**RULES REVIEW COMMISSION**

**November 15, 2012**

**MINUTES**

The Rules Review Commission met on Thursday, November 15, 2012, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Baird Choi, Margaret Currin, Garth Dunklin, Pete Osborne, Stephanie Simpson, Ralph Walker, Faylene Whitaker, Jeanette Doran joined via Skype.

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

The meeting was called to order at 10:08 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).

**APPROVAL OF MINUTES**

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the October 18, 2012 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

**Industrial Commission**

Larry Baker with the NC Association of Defense Attorneys addressed the Commission about the rules from the Industrial Commission.

Staci Meyer with the Industrial Commission addressed the Commission about the rules from the Industrial Commission.

04 NCAC 10A .0301 – Industrial Commission – This rule was approved unanimously.

04 NCAC 10A .0404, .0502, .0617, .0801, .0802 – All rules were approved unanimously. Rule .0801 was approved contingent on receiving a technical change. The change was subsequently received.

04 NCAC 10B .0201, .0203, .0501 – All rules were approved unanimously with the following exception:  Rule .0501 was approved contingent on receiving a technical change. with Commissioners Walker, Currin, Choi and Osborne voting to approve the rule.  Commissioners Doran, Simpson, Dunklin voted against approving the rule.  The technical change was subsequently received.

04 NCAC 10C .0108, .0201, .0202 – All rules were approved unanimously with the following exception: Rule .0201 was approved contingent on receiving a technical change with Commissioners Walker, Currin, Choi, Osborne and Simpson voting to approved the rule.  Commissioners Dunklin and Doran voted against approving the rule.  The technical change was subsequently received.

04 NCAC 10D .0104, .0110, .0111 – All rules were approved unanimously with the following exception: Rule .0110 was approved contingent on receiving a technical change with Commissioners Walker, Currin, Choi and Osborne voting to approve the rule.  Commissioners Doran, Simpson and Dunklin voted against approving the rule. The technical change was subsequently received.

04 NCAC 10E .0101, .0301, .0302 – The Commission approved Rule .0101 contingent on receiving a technical change. Rule .0301 was approved contingent on receiving a technical change with Commissioners Choi, Currin, Walker and Osborne voting to approve the rule.  Commissioners Simpson, Doran and Dunklin voted against approving the rule.  Rule .0302 was returned to the agency at the agency’s request. The technical changes were subsequently received.

04 NCAC 10F .0105, .0108 – Rule .0105 was approved unanimously. Rule .0108 was returned to the agency at the agency's request.

04 NCAC 10G .0105, .0107, .0108, .0110 – All rules were approved unanimously with the following exceptions:  Rules .0105 and .0110 were approved contingent on receiving technical changes with Commissioners Choi, Currin, Walker and Osborne voting to approve the rules. Commissioners Simpson, Doran and Dunklin voted against approving the rules. Rule .0107 was approved contingent on receiving a technical change.  All technical changes were subsequently received.

04 NCAC 10H .0201, .0202, .0206, .0207 – All rules were approved unanimously with the following exceptions:  Rule .0201 was approved contingent on receiving a technical change.  Rule .0206 was approved contingent on receiving a technical change with Commissioners Choi, Currin, Walker and Osborne voting to approve the rule.  Commissioners Dunklin, Simpson and Doran voted against approving the rule.  Rule .0207 was returned to the agency at the agency’s request.  All technical changes were subsequently received.

04 NCAC 10I .0201, .0204 – Rule .0204 was approved unanimously contingent on receiving a technical change.  The technical change was subsequently received.  Rule .0201 was returned to the agency at the agency’s request.

04 NCAC 10J .0101 – The agency has not responded to the objection and no action was taken.

**Child Care Commission**

10A NCAC 09 .0901, .0902, .1702, .1706, .1718 – All rules were approved unanimously.

10A NCAC 09 .3004, .3007, .3008 –  The Commission spent a considerable amount of time discussing these rules including Commissioner Dunklin’s intention and Mr DeLuca’s recommendation to vote against Rule .3004 based on lack of authority. There was also discussion about the other two rules including Commissioner Simpson’s concerns about ambiguity. At the request of the agency no action was taken on Rule .3004. No action was taken on Rules .3007 and .3008 with the concurrence of the agency.

**Department of Transportation**

19A NCAC 02E .0609, .0610 – No action was taken on these rules.

**Board of Podiatry Examiners**

21 NCAC 52 .0205 – Rule .0205 was approved unanimously.

**LOG OF FILINGS**

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

**Department of Administration**

All rules were approved unanimously with the following exepctions.

01 NCAC 09 .0401, .0402, .0403, .0404, .0405, .0406 – The Commission objected to these rules based on lack of statutory authority. There is no authority cited for the Department of Administration to repeal these rules. It appears from the cited authority that the Governor's Office is the agency with rulemaking authority and nothing in the published notice implied that the Governor was repealing these rules.

01 NCAC 11 .2102, .2102, .2103, .2104, .2105, .2111, .2116, .2201, .2202, .2203, .2204 - The Commission objected to these rules based on lack of statutory authority. There is no authority cited for the Department of Administration to repeal these rules. It appears from the cited authority that the Human Relations Commission is the agency with rulemaking authority and nothing in the published notice implied that the Human Relations Commission was repealing these rules.

01 NCAC 19A .0103 – The Commission objected to this rule based on lack of statutory. There is no authority cited for the Department of Administration to repeal this rule. It appears from the cited authority that the Youth Advisory Council is the agency with rulemaking authority and nothing in the published notice implied that the Youth Advisory Council was repealing this rule.

01 NCAC 22 – All Repeals - The Commission objected to these rules based on lack of statutory authority. The authority for these rules, S.L. 1977-677, gives the Department the authority to adopt these rules but also authorizes joint adoption with the Commission for Health Services (now Commission for Public Health) and the Environmental Management Commission. Jointly adopted rules may only be revoked upon the concurrence of all three agencies. There is some evidence that these rules were originally jointly adopted. There is no authority cited for the Department to repeal these rules without the concurrence of the other agencies. Nothing in the published notice implied that the other agencies were concurring in the repeal of these rules.

**Alcoholic Beverage Control Commission**

Commissioner Choi was not present during the vote on these rules.

All rules were approved unanimously.

**Private Protective Services Board**

These rules were withdrawn and have been refiled for the December meeting.

**Sheriffs' Education and Training Standards Commission**

All rules were approved unanimously with the following exepctions:

12 NCAC 10B .2004, .2102 - The Commission objected to these rules based on ambiguity in accordance with G.S. 150B-21.10. In Rule .2004(1)(d)(i), is not clear what is meant by "possessing a law degree under [one of the Commissions]." In Rule .2102(1), is not clear what is meant by "possessing a law degree under [one of the Commissions]."

**Alarm Systems Licensing Board**

All rules were approved unanimously.

**Department of Transportation**

Betsy Strickland from the agency addressed the Commission.

Commissioner Osborne was not present during the vote on these rules.

All rules were approved unanimously with the following exceptions:

19A NCAC 01C .0201 – The Commission objected to this rule based on lack of statutory authority. There are several places in this rule where the department is requiring things to be done based on standards "required by the District Engineer" or similar language. There is no authority cited to set these standards outside rulemaking.

19A NCAC 02D .0414 – The Commission objected to this rule based on lack of statutory authority. There is no authority cited for the requirement that a contractor with a ["valid"] claim against the Department of Transportation (DOT) for any amount he claims is due to "exhaust whatever informal negotiation steps the Chief Engineer has established" before resorting to any other options allowed him by law.

**Medical Board**

All rules were approved unanimously.

Commissioner Whitaker was not present for the vote on these rules.

Prior to the discussion of these rules, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning these rules because her husband's law firm may represent clients with a position on these rules.

**Nursing Board**

21 NCAC 36 .0809 was approved unanimously.

Commissioner Whitaker was not present for the vote on these rules.

Prior to the discussion of these rules, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning these rules because her husband's law firm may represent clients with a position on these rules.

Prior to the discussion of these rules, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because her law firm represents the Board of Nursing.

**Building Code Council**

All rules were approved unanimously.

**TEMPORARY RULES**

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

**Department of Cultural Resources**

The Commission declined to approve Rule 07 NCAC 04N .0202 because the findings of need statement did not comply with G.S. 150B-21.1(b1).  The findings of need statement for the rule stated that the temporary rule was required by the effective date of a recent act of the General Assembly.  There is nothing in the cited Session Law, S.L. 2012-142, that requires an increase in fees.  If anything, the inclusion of an additional appropriation would have been justification for reduced fees rather than increased fees.

**RRC CERTIFICATION**

**Board of Agriculture**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 02 NCAC 09B .0116.

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 02 NCAC 09F .0101, .0102, .0103, .0201, .0202, .0203, .0204, .0305, .0306.

**Home Inspector Licensure Board**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 11 NCAC 08 .1012 and .1116.

The Commission did not certify 11 NCAC 08 .1023 for publication. There is no authority cited for the provision in (f)(3) setting qualifications for pre-licensing programs' course instructors. The agency may not publish a notice a text for this rule or schedule this rule for a public hearing until it has either modified the rule or cited additional and sufficient authority for the rule.

The Commission voted on a motion to accept staff's recommendation to certify 11 NCAC 08 .1012 and .1116 and not certify Rule .1023 for publication. Commissioner Choi voted against the motion.

The meeting adjourned at 1:43 p.m.

The next scheduled meeting of the Commission is Thursday, December 20th 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

