**RULES REVIEW COMMISSION**

**October 18, 2012**

**MINUTES**

The Rules Review Commission met on Thursday, October 18, 2012, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Addison Bell, Anna Baird Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Pete Osborne, Bob Rippy, Stephanie Simpson, Ralph Walker, Faylene Whitaker.

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 10:02 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).

**APPROVAL OF MINUTES**

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

Margaret Currin recognized Matt Meinig, one of her students from Campbell Law School.

**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.

21 NCAC 52 .0205 – Board of Podiatry Examiners – The agency has not yet met and responded to the objection and no action was taken.

**LOG OF FILINGS**

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

**Alcoholic Beverage Control Commission**

All rules were approved unanimously.

The Commission displaced the Industrial Commission rules to the end of meeting.

**Child Care Commission**

Jani Kozlowski from the agency addressed the Commission.

All rules were approved unanimously with the following execptions:

10A NCAC 09 .3004 was objected to based on lack of statutory authority and ambiguity. The agency has not cited specific authority for the restrictions in this rule which prohibit "[a]ctivites, instruction, or communications, which promote religious beliefs" form being "directed toward children participating in the NC Pre-K program (formerly the "More at Four" program) during the NC Pre-K day." It appears these programs can be operated by any child care facility that is subject to these rules, including child care programs run by religious groups, and the rules are not restricted to programs operated by a public school system. If that is so, then there needs to be explicit authority to restrict any religious component of a school curriculum that might normally be offered by the child care program. If "religious sponsored child care facilities are eligible to operate under the NC Pre-K program and receive funding under it, then this rule would seem to violate G.S. 110-106. In addition this rule is ambigious in that it is not clear what constitutes "activities, instruction, or communications which promote religious beliefs."

10A NCAC 09 .3007 was objected to based on lack of statutory authority or ambiguity. It is unclear what constitutes the "Early Learning and Development Standards." There is no authority to adopt them outside the rulemaking process and the NCAC.

10 NCAC 09 .3008 was objected to based on ambiguity. In this rule it is unclear what an "approved assessment instrument" is or how the approval is made. There is no authority to make the "approved" determination outside rulemaking.

**Commission for Mental Health**

10A NCAC 27G .0813 was approved unanimously.

**Environmental Management Commission**

All rules were approved unanimously.

Prior to the discussion of these rules, Commissioner Osborne recused himself and did not participate in any discussion or vote concerning these rules because he owns property on the Dan River which is part of the Roanoke River.

**Wildlife Resources Commission**

All rules were approved unanimously.

**Department of Transportation**

Betsy Strickland from the agency addressed the Commission.

Craig Justice attorney for the Outdoor Advertising Association addressed the Commission.

John Nance with the agency addressed the Commission.

All rules were approved unanimously with the following exceptions:

19A NCAC 02E .0609 and .0610 - The Commission objected to these rules based on lack of statutory authority and ambiguity. The provision in (b)(9) allowing the agency to deny a selective vegetative removal (SVR) permit if there are conditions or restrictions upon the state which the state “agrees in writing to subject itself” is either outside its authority or ambiguous.

While the billboards in question are on private property, trees and other vegetation screening the billboards would be on state property in state highways’ right-of-ways. If the DOT grants a permit to construct a billboard along a roadside it is also required [under Article 11, The Outdoor Advertising Control Act (OACA), in Chapter 136 governing the DOT, GS. 136-126 (and following sections), as amended] to allow billboard owners or their agents access along the state right-of-ways to perform maintenance and vegetative removal.

Obviously any easement or restriction which is in place at the time a permit is granted would and should control. I don’t believe the SVR portions of the law were intended nor could they undermine a property interest in that easement that existed prior to the granting of any permit to erect a billboard. The existing easement would preclude the operation of the OACA and its selective vegetation removal permissions.

By the same token the state would have no authority to undermine the intent of the OACA by being able to create an easement that would restrict a billboard owner’s right to remove vegetation in front of a billboard granted by the SVR provisions.

If this rule provision is intended to apply to a piece of land for which there is an existing billboard or a permit to build a billboard and then the easement is granted, that is beyond the DOT’s authority.

If this provision is not intended to be used in that manner but apply only to easements granted prior to the issuing of any permit then the rule is unclear.

For much the same reasons the provision applying to any state permits should also be treated the same way.

Prior to the discussion of these rules, Commissioner Whitaker recused herself and did not participate in any discussion or vote concerning these rules because she owns billboards.

Prior to the discussion of these rules, Commissioner Walker recused himself and did not participate in any discussion or vote concerning these rules because he owns land that has billboards on it.

**Licensing Board for General Contractors**

21 NCAC 12 .0204 was approved unanimously.

Prior to the discussion of these rules, Commissioner Bell recused himself and did not participate in any discussion or vote concerning these rules because he is a licensed general contractor.

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.

Prior to the discussion of these rules, Commissioner Doran recused herself and did not participate in any discussion or vote concerning these rules because her husband works for a general contractor.

Prior to the discussion of these rules, Commissioner Osborne recused himself and did not participate in any discussion or vote concerning these rules because he is employed by and participates in ownership of a General Contractor Licensed by the state of North Carolina.

**Onsite Wastewater Contractors and Inspectors Certification Board**

All rules were approved unanimously.

Prior to 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.

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

**Board of Pharmacy**

21 NCAC 46 .1601 was approved unanimously

**Appraisal Board**

Roberta Ouelette from the agency addressed the Commission.

All rules were approved unanimously.

**North Carolina Housing Finance Agency**

All rules were approved unanimously.

**Office of Administrative Hearings**

Commissioner Currin reviewed the rules from the Office of Administrative Hearings.

All rules were approved unanimously.

**RRC CERTIFICATION**

**Private Protective Services Board**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 12 NCAC 07D .0707.

**Industrial Commission**

Connie Wilson addressed the Commission.

Victor Farah addressed the Commission.

Larry Baker with the NC Association of Defense Attorneys addressed the Commission.

Mike Carpenter with the Home Builders Association addressed the Commission.

John McMillan with the American Insurance Association addressed the Commission.

Connor Brockett with the NC Medical Society addressed the Commission.

Staci Meyer, Abigail Hammond, Amber Cronk, Meredith Henderson and Wanda Taylor from the agency addressed the Commission.

The meeting recessed at 12:30 p.m. and reconvened at 1:05 p.m.

**Subchapter 10A Rules**

All rules were approved unanimously with the following execptions:

04 NCAC 10A .0301 - The Commission extended the period of review so that it could request information from the Office of State Budget and Management about how it determined that there was no substantial economic impact as defined in G.S. 150B-21.4(b1) resulting from the change in Paragraph (a) of the Rule such that the Industrial Commission will no longer accept a notice from the North Carolina Rate Bureau as proof that an employer has obtained workers' compensation insurance. The Commission would like this information to help it determine whether the agency adopted the rule in accordance with the Administrative Procedure Act.

04 NCAC 10A .0404 - The Commission objected to this Rule based on lack of statutory authority and ambiguity. In (f), it is not clear what is meant by "good cause shown." Twice when it is used, it modifies a requirement set by rule without the specific guidelines required by G.S. 150B-19(6). The first time it is used, it repeats the statutory standard and is therefore acceptable. In addition, in (d), there is no authority cited for the requirement that the Industrial Commission refuse to accept a filing that specifies the number of pages. The Commission also requested that the agency change "set without delay" back to "peremptorily set" as a technical change in (g).

Commissioner Doran left the meeting prior to the review of 04 NCAC 10A .0405 and did not participate in the discussion or vote on the remaining Industrial Commission rules.

04 NCAC 10A .0502 - The Commission objected to this Rule based on ambiguity. In (b)(4), it is not clear what about the "issues in dispute" will result in the Industrial Commission approving the non-payment of unpaid medical bills by an employer, carrier or administrator.

04 NCAC 10A .0617 - The Commission objected to this Rule based on ambiguity. In (c), it is not clear what would constitute "good cause shown" for the Commission to allow an attorney to withdraw from representation.

04 NCAC 10A .0801 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

04 NCAC 10A .0802 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the agency to impose sanctions for violations of every rule in this Subchapter.

04 NCAC 10A .0102, .0105, .0405, .0406, .0408, .0601, .0603, .0604, .0605, .0607, .0608, .0609, .0609A, .0612, .0613, .0616, .0701, .0702, .0704 received 10 letters of objection and are subject to legislative review.

Prior to the discussion of the specific rules, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning rules 10A .0613(c), .0614 and .1001 because her husband's law firm represents the NC Medical Society and many physician clients.

**Subchapter 10B Rules**

All rules were approved unanimously with the following execptions:

04 NCAC 10B .0201 - The Commission objected to this Rule due to lack of necessity. This rule repeats G.S. 143-300 and is thus unnecessary.

04 NCAC 10B .0203 - The Commission objected to this Rule due to lack of statutory authority. G.S. 143-300 requires that the North Carolina Rules of Civil Procedure be followed in Tort Claim proceedings if they are not in conflict with the Tort Claims Act. Rule 17(b) of the Rules of Civil Procedure requires general and testamentary guardians to appear for infants and incompetents if they have any. By requiring the use of a guardian *ad litem*, the rule is not consistent with the statute and thus outside the authority of the agency.

04 NCAC 10B .0203 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

**Subchapter 10C Rules**

All the rules were approved unanimously with the following execptions:

04 NCAC 10C .0108 - The Commission objected to this Rule due to ambiguity. In (e)(1), it is not clear what is meant by the requirement that a rehabilitation professional not "initiate" a request for impairment ratings, second opinions or independent medical examinations. It is also possible that this requirement conflicts with the requirement in 04 NCAC 10C .0106(a) that a rehabilitation professional shall exercise independent professional judgment in making and documenting recommendations for medical and vocational rehabilitation for an injured worker.

04 NCAC 10C .0201 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

04 NCAC 10C .0202 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the agency to impose sanctions for violations of every rule in this Subchapter.

04 NCAC 10C .0101, .0103, .0107, .0109 received 10 letters of objection and are subject to legislative review.

Prior to the discussion of the 10C .0108, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning the rule because her husband's law firm represents the NC Medical Society and many physician clients.

**Subchapter 10D Rules**

All rules were approved unanimously with the following execptions:

04 NCAC 10D .0104 - The Commission objected to this Rule due to ambiguity. It is not clear what is meant by "change the provision of medical compensation" in this context. "Medical compensation" is defined in G.S. 97-2(19) as services. If "provision" read "provider" this rule might be clear, but it is not clear why what is provided would be changed because of problems with the provider.

04 NCAC 10D .0110 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

04 NCAC 10D .0111 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the agency to impose sanctions for violations of every rule in this Subchapter.

**Subchapter 10E Rules**

All rules were approved unanimously with the following exepctions:

04 NCAC 10E .0101 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the Chair to independently decide whether to grant or deny a petition for rulemaking. G.S. 150B-20 gives that responsibility to the agency, the full Commission. There is no authority cited for the agency to delegate that responsibility to a single member.

04 NCAC 10E .0301 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

04 NCAC 10E .0302 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the agency to impose sanctions for violations of every rule in this Subchapter.

04 NCAC 10E .0201, .0202, .0203 receieved 10 letters of objection and are subject to legislative review.

**Subchapter 10F Rules**

All rules were approved unanimously with the following execptions:

04 NCAC 10F .0105 - The Commission objected to this Rule due to ambiguity. In (a)(1)(C), it is not clear what is meant by "support methods." In (a)(2)(D), it is not clear what is meant by "process." In (b)(4)(F), it is not clear what this "companion guide" is or who publishes it.

04 NCAC 10F .0108 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the agency to impose sanctions for violations of every rule in this Subchapter.

**Subchapter 10G Rules**

All rules were approved unanimously with the following execptions:

04 NCAC 10G .0105 - The Commission objected to this Rule due to ambiguity. This rule references 04 NCAC 10A .0802. The Commission objected to that rule due to lack of statutory authority. The reference to that rule makes this rule unclear.

04 NCAC 10G .0107 - The Commission objected to this Rule due to ambiguity. In (b)(3), it is not clear what constitutes "good cause." The comparable rule of the Rules Implementing Statewide Mediated Settlement Conference in Superior Court Civil Actions contains a definition of "good cause." These rules are required by statute to be substantially similar to those rules. It is not clear if the agency intends the same definition to apply or if some other definition applies.

04 NCAC 10G .0108 - The Commission objected to this Rule due to ambiguity. In (a), it is not clear what constitutes "good cause" for the Commission to bar any person from holding himself out as a mediator, etc. There does not appear to be a comparable provision in the Mediated Settlement Conference rules. In (c), it is not clear what constitutes "good cause" for the failure of a mediator to appear. There does not appear to be a comparable provision in the Mediated Settlement Conference rules.

04 NCAC 10G .0110 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

04 NCAC 10G .0101, .0103, .0104A received 10 letters of objection and are subject to legislative review.

**Subchapter 10H Rules**

All rules were approved unanimously expections:

04 NCAC 10H .0201 - The Commission objected to this Rule due to ambiguity. In (b), it is not clear if the standard here also applies in Rule .0202(b).

04 NCAC 10H .0202 - The Commission objected to this Rule due to ambiguity. In (b), it is not clear what factors or standards the Commission will use in ordering a hearing or rehearing. It is also not clear if the Commission will use a different standard than that set out in .0201(b).

04 NCAC 10H .0206 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

04 NCAC 10H .0207 - The Commission objected to this Rule due to lack of statutory authority. There is no authority cited for the agency to impose sanctions for violations of every rule in this Subchapter.

**Subchapter 10I Rules**

All rules were unanimously approved with the following execptions:

04 NCAC 10I .0201 - The Commission objected to this Rule due to lack of necessity. This rule repeats the contents of G.S. 130A-425(d) and is thus unnecessary.

04 NCAC 10I .0204 - The Commission objected to this Rule due to lack of statutory authority. "In the interests of justice or to promote judicial economy" is not sufficient specific guideline for the agency to use in determining whether to waive or modify a requirement set by rule as required by G.S. 150B-19(6).

**Subchapter 10J Rules**

04 NCAC 10J .0101 - The Commission objected to this Rule due to ambiguity. In (d), it is not clear what the amount of the fees to be paid to hospitals is. There is also other potentially ambiguous language in the Rule that the agency may want to clarify if it submits a rewritten rule.

This Rule also received 10 letters of objection and is subject to legislative review, if it is later approved.

Prior to the discussion of 04 NCAC 10J .0101, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning this Rule because her husband's law firm represents the NC Medical Society and many physician clients.

The meeting adjourned at 6:56 p.m.

The next scheduled meeting of the Commission is Thursday, November 15th 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,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

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Judge Ralph A. Walker/Chair

