f. Imposed additional licensure moratorium exception requirements not contemplated by either the General Assembly or the Medical Care Commission, WP-Beulaville Health Holdings, LLC v. NC Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section, 2016 WL 4875308, 15 DHR 02422.

33. While a complete listing of OAH decisions finding arbitrary and capricious agency action is impractical, prior rulings suggest common themes of agency behavior that is (a) inequitable, and/or (b) based on "requirements" not present in statutes or rules, or simple lack of guidelines or rules. Further, the petitioner alleged and proved facts showing arbitrary action: bad measurements, revocations without guidelines, and so on.

34. In the context of this Respondent and permit-related decisions, one appellate panel found against petitioners who "do not suggest that DENR acted patently in bad faith, and we see no evidence that DENR's review process was whimsical." Anson Cty. Citizens Against Chem. Toxins in Underground Storage v. N.C. Dep't of Env't & Nat. Res., Div. of Waste Mgmt., 167 N.C. App. 341, 345, 606 S.E.2d 350, 353 (2004). OAH has held that "with regard to its claims that [Respondent] acted arbitrarily or capriciously, the Petitioner cannot meet its burden … by simply showing a disagreement with the agency position. It must present facts that NCDEQ's decision was 'whimsical' or made in 'bad faith'." Town of Leland, North Carolina v. North Carolina Department of Environmental Quality, Division of Water Resources, 2017 WL 7052568, 17 EHR 03759.

35. Petitioner repeatedly describes Respondent's actions as "arbitrary and capricious," see Petitioner's Brief in Support of Motion for Partial Summary Judgment, pp. 16-19. Petitioner uses words like "taint" and "infected' regarding the "special provisions" and the Title VI settlement. But Petitioner also admits, "It is certainly within DEQ's authority to enter into settlement agreements," Id. at 16, even though Petitioner disputes Respondent's authority to "agree to make changes to general permit conditions outside the regular process for issuing the permits." Id. These statements, however, are legal assertions, not proven facts.

36. The Tribunal concludes that Petitioner's filings, while creating an inference of such, do not rise to the "difficult standard" of proving that Respondent's actions "lacked fair and careful consideration" or were in bad faith, making them arbitrary and capricious.

37. Thus, while Petitioner proved that Respondent violated the APA, and in a substantive fashion, Petitioner failed to prove that Respondent's actions with "special provisions" were in bad faith, or so inequitable and in disregard of the law, to be arbitrary and capricious. Agency legal error alone does meet the arbitrary and capricious standard.

FINAL DECISION

With respect to the two stipulated issues for summary judgment:

1. The Tribunal **GRANTS** with one exception, Petitioner's motion for summary judgment on Issue One, on the grounds that the agency acted erroneously, failed to use proper procedure, or failed to act as required by law or rule, in violation of the APA, and **DENIES** Respondent's motion for summary judgment on those issues. The "special provisions" are **VOID**, as they violated the APA in the absence of the rulemaking process being conducted.

2. The Petitioner having failed to meet its burden that Respondent's actions were arbitrary and capricious, the Tribunal **GRANTS** Respondent's motion for summary judgment on that single issue and **DENIES** Petitioner's motion for summary judgment on that single issue.

3. Both parties' motions for summary judgment on Issue Two are **DENIED** as **MOOT**.

SO ORDERED

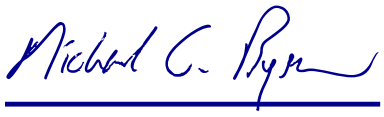
NOTICE OF APPEAL

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 9th day of February, 2021.



Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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