

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06F .0102 Temporary Rule

RECOMMENDATION DATE: April 17, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-38, "The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). "The Board shall have the right to make additional rules and regulations

William W. Peaslee
Commission Counsel

governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this [G.S. 86B-31]...” (emphasis added)¹

The Rule

In Paragraph (a) of this Rule, each barber school is required to designate a “manager.” The designed manager must be licensed to conduct barber services. Paragraph (b) makes the manager “responsible” for the school’s compliance with all of the Board’s rules and Chapter 86B of the North Carolina General Statutes.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Business Structure

It appears to staff counsel that the Board does not have the authority to require a school to designate a manager. While G.S. 86B-31(a) holds “owners or manager” responsible for certain enumerated sanitary standards, this is not an empowerment for the Board to require that schools have a manager. Clearly, every school has an owner or owners without regard to which ownership or business structure is selected by the owner(s). Accordingly, the General Assembly chose the phrase “owner or manager”. It appears to staff counsel that this should be read “the owner or manager if there is a manager.” It does not create a requirement that there be a manager, nor did the General Assembly authorize the Board to dictate that which is a structural or managerial prerogative of the owner or owners of barber schools.

¹ G.S. 86B-31(B) DOES NOT ADDRESS “MANAGERS AND OWNERS” AS DISCUSSED FURTHER IN THIS OPINION.

In short, Chapter 86B is intended to *inter alia* empower the Board with the authority to prescribe rules and regulations for the operation of barber schools, but not manage them or determine which employees a barber school must have.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or managers. The owners’ or manager’s personal responsibility is limited to those listed in G.S.86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity, the school.² The method of the school’s compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

Lack of Authority – Expansion of Manager Responsibility Outside of G.S. 86B-31

It appears to staff counsel that the Board has exceeded its authority by making managers, if the school has a manager, personally liable for the school’s noncompliance with all of Chapter 86B or rules adopted by the Board.³ The duties of a manager in Chapter 86B are limited to and prescribed by G.S. 86B-31(a), and the Board does not have authority to expand those statutory duties or the personal liabilities that come with lawful duties beyond those prescribed in G.S. 86B-31(a). Outside of the context of G.S. 86B-31(a), the Board can regulate and penalize the business only.

This opinion is consistent with the Commission’s objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

² UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

³ *IBID*.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly.

William W. Peaslee
Commission Counsel

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

§ 86B-38. Licensing and regulating barber schools and colleges.

The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least one instructor for the first 20 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present, or unless the theoretical training is offered online.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86B-31.

- (7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the

guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) that is in a form acceptable to the Board; (ii) that is executed by the applicant; (iii) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State (ii) that is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7; 2017-25, s. 1(f); recodified from N.C. Gen. Stat. 86A-22 by 2022-72, s. 1(cc); 2022-72, s. 2.)

21 NCAC 06F .0102 is amended under temporary procedures with changes as follows:

21 NCAC 06F .0102 MANAGER

(a) Each barber school shall designate ~~one of the instructors~~ an instructor required by ~~G.S. 86A-22(2)~~ [S.L. 2022-72, s. 2,] G.S. 86B-38 as the school manager.

(b) The barber school manager is responsible for the school's compliance with ~~G.S. 86A-15~~ [S.L. 2022-72, s. 2,] G.S. 86B-31 and the rules in this Subchapter, whether present on the school premises or not.

History Note: Authority ~~G.S. 86A-15; 86A-22; 86B-31; 86B-38~~;

Eff. February 1, 1976;

Readopted Eff. February 8, 1978;

Amended Eff. April 1, 2010; May 1, 1989; March 1, 1983;

Readopted Eff. July 1, 2016;

Amended Eff. January 1, ~~2018~~, 2018;

Temporary Amendment Eff. May 2, 2023.

RRC STAFF OPINION

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AGENCY: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06H .0101 Temporary Rule

RECOMMENDATION DATE: April 17, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-38, "The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). "The Board shall have the right to make additional rules and regulations

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governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this [G.S. 86B-31]...” (emphasis added)¹

The Rule

In Paragraph (a) of this Rule, barber school managers are required to ensure that all barber students are “instructed”, and to ensure the school’s compliance with “North Carolina General Statutes governing barber schools and barbering” and the rules of the Board.

In Paragraph (b), a barber school manager is required to “fill a vacancy to ensure compliance G.S. 86B-38.”

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Managerial Authority

While G.S. 86B-31(a) holds “owners or managers” responsible for certain enumerated sanitary standards, this is not an empowerment for the Board to regulate the internal management of barber schools nor dictate the job responsibilities of school employees outside of G.S. 86B-31(a).

In short, Chapter 86B is intended to *inter alia* empower the Board with the authority to prescribe rules and regulations for the operation of barber schools, but not manage them or determine the job responsibilities of barber school employees.

¹ G.S. 86B-31(B) DOES NOT ADDRESS “MANAGERS AND OWNERS” AS DISCUSSED FURTHER IN THIS OPINION.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or managers. The owners’ or manager’s personal responsibility is limited to those listed in G.S.86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity, the school.² The method of the school’s compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

Lack of Authority – Expansion of Manager Responsibility Outside of G.S. 86B-31

It appears to staff counsel that the Board has exceeded its authority by making managers responsible for the school’s compliance and personally liable for the school’s noncompliance with all of Chapter 86B or rules adopted by the Board.³ The duties of a manager in Chapter 86B are limited to and prescribed by G.S. 86B-31(a), and the Board does not have authority to expand those statutory duties or the personal liabilities that come with lawful duties beyond those prescribed in G.S. 86B-31(a). Outside of the context of G.S. 86B-31(a), the Board can regulate and penalize the business only.

This opinion is consistent with the Commissions objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly.

² UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

³ *IBID.*

Assuming *arguendo* that the Commission finds that the Board has authority to prescribe the responsibilities of a barber school employee, to wit the manager in this instance, it is unclear which vacancies a manager is required to fill in Paragraph (b).

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(2) for ambiguity.

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Commission Counsel

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

§ 86B-38. Licensing and regulating barber schools and colleges.

The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least one instructor for the first 20 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present, or unless the theoretical training is offered online.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86B-31.

- (7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the

guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) that is in a form acceptable to the Board; (ii) that is executed by the applicant; (iii) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State (ii) that is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7; 2017-25, s. 1(f); recodified from N.C. Gen. Stat. 86A-22 by 2022-72, s. 1(cc); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”⁴. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

⁴ PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).⁵ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁶ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

⁵ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁶ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

William W. Peaslee
Commission Counsel

21 NCAC 06H .0101 is amended under temporary procedures with changes as follows:

21 NCAC 06H .0101 DUTIES AND RESPONSIBILITIES

(a) Barber school managers shall:

~~(1) file for a school permit at least 30 days before opening the school for business;~~

~~(2)~~(1) ensure that all **barber** students are instructed; and

~~(3)~~(2) ensure compliance with the North Carolina General Statutes governing barber schools and barbering and the ~~administrative~~ rules of the Board.

(b) A barber school manager shall have 30 days to fill a vacancy to ensure compliance with ~~G.S. 86A-22(2); [S.L. 2022-72, s. 2];~~ **G.S.86B-38.**

~~(c) Managers of schools that are organized as nonprofits, have obtained a determination from the Internal Revenue Service recognizing their tax exempt status, and wish to have the lower number of instructors allowed under G.S. 86A-22 shall provide to the Board a copy of the Internal Revenue Service determination before offering instruction with the reduced number of instructors.~~

History Note: Authority G.S. ~~86A-13; 86A-15; 86A-22; 86B-29; 86B-31; 86B-38;~~

Eff. February 1, 1976;

Readopted Eff. February 8, 1978;

Amended Eff. September 1, 2013; June 1, 2008; May 1, 1989; March 1, 1983;

Readopted Eff. July 1, ~~2016;~~ 2016;

Temporary Amendment Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06I .0105 Temporary Rule

RECOMMENDATION DATE: April 15, 2023

RECOMMENDED ACTION:

- ☐ 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:

Barber apprentices must be licensed by the Board. G.S. 86B-40 establishes the requirements for apprentice licensure. G.S. 86B-40 requires a prospective barber apprentice licensee to pass an examination conducted by the Board. The statute places no prerequisites to taking the apprentice examination¹.

The Rule prohibits barber students who have been trained in another state from taking the apprentice examination unless his or her hours of training hours have been credited pursuant to Rule .0101 of Subchapter 06I.

¹ G.S. 86B-23 LISTS THE REQUIREMENTS FOR A PERSON TO BE A LICENSED BARBER BUT THESE ARE NOT APPLICABLE TO APPRENTICE LICENSURE.

William W. Peaslee
Commission Counsel

In response to a query in staff's Request for Changes concerning the Board's authority to establish prerequisites to taking the apprentice examination, the Board cited G.S. 86B-25 which reads in its entirety:

The Board shall conduct examinations of applicants for licensure to practice barbering as licensed barbers and licensed apprentices, not less than four times each year, at such times and places as will prove most convenient and as the Board may determine. The Board may adopt rules establishing procedures for the administration of examinations.

The Board opines that this language empowers it to "promulgate minimum standards as to whom the Board may administer the examination".

However, G.S. 86B-26 clearly states, "Whenever the provisions of **this Chapter** have been complied with, the Board shall issue, or have issued, a license as a barber or as an apprentice, as the case may be." (Emphasis added)

In short, if the General Assembly had wanted to require "minimum standards" to take the apprenticeship examination, it would have either prescribed the standards or authorized the Board to promulgate the same. By the plain language of G.S. 86B-40, the only prerequisite to apprentice licensure is passing the examination. Prospective apprentice licensees are not required to have training from a Board accredited school in or out of state.

It appears to staff counsel that the Board is establishing a barrier to taking the apprenticeship examination, and consequently apprenticeship licensure, without authority.

Accordingly, staff counsel recommends the Commission object to the rule pursuant to G.S. 150B-21.9(a)(1) for exceeding the Board's authority.

William W. Peaslee
Commission Counsel

§ 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.)

§ 86B-25. Board to conduct examinations not less than four times each year.

The Board shall conduct examinations of applicants for licensure to practice barbering as licensed barbers and licensed apprentices, not less than four times each year, at such times and places as will prove most convenient and as the Board may determine. The Board may adopt rules establishing procedures for the administration of examinations. (1929, c. 119, s. 10; 1979, c. 695, s. 1; 2004-146, s. 4; recodified from N.C. Gen. Stat. 86A-9 by 2022-72, s. 1(q); 2022-72, s. 2.)

§ 86B-26. Issuance of certificates of registration.

Whenever the provisions of **this Chapter have been complied with**, the Board shall issue, or have issued, a license as a barber or as an apprentice, as the case may be. (1929, c. 119, s. 11; 1979, c. 695, s. 1; 1981, c. 457, s. 5; recodified from N.C. Gen. Stat. 86A-10 by 2022-72, s. 1(r); 2022-72, s. 2.)

§ 86B-40. Apprenticeship.

(a) Before being issued an apprentice license, an applicant must pass an examination conducted by the Board to determine his or her competence, including his or her knowledge of barbering, sanitary rules and regulations, and knowledge of diseases of the face, skin and scalp.

(b) An apprentice license expires on May 31 of each year. Every holder of an apprentice license shall annually renew the apprentice license by the expiration date and pay the required renewal fee. An apprentice license issued under this Chapter is automatically suspended by operation of law after failure to renew the apprentice license by the expiration date. An apprentice whose apprentice license has expired may have the license restored immediately upon paying all lapsed renewal fees and the required late fee. The license of an apprentice is valid only so long as the apprentice works under the supervision of a licensed barber. The licensed barber shall remain present on the premises of the barbershop at all times while the apprentice is working. No apprentice shall operate a barbershop.

(c) On completion of at least one year's apprenticeship, evidenced by affidavit of the supervising licensed barber or barbers, and upon meeting the other requirements of G.S. 86B-23, the apprentice shall be issued a license as a barber, pursuant to G.S. 86B-26. No licensed apprentice may practice for a period exceeding three years without retaking and passing the required examination to receive a license as an apprentice. (1929, c. 119, ss. 4, 5; 1941, c. 375, s. 3; 1975, c. 68, ss. 1, 2; 1979, c. 695, s. 1; 1981, c. 457, s. 14; 1995 (Reg. Sess., 1996), c. 605, s. 13; 2004-146, s. 8; recodified from N.C. Gen. Stat. 86A-24 by 2022-72, s. 1(ee); 2022-72, s. 2.)

21 NCAC 06I .0105 is amended under temporary procedures with changes as follows:

21 NCAC 06I .0105 LICENSED APPRENTICE BARBER BASED ON OUT-OF-STATE TRAINING

A **barber** student who has trained in another state may take the examination to become a ~~registered~~ licensed apprentice ~~barber provided: if:~~

- (1) his or her hours of training in the out-of-state barber school have been credited under ~~21 NCAC 06I .0101; Rule .0101 of this Subchapter;~~
- (2) he or she completes and furnishes to the Board the Form BAR-4 that meets the requirements of 21 NCAC 06N .0105; and
- (3) he or she pays the required fee in ~~21 NCAC 06N .0101(a)(5);~~ 21 NCAC 06N .0101(a)(6).

*History Note: Authority G.S. ~~86A-5; 86A-18; 86A-24; 86A-25;~~ 86B-2; 86B-35; 86B-40; 86B-41;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. March 1, 1983;
Legislative Objection Lodged Eff. March 7, 1983;
Amended Eff. September 1, 2013; June 1, 2008; May 1, 1989;
Readopted Eff. October 1, 2016;
Amended Eff. April 1, ~~2017;~~ 2017;
Temporary Amendment Eff. May 2, 2023.*

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06J .0101 Temporary Rule

RECOMMENDATION DATE: April 15, 2023

RECOMMENDED ACTION:

- ☐ 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:

Barber apprentices must be licensed by the Board. G.S. 86B-40 establishes the requirements for apprentice licensure. G.S. 86B-40 requires a prospective barber apprentice licensee to pass an examination conducted by the Board. The statute places no prerequisites to taking the apprentice examination¹.

The Rule requires prospective barber apprentice licensees to attend "an approved barber school" for a prescribed period prior to apprentice licensure.

In response to a query in staff's Request for Changes about the Board's authority to establish prerequisites to apprentice licensure, the Board cited G.S. 86B-25 which reads in its entirety:

¹ G.S. 86B-23 LISTS THE REQUIREMENTS FOR A PERSON TO BE A LICENSED BARBER BUT THESE ARE NOT APPLICABLE TO APPRENTICE LICENSURE.

William W. Peaslee
Commission Counsel

The Board shall conduct examinations of applicants for licensure to practice barbering as licensed barbers and licensed apprentices, not less than four times each year, at such times and places as will prove most convenient and as the Board may determine. The Board may adopt rules establishing procedures for the administration of examinations.

The Board opines that this language empowers it to “promulgate minimum standards” for licensure.

However, G.S. 86B-26 clearly states, “Whenever the provisions of **this Chapter** have been complied with, the Board shall issue, or have issued, a license as a barber or as an apprentice, as the case may be.” (Emphasis added)

In short, if the General Assembly had wanted to require additional “minimum standards” for apprentice licensure, it would have either prescribed the standards or authorized the Board to promulgate the same. By the plain language of G.S. 86B-40, the only prerequisite to apprentice licensure is passing the examination. Training from a Board accredited school is not a prerequisite to barber apprentice licensure.

It appears to staff counsel that the Board is establishing a barrier to apprenticeship licensure without authority.

Accordingly, staff counsel recommends the Commission object to the rule pursuant to G.S. 150B-21.9(a)(1) for exceeding the Board’s authority.

William W. Peaslee
Commission Counsel

§ 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.)

§ 86B-25. Board to conduct examinations not less than four times each year.

The Board shall conduct examinations of applicants for licensure to practice barbering as licensed barbers and licensed apprentices, not less than four times each year, at such times and places as will prove most convenient and as the Board may determine. The Board may adopt rules establishing procedures for the administration of examinations. (1929, c. 119, s. 10; 1979, c. 695, s. 1; 2004-146, s. 4; recodified from N.C. Gen. Stat. 86A-9 by 2022-72, s. 1(q); 2022-72, s. 2.)

§ 86B-26. Issuance of certificates of registration.

Whenever the provisions of **this Chapter have been complied with**, the Board shall issue, or have issued, a license as a barber or as an apprentice, as the case may be. (1929, c. 119, s. 11; 1979, c. 695, s. 1; 1981, c. 457, s. 5; recodified from N.C. Gen. Stat. 86A-10 by 2022-72, s. 1(r); 2022-72, s. 2.)

§ 86B-40. Apprenticeship.

(a) Before being issued an apprentice license, an applicant must pass an examination conducted by the Board to determine his or her competence, including his or her knowledge of barbering, sanitary rules and regulations, and knowledge of diseases of the face, skin and scalp.

(b) An apprentice license expires on May 31 of each year. Every holder of an apprentice license shall annually renew the apprentice license by the expiration date and pay the required renewal fee. An apprentice license issued under this Chapter is automatically suspended by operation of law after failure to renew the apprentice license by the expiration date. An apprentice whose apprentice license has expired may have the license restored immediately upon paying all lapsed renewal fees and the required late fee. The license of an apprentice is valid only so long as the apprentice works under the supervision of a licensed barber. The licensed barber shall remain present on the premises of the barbershop at all times while the apprentice is working. No apprentice shall operate a barbershop.

(c) On completion of at least one year's apprenticeship, evidenced by affidavit of the supervising licensed barber or barbers, and upon meeting the other requirements of G.S. 86B-23, the apprentice shall be issued a license as a barber, pursuant to G.S. 86B-26. No licensed apprentice may practice for a period exceeding three years without retaking and passing the required examination to receive a license as an apprentice. (1929, c. 119, ss. 4, 5; 1941, c. 375, s. 3; 1975, c. 68, ss. 1, 2; 1979, c. 695, s. 1; 1981, c. 457, s. 14; 1995 (Reg. Sess., 1996), c. 605, s. 13; 2004-146, s. 8; recodified from N.C. Gen. Stat. 86A-24 by 2022-72, s. 1(ee); 2022-72, s. 2.)

21 NCAC 06J .0101 is amended under temporary procedures as follows:

21 NCAC 06J .0101 ~~REGISTERED~~ LICENSED APPRENTICE

~~A registered apprentice~~ To become a licensed apprentice, an applicant shall:

- (1) attend an approved barber school for a period of at least ~~4528~~ 1,528 hours as set forth in 21 NCAC 06F .0120;
- (2) furnish the Board with the Form BAR-4 as set forth in 21 NCAC 06N .0105 and pay the fee according to ~~21 NCAC 06N .0101(a)(5);~~ 21 NCAC 06N .0101(a)(6); and
- (3) make a score of at least 70 percent on both a written and practical apprentice examination.

*History Note: Authority G.S. ~~86A-3; 86A-10; 86A-24; 86A-25; 86B-23; 86B-26; 86B-40; 86B-41;~~
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. March 1, 1983;
Legislative Objection Lodged Eff. March 7, 1983;
Amended Eff. September 1, 2013; June 1, 2008; May 1, 1989;
Readopted Eff. October 1, ~~2016~~ 2016;
Temporary Amendment Eff. May 2, 2023.*

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06L .0112 Temporary Rule

RECOMMENDATION DATE: April 17, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S. 86B-31(b). "The Board shall have the right to make additional rules and regulations **governing barbers and barbershops, mobile barbershops, and barber schools** for the proper administration and enforcement of this [G.S. 86B-31]..." (emphasis added)¹

The Rule

¹ G.S. 86B-31(B) DOES NOT ADDRESS "MANAGERS AND OWNERS" AS DISCUSSED FURTHER IN THIS OPINION.

In Paragraph (a), the Board is required to hold the manager of a barber shop “responsible for the barbering services performed” therein by any barber who has rented or leased space in the barber shop. Additionally, the manager shall be held responsible for “the sanitary conditions for the rented or leased space.”

Paragraph (b) requires the Board’s inspectors to examine the entire premises of each barber shop.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority

While G.S. 86B-31(a) holds “owners or managers” responsible for certain enumerated sanitary standards within barber shop, this is not an empowerment for the Board to place the license of a barber shop manager in peril nor subject the manager to any penalties outside of G.S. 86B-31(a).

There is no authority to make a barber shop manager, if there is one, responsible for all “barbering services performed” by a barber-tenant.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or

managers. The owners' or manager's personal responsibility is limited to those listed in G.S. 86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity, the barber shop.² The method of the barber shop's compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly.

Ambiguity

Assuming *arguendo* that the Commission finds that the Board can impute the responsibilities or liability of a barber-tenant to the manager of a barber shop, here the Rule would make the barber shop manager responsible "for the barbering services performed" by the barber-tenant. It is unclear that for which what the manager is responsible.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(2) for ambiguity.

Lack of Necessity

Paragraph (b) only regulates the Board's inspectors which it has control over in the absence of the rule. Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(3) for lack of necessity.

² UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

§ 86B-38. Licensing and regulating barber schools and colleges.

The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least one instructor for the first 20 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present, or unless the theoretical training is offered online.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86B-31.

- (7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the

guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) that is in a form acceptable to the Board; (ii) that is executed by the applicant; (iii) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State (ii) that is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7; 2017-25, s. 1(f); recodified from N.C. Gen. Stat. 86A-22 by 2022-72, s. 1(cc); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”³. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

³ PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).⁴ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁵ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

⁴ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁵ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

William W. Peaslee
Commission Counsel

21 NCAC 06L .0112 is amended under temporary procedures as follows:

21 NCAC 06L .0112 RENTED BOOTH SPACE

(a) Where a barber shop or mobile barber shop rents or leases space to a barber, the Board shall hold the ~~barbershop~~
licensed barber manager and licensee responsible for the barbering services performed in the rented or leased space
and for the sanitary conditions of the rented or leased space.

(b) The Board's inspectors shall examine the entire premises of each barber shop or mobile barber shop, ~~shop~~
irrespective of booth space allotments.

History Note: Authority G.S. ~~86A-15~~; 86B-31;

Eff. June 1, 2008;

Readopted Eff. July 1, ~~2016~~; 2016;

Temporary Amendment Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06L .0116 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S. 86B-31(b). "The Board shall have the right to make additional rules and regulations **governing barbers and barbershops, mobile barbershops, and barber schools** for the proper administration and enforcement of this [G.S. 86B-31]..." (emphasis added)¹

¹ G.S. 86B-31(B) DOES NOT ADDRESS "MANAGERS AND OWNERS" AS DISCUSSED FURTHER IN THIS OPINION.

The Rule

In Paragraph (a), the Board requires barber shop managers² to verify the identity of any person employed by the barber shop claiming to be licensed.

In Paragraph (b), the manager is held responsible for the sanitary condition of the barbershop.

In Paragraph (c), the barbers shop manager is “accountable for activities” at the barber shop.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Paragraph (a) and (c)

While G.S. 86B-31(a) holds “owners or managers” responsible for certain enumerated sanitary standards within barber shop, this is not an empowerment for the Board to place the license of a barber shop manager in peril nor subject the manager to any penalties outside of G.S. 86B-31(a).

There is no authority to make a barber shop manager, if there is one, responsible for employee verification or accountable for “activities” within a barber shop. While the Board can certainly regulate a barber shop in this regard and require the business’ compliance, it does not have the authority to place the responsibility for compliance upon any specific employee of the barber shop, even the manager.

² AS USED IN THIS OPINION, BARBER SHOP MANAGERS INCLUDES BARBER SHOP AND MOBILE BARBER SHOP MANAGERS.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31 – Paragraph (b)

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or managers. The owners’ or manager’s personal responsibility is limited to those listed in G.S.86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity, the barber shop.³ The method of the business’s compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

This opinion is consistent with the Commission’s objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly.

³ UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”⁴. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...” (emphasis added).**

⁴ PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).⁵ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁶ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

⁵ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁶ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

William W. Peaslee
Commission Counsel

21 NCAC 06L .0116 is amended under temporary procedures as follows:

21 NCAC 06L .0116 BARBER SHOP MANAGERS

(a) All barber ~~shop~~ managers of barber shops and mobile barber shops shall verify that any licensee employed in the barber shop or mobile barber shop is the person whose name appears on the license or permit ~~prior to~~ before allowing the licensee to perform barbering services in the barber shop or mobile barber shop. This verification shall be based on government issued identification.

(b) The ~~shop-registered~~ barber manager of the barber shop or mobile barber shop is responsible for the sanitary condition, as defined in ~~21 NCAC 06P .0103(10)~~, 21 NCAC 06P .0103(11), of the entire barber shop or mobile barber shop.

(c) The barber ~~shop~~ manager of a barber shop or mobile barber shop is accountable for activities at the barber shop or mobile barber shop whether present on the premises or not.

History Note: Authority G.S. ~~86A-15; 86A-22~~; 86B-31; 86B-38;

Eff. June 1, 2008;

Amended Eff. April 1, 2010;

Readopted Eff. July 1, 2016;

Amended Eff. January 1, ~~2018~~ 2018;

Temporary Amendment Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06L .0204 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-30, "The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops including standards for facilities, personnel, and safety and sanitary requirements."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). "The Board shall have the right to make additional rules and regulations

William W. Peaslee
Commission Counsel

governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this [G.S. 86B-31]...” (emphasis added)¹

The Rule

In Paragraph (a) of this Rule, each mobile barber shop is required to have a “manager.” The manager is responsible for the sanitary condition of the barber shop, and verification of licensure and identity of employees. Paragraph (b) makes the manager “accountable” for “activities” within the barber shop.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always uses the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a barber shop or mobile barber shops to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Business Structure

It appears to staff counsel that the Board does not have the authority to require a barber shop to designate a manager. While G.S. 86B-31(a) holds “owners or manager” responsible for certain enumerated sanitary standards, this is not an empowerment for the Board to require that barber shops, mobile or not, to have a manager. Clearly, every barber shop has an owner or owners without regard to which ownership or business structure is selected by the owner(s). Accordingly, the General Assembly chose the phrase “owner or manager”. It appears to staff counsel that this should be read “the owner or manager if there is a manager.” It does not create a requirement that there be a manager, nor did the General Assembly authorize the Board to dictate that which is a structural or managerial prerogative of the owner or owners of barber shops.

¹ G.S. 86B-31(B) DOES NOT ADDRESS “MANAGERS AND OWNERS” AS DISCUSSED FURTHER IN THIS OPINION.

In short, Chapter 86B is intended to *inter alia* empower the Board with the authority to prescribe rules and regulations for the operation of barber shops, but not manage them or determine which employees a barber shop must have.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or managers. The owners’ or manager’s personal responsibility is limited to those listed in G.S.86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity, the barber shop.² The method of the barber shop’s compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

Lack of Authority – Expansion of Manager Responsibility Outside of G.S. 86B-31

It appears to staff counsel that the Board has exceeded its authority by making managers, if the barber shop has a manager, personally “accountable” for the barber shop’s noncompliance with all of Chapter 86B or rules adopted by the Board.³ The duties of a manager in Chapter 86B are limited to and prescribed by G.S. 86B-31(a), and the Board does not have authority to expand those statutory duties or the personal liabilities that come with lawful duties beyond those prescribed in G.S. 86B-31(a). Outside of the context of G.S. 86B-31(a), the Board can regulate and penalize the business only.

This opinion is consistent with the Commissions objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

² UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

³ *IBID.*

Ambiguity

Assuming *arguendo* that the Commission finds that the Board has the authority to assigned duties and responsibilities beyond those in G.S. 86B-31(a), it is unclear what the Board means by the phrase “accountable for activities” in Paragraph (b). Is the manager subject to penalties, civil liability, or revocation of any barber license which the manager may be vested? For what “activities” is the manager accountable?

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly and G.S. 150B-21.9(a)(2) for ambiguity.

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-30. Mobile barbershops.

(a) A motor home as defined in Article 1 of Chapter 20 of the General Statutes may be used as a mobile barbershop for the practice of barbering.

(b) The Board shall issue a permit to operate a mobile barbershop to any applicant who submits a properly completed application on a form approved by the Board, pays the required fee, and is determined after inspection to be in compliance with the provisions of this Chapter and the Board's rules.

(c) The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops, including standards for facilities, personnel, and safety and sanitary requirements. All permitting and operating requirements provided by this Chapter or by rules adopted by the Board pursuant to this Chapter that apply to barbershops shall also apply to mobile barbershops, except to the extent that the requirements conflict with this section or with any rules adopted by the Board pursuant to this section.

(d) In addition to the requirements of this Chapter, individuals and the vehicles they operate while providing mobile barbershop services shall be subject to the provisions of (i) Chapter 20 of the General Statutes, (ii) Title 19A of the North Carolina Administrative Code, (iii) all applicable OSHA requirements, and (iv) all local laws and ordinances regulating business establishments.

(e) A mobile barbershop must be equipped with a functional sink and toilet facilities and must maintain an adequate supply of clean water and wastewater storage capacity.

(f) No barbering or service may be performed in a mobile barbershop while the barbershop is moving. The mobile barbershop must be safely parked in a legal parking spot at all times while patrons are present inside the mobile barbershop.

(g) A mobile barbershop owner must maintain a permanent business address at which records of appointments, itineraries, license numbers, and vehicle identification numbers for each mobile barbershop being operated shall be kept and made available for verification and inspection by the Board and at which all correspondence from the Board can be received.

(h) To facilitate periodic inspections of mobile barbershops, prior to the beginning of each month, the owner of the barbershop shall provide to the Board a written monthly itinerary listing locations, dates, and hours of operation for the barbershop. (2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”⁴. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...” (emphasis added).**

⁴ PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).⁵ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁶ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

⁵ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁶ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

1 21 NCAC 06L .0204 is adopted under temporary procedures as follows:

2
3 **21 NCAC 06L .0204 PERSONNEL**

4 (a) Each mobile barber shop shall have a licensed barber manager responsible for the following:

5 (1) the sanitary condition, as defined in 21 NCAC 06P .0103(10), of the mobile barber shop;

6 (2) verifying that only licensed barbers provide barbering services in the mobile barber shop; and

7 (3) conducting a verification based on government-issued identification that any licensee employed in
8 the mobile barber shop is the person whose name appears on the license before allowing the licensee
9 to perform barbering services in the mobile barber shop.

10 (b) The licensed barber manager is accountable for activities at the mobile barber shop, whether or not he or she is
11 present on the premises.

12
13 *History Note: Authority G.S. 86B-30;*

14 *Temporary Adoption Eff. May 2, 2023.*

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06N .0102, .0103, .0104, .0116 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-30, "The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops, including standards for facilities, personnel, and safety and sanitary requirements."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). "The Board shall have the right to make additional rules and regulations

William W. Peaslee
Commission Counsel

governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this [G.S. 86B-31]...” (emphasis added)¹

The Rule

Each of the above captioned Rules requires the name, address, and barber license number of the manager of the barber shop or barber school. As written it is implied that there must be a manager of the shop or school.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Managerial Authority

It appears to staff counsel that the Board does not have the authority to require a barber shop or school to designate a manager. While G.S. 86B-31(a) holds “owners or manager” responsible for certain enumerated sanitary standards, this is not an empowerment for the Board to require that schools have a manager. Clearly, every school has an owner or owners without regard to which ownership or business structure is selected by the owner(s). Accordingly, the General Assembly chose the phrase “owner or manager”. It appears to staff counsel that this should be read “the owner or manager if there is a manager.” It does not create a requirement that there be a manager, nor did the General Assembly authorize the Board to dictate that which is a structural or managerial prerogative of the owner or owners of barber schools.

This opinion is consistent with the Commissions objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

¹ G.S. 86B-31(B) DOES NOT ADDRESS “MANAGERS AND OWNERS” AS DISCUSSED FURTHER IN THIS OPINION.

To the extent that these rules require a barber shop or barber school to have a manager, staff counsel recommends the Commission object to the Rules pursuant to G.S. 150B-21.9(a)(1) for the rules exceeding the authority granted to the Board.

Assuming *arguendo* that the Commission finds that the Rules do not require a manager, staff counsel recommends objection to the Rules pursuant to G.S. 150B-21.9(a)(2) for ambiguity. As written, requiring information concerning a position which may not exist creates ambiguity in such a circumstance. However, the ambiguity can be easily remedied by adding a clause such as "if one exists".

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) **Each barber and each owner or manager** of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

§ 86B-38. Licensing and regulating barber schools and colleges.

The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least one instructor for the first 20 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present, or unless the theoretical training is offered online.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86B-31.

- (7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the

guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) that is in a form acceptable to the Board; (ii) that is executed by the applicant; (iii) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State (ii) that is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7; 2017-25, s. 1(f); recodified from N.C. Gen. Stat. 86A-22 by 2022-72, s. 1(cc); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”². The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

² PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).³ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁴ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

³ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁴ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

William W. Peaslee
Commission Counsel

21 NCAC 06N .0102 is amended under temporary procedures as follows:

21 NCAC 06N .0102 FORM BAR-1

(a) The Form BAR-1 shall be filed when one applies to open ~~or manage~~ a new barber shop. It ~~requests~~ requires the following:

- (1) the name and address of the barber shop;
- (2) the name, address, and ~~certificate~~ license number of the licensed barber manager;
- (3) the name and address of the barber shop owner;
- (4) the physical dimensions of the barber shop;
- (5) the barber shop business hours;
- (6) the type of fixtures installed; and
- (7) the date the barber shop will be ready for inspection.

(b) The fee required by ~~Rule .0101(a)(19)~~ Rule .0101(a)(21) of this Section shall accompany this form.

(c) The Form BAR-1 shall include the applicant's attestation that the information in the form is correct.

*History Note: Authority G.S. ~~86A-1; 86A-13; 86A-15; 86A-25; 86B-21; 86B-29; 86B-31; 86B-41;~~
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. March 1, 1983;
Legislative Objection Lodged Eff. March 7, 1983;
Curative Amended Eff. April 6, 1983;
Amended Eff. May 1, 1989;
Readopted Eff. July 1, 2016;
Amended Eff. February 1, 2021; October 1, ~~2020~~ 2020;
Temporary Amendment Eff. May 2, 2023.*

21 NCAC 06N .0103 is amended under temporary procedures as follows:

21 NCAC 06N .0103 FORM BAR-2

(a) The Form BAR-2 shall be filed when there is a change of ~~management~~ licensed barber manager at any barber shop or mobile barber shop. It requires the following:

- (1) the name, mailing address, and permit number of the barber shop or mobile barber shop before the change of management;
- (2) the name of the barber shop or mobile barber shop after the change of management, if the ~~barber shop~~ business name changes;
- (3) the name, address, and ~~certificate~~ license number of the new ~~manager or managers~~; licensed barber manager;
- (4) if the barber shop or mobile barber shop was closed at the time the Form BAR-2 was submitted, the date of closure; and
- (5) the former licensed barber manager's name and ~~certificate~~ license number.

(b) The Form BAR-2 shall be notarized.

*History Note: Authority G.S. ~~86A-1; 86A-25; 86B-21; 86B-41~~;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. March 1, 1983;
Legislative Objection Lodged Eff. March 7, 1983;
Curative Amended Eff. April 6, 1983;
Amended Eff. May 1, 1989;
Readopted Eff. October 1, ~~2016~~ 2016;
Temporary Amendment Eff. May 2, 2023.*

21 NCAC 06N .0104 is amended under temporary procedures as follows:

21 NCAC 06N .0104 FORM BAR-3

(a) The Form BAR-3 shall be filed for permission to enroll in barber school. It requires the following:

- (1) the name, address, social security number, and birth date of the applicant;
- (2) the applicant's prior barber school attendance, if any;
- (3) the name of the school enrolled;
- (4) the date of enrollment; and
- (5) the school manager's attestation that the information in the form is correct.

(b) The fee in ~~21 NCAC 06N .0101(a)(12)~~ Rule .0101(a)(14) of this Section shall accompany this form.

*History Note: Authority G.S. ~~86A-18; 86A-22; 86A-25; 86B-35; 86B-38; 86B-41; 93B-14~~;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. March 1, 1983;
Legislative Objection Lodged Eff. March 7, 1983;
Curative Amended Eff. April 6, 1983;
Amended Eff. September 1, 2013;
May 1, 1989;
Readopted Eff. October 1, 2016;
Amended Eff. October 1, ~~2020~~ 2020;
Temporary Amendment Eff. May 2, 2023.*

21 NCAC 06N .0116 is adopted under temporary procedures with changes as follows:

21 NCAC 06N .0116 FORM BAR-13

(a) The Form BAR-13 shall be filed when one applies to open or manage a new mobile barber shop. It requires the following:

- (1) the name of the shop;
- (2) the permanent business address required by ~~G.S. 86B-20(g)~~; G.S. 86B-30(g);
- (3) the name, address, and license number of the licensed barber manager;
- (4) the name and address of the mobile barber shop owner;
- (5) if available, the email address, website, or social media handle of the mobile barber shop;
- (6) the physical dimensions of the mobile barber shop;
- (7) the vehicle identification number, license plate number, and vehicle make and model of the mobile barber shop;
- (8) the mobile barber shop business hours;
- (9) an explanation of how the mobile barber shop will dispose of sewage and wastewater;
- (10) the type of fixtures installed; and
- (11) the date the mobile barber shop will be ready for inspection.

(b) The fee required by Rule .0101(a)(22) of this Section shall accompany this form.

(c) The Form BAR-13 shall include the applicant's attestation that the information in the form is correct.

History Note: Authority G.S. 86B-30;

Temporary Adoption Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06O .0105, .0112, .0114, .0122 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-10, "The Board may assess a civil penalty not in excess of five hundred dollars (\$500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board." (Emphasis added)

Pursuant to G.S. 86B-30, "The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops, including standards for facilities, personnel, and safety and sanitary requirements."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). "The Board shall have the right to make additional rules and regulations

William W. Peaslee
Commission Counsel

governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this [G.S. 86B-31]...” (emphasis added)¹

The Rule

Each of the above captioned rules established a presumptive monetary penalty upon barber shop managers or barber school managers for various violations of Board rules dealing with licensure, notification of change of address, or change in personnel. Only one rule, 21 NCAC 06O .0114 concerning animals, is arguably related to a sanitary regulation.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Managerial Authority

While G.S. 86B-31(a) holds “owners or managers” responsible for certain enumerated sanitary standards, this is not an empowerment for the Board to regulate the internal management of barber shops or schools nor dictate the job responsibilities of their school employees outside of G.S. 86B-31(a).

In short, Chapter 86B is intended to *inter alia* empower the Board with the authority to prescribe rules and regulations for the operation of barber shops and schools, but not manage them or determine the job responsibilities of their employees.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31

¹ G.S. 86B-31(B) DOES NOT ADDRESS “MANAGERS AND OWNERS” AS DISCUSSED FURTHER IN THIS OPINION.

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or managers. The owners’ or manager’s personal responsibility is limited to those listed in G.S.86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity.² The method of the shop’s or school’s compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

Lack of Authority – Expansion of Manager Responsibility Outside of G.S. 86B-31

It appears to staff counsel that the Board has exceeded its authority by making managers responsible for the business’s compliance and personally liable for the business’s noncompliance.³ The duties of a manager in Chapter 86B are limited to and prescribed by G.S. 86B-31(a), and the Board does not have authority to expand those statutory duties or the personal liabilities that come with lawful duties beyond those prescribed in G.S. 86B-31(a). Outside of the context of G.S. 86B-31(a), the Board can regulate and penalize the business only.

This opinion is consistent with the Commissions objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly.

² UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

³ *IBID.*

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-10. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. - The Board may assess a civil penalty not in excess of five hundred dollars (\$500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. - Before imposing and assessing a civil penalty, the Board shall consider the following factors:

- (1) The nature, gravity, and persistence of the particular violation.
- (2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
- (3) Whether the violation was willful and malicious.
- (4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. - The Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board.

(d) Costs. - The Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, to the licensee against whom the proceedings were brought. (2004-146, s. 10; recodified from N.C. Gen. Stat. 86A-27 by 2022-72, s. 1(l).)

§ 86B-21. Necessity for license and shop or school permit.

No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering in the State of North Carolina without first obtaining a license either as a licensed apprentice or as a licensed barber issued pursuant to provisions of this Chapter by the North Carolina Board of Barber and Electrolysis Examiners. No person or combination of persons, or corporation, shall operate, manage or attempt to operate or manage a barber school, barbershop, mobile barbershop, or any other place where barber services are rendered, after July 1, 1945, without first obtaining a shop permit, or school permit, issued by the Board pursuant to the provisions of this Chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1; 1979, c. 695, s. 1; recodified from N.C. Gen. Stat. 86A-1 by 2022-72, s. 1(m); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

§ 86B-38. Licensing and regulating barber schools and colleges.

The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least one instructor for the first 20 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present, or unless the theoretical training is offered online.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86B-31.

- (7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the

guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) that is in a form acceptable to the Board; (ii) that is executed by the applicant; (iii) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State (ii) that is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7; 2017-25, s. 1(f); recodified from N.C. Gen. Stat. 86A-22 by 2022-72, s. 1(cc); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”⁴. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

⁴ PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).⁵ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁶ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

⁵ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁶ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

William W. Peaslee
Commission Counsel

21 NCAC 06O .0105 is amended under temporary procedures as follows:

21 NCAC 06O .0105 UNLICENSED BARBER OR APPRENTICE

(a) The presumptive civil penalty for a barber shop or mobile barber shop manager allowing a barber or apprentice to practice without a license:

(1) 1st offense \$300.00

(2) 2nd offense \$500.00

(b) The presumptive civil penalty for an individual engaging in barbering without a license:

(1) 1st offense \$250.00

(2) 2nd offense \$450.00

(3) 3rd offense \$500.00

*History Note: Authority G.S. ~~86A-1; 86A-5(a)(6); 86A-27; 86B-10; 86B-21~~;
Eff. April 1, 2005;
Readopted Eff. July 1, ~~2016~~. 2016;
Temporary Amendment Eff. May 2, 2023.*

21 NCAC 06O .0112 is amended under temporary procedures as follows:

21 NCAC 06O .0112 IDENTIFICATION

(a) The presumptive civil penalty for a barber shop or mobile barber shop owner or manager failing to positively identify a ~~registered~~ licensed barber, apprentice, or holder of a temporary permit:

(1) 1st offense \$100.00

(2) 2nd offense \$150.00

(3) 3rd offense \$250.00

(b) The presumptive civil penalty for a ~~registered~~ licensed barber, apprentice, or holder of a temporary permit failing to maintain and produce a license or permit as defined in 21 NCAC 06P .0103(7):

(1) 1st offense \$100.00

(2) 2nd offense \$150.00

(3) 3rd offense \$250.00

(c) The presumptive civil penalty for a barber student failing to wear identification as set forth in 21 NCAC 06F .0122:

(1) 1st offense \$100.00

(2) 2nd offense \$150.00

(3) 3rd offense \$250.00

History Note: Authority G.S. ~~86A-1; 86A-10; 86A-11; 86A-27; 86B-10; 86B-21; 86B-26; 86B-27;~~

Eff. June 1, 2008;

Amended Eff. September 1, 2009;

Readopted Eff. July 1, ~~2016~~ 2016;

Temporary Amendment Eff. May 2, 2023.

21 NCAC 06O .0114 is amended under temporary procedures as follows:

21 NCAC 06O .0114 ANIMALS IN BARBER SHOPS

The presumptive civil penalty for a ~~barber~~ manager of a barber shop or mobile barber shop allowing an animal in a barber shop or mobile barber shop in violation of 21 NCAC 06L .0114:

(1)	1st offense	\$100.00
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(2)	2nd offense	\$150.00
-----	-------------	----------

(3)	3rd offense	\$250.00
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History Note: Authority G.S. ~~86A-15; 85A-27; 86B-10; 86B-31;~~

Eff. June 1, 2008;

Readopted Eff. July 1, ~~2016;~~ 2016;

Temporary Amendment Eff. May 2, 2023.

21 NCAC 06O .0122 is amended under temporary procedures as follows:

21 NCAC 06O .0122 FAILURE TO NOTIFY BOARD OF CHANGE OF BARBER ~~SHOP~~ SHOP,
MOBILE BARBER SHOP, OR SCHOOL MANAGER

(a) The presumptive civil penalty for the failure of a barber shop or ~~barber school~~ mobile barber shop to notify the Board of a change of licensed barber ~~shop~~ manager:

- | | | |
|-----|-------------|----------|
| (1) | 1st offense | \$50.00 |
| (2) | 2nd offense | \$100.00 |
| (3) | 3rd offense | \$200.00 |

~~(b) The presumptive civil penalty for an individual for the failure to notify the Board of a change of manager of a barber shop or barber school:~~

- | | | |
|----------------|------------------------|---------------------|
| (1) | 1st offense | \$50.00 |
| (2) | 2nd offense | \$100.00 |
| (3) | 3rd offense | \$200.00 |

(b) The presumptive civil penalty for the failure of a barber school to notify the Board of a change of licensed instructor manager:

- | | | |
|------------|--------------------|-----------------|
| <u>(1)</u> | <u>1st offense</u> | <u>\$50.00</u> |
| <u>(2)</u> | <u>2nd offense</u> | <u>\$100.00</u> |
| <u>(3)</u> | <u>3rd offense</u> | <u>\$200.00</u> |

History Note: Authority G.S. ~~86A-1; 86A-5(a)(6); 86A-22; 86A-27;~~ 86B-2; 86B-10; 86B-38;
Eff. July 1, 2016;
Amended Eff. July 1, ~~2020.~~ 2020;
Temporary Amendment Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06O .0119 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-10, "The Board may assess a civil penalty not in excess of five hundred dollars (\$500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board." (Emphasis added)

Pursuant to G.S. 86B-30, "The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops, including standards for facilities, personnel, and safety and sanitary requirements."

William W. Peaslee
Commission Counsel

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). “The Board shall have the right to make additional rules and regulations **governing barbers and barbershops, mobile barbershops, and barber schools** for the proper administration and enforcement of this [G.S. 86B-31]...” (emphasis added)¹

The Rule

The Rule establishes a presumptive monetary penalty upon “the owner or licensed barber manager” of barber shops and schools for failing to notify the Board of a change of address for the shop or school.

Analysis

In Chapter 86B, the word “manager” is only used in G.S. 86B-31. This statute solely addresses “sanitary rules and regulations.” Here the General Assembly specifically enumerates the duties of “owners and managers”. Within G.S. 86B-31 the word “manager” never appears in isolation. The General Assembly always used the word manager in the context of “owner or manager” making either responsible for “sanitary rules and regulations”.

Pursuant to G.S. 86B-31, there are three duties placed upon the owner or manager, if there is a manager, of a “barber school or college” to wit: compliance with sanitary rules and regulations, provision of sterilizing solutions to each barber in the shop or school, and the posting of rules and regulations.

Lack of Authority – Managerial Authority

While G.S. 86B-31(a) holds “owners or managers” responsible for certain enumerated sanitary standards, this is not an empowerment for the Board to regulate the internal management of barber shops or schools nor dictate the job responsibilities of their school employees outside of G.S. 86B-31(a).

In short, Chapter 86B is intended to *inter alia* empower the Board with the authority to prescribe rules and regulations for the operation of barber shops and schools, but not manage them or determine the job responsibilities of their employees.

Lack of Authority to Designate Personal Liability Within G.S. 86B-31

¹ G.S. 86B-31(B) DOES NOT ADDRESS “MANAGERS AND OWNERS” AS DISCUSSED FURTHER IN THIS OPINION.

While the Board can make additional sanitary rules and regulations pursuant to G.S.86B-31(b) upon “barbers and barbershops, mobile barbershops, and barber schools”, those rules may govern the institutions only. Noteworthy is the absence of the phrase “owner or manager” in the delegation of authority to create additional rules in G.S.86B-31(b). Owners and managers appear to have been intentionally omitted for the Board’s G.S. 86B-31(b)-rulemaking authority. The Board lacks the authority to expand the liability for noncompliance with those rules directly to either the owners or managers. The owners’ or manager’s personal responsibility is limited to those listed in G.S.86B-31(a). Accordingly, the responsibility for compliance with rules adopted pursuant to G.S. 86B-31(b) lies solely with the business entity.² The method of the shop’s or school’s compliance to rules adopted pursuant to G.S. 86B-31(b) is the prerogative of the owners, and the liability for their violation is limited by existing principals of legal ownership. Staff counsel does not believe the General Assembly authorized the Board to set aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act by adoption of a rule.

Lack of Authority – Expansion of Manager Responsibility Outside of G.S. 86B-31

It appears to staff counsel that the Board has exceeded its authority by making managers responsible for the business’s compliance and personally liable for the business’s noncompliance.³ The duties of a manager in Chapter 86B are limited to and prescribed by G.S. 86B-31(a), and the Board does not have authority to expand those statutory duties or the personal liabilities that come with lawful duties beyond those prescribed in G.S. 86B-31(a). Outside of the context of G.S. 86B-31(a), the Board can regulate and penalize the business only.

This opinion is consistent with the Commissions objection to 12 NCAC 10B .0704 adopted by the North Carolina Sheriffs’ Education and Training Standards Commission attached hereto.

Accordingly, staff counsel recommends the Commission object to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule outside the authority delegated to the Board by the General Assembly.

² UNLESS THE RULES INTERPRET THE DUTIES SET FORTH IN G.S. 86B-31(A).

³ *IBID.*

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-10. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. - The Board may assess a civil penalty not in excess of five hundred dollars (\$500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. - Before imposing and assessing a civil penalty, the Board shall consider the following factors:

- (1) The nature, gravity, and persistence of the particular violation.
- (2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
- (3) Whether the violation was willful and malicious.
- (4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. - The Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board.

(d) Costs. - The Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, to the licensee against whom the proceedings were brought. (2004-146, s. 10; recodified from N.C. Gen. Stat. 86A-27 by 2022-72, s. 1(l).)

§ 86B-21. Necessity for license and shop or school permit.

No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering in the State of North Carolina without first obtaining a license either as a licensed apprentice or as a licensed barber issued pursuant to provisions of this Chapter by the North Carolina Board of Barber and Electrolysis Examiners. No person or combination of persons, or corporation, shall operate, manage or attempt to operate or manage a barber school, barbershop, mobile barbershop, or any other place where barber services are rendered, after July 1, 1945, without first obtaining a shop permit, or school permit, issued by the Board pursuant to the provisions of this Chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1; 1979, c. 695, s. 1; recodified from N.C. Gen. Stat. 86A-1 by 2022-72, s. 1(m); 2022-72, s. 2.)

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

§ 86B-38. Licensing and regulating barber schools and colleges.

The Board may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least one instructor for the first 20 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present, or unless the theoretical training is offered online.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86B-31.

- (7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the

guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) that is in a form acceptable to the Board; (ii) that is executed by the applicant; (iii) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) that is executed by a federally insured depository institution or a trust institution authorized to do business in this State (ii) that is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7; 2017-25, s. 1(f); recodified from N.C. Gen. Stat. 86A-22 by 2022-72, s. 1(cc); 2022-72, s. 2.)

RRC STAFF OPINION

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 Sheriffs' Education and Training Standards Commission**

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDED ACTION:

- ☐ 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:

I.

Pursuant to G.S. 17E-4, the agency has the authority to “establish minimum standards for the certification of training schools and programs or courses of instruction”. The agency also has authority to “certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction”.

As written, this Rule prescribes the employment responsibilities of a specific employee of each educational institution, the “School Director”⁴. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

⁴ PURSUANT TO 12 NCAC 10B .0703, THE EXECUTIVE OFFICERS OF THE INSTITUTION SPONSORING THE TRAINING COURSE HAVE PRIMARY RESPONSIBILITY FOR THE ADMINISTRATION OF THE OF THE SCHOOL AND COMPLIANCE WITH THE RULES OF SECTION .600 OF 12 NCAC 10B. THE EXECUTIVE OFFICERS ARE ALSO PRESCRIBED WITH APPOINTING A “SCHOOL DIRECTOR”.

William W. Peaslee
Commission Counsel

Pursuant to the Rule, the agency prescribes the job duties of an institutional employee. The agency is not directing one of its own staff but rather an employee of another entity. The undersigned requested the agency explain its authority in this regard in the "Request for Changes". The agency did not respond to that inquiry.

The Rule attempts to go beyond the mere establishment of standards for and certification of the educational institutions. Rather than directing the institution to accomplish certain tasks and ensure institutional compliances, the Rule directs a specific employee of the institution to so do.

For example, 12 NCAC 10B .0704(a)(2)(b) directs the "School Director" to provide each instructor with materials and information. Here the responsibility is not on the institution, but rather upon one of its employees. What if the materials were provided to the instructors but it was not by the hand, plan, or direction of the School Director? By the plain language of the Rule, this would be a violation. It is one thing to prescribe that the institution must provide materials and information to instructors. Prescribing which of the institution's employees is used to accomplish this task is very different.

The statute is intended to empower the agency with the authority to set standards for the educational institutions, not manage them. While the standards imposed upon the institution would impact the institution's employees and their assignments, it would be the managerial prerogative of the institution to determine how the standards are attained. Here the agency attempts to inject itself into the internal management of the institution's employees. There is no authority for the agency so do.

In short, the agency has authority to establish standards for certification, but it lacks authority to prescribe the institution's allocation of non-instructional human resources used to attain those standards.

This issue can be easily resolved by prescribing compliance to the standards upon the institutions directly.

II.

Pursuant to G.S. 150B-2(8a) d., a form does not fall under the definition of a "Rule" if the contents and substantive requirements of the form are prescribed by rule or statute.

William W. Peaslee
Commission Counsel

As written, 12 NCAC 10B .0704 requires the submission of Form F-7A (Pre-Delivery Report of Training Course Presentation).⁵ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form F-7A. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form F-7A. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form F-7A.

As written, 12 NCAC 10B .0704 requires the submission of Form 7-B (Post-Delivery Report of Training Course Presentation).⁶ 12 NCAC 10B .0704 does not prescribe the contents or substantive requirements of Form 7-B. A review of Subchapter 10A fails to reveal the contents or substantive requirements of Form 7-B. 12 NCAC 10B .0704 does not reference any other subchapter or statute which prescribes the contents or substantive requirements of Form 7-B.

Accordingly, the agency has failed to comply with the Administrative Procures Act by requiring the regulated public to use forms without adopting the forms or adopting a rule prescribing the contents or substantive requirements thereof.

III.

G.S. 17E-4(4), which the agency cites as its authority in this instance, authorizes the agency to, “Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter.”

12 NCAC 10B .0704(a)(7) requires the “School Director” to “if appropriate, recommend housing and dining facilities”. Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as housing and dining do not fall within “schools, programs and courses of instruction”. Assuming *arguendo* that it is within the agency’s authority, the requirement is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

12 NCAC 10B .0704(a)(14) requires the “School Director” to make available to the agency facilities “for the administration of a written examination to those trainees who have satisfactorily completed

⁵ SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

⁶ SEE 12 NCAC 10B .0704, PAGE 3, LINE 35.

all course work.” Notwithstanding the objection raised in section (I.) of this staff opinion, this subparagraph exceeds the agency’s authority pursuant to G.S. 150B-21.9(a)(1) as providing facilities for the agency does not fall under establishing minimum “standards” for schools, programs and courses of instruction. It is a usurpation by the agency of property owned or controlled by the educational institution for a government purpose, to wit: the administration of the agency’s certification exam.

Accordingly, staff recommends that the Rules Review Commission object to 12 NCAC 10B .0704.

William W. Peaslee
Commission Counsel

21 NCAC 06O .0119 is amended under temporary procedures as follows:

21 NCAC 06O .0119 FAILURE TO NOTIFY BOARD OF CHANGE OF ADDRESS

~~(a) The presumptive civil penalty for the failure of a barber shop or barber school to fail to notify the Board of a change of address:~~

~~(1) 1st offense \$50.00~~

~~(2) 2nd offense \$100.00~~

~~(3) 3rd offense \$200.00~~

~~(b) The presumptive civil penalty for an individual the owner or licensed barber manager of a barber shop or mobile barber shop, or the owner or school manager of a barber school, for the failure failing to notify the Board of a change of address for a barber shop shop, mobile barber shop, or barber school:~~

~~(1) 1st offense \$50.00~~

~~(2) 2nd offense \$100.00~~

~~(3) 3rd offense \$200.00~~

History Note: Authority G.S. ~~86A-1; 86A-5(a)(6); 86A-27; 86B-2; 86B-10; 86B-30;~~

Eff. July 1, ~~2016~~ 2016;

Temporary Amendment Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06O .0126 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

Statutory Authority

Pursuant to G.S. 86B-2, "The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of [Chapter 86B]."

Pursuant to G.S. 86B-10, "The Board may assess a civil penalty not in excess of five hundred dollars (\$500.00) per offense **for the violation of any section of this Chapter or the violation of any rules** adopted by the Board." (Emphasis added)

Pursuant to G.S. 86B-30, "The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops, including standards for facilities, personnel, and safety and sanitary requirements."

The Board also has further rule making authority in the context of sanitary rules and regulations pursuant to G.S.86B-31(b). "The Board shall have the right to make additional rules and regulations

William W. Peaslee
Commission Counsel

governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this [G.S. 86B-31]...”

The Rule

The Rule sets forth a presumptive penalty for a mobile barber shops disposal of waste water “by a means contrary to applicable federal, state, and local commercial, transportation, or environmental statutes and rules”.

Lack of Authority

Pursuant to G.S. 86B-10(a), the Board is authorized to assess civil penalties for a violation of Chapter 86B of the North Carolina General Statutes or the rules established by the Board. The Board does not have the authority to establish penalties for any other federal, state, or local statutes or rules.

Ambiguity

Assuming *arguendo* that the Commission finds that the Board has authority to assess penalties, the Board’s reference to penalties for violations of “applicable” federal, state, and local statutes and regulations is ambiguous. “Applicable” does not inform the regulated public for which violations they will suffer an additional penalty imposed by the Board.

Accordingly, staff counsel recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(1) for adopting a rule exceeding the authority granted by the General Assembly and G.S. 150B-21.9(a)(2) for ambiguity.

§ 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.)

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2; recodified from N.C. Gen. Stat. 86A-5 by 2022-72, s. 1(c); 2022-72, s. 2.)

§ 86B-10. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. - The Board may assess a civil penalty not in excess of five hundred dollars (\$500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. - Before imposing and assessing a civil penalty, the Board shall consider the following factors:

- (1) The nature, gravity, and persistence of the particular violation.
- (2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
- (3) Whether the violation was willful and malicious.
- (4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. - The Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board.

(d) Costs. - The Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, to the licensee against whom the proceedings were brought. (2004-146, s. 10; recodified from N.C. Gen. Stat. 86A-27 by 2022-72, s. 1(l).)

§ 86B-30. Mobile barbershops.

(a) A motor home as defined in Article 1 of Chapter 20 of the General Statutes may be used as a mobile barbershop for the practice of barbering.

(b) The Board shall issue a permit to operate a mobile barbershop to any applicant who submits a properly completed application on a form approved by the Board, pays the required fee, and is determined after inspection to be in compliance with the provisions of this Chapter and the Board's rules.

(c) The Board shall adopt rules for the operation, permitting, and inspection of mobile barbershops, including standards for facilities, personnel, and safety and sanitary requirements. All permitting and operating requirements provided by this Chapter or by rules adopted by the Board pursuant to this Chapter that apply to barbershops shall also apply to mobile barbershops, except to the extent that the requirements conflict with this section or with any rules adopted by the Board pursuant to this section.

(d) In addition to the requirements of this Chapter, individuals and the vehicles they operate while providing mobile barbershop services shall be subject to the provisions of (i) Chapter 20 of the General Statutes, (ii) Title 19A of the North Carolina Administrative Code, (iii) all applicable OSHA requirements, and (iv) all local laws and ordinances regulating business establishments.

(e) A mobile barbershop must be equipped with a functional sink and toilet facilities and must maintain an adequate supply of clean water and wastewater storage capacity.

(f) No barbering or service may be performed in a mobile barbershop while the barbershop is moving. The mobile barbershop must be safely parked in a legal parking spot at all times while patrons are present inside the mobile barbershop.

(g) A mobile barbershop owner must maintain a permanent business address at which records of appointments, itineraries, license numbers, and vehicle identification numbers for each mobile barbershop being operated shall be kept and made available for verification and inspection by the Board and at which all correspondence from the Board can be received.

(h) To facilitate periodic inspections of mobile barbershops, prior to the beginning of each month, the owner of the barbershop shall provide to the Board a written monthly itinerary listing locations, dates, and hours of operation for the barbershop. (2022-72, s. 2.)

21 NCAC 06O .0126 is adopted under temporary procedures as follows:

21 NCAC 06O .0126 DISPOSAL OF SEWAGE AND WASTEWATER

The presumptive civil penalty for a mobile barber shop disposing of sewage or wastewater by means contrary to applicable federal, state, and local commercial, transportation, or environmental statutes and rules: \$500.

History Note: Authority G.S. 86B-10; 86B-30;

Temporary Adoption Eff. May 2, 2023.

RRC STAFF OPINION

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: Board of Barber and Electrolysis Examines

RULE CITATION: 21 NCAC 06R .0101 Temporary Rule

RECOMMENDATION DATE: April 18, 2023

RECOMMENDED ACTION:

- ☐ 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:

The Rule requires "every establishment permitted to practice barbering" to display a sign with prescribed specification or in the alternative a barber pole, which "is visible from the street." Barber apprentices must be licensed.

In response to a query in the Request for Change the Board cited GS 86B-31(b) as its authority to compel the prescribed commercial speech. GS 86B-31 concerns sanitary rules and regulations applicable to barbershops, barber schools or any place where barbering services are rendered. The Board specifically cites Subsection (b) which states, "The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section..." which is GS 86B-31.

William W. Peaslee
Commission Counsel

Notwithstanding the obvious First Amend implications of compelling commercial speech and the broad grant of authority to the Board in GS. 86B-2 and GS 86B-31, staff counsel does not believe the authority granted extends to compelling advertisements.

While the Board avers that the signage will “ensure that the Board’s inspectors are not accused [of] trespassing on personal property” and is “reasonably related to the State’s interest in ensuring that businesses are subject to inspection during business hours”, the authority granted pursuant to GS 86B-31(b), as cited by the Board, is limited to sanitary rules and regulations. While the Board clearly has authority to inspect barbering establishments for compliance with sanitary rules and regulations, mandating signage to ensure inspectors are not accused of illegality is tangential at best.

Accordingly, staff counsel recommends the Commission object to the rule pursuant to GS 150B-21.9(a)(1) for exceeding the authority granted by the General Assembly.

The Rule requires that the sign meets three tests. The sign must be visible from the street. The lettering of the sign must be at least three inches; however, there is no requirement that the lettering be visible from the street. The rule requires the sign to be displayed “at its entrance”. It is unclear what the Board means by “entrance”. It could be the door to the room where barbering is being practiced or the door to the building. The alternative barber pole requirement contains no mandatory size requirement but must also be “visible from the street”; however, it is not required to be placed in any particular location. It is unclear whether the pole must be attached to the building where barbering is being practiced or even if it needs to be on the same premises as the building.

Accordingly, staff counsel recommends the Commission object to the rule pursuant to GS 150B-21.9(a)(2) for ambiguity.

William W. Peaslee
Commission Counsel

§ 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.)

§ 86B-2. Powers and duties of the Board.

The Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter. If the Board has reasonable cause to believe that a violation of a provision of this Chapter may have occurred, the Board may investigate, upon its own motion or upon receipt of a complaint from any individual, any licensee or establishment subject to the provisions of this Chapter to determine whether a violation has occurred.

§ 86B-31. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, mobile barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. -

- a. Every barbershop, or other place where barber service is rendered, shall be located in buildings, mobile units, or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
- b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
- c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
- d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The Board shall adopt rules regarding the disposal of wastewater in a barbershop or mobile barbershop.
- e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- f. If a mobile barbershop, all applicable requirements in accordance with G.S. 86B-30.

(2) Equipment and instruments. -

- a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
- b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
- c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be

covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

- d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. -

- a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
- b. Each person working as a barber shall be clean both as to person and dress.
- c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a licensed barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop, mobile barbershop, or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. Initial inspections conducted by the Board pursuant to this Chapter shall not be delayed if the sole reason for delay is the lack of a certificate of occupancy by a unit of local government. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop, mobile barbershop, or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop, mobile barbershop, or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section, but no such additional rules or

regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a licensed barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1; 2014-115, s. 39.7; recodified from N.C. Gen. Stat. 86A-15 by 2022-72, s. 1(v); 2022-72, s. 2.)

21 NCAC 06R .0101 is amended under temporary procedures as follows:

21 NCAC 06R .0101 DISPLAY OF SIGN OR BARBER POLE

Every establishment permitted to practice barbering shall display at its entrance a sign that is visible from the street with lettering no smaller than three inches, stating "barber shop," "barber salon," "barber styling," "mobile barber shop," or similar use of the designation, "shop, ~~salon~~ salon, or styling." Alternatively, an establishment may display a "~~barber pole~~" barber pole as defined in 21 NCAC 06P .0103(3) that is visible from the street.

*History Note: Authority G.S. ~~86A-1; 86A-13; 86B-2~~;
Eff. June 1, 2008;
Amended Eff. September 1, 2009;
Readopted Eff. July 1, ~~2016~~. 2016;
Temporary Amendment Eff. May 2, 2023.*