

ARGUMENT

- I. PETITIONERS ARE NOT “PERSONS AGGRIEVED” AS THAT TERM IS DEFINED BY N.C.G.S. § 150B-2(6) OR INTERPRETED BY THE NORTH CAROLINA SUPREME COURT IN THE *EMPIRE POWER* CASE AND PETITIONERS HAVE IN N.C.G.S. § 148-118.2 AN EXCLUSIVE REMEDY TO CHALLENGE ALL ASPECTS OF THE EXECUTION PROTOCOL

“Persons aggrieved” have the right to bring a contested case and seek judicial review.

N.C.G.S. §§150B-2(6), -43 (2007). The General Assembly has defined that term to mean “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.C.G.S. § 150B-2(6) (2007). However, only those persons aggrieved “within the meaning of the organic statute [are] entitled to an administrative hearing to determine the person’s rights, duties or privileges.” *Empire Power Co. v. N.C. Dep’t of Env’t, Health and Natural Res.*, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994). Although the organic statute at issue here - N.C.G.S. § 15-188 – does not identify death-row inmates like Petitioners as having rights or responsibilities that could form the basis of an administrative appeal, neither does it expressly foreclose such an appeal. If the organic statute does not speak to the availability of an administrative hearing, reference is next made to the APA. *Empire Power*, 337 N.C. at 586, 447 S.E.2d at 778.

As the *Empire Power* court explained, the term “person aggrieved” has “no technical meaning” and “depends on the circumstances involved,” but “may be employed [to mean] adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.” *Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779 (quoting *In re Assessment of Sales Tax*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (quoting 3 C.J.S. *Aggrieved*, at 509 (1973))). The Court further explained that an aggrieved party must demonstrate injuries “within

the zone of those to be protected and regulated by the statute.” *Id.*, 447 S.E. 2d at 780.

In *Empire Power*, the North Carolina Department of the Environment, Health and Natural Resources (“NCDEHNR”) gave public notice that it had granted a permit to a power company who planned to build and operate sixteen combustion turbine electric generating units at a turbine station in Lincoln County. *Id.* at 572, 447 S.E.2d at 770. Petitioner George Clark, an adjacent landowner, filed a contested case petition alleging that, by approving the permit, NCDEHNR violated its statutory duty under N.C.G.S. § 143-215.108(b). *Id.* at 572-73, 447 S.E.2d at 771. In assessing Clark’s status as an “aggrieved person,” the Court summarized Clark’s allegations, noting that:

as the owner of property immediately adjacent to and downwind of the site of the proposed [turbine station] - which will emit tons of harmful air pollutants if constructed and operated in accordance with its air quality permit - he and his family will suffer injury to their health, the value of their property, and the quality of life in their home and their community.

Id. at 588, 447 S.E.2d at 780 (emphasis added). Therefore, the injuries Clark himself expected to suffer would ensue from the normal and customary operation of the turbine station.

By contrast, the factual record presented by Petitioners below supports one, simple conclusion - that injury will occur only if the Execution Protocol is **improperly** implemented and sodium thiopental is not administered correctly and completely into Petitioners’ veins. Petitioners’ own medical expert agreed, stating that, while human error was possible, the Execution Protocol “should succeed as outlined.” (Tr. at 120) In direct contradiction to their own medical expert, however, Petitioners argue in their brief that they are “persons aggrieved” “[b]ecause the Execution Protocol, if implemented, would subject [them] to a substantial risk of undue pain and suffering.” Pet’s Br. at 11. Because Petitioners cannot show actual injury or

even the likelihood of such injury occurring, *Empire Power* does not bestow upon them “aggrieved person” status sufficient to confer jurisdiction to OAH to consider a contested case hearing.

Despite their protestations to the contrary, Petitioners also cannot be considered as “persons aggrieved” under the APA because the General Assembly has already provided to them an avenue to pursue grievances relating to their confinement. In N.C.G.S. § 148-118.1 (2007), the NCDOC is required to adopt an Administrative Remedy Procedure in accordance with federal law. Once implemented, this procedure “shall constitute **the** administrative remedies available to a prisoner for purposes of preserving any cause of action under the purview of the Administrative Remedy Procedure, which a prisoner may claim to have against **the State of North Carolina**, the Department of Correction, or its employees.” N.C.G.S. § 148-118.2(a) (2007) (emphasis added). As the warden of Central Prison is responsible under N.C.G.S. § 15-188 for devising the Execution Protocol, Petitioners have every opportunity to challenge the Execution Protocol and any perceived deficiencies within it through the Administrative Remedy Procedure and, ultimately, a federal lawsuit filed pursuant to the Prisoner Litigation Reform Act, codified at 42 U.S.C. § 1997(e) (2007).

Petitioners further imply that a contested case in OAH is necessary because otherwise the NCDOC “is exempt from rulemaking and contested case procedures in the APA” and “operates largely out of public sight and beyond meaningful challenge by inmates.” Pet’s Br. at 16. Petitioners’ complaints notwithstanding, the General Assembly deliberately limited the scope of examination into matters within the authority of the NCDOC. The application of N.C.G.S. § 148-118.2(a) to provide Petitioners an alternate and exclusive forum and thus prohibit

jurisdiction in OAH over the Petitioners' complaints about the Execution Protocol is wholly consistent with those limitations. The exclusivity of this statutory procedure is further evidenced by the exemption given to the NCDOC from the APA's contested case hearing and rulemaking provisions. N.C.G.S. §§ 150B-1(d)(6) & (e)(7) (2007).

Accordingly, whether based on Petitioners' lack of "persons aggrieved" status under the APA and *Empire Power* or the exclusivity of the Administrative Remedy Procedure made available to Petitioners under N.C.G.S. § 148-118.2(a), the OAH lacked jurisdiction to consider the contested case petitions filed by Petitioners. Respondent correctly rejected the Recommended Decision on the merits entered by the ALJ and found that jurisdiction in OAH did not exist.

II. ATTORNEY GENERAL ROY COOPER'S PARTICIPATION IN RESPONDENT'S MEETING DURING WHICH THE ALJ'S RECOMMENDED DECISION WAS REJECTED WAS NEITHER IMPROPER NOR TAINTED BY BIAS.

Petitioners baldly assert that Attorney General Roy Cooper, a member of the Council of State, possessed personal bias that was "highly likely and apparent" thus tainting Respondent's consideration of both the Execution Protocol at its 6 February 2007 meeting and its rejection of the ALJ's Recommended Decision at its 2 October 2007 meeting. Petitioners did file an affidavit of personal bias pursuant to N.C.G.S. § 150B-36(a), and that statute permits this Court to review the determination by Respondent that Mr. Cooper's participation was proper and free of bias.

Petitioners' affidavit, with its recital of alleged misrepresentations and allegedly erroneous advice by the Chief Deputy Attorney General and Special Deputy Attorney General Thomas Pitman at Respondent's 6 February 2007 meeting, implies that such conduct must be imputed to Mr. Cooper himself and thus creates bias requiring Mr. Cooper's recusal from

participation at Respondent's 2 October 2007 meeting. As an initial matter, Petitioners ignore the absence of authority, statutory or otherwise, either requiring or permitting Respondent collectively, or any of its members individually, from excluding a constitutionally-designated member from Respondent's meetings. More importantly, however, Petitioners' affidavit is utterly devoid of facts that suggest that Mr. Cooper himself was incapable of exercising his independent judgment on the issues. Petitioners also present no evidence that Mr. Cooper had consulted with undersigned counsel prior to the 6 February 2007 meeting. The explanation for this omission is plain - no such consultation occurred.

Moreover, N.C.G.S. § 114-2(2) requires the Attorney General's Office to represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." N.C.G.S. § 114-2(2) (2007). In *Dorsey v. Univ. of N.C. at Wilmington*, 122 N.C. App. 58, 66-67, 468 S.E.2d 557, 562 (1996), the Court of Appeals held that N.C.G.S. § 114-2(2) required the Attorney General's office to both represent UNC-Wilmington in an advocacy role in a terminated employee's personnel action and advise the State Personnel Commission in its consideration of the employee's appeal. The *Dorsey* court further concluded that, absent a "showing of actual bias or unfair prejudice," the dual role of the Attorney General's office did not constitute a *per se* violation of the employee's due process rights. *Id.* at 67, 468 S.E.2d at 562.

As previously noted, Petitioners have come forward with no evidence of actual bias on the part of the Attorney General or unfair prejudice as a result of his participation in Respondent's 2 October 2007 meeting. Neither in their brief to this Court nor in their affidavit of personal bias have Petitioners cited to any transcript pages or other evidence of statements made

by Mr. Cooper indicative of a personally held bias towards Petitioners' claims or about the Execution Protocol, the Recommended Decision of the ALJ or any other subject. Accordingly, Petitioners' attempt to invalidate Respondent's Final Agency Decision on the basis of alleged bias by Mr. Cooper must fail.

Undeterred, however, Petitioners contend that the North Carolina Supreme Court's decision in *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990) "held that proof of bias of a single member of a board or agency will taint the decision of the agency, requiring that it be reversed." Pet's Br. at 17. Petitioners grossly and fundamentally misstate the holding of *Crump* and a review of that decision shows that is entirely inapplicable to the situation here.

Crump, a dismissed teacher, filed a joint petition for judicial review under N.C.G.S. § 115-325 and a civil action under 42 U.S.C. § 1983 in Catawba County Superior Court seeking both a reversal of his dismissal as well as money damages for the alleged denial of due process in the local school board's decision-making process. *Crump*, 326 N.C. at 607, 392 S.E.2d at 580. After the actions were severed, the trial court found and the Court of Appeals affirmed that the school board's decision to dismiss Crump was justified. *Id.* at 607-08, 392 S.E.2d at 580-81. Crump's § 1983 action proceeded to trial. *Id.* at 608, 392 S.E.2d at 581. There, the jury concluded that Crump's due process rights had been violated by virtue of trial testimony that certain school board members had preformed ideas about Crump's guilt and had made the decision to dismiss him despite having said at the meeting to consider his dismissal that they could be objective and had not formed any opinions. *Id.* at 608-10, 392 S.E.2d at 581-82. The jury then awarded Crump monetary damages. *Id.* at 610, 392 S.E.2d at 582.

The school board appealed the trial court's instruction to the jury that the bias of one

member of the board was sufficient for the jury to find that Crump had been deprived of a fair hearing. *Id.* at 613, 392 S.E.2d at 584. In a 2-1 decision, the Court of Appeals affirmed. The Supreme Court agreed, upholding the jury award and judgment finding a due process violation by the board despite the fact that Crump's dismissal was found to be justified. Clearly, therefore, *Crump* does not remotely stand for the proposition that Respondent's Final Agency Decision is invalidated by bias.

III. N.C.G.S. § 150B-35 DOES NOT PRECLUDE A DECISION-MAKER FROM CONSULTING INDEPENDENT LEGAL COUNSEL IN CONNECTION WITH THE DECISION-MAKING PROCESS.

At Respondent's 2 October 2007 meeting, preceding his motion that Respondent find that the OAH lacked jurisdiction and decline to reconsider Respondent's action at the 6 February 2007 meeting, Commissioner of Agriculture Steve Troxler remarked that "I've discussed this with legal counsel, and I'm sure the other Council of State members have, too." The narrow interpretation given N.C.G.S. § 150B-35 by Petitioners would necessarily prohibit communications between agency representatives and independent legal counsel regarding the propriety and legality of a particular, proposed course of action. The General Assembly, in enacting that section, could not have intended such an interpretation.

By its very terms, N.C.G.S. § 150B-35 prohibits communications by the decision maker with parties to actions before it without all parties being present and having an opportunity to be heard. N.C.G.S. § 150B-35 (2007). Consultation by the decision maker with independent counsel, however is by definition not an *ex parte* communication. Reduced to its essence, Petitioners' interpretation of N.C.G.S. § 150B-35 would preclude an ALJ from discussing issues of law or fact with other ALJs, law clerks, administrative staff, or hearing officers. Furthermore,

in those cases, like the instant one, where agency or commission representatives – individuals far less experienced than ALJs and, often, non-lawyers – are tasked with decision-making responsibility, the availability of independent legal counsel is paramount to insure proper statutory interpretation, complete analysis of precedent, and full comprehension of procedural requirements. Despite these obvious realities, Petitioners’ advance an interpretation of N.C.G.S. § 150B-35 that would preclude such sensible and reasonable conduct by agencies, boards and commissions deciding the rights and responsibilities of others.

In further support of their argument that this Court should vacate the Final Agency Decision, Petitioners cite the subsequently decided case of *Mission Hospitals, Inc. v. N.C. Dep’t of Health and Human Servs.*, ___ N.C. App. ___, 658 S.E.2d 277 (2008). Petitioners’ reliance on *Mission Hospitals* is misplaced. While it does address the prohibition of *ex parte* communications set out in N.C.G.S. § 150B-35, *Mission Hospitals* is distinguishable on its facts from the case at bar. There, the agency director responsible for deciding the case twice communicated directly via e-mail with counsel for one of the parties to the litigation. *Id.*, 658 S.E.2d at 280. The e-mails requested a table of costs that had not been made an exhibit in the evidentiary hearing before the ALJ and was legally significant because the amount of costs claimed by petitioners determined whether or not a Certificate of Need was required. *Id.*, 658 S.E.2d at 280-82. The Court of Appeals held that the *ex parte* communications, therefore, involved both a “question of law” and an “issue of fact” before the agency as defined by N.C.G.S. § 150B-35 and that those communications constituted an error of law under N.C.G.S. § 150B-51(b). *Id.*, 658 S.E.2d at 282. Notably, however, the Court declined to impose the “drastic remedy” requested by the appellant - imposition of the ALJ’s decision - and remanded

the matter back to the agency for another hearing, excluding the agency director who had issued the earlier final agency decision, and ordered that no further *ex parte* communications take place. *Id.*, 658 S.E.2d at 283.

In the case at bar, a far different scenario exists. Here, Commissioner Troxler did not engage in any *ex parte* communication with any party or legal counsel involved in the presentation of legal arguments either to the OAH or to Respondent. Also, unlike the agency director who was the sole decision maker in *Mission Hospitals*, Commissioner Troxler was one of ten (10) collective decision makers who voted 8-2 to approve the course of action that Commissioner Troxler proposed. Accordingly, Petitioners were not prejudiced in any way by the fact that Commissioner Troxler sought legal advice from his independent counsel prior to participating in the decision-making process. Finally, as Respondent's meetings are conducted in a fundamentally different manner than the evidentiary hearing conducted by the agency in *Mission Hospitals*, the remedy of a new Council of State meeting would be an empty gesture devoid of meaningful benefit to Petitioners.

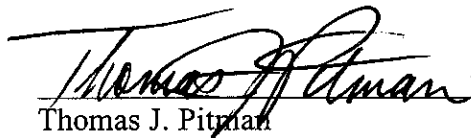
Finally, Petitioners make a thinly-veiled implication that the "legal counsel" referred to by Commissioner Troxler were, in fact, undersigned counsel or at least other members of the Attorney General's office. Pet's Br. at 20. As officers of the court and as designated counsel for Respondent in this case, undersigned counsel expressly deny the suggestion that they engaged in *ex parte* communications with Commissioner Troxler (or other members of Respondent) and expressly deny having done so. Furthermore, even if the "legal counsel" consulted by Commissioner Troxler were members of the Attorney General's office other than undersigned counsel, such consultation would not be improper. *Dorsey*, 122 N.C. App. at 66-67, 468 S.E.2d

at 557.

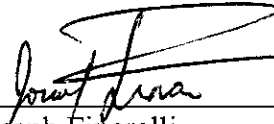
CONCLUSION

For the reasons set forth above, Respondent's rejection of the Decision of the ALJ on the grounds that the OAH lacked subject matter jurisdiction to consider Petitioners' claims should be upheld by this Court and found to be free of bias or any error of law.

Respectfully submitted, this the 12th day of May, 2008.



Thomas J. Pitman
Special Deputy Attorney General
North Carolina State Bar No. 9629
E-mail: tpitman@ncdoj.gov
Telephone: (919) 716-6529
Facsimile: (919) 716-6761



Joseph Finarelli
Assistant Attorney General
North Carolina State Bar No. 26712
E-mail: jfinarelli@ncdoj.gov
Telephone: (919) 716-6531
Facsimile: (919) 716-6761



Donald R. Teeter, Sr.
Special Deputy Attorney General
North Carolina State Bar No. 9492
E-mail: dteeter@ncdoj.gov
Telephone: (919) 733-7408
Facsimile: (919) 733-2947

North Carolina Department of Justice
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Respondent's Brief in Response to Petitioners' Brief in Support of the Petition for Review of Final Agency Decision** was served on the Petitioners by first class mail and by electronic mail transmission to their counsel of record addressed as follows:

Lucy N. Inman
E-mail: lucyinmanlaw.rr.com
2627 Dover Road
Raleigh, NC 27608

Elizabeth F. Kuniholm
E-mail: ekuniholm@kuniholmlaw.com
Kuniholm Law Firm
1500 Sunday Drive
Raleigh, NC 27607

Counsel for Petitioner James A. Campbell

E. Hardy Lewis
E-mail: hlewis@bjmls-law.com
1117 Hillsborough Street
Raleigh, NC 27603

Kenneth J. Rose
E-mail: ken@cdpl.org
Mark J. Kleinschmidt
E-mail: markkleinschmidt@gmail.com
Center for Death Penalty Litigation
201 West Main Street, Suite 300
Durham, NC 27701

Counsel for Petitioner Jerry W. Conner

Ann Groninger
E-mail: agroninger@pathlaw.com
P.O. Box 27927
Raleigh, NC 27611

Robert E. Zaytoun
E-mail: rzaytoun@zaytoun-miller.com
P.O. Box 307
Raleigh, NC 27602-0307

Counsel for Petitioner James Edward Thomas

Geoffrey W. Hosford
E-mail: ghosford@hosfordandhosford.com
P.O. Box 1653
Wilmington, NC 28402

Michael R. Ramos
E-mail: ramoslewis@infoave.net
P.O. Box 2019
Shallotte, NC 28459

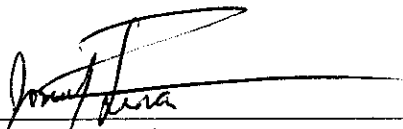
Counsel for Petitioner Marcus Robinson

Kevin P. Bradley
E-mail: kevinpatrickbradley@yahoo.com
P.O. Box 303
Durham, NC 27702-0303

Cynthia Katkish
E-mail: ckatkish1@comcast.net
601 Pennsylvania Avenue, NW
Suite 900-S PMB 221
Washington, DC 20004-3615

Counsel for Petitioner Archie Billings

This the 12th day of May, 2008.



Joseph Finarelli
Assistant Attorney General