**RULES REVIEW COMMISSION**

**June 16, 2011**

**MINUTES**

The Rules Review Commission met on Thursday, June 16, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Jennie Hayman, George Lucier, Dan McLawhorn, Ann Reed, Curtis Venable and Ralph Walker.

Staff members present were: Joe DeLuca and Bobby Bryan, Commission Counsel, and Dana Vojtko, Julie Edwards and Tammara Chalmers

The following people were among those attending the meeting:

Donnie S. Sides Office of Emergency Services

Margaret Currin (Private Citizen)

Barry Gupton NC Department of Insurance/NC Building Code Council

Wilson Hayman Poyner Spruill LLP

Tom West Poyner Spruill LLP

Vance Kinlaw Board of Chiropractic Examiners

Lisa Deubler Irrigation Contractors' Licensing Board

Ronald E. Sneed Irrigation Contractors' Licensing Board

Barry Bloch Department of Justice

Richard Armstrong Health Network Services

Nadine Pfeiffer DHHS/Division of Health Service Regulation

Mandy Poole DHHS/Division of Health Service Regulation

Gene DePorter DHHS/Division of Health Service Regulation

Jennifer Chrisohon Department of Labor

Natalie Caviness Department of Labor

Norman Young Department of Justice/Wildlife Resources Commission

Wade Tyndall Department of Justice

Erin Gould Department of Labor

Karen Waddell Department of Insurance

Julie Ventaloro Division of Water Quality

Reed Fountain Att'y on behalf of Board of Examiners for Electrical Contractors

Micki Lilly Social Work Certification and Licensing Board

Amanda Reeder Division of Mental Health/DD/SAS

Robbie Brooks Board of Examiners for Electrical Contractors

Erin Glendening DHHS/Division of Health Service Regulation

Michael Bryne Attorney for Health Source Chiropractic Inc

Bob Martin Division of Public Health

Bob Peter Irrigation Contractors' Licensing Board

Elizabeth Turgeon OAH Extern

Nahale Kalfas Speech and Language Pathologists and Audiologists

John Randall Attorney for Speech and Language Pathologists and Audiologists

Christian Waters Wildlife Resources Commission

Eric David Board of Pharmacy

Jack M. Given Jr Department of Labor

Wanda Nicholson Marriage and Family Therapy Licensure Board

Chris Hoke Department of Health and Human Services

Nick Fountain Young Moore

The meeting was called to order at 9:59 a.m. with Ms. Hayman presiding. She 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 Hayman asked for any discussion, comments, or corrections concerning the minutes of the May 19, 2011 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

21 NCAC 52 .0206 – Board of Podiatry Examiners. The Commission approved the rewritten rule submitted by the agency.

**LOG OF FILINGS**

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

**Medical Care Commission**

All rules were approved unanimously.

**Commission for Mental Health**

All rules were approved unanimously.

**Department of Insurance**

All rules were approved unanimously.

**Private Protective Services Board**

Prior to the review of the rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because Charles McDarris, an attorney with his law firm, Bailey and Dixon, LLP, represents the Board as its counsel. Also, he has a separate contract to teach for the Board.

All rules were approved unanimously.

**Department of Labor**

All rules were approved unanimously with the following exception:

13 NCAC 13 .0211 – The Commission objected to this rule based on ambiguity. In (b) it is unclear when an external inspection must be done. As the rule was written before the proposed amendment an internal inspection was to be performed at the time of installation and then every year afterwards. In the period between three and nine months after the internal inspection the inspector was to perform an external inspection as well. Now it is not clear at the least whether the external inspection is a one-time inspection at the time of installation or whether it is to be done every year as well. The language of the rule seems to require only one external inspection, which can be performed at any time, of the boiler. In that same paragraph the inspector is given the authority to suspend or revoke the certificate of operation if the inspector determines (during the external inspection while the high pressure boiler is operating) that “an unsafe condition exists that is likely to result in serious personal injury or property damage.” Counsel would hope that if such a situation existed – “unsafe condition exists … likely to result in serious … injury or … damage” – that there would not be much discretion involved and that the inspector would be required to suspend or revoke the certificate. If there is discretion, then it is unclear what standards the inspector is to use to determine whether to take action.

**Wildlife Resources Commission**

All rules were approved unanimously.

**Board of Chiropractic Examiners**

Prior to the review of the rules from the Board of Chiropractic Examiners, Commissioner Hayman recused herself and did not participate in any discussion or vote concerning these rules because her husband, Wilson Hayman, appeared before the Commission.

Commissioner Reed recused herself and did not participate in any discussion or vote concerning these rules because her husband's law firm is appearing on behalf of a party who objects to these rules.

All rules were approved unanimously with following exception:

21 NCAC 10 .0211 – The Commission voted in favor of Commissioner Venable’s motion to object to the rule based on staff’s recommendation and adding to that an objection to paragraph (b) were Commissioners Crisp, Lucier and Venable. Commissioner Funderburk voted in favor of the motion and to break the tie created by the negative votes of Commissioners Gray, McLawhorn, and Walker.

The Commission objected to this rule based on lack of statutory authority. There is no authority cited for the provision in (b) requiring that the contract be in writing and for possibly not being clear enough that there is no requirement that the contract be submitted to the board for prior approval. It is also not clear under what circumstances the board would seek to review the contract. There is also no authority for the provisions in (d)(1) and (2) which appear to control or restrict how a licensee may choose to divide the proceeds he receives as a result of exercising his professional control over his practice. The Commission also expressed concern about the provisions in (d)(4), (5) and (6) prohibiting “indirect” control or requirements in that any control over business management aspects of the practice – no matter how remote or "indirect" – could be perceived as exercising control over the practice of chiropractic.

Vance Kinlaw represented the Board and spoke in favor of rule 21 NCAC 10 .0211.

Wilson Hayman representing Healthsource Network Services and Michael Byrne representing Healthsource Chiropractic Inc spoke in opposition to rule 21 NCAC 10 .0211.

**Board of Examiners for Electrical Contractors**

All rules were approved unanimously with the following exception:

21 NCAC 18B .1103 – The Commission objected to this rule based on lack of statutory authority. In (b), there is no authority cited for the Board to set occupational requirements for instructors.

The Commission granted the Board’s Request for Waiver of Rule 26 NCAC 05 .0108 and approved the re-written rule.

**Irrigation Contractors' Licensing Board**

All rules were approved unanimously with the following exceptions:

21 NCAC 23 .0102 – The Commission objected to this rule based on lack of statutory authority and ambiguity. In Paragraphs (d) and (e), it is not clear what corporate entities the rule is referring to, and there is no authority cited to place any requirements on corporate entities. Subparagraphs (f)(3), (4) and (5) make no sense as written. Only an individual can meet the statutory requirements for licensure. It is not clear how an individual can be administratively or legally dissolved, or have a corporate form. In the final sentence in Paragraph (f), there is no authority cited for the Board to license corporate entities.

No motion was made to grant the Board's request for Waiver of Rule 26 NCAC 05 .0108 for Rule .0102.

21 NCAC 23 .0105 was withdrawn by the agency.

21 NCAC 23 .0401 – The Commission objected to this rule based on lack of statutory authority. Paragraph (e) sets requirements for an "irrigation system designer." The Board has cited no authority for it to regulate a system designer who is not licensed as an irrigation contractor. An irrigation contractor is defined in G.S. 89G-1(3) as "[a]ny person who, constructs, installs, expands, services, or repairs irrigation systems." This definition does not include "design" and it does not appear that anything in the statute limits the design of irrigation systems to irrigation contractors. A license is only required for irrigation construction or contracting, which is defined as providing services as an irrigation contractor. The Commission is not questioning the Board's authority to regulate its licensees when they design a system in conjunction with their work as an irrigation contractor, but it knows of no other authority to regulate others who may design a system.

21 NCAC 23 .0404 – The Commission objected to this rule based on ambiguity and lack of necessity. Paragraph (c) is unclear as written and apparently redundant. The two sentences appear to be requiring the same thing and this was not clarified by a requested technical change.

21 NCAC 23 .0406 – The Commission objected to this rule based on ambiguity. In Subparagraph (n)(4), it is not clear if the word "Avoid" is meant to be an absolute prohibition or something less.

**Marriage and Family Therapy Licensure Board**

All rules were approved unanimously with following exceptions:

21 NCAC 31 .0201 – The Commission objected to Rule .0201 based on lack of statutory authority, ambiguity and lack of necessity. In Item (3), it is not clear when additional documentation will be required. In Item (4), there is no authority cited for the Board to require American Association of Marriage and Family Therapy approved supervisors endorsement as a condition of licensure. That is beyond what G.S. 90-270.54 requires. In Item (5), there is a requirement that an applicant obtain the endorsement of three licensed or certified mental health professionals as evidence of good moral character. "Good moral character" is a requirement for licensure by the Board, but there is no reason to believe that the endorsement of a mental health professional is superior to the endorsement of anyone else in determining good moral character. This would also present a hardship on persons with very good moral character who do not have numerous personal relationships with mental health professionals. This requirement does not appear to be reasonably necessary to implement the statute.

21 NCAC 31 .0501 – The Commission objected to Rule .0501 based on lack of statutory authority and ambiguity. There is no authority cited for Paragraph (b). An applicant with a master's degree in marriage and family therapy meets the educational requirements imposed by the statute. Only applicants with a related degree are subject to additional training requirements. It is also not clear what is meant by "prior version of this Rule."

21 NCAC 31 .0801 – The Commission objected to Rule .0801 based on lack of necessity. In Subparagraph (a)(3), there is a requirement that an applicant obtain the endorsement of three licensed or certified mental health professionals as evidence of good moral character. "Good moral character" is a requirement for licensure by the Board, but there is no reason to believe that the endorsement of a mental health professional is superior to the endorsement of anyone else in determining good moral character. This would also present a hardship on persons with very good moral character who do not have numerous personal relationships with mental health professionals. This requirement does not appear to be reasonably necessary to implement the statute.

**Board of Pharmacy**

21 NCAC 46 .2901 was a approved unanimously.

**Social Work Certification and Licensure Board**

All rules were approved unanimously.

**Board of Examiners for Speech and Language Pathologists and Audiologists**

Prior to the review of the rule from the Board of Examiners for Speech and Language Pathologists and Audiologists, Commissioner McLawhorn recused himself and did not participate in any discussion or vote concerning this rule because he has a family member who is licensed in the profession.

21 NCAC 64 .0307 – The Commission objected to this rule based on lack of statutory authority and ambiguity. In line six the meaning of “lascivious conduct” is unclear in the context of this rule and what actions are forbidden is unclear. The board has cited no authority, and counsel is not aware of any authority, to deny licensure based on some sort of qualification relating to sexual activity. G.S. 90-295 and 90-298, the specific statutes setting out the qualifications for licensure refer to qualifications that address only an applicant’s education and experience. There is another statute, G.S. 90-296, that requires passing an examination. (That statute even refers to “an applicant … who has satisfied the academic requirements of G.S. 90-295” without referring to any other qualifications.) There is also no reference in G.S. 90-301, Grounds for suspension or revocation; 90-301A, Unethical acts and practices; or 90-302, Prohibited acts and practices, to any prohibition against “lascivious conduct” or requirement to have good moral character.

The Rules Review Commission has consistently taken the position that where the legislature has set out the qualifications for licensure and has not given the agency any further discretion to add to those qualifications or establish new or different qualifications, then the agency cannot do so by rulemaking. It is possible that the board could incorporate a more carefully crafted requirement to refrain from lascivious conduct as part of its code of ethics. Then, under 90-301(3) it would have the authority to suspend or revoke (but not necessarily deny) licensure to someone who violated that code. G.S. 90-301 lists the grounds for suspending or revoking a license. One of those grounds (4) is the “[v]iolation of any lawful order, rule or regulation rendered or adopted by the Board.” The board is entitled to set many qualifications (in other words, “order, rule or regulation”) outside the statutes to remain a licensed individual. It is not entitled to expand those qualifications in order to obtain licensure.

**Building Code Council**

All rules were approved unanimously with the following exceptions:

2012 NC Fire Code Appendices 101.2.1, R311.2, Table R403.1, Figure R403.3(1), R408.1.1, R408.2, R802.3, R807.1 received ten letters of objections but a bill previously enacted and signed into law made them effective January 1, 2012.

Amendments to 2011 NEC received ten letters of objection after the meeting and will be subject to a delayed effective date.

**TEMPORARY RULES**

10A NCAC 41A .0205 was approved unanimously.

**COMMISSION PROCEDURES AND OTHER BUSINESS**

Commissioner Funderburk made a motion to reconsider the Chiropractic Board Rule 21 NCAC 10 .0211. Commissioners Gray, Walker and Funderburk voted in favor of the motion. Commissioners Crisp, Lucier and Venable voted against it and the motion failed. Attorney Vance Kinlaw was in the room for at least a part of the brief motion by Commissioner Funderburk.

The meeting adjourned at 12:46 p.m.

The next scheduled meeting of the Commission is Thursday, July 21 at 1:30 p.m.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

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Jennie J. Hayman/Chair

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Date