

RRC STAFF OPINION (REVISED)

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina State Board of Examiners in Optometry

RULE CITATION: 21 NCAC 42D .0102

RECOMMENDATION DATE: January 16, 2024

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Posture

This rule was originally on the Rules Review Commission's ("RRC") agenda in October 2023. It was subject to a staff opinion for lack of clarity and ambiguity. The Board requested an extension which was granted by the RRC.

The Board submitted a revision to the Rule prior to the RRC considering the original submission. Like its predecessor, the revised Rule was subject to a staff opinion lack of clarity and ambiguity. Additionally, the staff opinion recommended objection for lack of authority, and failure to comply with the Administrative Procedures Act. At its November meeting, the RRC objected to the revised version consistent with staff's opinion of November 1, 2023.

The Rule before the RRC in January 2024 is the fourth revision filed with the RRC but the second to be considered by the RRC.

Opinion

The Rule currently before the RRC resolves the objections concerning authority and clarity. However, in resolving the clarity objection the Board has greatly expanded the Rule from that published in the North Carolina Register.

William W. Peaslee
Commission Counsel

The published Rule was less than half a page while the current version is five pages in length. While the length of a revision is not dispositive of the issue of substantial change pursuant to G.S. 150B-21.2(g), it is indicative of the revisions necessary to resolve the objection concerning clarity and ambiguousness.

The change in the Rule “affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.” The published rule regulated and set prerequisites for “paraoptometric personnel” including “optometric assistants” and “optometric technicians,” all of which were undefined terms. Accordingly, it was unclear who was being regulated.

While the ambiguity of who is being regulated is resolved in the Rule currently before the RRC, the published version did not provide notice to those the Board intended to regulate since the regulated was not defined in clear and unambiguous terms. Therefore, the adoption of the Rule currently before the RRC violates G.S. 150B-21.2(g)(1).

Further, the published rule regulated in unclear and ambiguous terms. While the current Rule provides much greater clarity, the regulated, to the extent they could identify themselves, could not have known the effect that the Rule would have on them based upon the ambiguity in the proposed text of the rule. Therefore, the adoption of the Rule currently before the RRC violates G.S. 150B-21.2(g)(3).

Pursuant to G.S. 150B-21.12(c), staff recommends that the RRC find that its objections to the Rule have been satisfied and approve the Rule. Staff further recommends that the RRC find that changes made to the Rule are substantial pursuant to G.S. 150B-21.2(g)(1) and (3). Accordingly, the Rule would need to be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.2, pursuant to G.S. 150B-21.12(c) as amended by Section 21.2(h) of Session Law 2023-134.

Proposed Rule
Volume 37, Issue 22
North Carolina Register

21 NCAC 42D .0102 ~~FUNCTION~~ **PARAOPTOMETRIC PERSONNEL**

(A) FOR THE PURPOSES OF THIS RULE, "PARAOPTOMETRIC PERSONNEL" MEANS AN OPTOMETRIC ASSISTANT, OPTOMETRIC TECHNICIAN, OR SIMILARLY TITLED POSITION WHO QUALIFIES BY TRAINING AND EXPERIENCE TO PERFORM DUTIES OF AN ADMINISTRATIVE, TECHNICAL, OR CLINICAL NATURE AND IS DIRECTED AND SUPERVISED BY A LICENSED OPTOMETRIST. PARAOPTOMETRIC PERSONNEL WHO WISH TO BECOME CERTIFIED AS OPTOMETRIC ASSISTANTS OR OPTOMETRIC TECHNICIANS MUST BE CERTIFIED BY THE AMERICAN OPTOMETRIC ASSOCIATION AND MAINTAIN SUCH CERTIFICATION.

(B) PARAOPTOMETRIC PERSONNEL SHALL PERFORM HIS OR HER FUNCTIONS WITHIN THE SCOPE OF HIS OR HER TRAINING, AS DIRECTED BY AND ASSIGNED BY AN OPTOMETRIST, SO LONG AS THOSE FUNCTIONS ARE AT THE SPECIFIC DIRECTION AND UNDER THE SUPERVISION OF THE LICENSEE. THE BOARD MAY REQUIRE THAT PARAOPTOMETRIC PERSONNEL BE CERTIFIED IN ENVIRONMENTS WHERE SUPERVISION IS LIMITED.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and

the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), (7); 1987, c. 285, ss. 7-9; 1989, c. 5, s. 1; 1991, c. 418, s. 1; 1995, c. 507, s. 27.8(d); 1996, 2nd Ex. Sess., c. 18, s. 7.10(e); 2003-229, s. 4; 2011-398, s. 5; 2013-143, s. 1; 2013-413, s. 3(a); 2021-88, s. 17.)

21 NCAC 42D .0102 is adopted with changes as published in 37:22 NCR 2129-2130 as follows:

21 NCAC 42D .0102 FUNCTION OPTOMETRIC ASSISTANT; OPTOMETRIC TECHNICIAN

(a) ~~For the purposes of this Rule, "paraoptometric personnel" means an optometric assistant, optometric technician, or similarly titled position who qualifies by training and experience to perform duties of an administrative, technical, or clinical nature and is directed and supervised by a licensed optometrist. An optometric assistant is an individual who is certified through the American Optometric Association's certification process. The Board recognizes the American Optometric Association's certification process as its only approved certification process for certified optometric assistants. The certified optometric assistant assists the optometrist in the evaluation and treatment of a patient. The optometrist may delegate acts and duties within the scope of the American Optometric Association training and certification process to the certified optometric assistant; however, the optometrist remains responsible for the acts and duties he or she assigns to that individual. The following are those acts and duties which may be assigned to the certified optometric assistant:~~

(1) Testing and Procedures

(A) Take case histories (including chief complaint, patient and family medical and ocular history, current medications, and allergies.)

(B) Perform testing procedures

(i) Visual acuity testing and assess visual acuity

(ii) Stereo acuity testing

(iii) Blood pressure measurement (manual, automated)

(iv) Keratometry

(v) Color vision assessment

(vi) Chair-side scribing

(vii) Tonometry

(viii) Screening for Binocular abnormalities, including cover test screening

(ix) Dry eye testing

(x) Meibography

(xi) Corneal topography

(xii) Scanning computerized ophthalmic testing

(xiii) Visual field testing

(xiv) Glaucoma ancillary testing

(xv) Near points of accommodation and convergence testing

(xvi) Macular Pigment Optical Density (MPOD)

(xvii) Pupil evaluation screening

(xviii) Amsler grid

(xix) Frequency doubling technology (FDT) fields

(xx) Aberrometry

- 1 (xxi) Automated refractometry
- 2 (xxii) Contrast sensitivity tests
- 3 (xxiii) Anterior segment photography
- 4 (xxiv) Fundus photography
- 5 (xxv) Low vision testing
- 6 (xxvi) Pachymetry
- 7 (xxvii) Traumatic brain injury testing
- 8 (xxviii) Vision therapy testing
- 9 (xxix) Administer diagnostic/therapeutic medications
- 10 (2) Ophthalmic Optics and Dispensing
- 11 (A) Order and maintain eyewear inventory and frame display
- 12 (B) Educate and assist patient in selecting eyewear
- 13 (C) Take appropriate frame and eye measurements on patient
- 14 (D) Use digital dispensing technology
- 15 (E) Lensometry
- 16 (F) Dispense/adjust/repair eyewear
- 17 (G) Understand fabrication requirements with various frames and prescriptions
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- 19 (3) Contact Lenses
- 20 (A) Maintain/order/inventory contact lenses
- 21 (B) Educate patients concerning contact lens options and fees
- 22 (C) Basic Insertion and removal of contact lenses
- 23 (D) Select proper care system for contact lenses
- 24 (E) Perform and evaluate contact lens preliminary fitting
- 25 (F) Educate patients on contact lens care and handling
- 26 (G) Measure base curves using radiuscope
- 27 (H) Verify contact lens diameter, thickness, and power
- 28 (I) Clean and polish gas permeable lenses or prosthetic eyes
- 29 (J) Use slit lamp to evaluate contact lens fit
- 30 (4) Other Duties
- 31 (A) Office Operations
- 32 (i) Prepare patient charts for optometrist to review
- 33 (ii) Patient education and communications
- 34 (iii) Direct patient flow
- 35 (iv) Provide patient education
- 36 (v) Perform telephone triage
- 37 (vi) Computer skills and documentation in the electronic health record
- 38 (vii) Relay communication between doctor, patient, specialists, and pharmacy

1 (viii) Maintain and Clean examination rooms and testing equipment

2 (B) Administrative Duties

3 (i) Understand and perform medical billing and coding

4 (ii) Maintain diagnostic listings and fee schedule

5 (iii) Handle insurance issues

6 (iv) Perform staff training

7 (v) Purchase ophthalmic examination equipment and supplies

8 (vi) Maintain inventory of diagnostic/therapeutic medications

9 (vii) Take inventory and reorder office supplies

10 (viii) Comply with federal regulations

11 (ix) E-prescribe and managing medication refills

12 (x) Coordinate referrals to other offices for surgeries or other specialty

13 (xi) Administer, record, and transmit prescribed medications

14 (b) Paraoptometric personnel shall perform his or her functions within the scope of his or her training, as directed by
15 and assigned by an optometrist, so long as those functions are at the specific direction and under the supervision of
16 the licensee. An optometric technician is an individual who is certified through the American Optometric Association's
17 certification process. The Board recognizes the American Optometric Association's certification process as its only
18 approved certification process for certified optometric technicians. The certified optometric technician assists the
19 optometrist in the evaluation and treatment of a patient. The optometrist may delegate acts and duties within the scope
20 of the American Optometric Association training and certification process to the certified optometric technician;
21 however, the optometrist remains responsible for the acts and duties he or she assigns to that individual. The following
22 are those acts and duties which may be assigned to the certified optometric technician (in addition to those acts and
23 duties which may be assigned to a certified optometric assistant):

24 (1) Testing and Procedures

25 (A) Slit Lamp Examination

26 (B) Ocular surface disease (e.g., SPEED questionnaire, Schirmer's test, TBUT, TearLab tests)

27 (C) Aseptic or Infection Control techniques

28 (D) Instrument and equipment sterilizing

29 (E) Automated and manual refractometry

30 (F) Ocular motility testing (pursuits and saccades)

31 (G) Binocularity testing including cover testing

32 (H) Goldmann tonometry - serial testing

33 (I) Assist with performing surgical tasks

34 (J) Low vision testing and training

35 (K) Specular microscopy

36 (L) Electrodiagnostic Testing and training

37 (M) Sports vision testing

- 1 (N) Vision therapy testing
- 2 (O) Understand use of YAG lasers
- 3 (2) Ophthalmic Optics and Dispensing
- 4 (A) Fabricate eyewear
- 5 (B) Measure parameters of special lenses including prism and slab off prescriptions
- 6 (C) Calculate Spherical Equivalent and Transpose lens prescriptions
- 7 (D) Write/copy prescriptions
- 8 (E) Troubleshoot problems with eyewear
- 9 (3) Contact Lenses
- 10 (A) Advanced handling - Insertion and removal of specialized and various types of contact
- 11 lenses (e.g., soft, gas permeable, hybrid, scleral)
- 12 (B) Using slit lamp perform contact lens fitting and assessments (e.g., soft, gas permeable,
- 13 hybrid, scleral, etc.)
- 14 (C) Educate patients on contact lens care and handling of specialized contact lenses
- 15 (D) Trouble shoot contact lens problems
- 16 (E) Perform progress checks on contact lens patients
- 17 (F) Clean and polish gas permeable lenses
- 18 (4) Other Duties
- 19 (A) Office Operations
- 20 (i) Overseeing management of daily patient flow
- 21 (ii) Management of patient clinical issues between patient and doctor
- 22 (B) Administrative Duties
- 23 (i) Coordinate patient correspondence
- 24 (ii) Assist in publication of office newsletter
- 25 (iii) Assist in use of social media
- 26 (iv) Assist in website development and maintenance
- 27 (v) Maintain and update policy and procedure manuals
- 28 (vi) Implement new software
- 29 (vii) Prepare internal reports
- 30 (viii) Use computer for billing/accounting
- 31 (ix) Maintain diagnostic listings and fee schedule
- 32 (x) Perform medical coding
- 33 (xi) Verify accuracy of procedure and medical coding
- 34 (xii) Provide patient education regarding diagnoses and ophthalmic surgery
- 35 (xiii) Help to resolve patient complaints and concerns
- 36 (xiv) Implement and maintain Meaningful Use (MACRA/MIPS) and PQRS
- 37 (xv) Assist in hiring and termination of employees

- 1 (xvi) Supervise personnel
- 2 (xvii) Plan and lead staff meetings
- 3 (xviii) Organize in-house educational offerings
- 4 (xiv) Train personnel
- 5 (xx) Take office supply inventory
- 6 (xxi) Coordinate purchase of ophthalmic examination equipment and supplies
- 7 (xxii) Coordinate/maintain credentialing within the office
- 8 (xxiii) Maintain inventory of diagnostic/therapeutic medications
- 9 (xiv) Comply with federal regulations (e.g., HIPAA, OSHA, etc.)
- 10 (xv) Perform CPR certification in BLS in case of emergency

11 ~~(b) (c) The Board may require that paraoptometric personnel~~ An optometric technician be currently certified by the
12 American Optometric Association and maintain this certification shall be in the physical presence of the patient during
13 any patient examination in environments where there is no onsite optometrist physically present during such
14 examination. and supervision is limited.

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18 *History Note: Authority G.S. 90-115.1(6); 90-117.5;*
19 *Eff. February 1, 1976;*
20 *Readopted Eff. May 30, 1978;*
21 *Amended Eff. June 1, 1989; September 30, 1981;*
22 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,*
23 *2015;*
24 *Amended Eff. March 1, 2023.*
25 *Amended Eff. February 1, 2024*