

**RULES REVIEW COMMISSION MEETING
MINUTES
April 17, 2014**

The Rules Review Commission met on Thursday, April 17, 2014, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Garth Dunklin, Jeff Hyde, Jay Hemphill, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

Staff members present were: Commission counsels Joe DeLuca, Abigail Hammond, Amber Cronk May and Amanda Reeder; and Julie Brincefield, Tammara Chalmers, Dana Vojtko.

The meeting was called to order at 10:00 a.m. with Chairman Currin presiding. She read the notice required by NCGS 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts. The Chairman reminded the Commission members that the audio of the meeting was being broadcast.

APPROVAL OF MINUTES

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the March 20, 2014 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

NC Rural Electrification Authority

All rules were unanimously approved.

Industrial Commission

All rules were unanimously approved.

The Commission received ten letters of objection in accordance with G.S. 150B-21.3(b2), requesting a delayed effective date and legislative review for the approved Rule 04 NCAC 10A .0609A.

State Board of Education

16 NCAC 06C .0701 – The agency has not responded in accordance with G.S. 150B-21.1(b1) or (b2). There was no action for the Commission to take at the meeting.

Cemetery Commission

21 NCAC 07A .0101, .0103, .0104, .0106, .0201, .0202, .0203, .0204, .0205; 07B .0103, .0104, .0105; 07C .0103, .0104, .0105; 07D .0101, .0102, .0104, .0105, .0201, .0202, .0203. The agency has not responded in accordance with G.S. 150B-21.12(b). There was no action for the Commission to take at the meeting.

State Human Resources Commission

25 NCAC 01B .0350, .0413, .0414, .0429, .0430; 01C .0311, .0403, .0404, .0411, .0412; 01D .0201; 01E .0901; 01H .0901, .0902, .0904, .0905, .1001, .1003, .1004, .1005; 01I .2002; 01J .0603, .0610, .0615, .0616, .1101, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1208, .1301, .1302, .1304, .1305, .1306, .1307, .1312, .1313, .1314, .1315, .1316, .1317, .1318, .1319, .1320, .1321, .1322, .1401, .1402, .1403, .1404, .1405, .1406, .1407, .1408, .1409, .1410, .1411, .1412. The agency has not responded with any rewritten temporary rules. There was no action for the Commission to take at the meeting.

State Human Resources Commission

25 NCAC 01J .1310 – The agency has not responded. There was no action for the Commission to take at the meeting.

Building Code Council

2015 NC Existing Building Code – The agency filed its rewritten rules the day before the meeting, and the Commission had no chance to review them prior to the meeting. There was no action for the Commission to take at the meeting, but the Commission will review these rules at its May meeting.

LOG OF FILINGS

Department of Justice, Division of Criminal Information

The Commission extended the period of review for all rules filed. It did this in order to give the agency more time to complete the requested technical changes and make any other necessary changes to the rules.

Private Protective Services Board

All rules were unanimously approved.

Criminal Justice Education and Training Standards Commission

All rules were unanimously approved.

Environmental Management Commission

All rules were unanimously approved.

Coastal Resources

15A NCAC 07H .0304 was unanimously approved.

Wildlife Resources Commission

David Cobb with the agency addressed the Commission.

All rules were approved unanimously with the following exception:

The Commission objected to 15A NCAC 10K .0101 based on the adopted amended language creating unclear or ambiguous course requirements. Specifically, in Paragraph (a) of the amended language, the requirement of "a minimum of 10 hours of instruction" was deleted and as adopted, the Rule merely states "[a] hunter education instructor-led course or self-paced, independent study option." There is no longer a definitive minimum period of instruction time. In Paragraph (b) of the amended language "four hours" is deleted, but as adopted, this Rule maintained the language "60 percent." The percentage of time without a definitive minimum period of instruction time makes the language "60 percent" unclear and ambiguous.

Department of Transportation

19A NCAC 03B .0201 was unanimously approved.

Board of Examiners in Optometry

Chairman Currin stepped away and Vice Chairman Dunklin presided over the discussion and vote on the Board of Optometry rules.

Chairman Currin did not participate in the discussion or vote for these rules.

The Commission objected to 21 NCAC 42B .0107 and .0114 for failure to comply with the Administrative Procedure Act. In the initial filing on March 20, 2014, the Board stated on the Submission for Permanent Rule forms that the rules had not yet been formally adopted by the agency, but would be on November 14, 2014. Agencies are required to adopt rules before submitting them to the Commission, pursuant to G.S. 150B-21.1. In response to a Request for Technical Change from Commission staff that requested the actual date of adoption by the agency, the Board filed new Submission for Permanent Rule forms on April 11, 2014. The new forms stated the rules had been adopted by the Board on November 14, 2013. The comment period for both rules was January 2, 2014 through March 3, 2014. G.S. 150B-21.2(g) states, in relevant part, "An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed[.]"

Based upon the submissions of the agency, the Commission found that the Board failed to comply with the Administrative Procedure Act. If the Board did comply with the Act, it may file evidence of compliance with the Commission for review at a later meeting in accordance with G.S. 150B-21.12.

The Commission also objected to Rule 42B .0114 based upon ambiguity. In Subparagraphs (a)(1) and (b)(2), the Board proposed to determine “other methods as appropriate to the Board” and gave no guidance on how this will be determined. This lack of guidance makes the rule unclear. The Commission also objected to the rule for lack of statutory authority to require in Subparagraph (a)(1)(iii) for the applicant to be performing at a satisfactory level of competency in the occupational specialty. G.S. 93B-15.1 requires performance in the specialty, but it does not require the individual to be actively performing it to seek licensure under the statute. This statute does not confine itself to active duty military members, but instead speaks to those who have received military training and been awarded an MOS. The law can extend to retired or discharged military applicants seeking licensure. In addition, the language is ambiguous, as there is no guidance in the Rule as to what will constitute the “satisfactory level” of competency.

Office of Administrative Hearings

26 NCAC 03.0103 - The Commission extended the period of review on this Rule. The Commission noted that the provision in the last sentence of (g) was permissive as to the dismissal of the case by the Administrative Law Judge and as such, created an ambiguous circumstance where a case might be left in limbo for an undetermined period of time with the parties not knowing whether the case was to proceed. The agency noted that the cases are dismissed unless there is good cause shown and the Commission extended the period of review for the agency to consider revising the language to reflect actual practice that the case shall be dismissed unless good cause is shown and address deadlines for such showing.

26 NCAC 03.0132 - The Commission extended the period of review on this Rule. The Commission noted that the phrase “reasonable hourly rate based upon prevailing market rate” is ambiguous as a standard standing alone without consideration of other factors. Further, the Commission noted that there are well settled criteria for the determination of reasonable attorney’s fees, use of which (by statement or reference) might eliminate the ambiguity and avoid possible concerns with anti-trust issues were attorneys required to argue that there is a prevailing rate to establish their fees. The agency and the Commission noted that the Administrative Law Judge’s authority to award reasonable attorney’s fees is clear and that given that fact and the well-settled case and statutory law regarding determination of reasonable attorney’s fees, perhaps the rule is not even necessary. The Commission extended the period of review to permit the agency to consider either withdrawing the rule or re-writing the rule to address the ambiguity and possible anti-trust considerations.

Commissioner Walker offered his assistance in working with the agency to address the Commission concerns as to both rules.

TEMPORARY RULES

Medical Care Commission

Prior to the review of the rules from the Medical Care Commission, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning these rules because of a possible perception of conflict with her husband’s law firm.

All rules were unanimously approved.

G.S. 150B-19.1(h) RRC CERTIFICATION

Criminal Justice Education and Training Standards Commission

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 09B .0202, .0205, .0302, .0304, .0401, .0406, .0408, .0413, .0414, .0416.

Alarm Systems Licensing Board

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 12 NCAC 11 .0201.

COMMISSION BUSINESS

The Commission discussed the use of the Office of Administrative Hearings' Website for posting documents for the meeting. The Commissioners would like emails about the addition of new documents. The Commissioners encourage staff to use discretion in posting communications from agencies and third parties and to make certain the information is relevant for review by the public.

The Commission agreed to reschedule its June meeting to Wednesday, June 18th.

The meeting adjourned at 11:35 a.m.

The next regularly scheduled meeting of the Commission is Thursday, May15th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings /Rules Division.

Respectfully Submitted,

Julie Brincefield
Administrative Assistant

Minutes approved by the Rules Review Commission:

Margaret Currin, Chair

Rules Review Commission

Meeting

Please **Print** Legibly

APRIL 17, 2014

Name	Agency
Kate Pipkin	NCWRC
David Cobb	NCWRC
Tamara Zmuda	NCDDQ
Azzie Conley	NC DHHS/DHSR
GORDON MYERS	NCWRC
Frances Liles	NCREA
Trevor Allen	CJETS
Meredith Henderson	NCIC
Victor Farah	Attorney
Chris Evans	BCBSNC
Joelle Burleson	NCDENR-DAQ
SUMIT GUPTA	NCIC
Ryan Boyce	"
Janice Davidson	NC DOR
Jennifer Everett	DENR
Jeff Gray	NSD
Patrick Knowlson	NCDENR-DAQ
BRIAN LIVECCHI	NCIDOT
Ann Wall	SOA