

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
 COUNTY OF WAKE SUPERIOR COURT DIVISION
 2021 AUG -9 PM 12: 37 20-CVS-013794

WAKE CO., C.S.C.

EPISCOPAL FARMWORKER)
 MINISTRY, et al.,)
)
 Petitioners,)
)
 v.)
)
 NORTH CAROLINA DEPARTMENT)
 OF LABOR,)
)
 Respondent.)

ORDER

THIS MATTER was heard via WebEx before the undersigned on June 10, 2021, on Petition for Judicial Review, pursuant to N.C. Gen. Stat. § 150B-43 *et seq.* by Episcopal Farmworker Ministry, the Hispanic Liaison of Chatham County, NC Raise Up/ Fight for \$15 and a Union, North Carolina State AFL-CIO, North Carolina State Conference of the NAACP, and Western North Carolina Workers' Center ("Petitioners"). Petitioners were represented at the hearing by Clermont Ripley of the North Carolina Justice Center and Julia Solórzano of the Southern Poverty Law Center. The North Carolina Department of Labor ("Respondent") was represented by Victoria Voight of the Attorney General's Office for the North Carolina Department of Justice.

The Court has considered the Petition, the submissions of the parties, and the arguments of counsel, has reviewed the whole record, and has also undertaken a *de novo* review of the agency decision to determine whether it was based upon unlawful procedure or errors of law. Based on that review the Court hereby FINDS and CONCLUDES that:

1. Petitioners submitted a Petition for Rulemaking and proposed rule to Respondent on October 12, 2020, asking Respondent to adopt their proposed rule pursuant to N.C. Gen. Stat. § 150B-21.1A or, in the alternative, initiate rule-making proceedings, as allowed by N.C. Gen. Stat. § 150B-20.

2. According to the Petitioners, their proposed rule is intended to establish workplace protections related to COVID-19.

3. On November 14, 2020, Respondent sent Petitioners a letter to notify them that “NCDOL will not adopt an emergency temporary standard regarding SARS-CoV-2, and is denying your Petition for Rulemaking to adopt a permanent rule to establish requirements for employers regarding SARS-CoV-2, the virus that causes COVID-19, pursuant to North Carolina General Statute § 150B-20.”
4. Respondent’s denial of the rulemaking petition constitutes final agency action, subject to judicial review. N.C. Gen. Stat. § 150B-20(d).
5. The Court finds Respondent’s rejection of Petitioners’ request to adopt the proposed rule as an emergency temporary rule was a valid exercise of Respondent’s discretionary authority.
6. With respect to Petitioners’ request that Respondent process the proposed rule as a permanent rule, 13 N. C. Admin. Code § 01B.0103(a) requires that where “the requirements of 13 NCAC 01B .0102 regarding the contents of the petition are not met, the petition shall not be accepted and shall be returned to the petitioner(s) with the deficiencies noted.”
7. Among the reasons listed in the decision to deny the petition were a list of purported deficiencies in the contents of the petition.
8. Respondent did not return the petition to the Petitioners to allow them an opportunity to correct the deficiencies and resubmit the petition prior to exercising its discretion to grant or deny the petition.
9. The Court finds that Respondent’s denial of the petition without providing Petitioners an opportunity to correct the deficiencies was made upon unlawful procedure.
10. Pursuant to N.C. Gen. Stat. § 150B-21.4, preparation of a fiscal note for a proposed rule is Respondent’s responsibility and cannot be delegated to Petitioners. Respondent’s decision to deny the petition on this basis was affected by error of law.
11. The Respondent’s inability to address the spread of COVID-19 in the general population or eradicate it in worksites does not bar the adoption of specific rules related to the spread of COVID-19 in workplaces pursuant to N.C. Gen. Stat. § 95-4(2) and § 95-126(b)(1)-(2) as appropriate. Respondent’s decision to deny the petition on this basis was affected by error of law.


12. Respondent's ability to issue citations for COVID-19 related workplace hazards under N.C. Gen. Stat. § 95-129(1), known as the General Duty Clause, is not a bar to adopting specific rules to address the spread of COVID-19 in the workplace as appropriate. Respondent's decision to deny the petition on this basis was affected by error of law.
13. Respondent correctly determined that portions of the proposed rule are outside of NCDOL's statutory authority. However, this does not render the entire Petition void. The Petition also proposes rules that are within the Respondent's power
14. The Court makes no finding as to the ultimate outcome of the review of the revised petition for rulemaking, if submitted, or the outcome of the rulemaking process in the event that the revised rule is accepted for processing as a permanent rule.
15. The Court declines to rule as to whether the Respondent's ultimate decision to refuse to adopt the proposed rules was correct in its substance. This ruling is limited to a finding that the Respondent's refusal to return the petition for rulemaking to Petitioners to correct the deficiencies noted in the review process and the use of the herein noted criteria in evaluating the petition for rulemaking was made upon unlawful procedure and was affected by errors of law.
16. Having reversed the Respondent's decision based on procedural and legal errors, this Court does not reach Petitioners' argument that the decision was unsupported by substantial evidence in the record and does not reach the argument that the Respondent's action was arbitrary and capricious.

Based on the foregoing findings and conclusions, the Court hereby ORDERS, ADJUDGES and DECREES, pursuant to N.C. Gen. Stat. § 150B-51, that Respondent's denial of the rulemaking petition was made upon unlawful procedure and affected by error of law and is therefore REVERSED.

- I. Respondent is hereby ORDERED to return the petition for rulemaking with any deficiencies noted within 30 days of the issuance of this Order.
- II. Upon receipt of a revised petition, Respondent shall evaluate the revised petition and make a determination to accept or reject the petition for processing in accordance with the requirements of N.C. Gen. Stat. § 150B-20, recognizing that:
 - a. preparation of the fiscal note is the responsibility of Respondent and cannot be delegated to Petitioners;

- b. Respondent's inability to address the spread of COVID-19 in the general population or eradicate it in worksites does not bar the adoption of specific rules related to the spread of COVID-19 in the workplace if otherwise appropriate; and
- c. Respondent's ability to use the General Duty Clause (N.C. Gen. Stat. § 95-129(1)) to address COVID-19 related hazards in worksites is not a bar to the adoption of specific rules to address the spread of COVID-19 in the workplace if otherwise appropriate.

So Ordered, this the 8th day of August, 2021.



Hon. G. Bryan Collins
Superior Court Judge