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"WHEREAS, THE PEOPLE OF NORTH CAROLINA ENTRUST PUBLIC POWER TO ELECTED AND APPOINTED OFFICIALS FOR THE PURPOSE OF FURTHERING THE PUBLIC, NOT PRIVATE OR PERSONAL, INTEREST..."
EXECUTIVE ORDER NO. ONE

Letter from the Director

First, let me welcome back our indefatigable Administrative Officer, **Millie Donavant**, from her medical leave. We missed her greatly (OK – I missed her most of all), and we are happy to have her back “running things” at the office. I would like to say handling all of the day-to-day details of the office was a good “learning experience,” but that might not be ethical. Millie has forgotten more than most people know about the Board of Ethics. It was a challenge just to keep the office running at a fraction of its prior effectiveness and efficiency, and things will definitely run more smoothly now that she is back. More importantly, Millie is a model of courage, commitment, and self-determination. She is truly an inspiration to me and others around her, and I am so thankful to be able to work with her and draw strength from her character.

Also along the line of exciting staff news, we now have a full staff for the first time in over a year. As of August 1 we welcomed our new Research Assistant, **Jeanette Furney**, to the office. Jeanette came to us by way of the State Clearinghouse where she was managing the NC Intergovernmental Review Process for federal grants and environmental impact documents. She has been in State government for over 23 years and comes very highly recommended. Jeanette will be featured in our next issue’s “Board News” section. Please give her a warm welcome.

And finally, this issue of our newsletter reports the results of the **Board’s August 23 meeting** in Raleigh. The Board had a very full agenda and met for most of the day. Among other things, the Board resolved a record seven outstanding complaints, reviewed and approved three advisory opinions, and amended its internal operating procedures. These and other topics will be discussed separately. If you have any questions or would like additional information about the results of the Board meeting, please do not hesitate to contact me.

Perry Y. Newson

Board Adopts New Operating Procedures

One of the major orders of business at its August 23 meeting was the Board’s adoption of new internal operating procedures. The Board had not updated its procedures pursuant to Governor Easley’s Executive Order Number One, and several changes were necessary.

The new procedures will be available on the Board’s web site shortly. Here are some of the highlights.

Complaint Procedure

Perhaps the most dramatic change was to the way the Board investigates and handles complaints against covered Public Officials. The Board made it clear that it will serve an *investigatory* and *advisory* role in dealing with valid complaints. This is consistent with both legal requirements and over 20 years of the Board’s operating history.

The Board added several stages to the investigation process. Under the Board’s new procedures, the Executive Director conducts an *initial review* to make sure all of the necessary requirements have been met for a valid complaint. For example, the Director makes sure the person against whom the complaint has been filed is a covered Public Official subject to the Board’s jurisdiction. He also looks to see whether the complaint was filed in time, whether the allegations indicate a probable violation of the Order of a type and magnitude justifying a full investigation by the Board, and whether he believes the Board should exercise its discretion and decline to accept the complaint for any of the reasons listed in section 5 (c) (2) of the Order (e.g., it is frivolous or in bad faith).

If during this initial review the Director determines that he needs additional information, he can request it from the complainant or conduct a **limited investigation**.

New Internal Operating Procedures -- Complaints (continued)

If after the initial review, the Director determines that the Board does not have jurisdiction over the respondent, he shall, after consultation with the Chair, notify the complainant and **terminate the investigation**. This was the only expansion of the Director's complaint-resolution authority.

Once the initial investigation has been completed, the Director reports his findings to the Chair and makes appropriate recommendations. The Chair then either initiates a full investigation or recommends disposition of the complaint to the full Board. Note the Chair does *not* have the authority to dispose of the complaint. That power lies solely with the full Board.

If a full investigation has not been initiated, the Board reviews the Chair's recommended disposition and makes a decision based on the written record and information provided by the Director pursuant to his limited investigation. The Board then either resolves the complaint by taking any action it deems necessary or appropriate under the Order *or* it instructs the Director to proceed with a full investigation. If the Board recommends any sanction or punishment, the respondent (but *not* the complainant) may request a full investigation and conference with the Board.

A full investigation is given the highest priority of staff work. Once the Director completes the full investigation, he submits a **written report** to the Chair, with copies to the complainant and respondent. Such parties then may, but do not have to, submit **written responses**. The Chair then reviews the written report and the parties' responses, if any, and requests any additional information he deems necessary to obtain a full understanding of the facts and issues involved. Once he is satisfied that he has acquired sufficient information, he schedules an **informal conference** between the parties and the full Board. This will usually take place at a regular Board meeting.

While the parties may be assisted by counsel if they wish, the **conference** is informal: there is no swearing-in or cross-examination of witnesses. All questioning of the parties and others in attendance takes place in an open, public meeting, but the Board intends to go into closed session to deliberate the final outcome of the complaint. Any final action on the complaint will be taken in public.

The Board will make a **final report** to the proper officials, and may make such other recommendations as it deems appropriate under the circumstances.

Board News

Administrative Officer Returns. We are extremely pleased to welcome our Administrative Officer, Millie Donavant, back after an extended medical leave. Millie was out from March through June battling breast cancer. After completing chemo and radiation treatment, Millie's spirits are high and her prognosis excellent. She wishes to thank all friends and co-workers for their support and concern during her surgery and subsequent recovery.

Board Member Starts New Job. As of April 15, Board member **Penny Craver** began working as the New Hanover County program coordinator for the Drug Treatment Court (DTC). The DTC is an intensive, highly structured community-based program designed to identify and treat offenders whose criminal activities are generally related to substance abuse. The program is a key component of the criminal justice system's attempt to decrease recidivism. This is done by identifying substance abusing offenders and placing them in appropriate counseling. This comprehensive program provides continuous case management and introduces structure into participants' lives. There are currently eight such programs in the State. We wish Penny and the program all the best in the future.

New Internal Operating Procedures (continued)

Advisory Opinions

The Board only slightly modified its procedures for accepting and issuing **advisory opinions**. It made it clear that advisory opinions are intended to address *future* conduct, decisions, or actions – they are not to be used as a means of challenging past conduct by Public Officials. That is reserved for the complaint procedure outlined in section V of the Board’s Procedures. In consultation with the Chair, the Executive Director still prepares a preliminary advisory opinion which may be relied upon until the full Board adopts, modifies, or replaces it.

Statement of Economic Interest Evaluations

The Board also made some significant changes with regard to staff’s acceptance, review, and evaluation of Public Officials’ Statements of Economic Interest (SEI). All currently serving Public Officials who were required to file an SEI under former Executive Order 127 were required to submit a new Statement in accordance with Governor Easley’s Executive Order Number One. Thereafter, covered Officials must update their Statements annually by May 15. The Board spelled out how Public Officials may update their Statements:

- (1) by submitting a **new, complete Statement** with all information provided and all questions answered,
- (2) by submitting a **“Supplemental Statement”** on a form provided by Board staff,
- (3) by submitting a **“No-Change” form** indicating no material changes from the previous year’s filing, or
- (4) by submitting such other documentation or information requested or approved by staff *on a case-by-case basis*. (Use of this option would be extremely rare, but was included to cover a situation where special consideration was warranted.)

Once timely and properly filed for the reporting year, Public Officials are generally **not** required to file an updated or supplemental Statement prior to the next annual filing period unless specifically requested to do so by the Board. If, however, there are significant, material, and relevant changes to the Official’s personal, familial, or financial situation which would render the current Statement not only technically obsolete but also misleading and incorrect from a conflict of interest standpoint, the Official should carefully consider filing a supplemental Statement with the Board. Public Officials should consult with Board staff if they have any doubt about whether it would be necessary or advisable to file a supplemental Statement. Typical fluctuations in the value of financial holdings or portfolios during the course of a year would *not* normally require the filing of a supplemental Statement.

Staff will generally not issue evaluation letters for supplemental statements or “No-Change” forms unless items requiring additional comment by the Board are disclosed.

The Board may not accept and cannot evaluate Statements voluntarily or inadvertently submitted by those who are *not* Public Officials covered under the Order (including appointees to advisory boards or employees or appointees in branches of State government other than the Executive branch).

RESOLUTION OF PENDING COMPLAINTS

The Board also addressed and resolved seven (7) pending complaints, five of which were held over from 2001 and two were recently filed. They will be discussed separately.

Inman vs. Owen (C-2001-002).

This case has a long and complicated history. The Complainant, Mr. Robert D. Inman, is a professional land surveyor who is licensed by the North Carolina Board of Examiners for Engineers and Surveyors ("E&S Board"). He is also a member of the North Carolina Society of Surveyors (the Society). For a number of years, Mr. Inman's wife, Mrs. Lucille Inman, was employed as the Executive Secretary of the Society. Friction between Mr. Inman, his wife, and the Society goes as far back as 1990. It peaked in 1997 when the Society, through its officers and directors, allegedly wrongfully discharged Mrs. Inman from her position as Executive Secretary for the Society. At the time of her termination, the Respondent here, Mr. William C. Owen, had been recently elected president of the Society.

In January 1998, Mrs. Inman filed a civil lawsuit against the Society and three of its past or present officers, including Mr. Owen. At the time of the lawsuit, Mr. Owen was the sitting president of the Society. Mr. Inman was not a party to the suit. Among other things, Mrs. Inman alleged that the defendants, including Mr. Owen, took improper actions against her in order to "get back" at her husband, the Complainant here. The suit was settled in 1999.

At the Board of Ethics hearing, Mr. Owen also admitted making certain disparaging comments about Mr. Inman's photograph which was hanging on the wall of the E&S Board room, although he said they were made in jest. There was also a dispute over the E&S Board's scoring of a licensing examination taken by one of Mr. Inman's employees. Mr. Inman asserted that Mr. Owen defended the scoring and argued with him about it, while Mr. Owen contended that it was in fact he who caught and corrected the scoring error, which ultimately resulted in the examinee passing.

Around the same time as the exam-scoring controversy, the E&S Board initiated an investigation against Mr. Inman based on charges filed against him relating to an earlier survey. Mr. Owen was *not* involved in the initial decision to investigate the complaint filed against Mr. Inman. In November 2000, Mr. Owen was assigned to the E&S Board "Review Committee" handling Mr. Inman's case. Committee members receive informational packets approximately two weeks prior to the scheduled meeting. Once they receive their informational packets, Review Committee members are informed and aware of the identity of the parties to a complaint. Once Mr. Owen became aware he would be involved in the Inman case, he discussed whether he should remain involved in the case with the E&S Board's Executive Director. When Mr. Inman's case was ready for submission to the Review Committee, Mr. Owen believed that the other two surveyor members of the Board were unable to serve on the committee. One was ineligible to serve on any Review Committee because of a Board policy unrelated to the issues in this case, and Mr. Owen believed the other surveying member had a conflict of interest. While Mr. Owen believed he could be fair with Mr. Inman, he testified that in deciding to remain involved in the case, he did *not* consider whether his involvement could create an *appearance* of a conflict from Mr. Inman's personal perspective.

Because Mr. Inman had allegedly failed to cooperate with the E&S Board's investigation, the Review Committee could not make any decision and continued his case. The continuance of the matter was reflected, by case number, on the agenda for a subsequent E&S Board meeting. In January 2001, the full E&S Board took up the matter of staff's recommendation to prefer charges against an unidentified surveyor for failing to cooperate with an official investigation.

According to E&S Board minutes for their January 2001 meeting, Mr. Owen seconded a motion to authorize such investigation, which motion passed unanimously. At his Board of Ethics hearing, Mr. Owen stated that he *knew* that this motion pertained to Mr. Inman when he seconded it. Thereafter, Mr. Inman filed a formal complaint with the Ethics Board, alleging that Mr. Owen should not be involved in any E&S Board proceeding against him. Mr. Owen withdrew from further participation in the Inman matter.

After a full investigation, the Board of Ethics conducted an informal hearing on September 21, 2001. The Board found that Mr. Owen had violated the Governor's Executive Order Number One by failing to recuse or otherwise remove himself from consideration of the disciplinary proceedings against Mr. Inman, and that Mr. Owen's impartiality might reasonably be questioned in that case. The Board issued its Final Complaint Report on October 12, 2001, censuring Mr. Owen for violating the Order. Thereafter, Mr. Owen retained legal counsel and sought a reconsideration of the Board's determination. At its December 7, 2001, meeting, the Board granted Mr. Owen's request for reconsideration and re-opened the case.

At its August 23, 2002, meeting, the Board once again found that Mr. Owen had violated the Governor's Executive Order Number One by failing to remove himself from consideration of the Inman matter. When determining the appropriate course of conduct after being confronted with a challenge based on an alleged conflict of interest, a covered Public Official must view such challenge as a member of the public would view it, and not based on whether the Public Official personally believes that he or she may act without bias in such circumstances.

On review of the record, and in particular Mr. Owen's testimony, the Board did not find any indication that Mr. Owen's actions constituted an *actual* conflict of interest. However, Mr. Owen admitted making certain statements in a public forum that could have caused *reasonable people*, including Mr. Inman, to question Mr. Owen's impartiality. Accordingly, considering the totality of the circumstances, the Board found that Mr. Owen's involvement in the Inman complaint investigation and the resulting motion created a reasonable *appearance* of conflict of interest, regardless of whether Mr. Owen personally believed that he could act impartially under the circumstances. Mr. Owen was under an obligation to remove himself from the entire disciplinary proceeding if his "impartiality might reasonably be questioned" due to his personal relationship with Mr. Inman. Under the facts set forth above, the Board believed that Mr. Owen's impartiality might reasonably be questioned in this case.

The basic rule of conduct for covered Public Officials is that they must perform their official duties in a manner to promote the best interests of the public. EO One, § 7. This encompasses avoiding both conflicts of interest and the appearance of conflicts of interest. Section 7 (b) of the Order addresses appearances of conflict of interest. Public Officials must make every effort to avoid even the appearance of a conflict of interest. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the Official's ability to protect the public interest, or perform public duties, is compromised by personal interests. An appearance of conflict may exist even in the absence of a true conflict of interest. EO One, § 7 (b) (1). A Public Official must remove himself or herself from any proceeding in which the Official's impartiality might reasonably be questioned due to the Official's familial, personal, or financial relationship with a participant in the proceeding. EO One, § 7 (b) (2).

In light of the foregoing, the Board of Ethics rescinded its Final Complaint Report issued on October 12, 2001, and substituted a Revised Ruling and Report. The Board further issued a warning to Mr. Owen that in similar situations he should carefully consider the appearance aspects of his public service, particularly including any future matters concerning the complainant in this case.

Roberts vs. Eanes (C-2001-004).

This was the second complaint filed by Mr. Derek A. F. Roberts, Complainant, against the chair of the North Carolina Cemetery Commission, Mr. Nick Eanes. The first (C-2001-003) was resolved at the Board's September 21, 2001, meeting with a finding that Mr. Eanes had *not* violated the ethics Order as alleged. At its August 23, 2002, meeting, the Board agreed with and adopted the Executive Director's report and Chair's recommendation and dismissed Mr. Roberts' complaint with prejudice. Among other things, it was found to have been brought in bad faith. Mr. Roberts did not attend the meeting.

While factually accurate in many respects, the initial review of the second complaint found key allegations somewhat vague, confusing, and conclusory. As a result, the Executive Director could not determine "whether the activity alleged appears to be a violation of the Order." With the Chairman's concurrence, the Director proceeded to obtain some additional information directed to the sufficiency of the complaint to allege a violation cognizable under Executive Order Number One.

After pointing out its *limited jurisdiction and authority*, which the Complainant appeared to confuse or disregard, the Board found that there was a serious question about the *timeliness* of Mr. Roberts' attempted complaint. It is undisputed that the underlying conduct complained of took place in February 2001, over seven (7) months prior to filing of the complaint. The new Order requires that complaints against Public Officials be filed within 90 days of when the complainant *knew or should have known* of the conduct complained of. Mr. and Mrs. Roberts attended the February 7, 2001, Commission meeting, so they obviously had firsthand knowledge of what transpired there. Likewise, Mrs. Roberts was notified of the result of the February 13, 2001, teleconference meeting. Mr. Roberts attempts to come within the new "statute of limitations" by tying the allegedly improper actions to his recent "discovery" of certain financial disclosures in Mr. Eanes' Statement of Economic Interest ("SEI") filed with the Board of Ethics. While the Board agreed that this was an improper attempt to resuscitate an otherwise time-barred claim under the new Order, it proceeded to address the Complainant's claims on a substantive basis.

The Board agreed that the basic gist of Mr. Roberts' complaint was that Mr. Eanes "used his position as Chairman of the N.C. Cemetery Commission" for personal gain by influencing the Commission's actions at its February 2001 meeting. This allegedly happened in two contexts: (1) Citadel Management Company/William Gaffney's petition to transfer control of certain perpetual care cemeteries and (2) Mr. Eanes' own purchase of Pamlico Memorial Gardens. Despite the Complainant's contradictory allegations and statements, the hard evidence in the record indicated that Mr. Eanes did *not* take part in the questioned decisionmaking. Minutes of the February 7 Commission meeting reveal not once but *three times* that Mr. Eanes took no part in the decision regarding change of control of the Loewen Group cemeteries. According to the minutes, Mr. Eanes recused himself and "handed the gavel" to another Commission member to chair the meeting. Yet another member questioned Mr. Gaffney on substantive issues. But perhaps most significantly, with Mr. Eanes' recusal, the Commission did not have a quorum and had to postpone the ultimate decision on change of control to another meeting. Thus, *no action* was taken at the February 7 meeting on the challenged change of control. A teleconference meeting was scheduled for February 13.

Neither Mr. nor Mrs. Roberts took part in the February 13 teleconference meeting. The minutes again reflect that Mr. Eanes recused himself from all decisions regarding the requested change of control of the Loewen Group cemeteries, including Pamlico Memorial Gardens. The meeting lasted approximately 20 minutes. Mr. Eanes confirmed that indeed he took no part in these decisions by the Commission.

RESOLUTION OF COMPLAINTS -- *Roberts vs. Eanes (C-2001-004) (continued)*.

Later in the investigation, Mr. Roberts also changed the slant of his allegations from that of a bargained-for exchange of official influence and action in return for control of a specific cemetery (Pamlico) to that of a misuse of “insider” information for personal gain. Despite requests for specific information and evidence of *how* Mr. Eanes supposedly used his position and available confidential information, Mr. Roberts responded with more conclusory, unsupported accusations. In addition, much of Mr. Roberts’ complaint is internally inconsistent and in conflict with the evidence at hand.

Likewise, Mr. Roberts’ unsupported allegations about Mr. Eanes’ “support” are belied by the apparently undisputed fact that Mr. Eanes recused himself from the votes at issue. According to § 7 (b) of the Order, this is precisely what he was supposed to do. Nothing in the Order says *how* recusal should be handled, and it is largely left to individual Public Officials and the public bodies upon which they serve. Also with regard to allegations about Mr. Eanes’ “support,” the actual votes about which Mr. Roberts complains took place during a *teleconference* meeting. This would minimize, if not eliminate, the opportunity for “off the record” lobbying or undue influence alleged by Mr. Roberts. Moreover, the minutes indicate that neither Mr. nor Mrs. Roberts took part in the teleconference meeting. Mr. Roberts does not explain how he knows what transpired (particularly “off the record”) at a meeting he did not attend other than through the minutes, which contradict his assertions

Documents and records provided by the Commission also cast serious doubt on Mr. Roberts’ true motive for bringing this second in a series of complaints against Mr. Eanes and the Commission’s Administrator and legal counsel. A complainant’s motive goes to determining whether a complaint was filed in “**bad faith**.” The Commission’s problems with Mr. and Mrs. Roberts go at least as far back as 1999 when apparently there were questions about the number of burial vaults stored off-site. From early 2000 through this year, the Commission, through its administrator and legal counsel, brought a series of actions against Mr. and Mrs. Roberts and their cemeteries, ultimately resulting in numerous fines, penalties, and receiverships.

Finally, Mr. Roberts accused not only Mr. Eanes but also the Commission’s Administrator and its legal counsel of **collusion**. Mr. Roberts says that these public servants colluded to hide the fact of Mr. Eanes’ connection to Citadel/Mr. Gaffney. Again, Mr. Roberts offers no proof to substantiate this very serious charge. To accuse public officials, including a long-standing member of the bar and officer of the court, of such outrageous and potentially criminal conduct with absolutely no proof of the same casts serious doubt on not only the substantive validity but also the good faith of the entire complaint.

Therefore, based on documents and information obtained during the initial review and hearing of this matter, the Board agreed with the Executive Director and Chair that **Mr. Roberts’ complaint should be dismissed with prejudice** because

- Mr. Roberts’ complaint was time-barred under § 5 (c) (1) of the Order;
- a reasonable person would conclude that the specific facts alleged, together with relevant information acquired during the initial review, do **not** indicate a violation of the Order; far from it, they indicate compliance with applicable provisions of the Order requiring that a Public Official recuse himself in the face of a reasonable appearance of conflict of interest; and
- the Board should decline to accept or investigate Mr. Roberts’ complaint because it appears to be brought in bad faith.

Mr. Roberts failed to attend the Board’s August 23, 2002, meeting addressing this and his other complaint (Roberts vs. Summerville), which was also dismissed.

Roberts vs. Summerville (C-2001-005).

Mr. Derek A. F. Roberts filed a third complaint against a member of the Cemetery Commission, Ms. Joyce Summerville. For the third time, the Board found that Mr. Roberts' attempted complaint was both substantively invalid and time-barred under the new Order. The new Order requires that complaints against Public Officials be filed within 90 days of when the complainant *knew or should have known* of the conduct complained of. Section 5 (c) (1). The primary, if not exclusive, gist of Mr. Roberts' complaint was that Ms. Summerville failed to disclose that she was on the board of directors of Cemetery Funds of North Carolina ("CFNC") in her Statement of Economic Interest ("SEI") filed with the Board in January 2000. Without any supporting evidence, Mr. Roberts alleges that this failure to disclose was "willful and contrived." The SEI to which Mr. Roberts refers is actually a "Form 2" short-form under former Executive Order 127 used to report no material changes from the previous year. Ms. Summerville likewise filed a short-form in 1999. The substantive omission about which Mr. Roberts complains harks back to Ms. Summerville's long form (Form 1) filed in February 1998. Thus, the Board agreed that Mr. Roberts had ample opportunity to learn of any purported material omissions from Ms. Summerville's disclosure forms over the past three years and thus *should have known* of the conduct now belatedly being complained of.

More significantly, the Board found irrefutable evidence that Mr. Roberts actually *did know* of the exact same situation he now claims to have discovered within the past 90 days. Mr. Roberts states in his complaint that he learned of Ms. Summerville's omission from the financial disclosure forms provided to him around August 25, 2001, including the 1998 long form mentioned above. In mid-1998, however, Mr. Roberts began a series of communications with the Board of Ethics' then-executive director, Ms. Katherine White, concerning perceived problems with the Cemetery Commission. Among other things, Mr. Roberts requested copies of all Commissioners' financial disclosure forms (Form 1s). These were provided to him on July 10, 1998. This included Ms. Summerville's February 1998 Statement of Economic Interest (the one from which he now claims to have discovered the damning omission).

Even more tellingly, in response to Ms. White's July 29, 1998, letter requesting substantiation of his claims, Mr. Roberts sent a letter wherein he specifically and expressly complained that "Mrs. Summerville failed to disclose her position on the Board of Directors of Cemetery Funds of N.C." Thus, for over three years, Mr. Roberts has had actual knowledge of the precise claim he now attempts to revive through a subsequent public records request. The Director found, and the Chair agreed, that saying or implying that he learned of the purported omission last August was tantamount to a direct falsehood and indicated bad faith.

On a substantive level, Ms. Summerville cannot be faulted for failing to list her involvement with CFNC on her 1998 SEI. After Mr. Roberts complained of this particular omission, Ms. White reviewed all statements and found that Ms. Summerville, among others, "filled out an earlier statement of economic interest form that did not require the listing of non-profit memberships or directorships." So, the Board's executive director investigated Mr. Roberts' claim concerning Ms. Summerville and found it to be lacking. Ms. White also noted that she was awaiting further contact from Mr. Roberts' lawyer, but had not heard from him as of November 16, 1998. Nothing in the file indicates any further communications on this subject from either Mr. Roberts or his attorney.

Because of subsequent changes to the financial disclosure forms and requirements, and the permissible procedure of filing "short forms" when there were no material changes to Public Officials' information, Ms. Summerville remained in compliance with filing requirements under Executive Order 127.

RESOLUTION OF COMPLAINTS -- *Roberts vs. Summerville (C-2001-005) (continued)*.

She was never notified otherwise. Despite the tenuous and perhaps even debatable actual connection between CFNC as a “trust company” and the Commission, out of an abundance of caution and more due to what *could* statutorily happen, Ms. Summerville was advised to list her CFNC directorship on any future SEI and treat it as a *potential* conflict of interest, which she did.

Finally, it was noted that as of December 2001, Ms. Summerville was no longer on the Cemetery Commission and therefore not subject to Executive Order Number One or the Board of Ethics’ jurisdiction.

Therefore, based on documents and information obtained during the initial review of this matter, the Board agreed with the Director and Chair that **Mr. Roberts’ complaint should be dismissed with prejudice** because

- Mr. Roberts’ complaint is time-barred under § 5 (c) (1) of the Order;
- a reasonable person would conclude that the specific facts alleged, together with relevant information acquired during the initial review, do **not** indicate a violation of the Order; and
- the Board should decline to accept or investigate Mr. Roberts’ complaint because it appears to be brought in bad faith;
- Ms. Summerville is no longer a covered Public Official under Executive Order Number One.

The Board also addressed four complaints involving two sitting members of the **Board of Electrolysis Examiners**, Ms. Thelma G. White and Ms. Myrtle Hamrick. Two of the complaints were carried over from 2001, and two were filed on the eve of the Board’s August 23 meeting. For procedural reasons, the most recent complaints were addressed first.

Smith vs. Hamrick (C-2002-002)

While most of the complainant’s allegations of wrongful conduct related to the internal operations and procedures of the Electrolysis Board and of Ms. Hamrick as its “License Renewal Chairman,” liberally construed there appeared to be a core allegation that Ms. Hamrick knowingly and intentionally misused her official position because of an impermissible bias or prejudice against one of her licensees. Such conduct, if true, would appear to create an appearance of conflict in violation of section 7 (b) of the Order.

Specifically, Ms. Smith alleges that because she was mentioned in two patient complaints against Ms. Hamrick in early 2001, Ms. Hamrick intentionally failed to send license renewal information in a timely manner. While not all vengeful, spiteful, or even illegal conduct is covered by the Order, Public Officials must remove themselves from decisions where their impartiality might reasonably be questioned due to a personal relationship with a participant in a proceeding. Deciding whether to send a licensee required renewal materials or whether to consider a request to waive a late fee are official decisions that should be made fairly and in the public interest and not based on some personal animosity or ulterior motive. While every malfeasance or nonfeasance of public duty is not necessarily prohibited conduct under the Order, the allegations in Ms. Smith’s complaint, taken as true for the purposes of this initial review, appear to be. Proving these allegations may be an entirely different matter.

RESOLUTION OF COMPLAINTS -- *Smith vs. Hamrick (C-2002-002) (continued)*.

Regardless of the merits of the case, however, the Board agreed that there was a serious timeliness issue. The new Order requires that third-party complaints against Public Officials be filed within 90 days of when the complainant *knew or should have known* of the conduct complained of. Section 5 (c) (1). The patient complaints mentioning Ms. Smith were filed in January and February of 2001. Taking Ms. Smith's allegations as true, Ms. Hamrick's purportedly wrongful conduct took place in late 2001 or early 2002, clearly outside the 90-day "statute of limitations" for complaints under Executive Order Number One. Moreover, Ms. Smith made the same charge of improper conduct in her February 27, 2002, letter to the Electrolysis Board indicating that she was aware of it at that time.

The Board agreed with the initial recommendation that *unless* the Board initiated its own complaint against Ms. Hamrick for the conduct at issue, Ms. Smith's complaint was time-barred by Section 5 (c) (1) of the Order and should be dismissed. On the Chair's recommendation, the matter was presented to the Board at its August 23, 2002, meeting. Upon *failing to offer any evidence* of the alleged ethical violation under Executive Order Number One, the Board declined to initiate its own investigation under Section 5 (c) (3) of the Order and dismissed the complaint.

The Board reminded all parties that complaints with the Board of Ethics alleging ethical violations by Public Officials are serious matters. People should not take them lightly. Nor should complainants try to use the Board of Ethics to further personal, political, or professional agendas.

White vs. Hamrick (C-2002-001)

The Board next addressed Thelma White's recent complaint against Myrtle Hamrick. Despite its facial validity, Ms. White's complaint also had timeliness problems. Ms. White was made aware of Ms. Hamrick's purportedly wrongful conduct, and was provided with a copy of the brochure at issue, around November 14, 2001, clearly outside the 90-day "statute of limitations" for complaints under Executive Order Number One. Ms. White even used both the brochure and Ms. Hamrick's October 26, 2001, letter to the Executive Director as exhibits to her complaint. Therefore, Ms. White had actual knowledge of Ms. Hamrick's allegedly wrongful conduct over eight (8) months before filing a complaint regarding the same. As a result, *unless* the Board initiated its own complaint against Ms. Hamrick for the conduct at issue, Ms. White's complaint was time-barred by Section 5 (c) (1) of the Order and would have to be dismissed.

At the recommendation of the Executive Director, the Board voted to initiate its own complaint against Ms. Hamrick pursuant to section 5 (c) (3) of the Order and to consolidate and resolve it along with the other two pending Electrolysis Board complaints. See discussion below. All interested parties had been notified of this possibility and were in attendance and ready to proceed on the merits of the case.

Hamrick vs. White (C-2001-006); Wingate vs. White (C-2001-007), & White vs. Hamrick (C-2002-001)

In October 2001, Ms. Myrtle Hamrick filed the first in a related series of formal complaints against Ms. Thelma Glenn White (C-2001-006). Both parties are members of the North Carolina Board of Electrolysis Examiners ("Electrolysis Board"). Ms. White is the current chair of the Electrolysis Board, and Ms. Hamrick is a former chair. Later that same month, Ms. Margaret S. Wingate, President of the Electrolysis Association of North Carolina ("EANC" or "the Association") filed a similar, if not identical, complaint against Ms. White (C-2001-007). Among other things, both complaints alleged that Ms. White had referenced her Electrolysis Board membership in her internet web site in violation of EO One.

RESOLUTION OF COMPLAINTS -- *White & Hamrick complaints (continued)*.

Both complaints also contained allegations of conduct not covered by the Order and thus not subject to the Board's investigative authority. By letter of August 8, 2002, Ms. White filed a formal complaint against Ms. Hamrick (C-2002-001), alleging a similar violation related to a brochure which referenced Ms. Hamrick's former Electrolysis Board membership. See discussion above as to the timeliness of this complaint.

According to the Board's "Rules and Regulations," the Board of Ethics' Executive Director completed his "Initial Review" and determined that (1) the respondents were subject to the Order and thus the Board of Ethics' jurisdiction, and (2) "the activity alleged appears to be a violation of the Order." Rules, Section V (3). In making his initial determination, the Director heavily relied on a 1992 complaint report dealing with virtually identical conduct by a member of the Electrolysis Board. Accordingly, the Executive Director prepared summaries of the complaints for the Board Chairman's review and subsequent direction to staff. Upon further review, however, the Director determined that Ms. White's complaint against Ms. Hamrick was time-barred by the new Order and should be dismissed *unless* the Board initiated its own complaint investigation pursuant to section 5 (c) (3) of the Order.

Given the similarity of the *relevant* claims and ethical issues involved, the Chairman concluded that all three cases should be consolidated and resolved at the Board's August 23, 2002, meeting. All parties and interested persons were so notified. As mentioned above in the discussion of *White vs. Hamrick* (C-2002-001), the Board voted to initiate its own complaint against Ms. Hamrick and resolve it along with the other two complaints involving the same or similar conduct.

Preliminarily, the Board, through the Executive Director, reminded the parties that the Board of Ethics is a board of *limited jurisdiction*. Many, if not *most*, of the complainants' allegations related to conduct which is not covered by the Governor's ethics Order. The Director stressed that these cases were *not* about who should or should not be appointed to the Electrolysis Board; how anyone came to be chair of the Electrolysis Board; anyone's competence to be an electrologist; the internal operations of the Electrolysis Board; the truth or falsity of particular advertisements; whether an office can be classified or described as a "model" office; whether Ms. White's office was or is a "model office"; whether Ms. White is or is not licensed by other boards or commissions; whether Ms. White was admitted to practice electrolysis by examination or was "grandfathered in"; or the race of any party.

The sole conflict of interest or "ethical" issue involved in all three consolidated complaints was a Public Official's reference or mention of her official position or public office on her commercial web site or informational brochures given to customers. The Board attempted to hear testimony and review relevant documents in this context alone.

Testimony and documents presented to the Board revealed that Ms. White was appointed to the Electrolysis Board in August of 1999. She became chair in July 2001 and currently serves in that position. Soon after being appointed to the Electrolysis Board in 1999, a local newspaper did an article about her. When she created her business web site in 2000, her husband developed a "Meet the Owner" section and included text from the newspaper article. Such text mentioned Ms. White's membership on the Electrolysis Board several times. Ms. White testified that she was unaware of any "ethical" problem connected to mentioning her public position in her commercial web site. In particular she was not aware of the Board of Ethics' 1992 complaint holding that a member of the Electrolysis Board should *not* reference her board membership in a Yellow Page advertisement (K.D. Kennedy to L. Dean Myers, Jr., January 21, 1992). Immediately upon being notified of Ms. Hamrick's complaint and the possible violation of EO One, Ms. White had the references to her Electrolysis Board membership removed. There was some slight delay due to trouble gaining access to the site, but the references were removed within two weeks or less.

RESOLUTION OF COMPLAINTS -- *White & Hamrick complaints (continued)*.

Ms. Hamrick is currently serving her second term on the Electrolysis Board. She was first appointed in 1995 (serving until 1996) and then again in 2000. At one time, she too served as chair of the Electrolysis Board. Ms. Hamrick produced and used a "Know Your Electrologist" brochure from 1997 to 1999 which references her former membership on the Electrolysis Board. She admitted giving this brochure to at least one client in 2001 while she was serving her second term on the Electrolysis Board. At the time she gave out this brochure mentioning her former Electrolysis Board membership, Ms. Hamrick was aware of the Board of Ethics' position on referencing public positions in commercial advertising. She testified that she was aware of the Board's 1992 decision in particular.

Much of the current controversy involved Ms. White's statement on her web site that her office "has been cited by the state inspector for electrolysis as a model office for the state." Regardless of whether Ms. White's office is or should be a "model" for other electrologists, or even whether there is or can be such a denomination, the Board found that Ms. White did *not* use or attempt to use her official position on the Electrolysis Board to obtain a favorable review by the contract reviewer.

After review of the complaints and all corresponding materials, the respondents' written responses, and other information presented to the Board, including the verbal testimony of all interested parties in attendance at the August 23, 2002, meeting, the Board concluded that both Ms. White and Ms. Hamrick committed relatively minor violations of Executive Order Number One by referencing or mentioning their public positions in commercial media. The basic rule of conduct for covered Public Officials is that they must perform their official duties in a manner to promote the best interests of the public. EO One, §7. This encompasses avoiding both conflicts of interest and the appearance of conflicts of interest. Section 7 (a) (1) of the Order prohibits a Public Official from *knowingly* using her position in any manner which will result in financial benefit, direct or indirect, to the Official or a business with which she is associated.

At the time she referenced her Electrolysis Board membership in her web site, Ms. White was unaware of the Board of Ethics' position with regard to the same. Her violation was thus unknowing and unintentional. The Board found that there was no attempt to misuse her public office for private benefit. Once she was made aware of the situation, Ms. White promptly complied with the Board's rulings and prior directives.

Ms. Hamrick, on the other hand, knew or should have known that her reference to her board membership in her informational brochure was in violation of the Board of Ethics' earlier pronouncement on the subject. Ms. Hamrick admitted knowing about the 1992 ruling involving advertising by an Electrolysis Board member. Ms. Hamrick failed to take appropriate precautions in this regard.

As a result, the Board reminded Ms. White to be aware of Executive Order Number One as she performs her public duties. As chair of the Electrolysis Board, she has a duty to make herself aware of her individual and leadership responsibilities under the Order. The Board recommended no further action with regard to Ms. White at this time.

Because she was aware of the Board of Ethics' prior advertising ruling, the Board issued a warning to Ms. Hamrick not to use or appear to use her public position for private benefit, specifically with regard to passing out brochures mentioning her present or former board membership.

ADVISORY OPINIONS ISSUED

Finally, the Board addressed and issued three formal advisory opinions at its August 23, 2002, meeting:

AO-02-001 (January 23, 2002) involving the N.C. Real Estate Commission;

AO-02-002 (April 24, 2002) involving the N.C Board of Massage & Bodywork Therapy; and

AO-02-003 (May 30, 2002) involving the N.C Medical Board.

These opinions will be featured in the next newsletter.