June 16, 2011

John C. Randall

3100 Tower Blvd

Suite 1315

Durham, NC 27707

Re: 21 NCAC 64 .0307

Dear Mr. Randall:

At its June 16, 2011 meeting the Rules Review Commission objected to the above-captioned rule in accordance with G.S. 150B-21.10.

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.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s action, please let me know.

Sincerely,

 Joseph J. DeLuca, Jr.

 Commission Counsel

JJD:jbe