**RULES REVIEW COMMISSION**

**July 19, 2012**

**MINUTES**

The Rules Review Commission met on Thursday, July 19, 2012, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Baird Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Bob Rippy, Stephanie Simpson, Ralph Walker.

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 10:02 a.m. with Chairman 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).

Chairman Walker recognized former Commissioner George Lucier.

New Commissioners Anna Baird Choi and Jeanette Doran were welcomed and introduced by Chairman Walker. He then administered the oath of office to the new Commissioners.

Chairman Walker read into the record the following statements of economic interest for:

Anna Baird Choi, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Ms. Baird-Choi is an attorney with the law firm of Allen, Pinnix & Nichols, P.A. which represents several occupational licensing boards which come before the Commission during the rulemaking process. Additionally, Ms. Choi’s spouse is employed as a Deputy City Attorney for the City of Raleigh (“City”). Ms. Choi should exercise appropriate caution in the performance of her public duties should issues involving employees or partners of the firm, any of the firm’s current or former clients, or the City come before the Commission for official action or otherwise seek to conduct business with the Commission. This would include recusing herself to the extent that those interests would influence or could reasonably appear to influence her actions.

Jeanette Doran, which stated there was no actual conflict of interest. However, there is the potential for a conflict of interest because Ms. Doran is the Executive Director and General Counsel for the NC Institute for Constitutional Law. Her husband also owns a threshold amount of stock in Duke Energy Corporation. Ms. Doran should exercise appropriate caution in the performance of her public duties should matters being litigated by the NC Institute for Constitutional Law or issues involving Duke Energy Corporation come before the Commission for official action or otherwise seek to conduct business with the Commission. This would include recusing herself to the extent that those interests would influence or could reasonably appear to influence her actions

The Chairman introduced Sarah Beth Koonce, an extern from the Department of Labor.

**APPROVAL OF MINUTES**

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the June 20, 2012 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

10A NCAC 09 .0901, .0902, .1702, .1706, .1718 – Child Care Commission –The agency has not yet met and responded to the objection and no action was taken.

10A NCAC 13D .2701 – Medical Care Commission. The Commission approved the re-written rule submitted by the agency.

Cindy DePorter addressed the Commission.

12 NCAC 09E .0102 – Criminal Justice Education and Training Standards Commission – The agency has not yet met and responded to the objection and no action was taken.

10A NCAC 18A .2608, .2609, .2610, .2611, .2612 – Commission for Public Health – The Commission approved these repealed rules.

10A NCAC 18A .2653 – Commission for Public Health – The Commission approved the rewritten rule submitted by the agency.

21 NCAC 02 .0204 – Board of Architecture – Prior to the discussion of this Rule Commissioner Choi recused herself and did not participate in any discussion or vote concerning this rule because the law firm where she is employed represents the Board.

The Commission approved the rewritten rule submitted by the agency.

21 NCAC 03 .0201 – Athletic Trainer Examiners – The Commission approved the rewritten rule submitted by the agency.

Commissioner Dunklin questioned the Board about its continued charging the increased fees after telling the Commission that it would cease doing so until the amended rule was effective.  He also pointed out some misleading portions of the agency’s website.

Ann Christian addressed the Commission.

21 NCAC 22F .0103, .0114 – Hearing Aid Dealers and Fitters Board. The Commission approved the rewritten rules submitted by agency.

25 NCAC 01B .0437, .0438 – State Personnel Commission. The Commission approved the rewritten rules submitted by the agency.

**LOG OF FILINGS**

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

**Social Work Certification and Licensure Board**

Prior to the discussion of this Rule, Commissioner Baird-Choi recused herself and did not participate in any discussion or vote concerning these rules because the law firm where she is employed represents the Board.

All rules were approved unanimously.

**Department of Cultural Resources**

Josh Davis addressed the Commission.

07 NCAC 04N .0202 was approved unanimously.

**Department of Labor**

Jane Ammonds Gilchrist addressed the Commission.

Erin Gould addressed the Commission.

All rules were approved with the following exception:

13 NCAC 12 .0903 – The Commission objected to this rule based on ambiguity.  It seems to me that the phrase “any day on which a business is in operation” is unclear.

It is certainly possible that “in operation” could mean legally operating, i.e, that its legal status as a business is not questioned and that the business is entitled to carry on any of its business functions. Another way of saying this is that the business is in existence by “operation of law” and is therefore “operating.”

A dictionary definition would be more restrictive. Black’s Law Dictionary (Fifth Edition) defines “operate” as “to perform a function, or operation, or produce an effect.” This would seem to require that the business, through its employees, is taking some action that is an active part of its function, operation, or production. That would seem to be what is implied or intended.

But even that does not completely settle the question. For instance in the case of a sole proprietorship where on a given “day-off” for a business, no employees are performing any functions or operations or producing anything for the business, but the owner is carrying out necessary components of the business, such as sales, maintenance, payroll and other paperwork, or documentation of compliance with various federal, state or local laws or regulation, is the business “in operation” that day? Would a factory engaged in manufacturing of some product and with no retail sales be in operation and “open for business” if manufacturing lines were shut down for necessary maintenance one day a week?

The Commission granted the Agency's Request for Waiver of Rule 26 NCAC 05 .0108 and approved the re-written rule 13 NCAC 12 .0903.

**Department of Environment and Natural Resources**

All rules were approved unanimously with the following exception.

15A NCAC 01A .0102 was withdrawn by the agency.

**Department of Transportation**

All rules were approved unanimously.

Commissioner Choi was not present for the vote.

**Medical Board**

Nancy Hemphill addressed the Commission.

During the discussion, Chairman Walker briefly excused himself but returned before the vote.  Vice-Chairman Currin presided in his absence.

All rules were approved unanimously.

**Board of Funeral Service**

Prior to the discussion of this Rule, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because the law firm where she is employed represents the Board.

All rules were approved unanimously.

**Board of Examiners in Optometry**

All rules were approved unanimously.

**TEMPORARY LOG OF FILINGS**

Chairman Walker presided over the review of the log of temporary rules. There were two rules from the Wildlife Resources Commission. These rules had been approved as permanent rules by the Commission at its previous meeting. However they were subject to legislative review and a delayed effective date because the Commission received ten letters of objection. The agency was seeking to make these rules effective under the provisions of G.S. 150B-21.3(b2) and -21.1(a)(7).

**Wildlife Resources Commission**

15A NCAC 10B .0219, and .0223 were approved unanimously.

**OTHER BUSINESS**

Staff informed the Commission that Senate Bill 810 has been signed into law by the Governor.  The bill requires agencies that are within the departments of the Council of State, other than the Governor, to submit the text of a proposed rule change and an analysis of the change to the Commission and obtain a certification from the Commission, or the Commission’s designee, that the agency adhered to the principles set forth in G.S. 150B-19.1.  A rough draft of a form to be used was provided.

During the discussion, Chairman Walker excused himself and Vice-Chairman Currin presided over the remainder of the meeting.

The meeting adjourned at 12:17 p.m.

The next scheduled meeting of the Commission is Thursday, August 16 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 Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge Ralph A. Walker/Chair

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Date



