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NORTH CAROLINA COURT OF APPEALS  
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MEHERRIN INDIAN TRIBE OF NORTH )  
CAROLINA, a/k/a MEHERRIN INDIAN )  
TRIBE, )  
 )  
Petitioners-Appellee, )  
 )  
v. )  
 )  
NORTH CAROLINA STATE COMMISSION )  
OF INDIAN AFFAIRS, )  
 )  
Respondents-Appellants. )

FROM WAKE COUNTY  
09 CVS 23196

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BRIEF OF APPELLEE  
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CLERK COURT OF APPEALS  
OF NORTH CAROLINA

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NO. COA11-885

TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS  
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MEHERRIN INDIAN TRIBE OF NORTH	)	
CAROLINA, a/k/a MEHERRIN INDIAN	)	
TRIBE,	)	
	)	
Petitioners-Appellee,	)	<u>FROM WAKE COUNTY</u>
	)	09 CVS 23196
v.	)	
	)	
NORTH CAROLINA STATE COMMISSION	)	
OF INDIAN AFFAIRS,	)	
	)	
Respondents-Appellants.	)	

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BRIEF OF APPELLEE  
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QUESTIONS PRESENTED

1. Whether the North Carolina OAH had subject matter jurisdiction over Petitioner's Petition for Contested Case Hearing pursuant to N.C. G.S. § 150B-23.
2. Whether the Superior Court of Wake County had subject matter jurisdiction over Petitioner's Petition for Judicial Review pursuant to N.C. G.S. § 150B-45.
3. Whether the pendency in another superior court of a separate case that might involve related issues required the

Superior Court of Wake County to refuse to exercise its subject matter jurisdiction in this case.

4.<sup>1</sup> Whether the Commission failed to make a final decision within the time limit established by N.C. G.S. § 150B-44 and, therefore, as provided by that statute, the Commission "is considered to have adopted the administrative law judge's decision as the agency's final decision."

5.<sup>2</sup> Whether the Commission meeting was conducted in violation of the open meetings law, was presided over by the uncle of the attorney for the other candidate for the Meherrin seat on the Commission, and received and considered a secret document submitted by the attorney for the other candidate, and thus failed to make a final decision within the time limit established by N.C. G.S. § 150B-44 and, therefore, as provided by that statute, the Commission "is considered to have adopted the administrative law judge's decision as the agency's final decision."

6. Whether the trial court correctly adopted the OAH's conclusion that there were no genuine issues of material fact

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<sup>1</sup>See, N.C. R. App. P. 10(c).

<sup>2</sup>See, N.C. R. App. P. 10(c).



and entered summary judgment in favor of Petitioner on Petitioner's Petition for Judicial Review.

**STATEMENT OF THE CASE**

On 5 September 2008 the Commission voted to seat Douglas Patterson rather than Chassidy Hall as the representative of the Meherrin Indian Tribe on the Commission. On 8 September 2008, the Commission withdrew that decision on the ground that its Chairman participated in the proceeding despite the fact that he is the uncle of the attorney representing Patterson, and declared the seat to be vacant, still refusing to seat Hall. (R 282-4)

On 8 September 2008 Petitioner filed a Petition for Contested Case Hearing in the Office of Administrative Hearings ("OAH") seeking an order requiring the Commission to seat Hall. (R 124-7) On 15 June 2009, the OAH issued a Decision Granting Summary Judgment for Petitioner. (Supp R 1-3)<sup>3</sup>

On 18 June 2009, the OAH delivered the Official Record to the Commission by serving it on the General Counsel for the Department of Administration, who is the process agent for the Commission, and who forwarded it to the Commission. (Supp R 19, 27, 55-8, 62, 65, 74) The Commission held its next regularly scheduled meeting on 11 September 2009 but took no action on the

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<sup>3</sup>Rule 9(b)(5) Supplement to the Printed Record on Appeal.

matter. (Supp R 20, 38-44) On 17 November 2009, more than 60 days after that first regularly scheduled meeting after the OAH delivered the Official Record to the Commission and more than 120 days since the close of the contested case, with the Commission having taken no action on the OAH Decision, Petitioner filed its Complaint and Petition for Judicial Review in the Wake County Superior Court. (R 5-10)

On 17 November 2009, the Commission filed its Answer. (R 11-13) On 22 December 2009, Petitioner filed a Motion for Judgment on the Pleadings and a Motion for Summary Judgment. (R 14-17)

On 2 February 2010, the Commission considered the OAH Decision in a closed session (Supp R 79-128) and denied Petitioner's Motion for Summary Judgment, finding that there are genuine issues of material fact. (R 31-15) On 17 February 2010, Petitioner filed a Second Petition for Judicial Review, and on 1 March 2010 a First Amended Second Petition for Judicial Review. (R 71-6, 87-102)

On 8 June 2010, the Court issued orders denying Petitioner's Motions for Summary Judgment. (332-8) On 9 June 2010, the Court issued its Order on Petition for Judicial Review, adopting the OAH's decision allowing summary judgment

for Petitioner and thereupon reversing the Commission's decision. (R 339-45)

The Commission filed a Notice of Appeal and on 6 August 2010 the Commission filed a Motion for Stay of Execution of Judgment in the Superior Court. (Supp R 5-10) The Superior Court denied the Motion for Stay. (Supp R 11-12) The Commission filed a Motion to Stay or for Writ of Supersedeas in this Court. This Court denied both motions.

Thereafter, the Commission seated Chassidy Hall pursuant to the Order of the Superior Court and the Commission then dismissed its appeal on 15 February 2011. (Supp R 16-17) Thereafter Petitioner filed a Petition for Writ of Certiorari. On 23 May 2011, this Court allowed the Petition.

#### **I. STATEMENT OF THE FACTS**

At a regularly scheduled meeting of the General Body of Petitioner Meherrin Indian Tribe on 10 November 2010, the General Body unanimously scheduled the next meeting of the General Body for January 12, 2008 at the Meherrin Native American Church in Winton, N.C. (R 226) At the January 12, 2008 meeting of the General Body, the General Body unanimously voted to remove Douglas Patterson as the Meherrin representative on the Commission pursuant to Article IX, Section 8 of the Meherrin

Constitution and Bylaws, and elected Chassidy Hall as the new Meherrin representative. (R 229)

Doug Patterson never filed a grievance with the Meherrin Grievance Committee as provided in Article IX, Section 8 and Article XII, Section 3 of the Meherrin Constitution and Bylaws. Accordingly, the action of the General Body removing him as the Meherrin representative on the Commission became final.

The Meherrin Indian Tribe notified the Commission of those actions and provided the Commission the Meherrin Constitution and Bylaws and the minutes of those meetings. (R 216-41, 280-81) By letter dated 22 July 2008, on the letterhead of "Meherrin Indian Tribe dba Meherrin Choanoke Nation," Mr. Ernest Poole, advised the Commission "that our monthly Council meeting took place on July 12, 2008 in Winton, North Carolina. . . . Let this official notice indicate the the Meherrin Indian Tribe, Inc. (119A) has reappointed Mr. Douglas Patterson as our representative with the North Carolina Commission of Indian Affairs." (R 277) (At the January 12, 2008 General Body meeting, the General Body also unanimously removed Poole as Chair of the Tribal Council pursuant to Article IX, Section 8 of the Meherrin Constitution and Bylaws. Poole also never filed a Grievance with the Meherrin Grievance Committee so his removal became final.) (R 229)

The Commission initially "determined that Mr. Patterson will remain on the commission until June 30, 2008," the conclusion of his current term. (R 218) Thereafter, the Commission reconsidered its action because of "a perceived conflict of interest since Mr. Ed Brooks, attorney, who represents one of the groups involved in a court case associate with the Meherrin Tribe is {Chair Paul Brooks'} nephew. Paul Brooks then recused himself and the Commission voted to rescind its earlier action and decided that Mr. Patterson's term had expired and that the seat should remain vacate until a resolution of the dispute. (R 282-4)

#### **ARGUMENT**

##### **I**

#### **THE NORTH CAROLINA OAH HAD SUBJECT MATTER JURISDICTION OF PETITIONER'S PETITION FOR CONTESTED CASE HEARING PURSUANT TO N.C. G.S. § 150B-23.**

"According to our legislature, the purpose of the APA {Administration Procedure Act} is to 'establish [] a uniform system of administrative rule making and adjudicatory procedures for agencies.' N.C. G.S. § 150B-1(a) (2009)." *Conner v. North Carolina Council of State*, -- N.C. --, -- S.E.2d --, 2011 WL 4636587, 7 (2011). N.C. G.S. § 150B-1(e) provides: "The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter."

N.C. G.S. § 150B-2(1a) defines "agency" as follows: "'Agency' means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency."

N.C. G.S. § 150B-1 exempts certain identified agencies from the Administrative Procedure Act in its entirety (N.C. G.S. § 150B-1(c), from the Act's rule-making provisions (N.C. G.S. § 150B-1(d), and from the Act's "contested case provisions." N.C. G.S. § 150B-1(e). There is no exemption for the North Carolina Department of Administration or the North Carolina Commission of Indian Affairs. N.C. G.S. § 150B-1(c, d, and e).

N.C. G.S. § 150B-23(a) provides: "Any person aggrieved may commence a contested case hereunder." An aggrieved party commences a contested case by filing a petition for contested case hearing that "shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency: (1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; or

(5) Failed to act as required by law or rule."

N.C. G.S. § 143B-366 provides as follows: There is hereby recreated and reestablished a department to be known as the 'Department of Administration,' with the organization, powers, and duties defined in the Executive Organization Act of 1973."

N.C. G.S. § 143B-404 provides as follows: "There is hereby created and established the North Carolina State Commission of Indian Affairs. The Commission shall be administered under the direction and supervision of the Department of Administration pursuant to G.S. 143A-6(b) and (c)."

Both the Department of Administration and Respondent North Carolina State Commission of Indian Affairs are "agencies" as defined in N.C. G.S. § 150B-2(1a).

Petitioner timely filed its Petition for Contested Case Hearing in the OAH against Respondent North Carolina State Commission of Indian Affairs pursuant to N.C. G.S. § 150B-23(a). (R 124-6, 128-33) Accordingly, the OAH had subject matter jurisdiction over this case.

The Commission's Brief does not even discuss these statutes that confer subject matter jurisdiction on the OAH in this case.

## II

**THE WAKE COUNTY SUPERIOR COURT HAD SUBJECT MATTER  
JURISDICTION OF PETITIONER'S PETITION FOR JUDICIAL  
REVIEW PURSUANT TO N.C. G.S. §§ 150B-43, 45.**

N.C. G.S. § 150B-43 provides as follows:

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

N.C. G.S. § 150B-45 provides as follows:

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision. The petition must be filed as follows:

- (1) Contested tax cases. . . .
- (2) Other final decisions. -- A petition for review of any other final decision under this Article must be filed in the Superior Court of Wake County or in the superior court of the county where the person resides.

Petitioner was aggrieved by the final decision of the Commission and, therefore, having exhausted its administrative remedies, was entitled to judicial review in the Wake County Superior Court. Accordingly, pursuant to these statutes the Wake County Superior Court had subject matter jurisdiction over Petitioner's Petition for judicial review.

## III.

**N.C. GEN. STAT. § 7A-247 DID NOT DEPRIVE THE  
OAH OR THE WAKE COUNTY SUPERIOR COURT OF THEIR  
SUBJECT MATTER JURISDICTION IN THIS CASE.**



The Commission argues, at page 10 of its Brief: "N.C. Gen. Stat. 7A-247 gives sole jurisdiction to try the title to a public office, a suit in the nature of quo warranto, to the Superior Courts:" The Brief then quotes that statute as follows: "The superior court division is the proper division, without regard to the amount in controversy, for the trial of all civil actions seeking as principal relief the remedy of quo warranto, according to the practice and procedure provided for that remedy." The Commission then argues: "In the face of such a statute, it cannot be contemplated that subject matter jurisdiction in such matters resides in an administrative tribunal, which is not a court, but is rather an organ existing within the executive branch and organized under a statute that expressly only "confers procedural rights.'" N.C. Gen. Stat. § 150B-1(b).

First: The Commission's Brief does not explain that conclusion. The legislature has conferred original jurisdiction on the OAH in many matters that would otherwise be in the original jurisdiction of the superior court. The OAH decision is subject to review by the agency and then by the superior court. N.C. G.S. §§ 150B-42, 43, 45. Moreover, the Commission's Brief does not explain its comment that the OAH is created under a statute that "only 'confers procedural rights.'" The

procedural rights include the right to file a petition for a contested case hearing and obtain a hearing on that petition, and that is what is at issue on the basis of the Commission's argument.

Secondly: N.C. G.S. § 1-514 provides: "The writs of *sciere facias* and *quo warranto*, and proceedings by information in the nature of *quo warranto*, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this Article. To the extent that rules of procedure are not provided for in this article, the Rules of Civil Procedure shall apply." The Commission's Brief does not even cite this statute let alone discuss its effect on the Commission's argument.

Thus, the decisions relied on by the Commission's Brief on this issue, at pages 11-12, date back to 1882, 1931 and 1952, before the enactment of N.C. G.S. § 1-514. *Eliason v. Coleman*, 86 N.C. 235 (1882); *Cooper v. Crisco*, 201 N.C. 739, 161 S.E.310 (1931); *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E.2d 292 (1951).

Third: N.C. G.S. § 7A-247 is part of Article 20 of Chapter 7A, which is entitled, "Original Civil Jurisdiction of the Trial Divisions." Thus, § 7A-247 provides only for the original jurisdiction of the trial divisions, and not for cases that originate in other tribunals, such as the OAH. For such

proceedings, the legislature has provided other statutes that specify the court in which judicial review may be had. The statute relevant to this case is N.C. G.S. § 150B-45(a)(2), which provides: "A petition for review of any other final decision under this Article must be filed in the Superior Court of Wake County or in the superior court of the county where the person resides." Thus, either way, the division with jurisdiction over the case is the superior court rather than the district court. That is precisely how the case got to the superior court, which issued the ruling that is under review in this case. Cf., *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) ("In this State, the only exception to the rule that 'nothing can be a conviction but the verdict of a jury' {*State v. Alexander*, 76 N.C. 231, 233} is the constitutional authority granted the General Assembly to provide for the initial trial of misdemeanors in inferior courts without a jury, with trial de novo by a jury upon appeal. N.C.Const., art. I, s 24 (1971)."); see also, *Ludwig v. Mass.*, 427 U.S. 618, 625-6, 96 S.Ct. 2781, 2785-6 (1976); *State v. Reaves*, 142 N.C.App, 629, 544 S.E.2d 253 (2001).

Fourth: The Commission's Brief argues, at page 11, that the requirement that the action be brought by the Attorney

General's office<sup>4</sup> applies to "public offices," which it defines, relying on the 1881 decision in *Eliason v. Coleman*, as follows: "The source of the office should be from the crown or sovereign authority, either by charter or legislative enactment; its tenure should be fixed and permanent; and its duties should be of a public nature." The Brief argues that the Meherrin seat on the Commission qualifies as a "public office" under these

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<sup>4</sup>The statute provides only that "An action may be brought by the Attorney General in the name of the State . . ." N.C. G.S. § 1-515. There is authority that the action may be brought by a private person without the necessity of the consent of the Attorney General. *People ex rel. Hargrove v. Hilliard*, 72 N.C. 169, 1875 WL 2632 (1875).

In this case, there is clearly a legislative jurisdictional basis for Petitioner's action, as discussed in Arguments I and II. Respondent's Brief never addressed this jurisdictional basis.

Note: Out of an abundance of caution, Petitioner asked the Attorney General's office to bring an action to dispute the former Tribal leadership, specifically including the Meherrin representative to the Commission continuing to hold that seat. The Attorney General's office declined that request, giving two grounds, one that the dispute does not involve a "public office" and secondly that the Commission has declined to become involved. The Commission's Brief, at page 13, noted this correspondence but erroneously stated that the request did not include the Tribe's representative to the Commission and did not provide the correspondence to the Court. Petitioner has included that correspondence as provided to its counsel by the Attorney General's office in its Supplement to the Record. Pursuant to Rule 201 (d) of the N.C. Rules of Evidence, Petitioner requests that the Court take judicial notice of this correspondence.

The Commission's Brief, at page 11, also argues that Petitioner failed to tender sufficient security. That argument is ingenuous in view of the refusal of the Attorney General to grant leave to Petitioner to bring the action. Moreover, that is not a jurisdictional issue that can be raised for the first time on appeal.

standards. However, the provision applies only "whenever the controversy is as to the validity of an election or the right to hold a public office." *Saunders v. Gatling*, 81 N.C. 298, 1879 WL 23641 (1879). That does not describe a seat on the Commission. N.C. G.S. § 143B-404 provides that the seats on the Commission are selected by designated appointing officers. 21 seats are appointed by the state-recognized Indian tribes including the Meherrin Indian Tribe, which has one seat. The statute specifies: "These Indian members shall be selected by tribal or community consent from the Indian groups that are recognized by the State of North Carolina . . . ." Thus, each Tribe selects its representative(s). The Indian representatives are not elected and are not selected by the "public." The Commission plays no role in the selection of the Tribal representatives who sit on the Commission. They represent their individual tribes on the Commission. By contrast, the cases relied on by the Commission involve the office of Sheriff (*State ex rel. Freeman v. Ponder; Cooper v. Crisco*). Other decisions involve elected offices such as mayor, *State ex rel. Wilson v. Pearson*, 242 N.C. 601, 89 S.E.2d 150 (1955) or judge . or offices appointed by an elected body or officer, such as a judge appointed by the elected Governor, *People ex rel. Hargrove v. Hilliard*, 72 N.C.

169, 1875 WL 2632 (1875), or chief of police appointed by the elected Town Council.

#### IV.

**TEH HERTFORD COUNTY SUPERIOR COURT CASE DID NOT  
DEPRIVE THE OAH OR THE WAKE COUNTY SUPERIOR COURT  
OF THEIR SUBJECT MATTER JURISDICTION IN THIS CASE.**

So the Commission's Brief switches gears and argues, at pages 14-16, that if the superior court did properly have jurisdiction, it should be the Superior Court of Hertford County, rather than the Superior Court of Wake County -- even though § 150B-45(a)(2) specifically provides for jurisdiction not just in the Superior Court but in the Superior Court of Wake County -- because there is a previously filed case in Hertford County Superior Court raising "the dispositive issue of the disputed leadership of the Meherrin Indian Tribe".<sup>5</sup>

First, the Commission's Brief blithely states that "the designation of representative to the NCCIA is necessarily contingent on the dispute concerning the governance of the

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<sup>5</sup>The Commission's Brief argues, at pages 14-15, that "The Superior Court of Hertford County attained subject matter jurisdiction over the dispositive issue of the disputed leadership of the Meherrin Indian Tribe . . . ." The Brief then argues that the two cases create an "unseemly conflict". The Commission does not explain why it accepts the jurisdiction of the Hertford County Superior Court over the dispute regarding the proper Meherrin Indian Tribe representative on the Commission but not that of the Wake County Superior Court. The Commission's Brief seems to take contradictory positions. Cf., *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (judicial estoppel).

Meherrin Tribe being resolved" in the Hertford County case. The Commission's Brief, however, does not disclose anything about the issues in the Hertford County Superior Court case to support that statement. The Commission's Record on Appeal has provided no documents from that Hertford County case from which the Court could determine the reliability of that statement or any information about the status of the Hertford County case.<sup>6</sup> But if the Commission's Brief is correct, at page 15, that "by adopting the administrative law judge's decision, the Wake County Superior Court effectively supplanted the jurisdiction of the Hertford County Superior Court in determining which of the competing factions possessed the authority to name the representative to the NCCIA," the Commission's Brief still has not explained any reason why that is a judicial problem. The Commission's Brief does correctly point out that one superior court judge may not overrule another, but makes no showing that anything of the kind has happened or is at risk. The

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<sup>6</sup> The Commission's Brief, at pages 5, 7 and 8, does nothing more than cite the decision of this Court in *Meherrin Indian Tribe v. Lewis*, 197 N.C.App. 38, 677 S.E.2d 203 (2009), and reference the Record in that case. That case, however, involved only an interlocutory appeal from the denial of a pre-answer motion to dismiss. Thus, the record in this case contains no information beyond the denial of the motion to dismiss. It does not, for example, contain any information about whether there have been any additional or amended pleadings or amendments to the pleadings. Thus, it discloses nothing about the issues pending in that case or the status of the case.

Commission's Brief speculates, at page 16, that "The Hertford County Superior Court may rule against the plaintiffs in the case before it, which would be in direct opposition to the decision of the Wake County Superior Court to seat the plaintiff's representative on the NCCIA." But the Commission has given this Court no basis for concern that such might happen or any documentation of the issues in the Hertford County case to support that statement. Indeed, the decisions of the OAH and the Superior Court of Wake County would suggest that it is more likely that the Hertford County Superior Court would rule in favor of the plaintiffs in that case, which would assuage all of the concerns expressed by the Commission's Brief. What is clear is that the Commission's Brief does not suggest that there is anything before the Court in which one superior court judge has overruled another.

In any event, the Commission's Brief has made no showing that its speculation should present any judicial concern justifying the the Court in finding that the Superior Court did not have jurisdiction over this case. The Commission's Brief has not shown any reason why this Court's resolution of the present appeal on its merits, the principles of res judicata or collateral estoppel, see gen., *Whiteacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), or the



opportunity to appeal to this Court any conflicting decision that might develop would not be an adequate resolution of any justified concerns if there are any. Indeed, the Commission's argument shows that this Court should find not that the Superior Court did not have jurisdiction, but rather should find that the Wake County Superior Court did have jurisdiction and proceed to review its decision on the merits.

The Commission's Brief concedes that the Commission did not raise the subject matter jurisdiction issue in the OAH, before the Commission, or in the Wake County Superior Court. The Commission did not even raise the issue in its Motion for Stay of Execution of Judgment. (Supp R 6-10) The Commission's Brief does not mention that the Commission filed a motion in the Hertford County Superior Court case to stay the proceedings in the OAH. That motion did not mention any subject matter jurisdiction issue. The Hertford County Superior Court denied the Commission's stay motions. (Supp R 4-5)<sup>7</sup> While the subject matter jurisdiction issue cannot be waived and can be raised for the first time on appeal, there is no authority that it can be raised for the first time on a petition for writ of certiorari by a party who has voluntarily dismissed its appeal. The need

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<sup>7</sup>Pursuant to Rule 201(d) of the N.C. Rules of Evidence, Petitioner requests that the Court take judicial notice of those orders.

for finality may come into play at some point. The Court need not decide that issue, however, as it is clear that the OAH and the Superior Court had subject matter jurisdiction over this proceeding pursuant to N.C. G.S. §§ 150B-1 and 45(a)(2). The Commission's Brief does not dispute that position in any way.

V.

**BECAUSE THE COMMISSION DID NOT MAKE A FINAL DECISION WITHIN THE TIME LIMIT ESTABLISHED BY N.C. G.S. § 150B-44, AS PROVIDED BY THAT STATUTE, THE COMMISSION "IS CONSIDERED TO HAVE ADOPTED THE {OAH'S} DECISION AS THE AGENCY'S FINAL DECISION."**

N.C. G.S. § 150B-44 provides as follows, in relevant part:

An agency that is subject to Article 3 of this Chapter and is a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision.

Rule 4(j)(4) of the N.C. Rules of Civil Procedure provides that the method for service of process on an agency of the State is by personal delivery "to the process agent appointed by the agency . . . "

Pursuant to N.C. G.S. § 143B-404, the Commission is "administered under the direction and supervision of the Department of Administration." The web site of the Department of Administration identified the Commission as part of the

Department of Administration and identifies W. Kevin McLaughlin, Jr. as the Chief Operating Officer and General Counsel of the Department of Administration and Sheila Green as the Administrative Assistant. McLaughlin was also the process agent for the Commission as well as the Department of Administration.

On 18 June 2009 the OAH delivered the Official Record to the Commission by delivering it to Sheila Green, Administrative Assistant to the General Counsel to the Department of Administration, who is the process agent for the Commission. Green signed a receipt for the delivery. (Supp R 19, 27, 29-30, 58, 61-5, 74) On 14 July 2009, Gretchen Aycock, Assistant General Counsel to the Department of Administration, sent a Memorandum to the Executive Director of the Commission in which she wrote: "Attached please find Judge Morrison's decision regarding the Meherrin Indian Tribe's claim against the Commission. Included in this transmittal is the official record of the trial. The Commission's final agency decision is due to the plaintiffs by August 15, 2009." (Supp R 58)

The Commission held its next regularly scheduled meeting on 11 September 2009. (Supp R 20, 38-44) Petitioner's counsel sent several email messages to the Commission's counsel encouraging the Commission to proceed with its review of the OAH decision. (Supp R 19-22, 45-9) Petitioner's counsel advised the

Commission's counsel by telephone and by email that the OAH had delivered the Official Record to the Commission on 18 June 2009. (Supp R 20-21, 47) The Commission held its next regularly scheduled meeting on 4 December 2009 and took no action on the OAH decision. (Supp R 20, 38-44) More than 60 days passed after the first regularly scheduled meeting after the Commission received the Official Record from the OAH, and the Commission took no action on the OAH decision.

Accordingly, pursuant to the express language of N.C. G.S. § 150B-44, "the agency is considered to have adopted the administrative law judge's decision as the agency's final decision." *Walton v. N.C. State Treasurer*, 176 N.C.App. 273, 625 S.E.2d 883 (2006); *Occaneechi Band of Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C.App. 649, 551 S.E.2d 535 (2001) (Involving the same agency as in this case).

## VI.

**BECAUSE THE COMMISSION MEETING WAS CONDUCTED IN VIOLATION OF THE OPEN MEETINGS LAW, WAS PRESIDED OVER BY THE UNCLE OF THE ATTORNEY FOR THE OTHER CANDIDATE, AND CONSIDERED A SECRET DOCUMENT FROM THAT ATTORNEY, THE COMMISSION FAILED TO MAKE A FINAL DECISION WITHIN THE TIME LIMIT ESTABLISHED BY N.C. G.S. § 150B-44 AND, THEREFORE, "IS CONSIDERED TO HAVE ADOPTED THE {OAH'S} DECISION AS THE AGENCY'S FINAL DECISION."**

N.C. G.S. § 143-318.9 provides as follows:

Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy

of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.

N.C. G.S. § 143-318.10 provides, in relevant part:

(a) Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15, and 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any elected or appointed . . . commission, . . . that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.

N.C. G.S. § 143-318.11(c) provides:

A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

*See, Knight v. Higgs*, 189 N.C.App. 696, 702, 659 S.E.2d 742, 747 (2008); *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C.App. 651, 654, 657, 566 S.E.2d 701, 704, 705 (2001).

Nevertheless, the Commission held its hearing in closed session. (Supp R 79-128) After inquiry by Petitioner's counsel

only, Commission Counsel announced that the legal basis for closing the hearing was N.C. G.S. § 143-318.11(a)(3). (Supp R 86) That statute provides:

To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

"The burden is on the government body to demonstrate that the attorney-client exception applies.'" *Multimedia Pub. of North Carolina, Inc. v. Henderson County*, 137 N.C.App. 567, 575, 525 S.E.2d 792 (2000). The Commission cannot meet that burden.

First, N.C. G.S. § 143-318.10(d) expressly prohibits "hearings" from being held in closed session and prohibits "General policy matters" from being discussed in closed session "merely because an attorney employed or retained by the public body is a participant."

Secondly, the Commission did not announce before going into closed session that receiving privileged communications from its attorney was the purpose of the closed session. "The statement

of the purpose for the closed session must precede, rather than follow, a motion and vote to go into closed session." *Knight v. Higgs*, 189 N.C.App. 696, 659 S.E.2d 742, 748 (2008).

Third, the Commission conducted the entire hearing in closed session, including deliberations and votes, not just any advice from an attorney. See, *Knight v. Higgs*, 189 N.C.App. 696, 704, 659 S.E.2d 742, 748 (2008); *Multimedia Pub. of North Carolina, Inc. v. Henderson County*, 137 N.C.App. 567, 575, 525 S.E.2d 791-2 (2000); *H.B.S. Contractors, Inc. v. Cumberland County Board of Ed.*, 122 N.C.App. 49, 53-4, 468 S.E.2d 517, 520-1 (1996); *Scott v. Scott*, 106 N.C.App. 606, 612, 417 S.E.2d 818, 822 (1992).

Fourth, the Commission Counsel, as a representative of the Commission, a party in the proceeding before this Court in this case and before the OAH, was not permitted to discuss any issue of law or fact with the Commission *ex parte*, N.C. G.S. § 150B-35, and was not permitted to discuss any issue of procedure with the Commission in a closed hearing. "(M)eeting with the attorney to discuss procedure does not fall under any of the exceptions set forth in subparagraph (a)." *Knight v. Higgs*, 189 N.C.App. 696, 703, 659 S.E.2d 742, 748 (2008). Petitioner's counsel was not allowed to be present during the closed session. The violation was aggravated because the Commission received and

accepted a position statement from the attorney representing the other candidate for the Commission seat, even though the position statement was never served on or provided to Petitioner's counsel. The violation was further aggravated by the fact that the Commission permitted the attorney's uncle to preside over the secret closed meeting over the timely objection of Petitioner by affidavit, and even though the attorney's uncle had been disqualified in an earlier meeting to make a decision about the seat. The Commission refused to permit Petitioner's counsel even to make a statement to the Commission, but permitted the attorney for the other candidate to submit a position statement that was not disclosed to Petitioner and permitted his uncle not only to attend it but to preside over it as Chair. (Supp R 79-88, R 282-4)

The refusal of Commission counsel to disclose in the open session the basis for the Commission's decision, and specifically refused to disclose the material fact or facts that the Commission found to be in dispute, violates due process. That is especially troublesome where the Commission counsel also represents a party in the OAH and the superior court, where the same Commission counsel will prepare the written decision, and where the written decision will be issued without the approval of the Commission at a hearing, so that it is impossible to know



whether the Commission considered let alone approved the terms of the written decision, specifically the material fact or facts that the decision claims are in dispute.

#### VII.

**THE TRIAL COURT CORRECTLY ADOPTED THE OAH CONCLUSION THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND ENTERED SUMMARY JUDGMENT FOR PETITIONER ON THE PETITION FOR JUDICIAL REVIEW.**

The agency decision listed 8 "genuine issues of material fact" for not accepting the OAH's decision granting summary judgment to Petitioner. The Commission's Brief, at page 17, argues that only three of those issues had "substantial ambiguities" so that they were genuine issues of material fact, as follows:

(A) "The ambiguity surrounding tribal membership presents a genuine issue of material fact."

The relevant votes for this proceeding are two:

The first took place at the November 10, 2007 General Body meeting Petitioner provided the minutes of that meeting to the Commission and they are in the record at R 225-7. There is no dispute about the genuineness of those minutes. The minutes show that "The meeting was called to order by Chief Thomas Lewis." The minutes show that there was no challenge made to the right of any member to be present or to vote at that meeting. The minutes state: "A motion was made by Abby Reid to have the

January 12, 2008 General Body meeting at the Meherrin Native American Church in Winton. The motion was second (*sic*) by Kelly Brown and it was unanimous vote and the motion was carried."

Since this vote was unanimous, it is hard to see that there is any ambiguity about tribal membership that would be relevant to this action. The Commission Brief argues that Petitioner has the burden of proving the membership of each person who voted. The Commission Brief cites no authority for that proposition. The Commission does not show any way in which it would be relevant whether some members who voted were not entitled to do so. Even if that were true and those votes were not counted, the vote would still be unanimous.

Moreover, the Meherrin Constitution and Bylaws, the Tribal governing document, has two provisions that may be relevant here: Article III, Section 1 establishes the qualifications for membership in the Meherrin Indian Tribe. (R 145-6) The Commission makes no showing that any person who voted at the November 10, 2007 General Body meeting did not meet those qualifications. Article IX, Section 8 provides a procedure for removal of any member and provides the grounds for such removal. (R 157) The Commission makes no showing that any person who voted at the November 10, 2007 General Body meeting had ever been removed from the Tribe or even that there were grounds for

removing any such person from the Tribe, as provided in Article IX, Section 8.

Most importantly, the Commission presented no evidence and the Commission Brief presents no information identifying any single person who voted at the meeting who was not eligible to do so. The Commission Brief argues, at page 17: "Conclusory allegations of the vote's validity and the voter's membership will not suffice." The Brief cites no authority for that proposition. On the contrary, "As a general rule the minutes of a corporation are the best evidence of its acts, resolutions and proceedings . . . ." *Respass v. Rex Spinning Co.*, 191 N.C. 809, 813, 133 S.E. 391, 394 (1926). "The general rule is that the recorded minutes of a corporation are presumed to cover the entire subject-matter or transaction and constitute the best evidence." *Scotton Motor Co. v. Scotton*, 190 N.C. 194, 129 S.E. 198, 199 (1925); see also, *Green River Mfg. Co. v. Bell*, 193 N.C. 367, 137 S.E. 132, 135 (1927). In any event, there is no evidence challenging or contradicting the minutes.

**(B)** "Ambiguity surrounding Chief Thomas Lewis' removal present a genuine issue of material fact."

Of course, the November 10, 2007 General Body vote removing former Chief Lewis is not at issue in this case. Only the January 12, 2008 General Body vote removing Douglas Patterson

and appointing Chassidy Hall as the Meherrin representative on the Commission (R 229) is at issue. The Commission Brief argues that the removal is "material because it relates to Thomas Lewis' authority to change the location of the January 12, 2007 (*sic*) meeting and his authority to call a special meeting . . . ." However, first, there is no evidence that Thomas Lewis did take any action to change the location of the meeting. There is evidence that one Janet Chavis sent an email message to 25 persons, including Thomas Lewis, advising that "the January meeting will be held at the Elks Shrine building in Winton, NC at 2 PM on January 12." (R 267) The meeting at the Elks Club had an armed guard posted at the entrance to keep out all persons other than those few who had been specifically invited. Of course, that message was contrary to the unanimous action of the General Body at the November 10, 2007 meeting. The meeting held at the Meherrin Church pursuant to the unanimous November 10, 2007 action of the General Body was attended by more than 150 members and was noticed and open to all members of the Tribe. (R 260-261)

Moreover, even if Thomas Lewis were the Chief and did try to change the location of the meeting, the uncontradicted evidence is that "Pursuant to the 1996 Meherrin tribal Constitution and Bylaws, as amended, a Chief has no authority to

make any change in the schedule of a meeting of the General Body as set by the General Body itself." (R 260) The Commission argues, at page 18, that the Chief has authority "to call a special meeting". If Thomas Lewis called the meeting at the Elks Club pursuant to that authority, that would be a special meeting, and the General Body meeting on January 12, 2008, at which the General Body voted unanimously to remove Douglas Patterson and appoint Chassidy Hall as the Meherrin representative to the Commission, would still be a valid meeting and valid action taken by the General Body. The Commission Brief suggests, at page 18, that such "may not" be the case, but gives no explanation for that statement.

(C) "Ambiguity surrounding the validity of the January 12, 2007 (*sic*) meetings presents a genuine issue of material fact."

The Commission Brief argues that there is a genuine issue of material fact about whether the Chief can change the location of a General Body meeting as fixed by the General Body itself. But the Brief suggests no reason for that argument. Essentially, the Commission Brief is arguing that a faction of the Tribe can hold a secret meeting limited to its group and thereby somehow nullify the actions taken at a General Body meeting at another location unanimously fixed by the General Body and attended by the overwhelming majority of the General Body. The Commission

Brief suggests no authority for such a proposition and there is none. The Commission Brief gives no explanation of any legitimate reason for any change in the location of the meeting

In addition, the following facts support the summary judgment decision:

(A) Article XIV, Section 1, of the Meherrin Constitution and Bylaws provides: "The General Body shall appoint the required number of representatives to the Commission of Indian Affairs." (R 160) The General Body, at its January 12, 2008 meeting at the Meherrin Church, unanimously appointed Chassidy Hall as the Meherrin representative to the Commission. (R 229) The General Body met pursuant to the unanimous action of the General Body at the General Body meeting on November 10, 2007 presided over by former Chief Lewis. Petitioner properly advised the Commission of this official action of the Tribe. (R 223-34)

(B) The Commission relies on evidence that a faction of the Tribe held a secret meeting at the same time as the General Body was meeting at the Meherrin Church pursuant to the unanimous action of the General Body at its November 10, 2007 meeting but in a different location. The Commission does not explain any way in which that meeting negates the action of the General Body at its meeting. Moreover, that group sent the Commission a letter over the signature of Mr. Ernest Poole, identified as

"Council Chairman" and on the letterhead of "Meherrin Indian Tribe dba Meherrin - Choanoke Nation". The letter advised that "our monthly Council meeting took place on July 12, 2008 in Winton, North Carolina. Our Chief Mr. Thomas Lewis as well as a quorum of our council members was present. . . . Let this official notice indicate that the Meherrin Indian Tribe, Inc. (119A) has reappointed Mr. Douglas Patterson as our representative to the North Carolina Commission of Indian Affairs." That notice had no validity for several reasons in addition to those discussed above:

First, the Meherrin Consitution specifically provides that the General Body, not the Tribal Council, appoints the representative to the Commission. (R 160) The letter purports to state the Council appointed Patterson, but the Council has no such authority, only the General Body does. Indeed, the letter states that the appointment was made by only a small faction of six persons. (R 279) By contrast, the General Body meeting that unanimously appointed Chassidy Hall was attended by over 150 members. (R 261)

Secondly, the letter purported to speak on behalf of the "Meherrin Indian Tribe dba Meherrin - Choanoke Nation" and/or the "Meherrin Indian Tribe, Inc. (119A)." N.C. G.S. § 71A-7.1 recognizes only the "Meherrin Tribe of North Carolina" and does

not recognize any tribe by the names used in the letter. Moreover, N.C. G.S. § 143B-407 then gives a seat on the Commission to the state recognized tribe of the "Meherrin of Hertford County," not to the "Meherrin - Choanoke" or the "Meherrin Indian Tribe, Inc. (119A).the " The faction that met at the Elks Club used those names to distinguish or separate themselves from the Meherrin Tribe of North Carolina itself, but only the Meherrin Indian Tribe itself had the authority to appoint a representative to the Commission.

Hence, the Commission had no basis for refusing to seat Chassidy Hall, the appointee of the Meherrin General Body, on the basis of that letter. Yet that letter is the only information that the Commission relied on to refuse to seat Chassidy Hall.

Third, Article IX, Section 8, and Article XII, Section 3 of the Meherrin Constitution provide that any officer who is removed shall have the right to a hearing before the Grievance Committee. (R 157, 159) Patterson never requested a requested such a hearing. Accordingly, Patterson failed to exhaust his Tribal remedies. The principle of exhaustion of remedies is a universal rule widely recognized in both criminal and civil

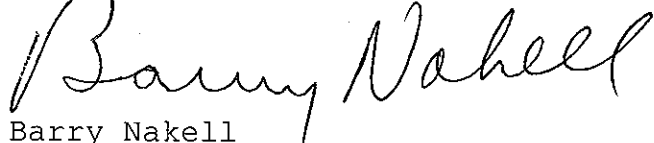


contexts.<sup>8</sup> See, N.C. Gen.Stat. § 150B-43; G.S. § 143-307; N.C. App. R 10(b)(1); *N.C. Central University v. Taylor*, 122 N.C.App. 609, 471 S.E.2d 115 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997); *Jackson v. Department of Admin.*, 127 N.C.App. 434, 436, 490 S.E.2d 248, 249 (1997). In *Meherrin Indian Tribe v. Lewis*, 197 N.C.App. 380, 386, 677 S.E.2d 203, 208 (2009), this Court stated: "(I)ndigenous tribes may enjoy sovereign immunity over some disputes".

#### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court affirm the judgment of the Superior Court.

Respectfully submitted,



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<sup>8</sup>The doctrine is justified on several grounds, including efficiency, the orderly administration of justice, and comity. *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856-7, 105 S.Ct. 2447, 2454 (1985); *Preiser v. Rodriguez*, 411 U.S. 475, 491, 93 S.Ct. 1827, 1837 (1973) (comity).

## CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the foregoing Brief of Appellants on all parties required to be served by e-mail and by United States mail, first class postage prepaid, addressed as follows"

Mr. Donald R. Teeter, Sr.  
Special Deputy Attorney General  
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Date: November 2, 2011

  
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Barry Nakell