

## **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)<sup>1</sup>

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<sup>1</sup> 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 managers<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>3</sup> 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.)

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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”<sup>4</sup>. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...” (emphasis added).**

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<sup>4</sup> 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).<sup>5</sup> 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).<sup>6</sup> 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

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<sup>5</sup> SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

<sup>6</sup> 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.*

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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)<sup>1</sup>

#### 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.

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<sup>1</sup> 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”<sup>2</sup>. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

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<sup>2</sup> 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).<sup>3</sup> 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).<sup>4</sup> 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

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<sup>3</sup> SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

<sup>4</sup> 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 .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)<sup>1</sup>

#### 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

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.

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

<sup>3</sup> *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”<sup>4</sup>. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

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<sup>4</sup> 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).<sup>5</sup> 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).<sup>6</sup> 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

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<sup>5</sup> SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

<sup>6</sup> 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.

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 |
| (2) | 2nd offense | \$150.00 |
| (3) | 3rd offense | \$250.00 |

*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.*



## **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)<sup>1</sup>

#### 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

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.

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

<sup>3</sup> *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”<sup>4</sup>. The Rule states, “In planning, developing, coordinating, and delivering each commission certified Detention Officer Certification Course, **the School Director shall: ...**” (emphasis added).

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<sup>4</sup> 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).<sup>5</sup> 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).<sup>6</sup> 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

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<sup>5</sup> SEE 12 NCAC 10B .0704, PAGE 2, LINE 13.

<sup>6</sup> 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.



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.*