**RULES REVIEW COMMISSION**

**April 19, 2012**

**MINUTES**

The Rules Review Commission met on Thursday, April 19, 2012, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Addison Bell, Margaret Currin, Garth Dunklin, George Lucier, Pete Osborne, Bob Rippy, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

Staff members present were: Joe Deluca and Bobby Bryan, Commission Counsel; Molly Masich; Dana Vojtko; Julie Edwards; and Tammara Chalmers.

The meeting was called to order at 10:01 a.m. with Judge Walker presiding. He reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

**APPROVAL OF MINUTES**

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the March 15, 2012 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

21 NCAC 32C .0102, .0105, .0106, .0109 – Medical Board. The Commission approved the re-written rules submitted by the agency.

**LOG OF FILINGS**

Chairman Walker presided over the review of the log of permanent rules.

**State Board of Elections**

08 NCAC 01 .0101 was approved unanimously.

**Child Care Commission**

10A NCAC 09 .1719 was approved unanimously.

**Private Protective Services Board**

All rules were approved unanimously.

**Environmental Management Commission**

Thomas Slusser from the agency addressed the Commission and answered questions from the Commission.

All rules were approved unanimously.

**State Personnel Commission**

Nellie Riley from the agency addressed the Commission.

All rules were approved unanimously with the following exception:

25 NCAC 01J .1101 – The Commission objected to this rule based on lack of statutory authority in accordance with G.S. 150B-21.10. There is no authority cited for Paragraph (e) as written. The addition of "genetic information" to the classifications of unlawful workplace harassment makes Paragraph (e) inconsistent with G.S. 126-34.1. G.S. 126-34.1(a)(10) limits filing a workplace harassment case to harassment based upon age, sex, race, color, national origin, religion, creed, and handicapping (disabling) condition. While harassment based on genetic information may violate federal law, it does not give rise to a contested case under Article 3 of G.S. 150B. G.S. 126-34.1(e) specifically states that "[a]ny issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by [G.S. 126-34.1] shall not be grounds for a contested case under G.S. 126." Harassment based on genetic information is not specifically authorized as a ground for a contested case.

**TEMPORARY RULES**

Chairman Walker presided over the review of the log of temporary rules.

**Department of Transportation**

Betsy Strickland with the Attorney General's office addressed the Commission.

Joseph Qubain with the agency addressed the Commission.

19A NCAC 02D .0531, .0532 – The Commission objected to these rules based on lack of statutory authority in accordance with G.S. 150B-21.1(b1). G.S. 136-82 requires the Board of Transportation to establish tolls. Based on all notices and forms received about these rules, it appears that the rules were both proposed and adopted by the Department of Transportation without any formal action by the Board. It appears simply that the wrong agency has engaged in rulemaking and the correct agency has not even begun rulemaking. Without action by the Board, there is no way to know if these are the tolls the correct agency desires to establish. Neither G.S. 143B-348 nor G.S. 143B-10(j) move the authority to adopt the rules from the Board to the Department. The last sentence in the first paragraph of G.S. 143B-348 gives the Secretary authority to promulgate rules and regulations concerning all transportation functions assigned to the Department. The problem is that the function of establishing tolls was not assigned to the Department, but to the Board, by the recent change to G.S. 136-82. The second sentence in the first paragraph says that all transportation matters assigned to the Department are the responsibility of the Secretary "except those reserved to the Board of Transportation by statute." The statute clearly gives the authority to establish tolls to the Board. This statute does not allow the Department to usurp the authority given to the Board by the General Assembly. There is nothing in G.S. 143B-10(j) that would authorize the Department to establish tolls. Tolls are fees. G.S. 150B-19(5) prohibits an agency from adopting a rule that establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so with limited exceptions that are not relevant to these rules. G.S. 136-82 authorizes the Board, not the Department, to establish the tolls so G.S. 143B-10(j) is not relevant to this rulemaking. In summary, there is no authority cited for the Department of Transportation to adopt these rules. That authority is given to the Board of Transportation and the Board has not engaged in rulemaking.

**OTHER BUSINESS**

The Commission discussed the meeting that some members were having with some of the legislative leadership that afternoon.  Issues to be discussed included an expedited process for the Department of Revenue when adopting rules dealing with forced combinations and adding a sunset provision for all rules.

The meeting adjourned at 11:33 a.m.

The next scheduled meeting of the Commission is Thursday, May 17 at 10:00 a.m.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

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Judge Ralph A. Walker/Chair

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Date

