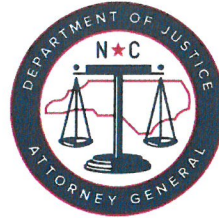
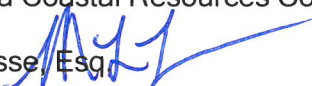


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Memorandum

To: North Carolina Coastal Resources Commission
From: Mary L. Lucasse, Esq. 
Date: June 28, 2019
Re: Petition for Rulemaking Procedures (CRC-19-17)

The N.C. Administrative Procedures Act (“Act”) provides that “[a] person may petition an agency to adopt a rule.” N.C. Gen. Stat. §150B-20(a). The Act requires that an agency, in this case the Coastal Resources Commission (“Commission”), establish rules setting forth the procedure it “follows in considering a rule-making petition.” *Id.* The Commission did so in 15A N.C. Admin. Code 07J .0605.

The Commission is required to grant or deny a rule-making petition within 120 days of the date the petition as submitted. N.C. Gen. Stat. §150B-20(b). Since the Commission received the petition requesting an amendment to 15A N.C. Admin. Code 07H .0209 on May 5, 2019, the Commission must provide a written final agency decision granting or denying the petition by September 2, 2019.

If the Commission denies the rule-making petition, the written final agency decision “must inform the person who submitted the rule-making petition of the reasons for denying the petition.” N.C. Gen. Stat. §150B-20(c). A petitioner may request judicial review in superior court of the final agency decision denying the request to initiate rule making. N.C. Gen. Stat. §150B-20(d).

If the Commission “grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings.”

N.C. Gen. Stat. §150B-20(c). When initiating rule making, the Commission may include in the published notice a statement “that the agency is initiating rule making as a result of a rule-making petition[,]” “the name of the person who submitted the petition[,]” and “whether the agency endorses the proposed text.” *Id.*

If the Commission decides to grant the petition, the Division of Coastal Management would begin the usual rule-making activities required by N.C. Gen. Stat. § 150B-21.2 such as publication of the proposed amendment, obtaining or preparing a fiscal note, and sending out the proposed amendment for public comment and/or hearing. The matter would eventually come back to the Commission for a final decision on whether to adopt the proposed amendment to 15A N.C. Admin. Code 07H .0209. At that time, the Commission will make a decision on whether to adopt the proposed amendment based on Staff’s recommendation and its own deliberations. The Commission may decide not to amend the rule. The Commission’s decision on whether to adopt a proposed amendment to a rule is not subject to judicial review. “[N.C. Gen. Stat. §]150B-2(2) expressly excludes ‘rulemaking’ from its definition of a ‘contested case.’” *North Carolina Chiropractic Ass’n v. North Carolina State Board of Education*, 122 N.C. App. 122, 123, 468 S.E.2d 539, 541 (1996). Once the Commission decides to either adopt or not adopt the proposed amendment, the issue is finished. There is no right to appeal the Commission’s decision on whether to adopt a proposed amendment to a rule.

Attachments:

1. N.C. Gen. Stat. §150B-20
2. 15A N.C. Admin. Code 07J .0605
3. *North Carolina Chiropractic Ass’n v. North Carolina State Board of Education*, 122 N.C. App. 122, 123, 468 S.E.2d 539, 541 (1996).

§ 150B-20. Petitioning an agency to adopt a rule.


(a) Petition. - A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition. An agency receiving a rule-making petition shall, within three business days of receipt of the petition, send the proposed text of the requested rule change and the statement of the effect of the requested rule change to the Office of Administrative Hearings. The Office of Administrative Hearings shall, within three business days of receipt of the proposed text of the requested rule change and the statement of the effect of the requested rule change, distribute the information via its mailing list and publish the information on its Web site.

(b) Time. - An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. - If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) Review. - Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b). (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; c. 477, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 7.10(b); 1997-34, s. 2; 2003-229, s. 1; 2017-211, s. 1(a).)

 KeyCite Yellow Flag - Negative Treatment
Distinguished by ACT-UP Triangle v. Commission for Health Services
of the State of N.C., N.C., April 11, 1997

122 N.C.App. 122

Court of Appeals of North Carolina.

NORTH CAROLINA CHIROPRACTIC
ASSOCIATION, Petitioner,
v.
NORTH CAROLINA STATE BOARD
OF EDUCATION, Respondent.

No. COA95-422.

|
March 19, 1996.

Synopsis

Association of chiropractors sought review of order of the State Board of Education which declined to amend rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes. The Superior Court, Wake County, Robert L. Farmer, J., dismissed, and association appealed. The Court of Appeals, John C. Martin, J., held that Board's decision was "rulemaking" decision and was not subject to judicial review.


Affirmed.

West Headnotes (4)

[1] **Administrative Law and Procedure**

 Findings; reason or explanation


Administrative Law and Procedure

 Rules, regulations, and other policymaking

If agency denies rule-making petition, it must send the person who submitted the petition a written statement of reasons for denial, and statute then provides for judicial review of the denial. G.S. § 150B-20(c, d).

2 Cases that cite this headnote


[2] **Administrative Law and Procedure**

 Procedure for Adoption

If agency grants rule-making petition, it must inform the person who submitted the petition of its decision and must initiate rule-making proceedings.

1 Cases that cite this headnote


[3] **Administrative Law and Procedure**

 Rules, regulations, and other policymaking

If agency grants rule-making petition, but then does not adopt or amend the rule after following the required procedures, judicial review is not available. G.S. §§ 150B-21.1, 150B-21.2, 150B-43.

2 Cases that cite this headnote

[4] **Education**

 Appeals from decisions

Board of Education's decision not to amend rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes was rulemaking decision and was not subject to judicial review. G.S. §§ 150B-21.1, 150B-43; N.C. Admin. Code title 16, r. 6E.0202(a)(4).

1 Cases that cite this headnote

****540 *122** Appeal by petitioner from order and judgment entered 16 February 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 25 January 1996.

Attorneys and Law Firms

Allen & Pinnix, P.A. by M. Jackson Nichols, Raleigh, and Vance C. Kinlaw, Greensboro, for petitioner-appellant.

Attorney General Michael F. Easley by Special Deputy Attorney General Thomas J. Ziko, for respondent-appellee.

Opinion

*123 JOHN C. MARTIN, Judge.

The North Carolina Chiropractic Association (“NCCA”) appeals from the dismissal of its petition seeking judicial review of a decision of the North Carolina State Board of Education. The matter comes before us upon the following factual and procedural history: On 28 October 1992, the NCCA petitioned the State Board of Education, pursuant to G.S. § 150B–20(a), to amend Rule 16 N.C.A.C. 6E.0202(a)(4) to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes. At its meeting on 7 January 1993, the Board granted the petition pursuant to G.S. § 150B–20(b) and initiated public rule-making procedures.

On 18 March 1993, the Board held a public hearing and received comments on the proposed amendment. At its regular monthly Issues Session on 6 May 1993, the Board accepted the recommendation of the Department and Program Committee not to adopt the amendment, but “to leave the subject policy as it currently exists.” The Board subsequently sent the NCCA notice of its decision on 15 November 1993. In December 1993, the NCCA petitioned for judicial review of the Board's decision, excepting to the decision on the following grounds:

- a. The Board's denial was made upon unlawful procedure in that the Board failed to provide the NCCA with a written statement of the reasons for denying the NCCA's rule-making petition, as required by G.S. 150B–20(c);
- b. The Board's denial was unsupported by substantial evidence in view of the entire record; and
- c. The Board's denial was arbitrary and capricious.

The trial court denied and dismissed the petition, finding that the case was not subject to review under G.S. §§ 150B–20(d) or 150B–43, and that the court did not have subject matter jurisdiction over the petition.

[1] [2] [3] The dispositive issue is whether the trial court erred in dismissing the petition for lack of jurisdiction. We

conclude the trial court had no jurisdiction and affirm its order dismissing the petition.

G.S. § 150B–20(c) provides in relevant part:

If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons *124 for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings.

Thus, if a rule-making petition is denied, the agency must provide the petitioner with a written statement of the reasons for the denial. G.S. § 150B–20(d) then provides for judicial review of the denial.

[4] If, however, as in this case, the agency grants a rule-making petition, subsequent **541 procedures for considering and adopting the rule are governed by either G.S. § 150B–21.1 for temporary rules, or § 150B–21.2 for permanent rules. Notably, neither of these sections provides for judicial review if the agency does not adopt or amend the rule after following the required procedures. Nor is judicial review available in such a case under G.S. § 150B–43, which provides a right to judicial review for “[a]ny person who is aggrieved by the final decision in a contested case....” However, G.S. § 150B–2(2) expressly excludes “rulemaking” from its definition of a “contested case.” Thus, inasmuch as the Board of Education's decision not to amend the rule was a “rulemaking” decision, it is not subject to judicial review and the trial court properly dismissed the NCCA's petition for judicial review for lack of jurisdiction. Accordingly, the decision of the trial court is

Affirmed.

JOHNSON and MARK D. MARTIN, JJ., concur.

All Citations

122 N.C.App. 122, 468 S.E.2d 539, 108 Ed. Law Rep. 972

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