



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

September 22, 2023

Jeff Gray, Rulemaking Coordinator.
North Carolina Private Protective Services Board
Sent via email only to: JGray@bdixon.com

Re: Objection to 14B NCAC 16 .0201, .0205, .0403, .0807, .1101, .1501, .1502, .1601, .1701, .1706, and .1707

Dear Mr. Gray:

At its meeting on September 21, 2023, the Rules Review Commission (RRC) objected to the above-captioned Rules pursuant to G.S. 150B-21.9(a). Specifically, the RRC adopted the opinions of counsel attached hereto and incorporated by reference.

Please respond to this objection in accordance with the provisions of G.S. 150B-21.12.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Brian Liebman
Commission Counsel

Enc: Staff opinions issued September 13, 2023.

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

An Equal Employment Opportunity Employer
1711 New Hope Church Road, Raleigh, NC 27609
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www.oah.nc.gov

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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0201

DATE ISSUED: September 13, 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:

This Rule governs the application process for licenses or trainee permits issued by the Board.

Ambiguity

Paragraph (a) sets out the contents of the application. In Item (4), the applicant is directed to submit a "non-refundable application fee, along with a four dollar (\$4.00) convenience fee and credit card transaction fee." It is unclear whether the Board is requesting payment of a single four-dollar fee which covers "convenience" and credit card fees, or whether these are two separate fees. The Board has declined to make minor edits to clarify the issue.

Based on the foregoing, staff recommends objection to this Rule for ambiguity under G.S. 150B-21.9(a)(2).

Failure to Comply with the APA

In paragraph (c), the Board requires trainees to supply a "log of experience on a form provided by the Board as required by Rule .0403 of this Chapter." Rule .0403 merely repeats that the trainee "shall maintain a log on a form provided by the Board on its website as evidence of experience." It does not state what the contents or substantive requirements of this form are. Pursuant to G.S. 150B-2(8a)d., a form is included in the definition of a "rule," and thus is subject to rulemaking itself, except when "the contents or substantive requirements [of the form] are prescribed by rule or statute." While Rule .0403 states that the form shall contain a "log" of "experience", there is no indication of what information the Board would require for it to consider such a log complete.

Brian Liebman
Commission Counsel

Consequently, as the form referenced here has not been adopted as a Rule, and its contents or substantive requirements are not described in any other Rule or statute, staff recommends objection for failure to comply with the APA, pursuant to G.S. 150B-21.9(a)(4).

Similarly, in paragraph (e), the applicant is required to meet with a Board representative and “sign a form provided by the Board indicating that he or she has reviewed G.S. 74C and the administrative rules in this Chapter with the Board’s representative.” Again, the form itself has not been adopted as a rule, and the agency has declined to represent that the complete contents or substantive requirements are captured in (e) or point staff to another Rule or statute which contains the contents or substantive requirements.

Consequently, staff recommends objection for failure to comply with the APA, pursuant to G.S. 150B-21.9(a)(4).

Brian Liebman
Commission Counsel

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

.....

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. **The term does not include the following:**
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. **A form, the contents or substantive requirements of which are prescribed by rule or statute.**

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

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

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

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

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

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

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

1 14B NCAC 16 .0201 is amended as published in 37:18 NCR 1883 with changes as follows:

2
3 **14B NCAC 16 .0201 APPLICATION FOR LICENSE AND TRAINEE PERMITS**

4 (a) Each applicant for a license or trainee permit shall submit an online application on the website provided by the
5 Board. The online application shall be accompanied by:

- 6 (1) electronic submission of fingerprints from a Live Scan or similar system approved by the State
7 Bureau of Investigations or one set of classifiable fingerprints on an applicant fingerprint card that
8 shall be mailed separately to the Board's office;
- 9 (2) one head and shoulders digital photograph of the applicant in JPG, JPEG, or PNG format of
10 sufficient quality for identification, taken within six months prior to online application and
11 submitted by uploading the photograph online with the application submission;
- 12 (3) ~~upload online~~ a statement of the results of a statewide criminal history records search by the
13 reporting service designated by the Board pursuant to G.S. 74C-8.1(a) for each state where the
14 applicant has resided within the preceding 60 months;
- 15 (4) the applicant's non-refundable application fee, along with a four dollar (\$4.00) convenience fee and
16 credit card transaction fee;
- 17 (5) the actual cost charged to the Private Protective Services Board by the State Bureau of
18 Investigation to cover the cost of criminal record checks performed by the State Bureau of
19 Investigation, collected online by the Private Protective Services Board;
- 20 (6) an Equifax credit check run within 30 days of the license application submission date, which will
21 be submitted to the Board's investigator during the application process; and
- 22 (7) five letters attesting to the good character and reputation of the applicant using the online character
23 letter submission process.

24 (b) Applications for trainee permits shall be accompanied by a notarized statement on a form provided by the Board
25 and signed by the applicant and his or her prospective supervisor, stating that the trainee applicant shall at all times
26 work with and under the direct supervision of that supervisor and the form shall be uploaded as part of the online
27 application process.

28 (c) Private investigator and digital forensics examination trainees applying for a license shall make available for
29 inspection a log of experience on a form provided by the ~~Board.~~ Board as required by Rule .0403 of this Chapter.

30 (d) Each applicant must upload evidence of high school graduation either by diploma, G.E.D. certificate, or other
31 proof.

32 (e) Each applicant for a license shall meet personally with either a Board investigator, the Screening Committee, the
33 Director, or another Board representative designated by the Director prior to being issued a license. The applicant
34 shall discuss the provisions of G.S. 74C and the administrative rules in this Chapter during the personal meeting. The
35 applicant shall sign a form provided by the Board indicating that he or she has reviewed G.S. 74C and the
36 administrative rules in this Chapter with the Board's representative. During a national or State declared state of

1 emergency that restricts or prohibits travel, the personal meeting requirement may be waived if requested by the
2 applicant in favor of alternative means of communication.

3

4 *History Note: Authority G.S. 74C-2; 74C-5; 74C-8; 74C-8.1; 74C-12;*

5 *Eff. June 1, 1984;*

6 *Amended Eff. May 1, 2012; July 1, 2011; August 1, 1998; December 1, 1995; July 1, 1987;*

7 *December 1, 1985;*

8 *Transferred and Recodified from 12 NCAC 07D .0201 Eff. July 1, 2015;*

9 *Amended Eff. November 1, 2017;*

10 *Readopted Eff. March 1, 2020;*

11 *Emergency Amendment Eff. May 6, 2020;*

12 *Temporary Amendment Eff. July 24, 2020;*

13 *Temporary Amendment Expired May 14, 2021;*

14 *Amended Eff. January 1, 2022; July 1, 2021;*

15 *Temporary Amendment Eff. April 28, 2023;*

16 *Amended Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0205

DATE ISSUED: September 13, 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:

This Rule outlines the process by which the Board will issue a license to firms, associations, and corporations which are required to be licensed under G.S. 74C-2. As part of the application process, the applicant must provide the Board with the name and address of a qualifying agent as defined in G.S. 74C-8(c). Under the statute, the qualifying agent must be in a "management position." Upon receipt of a completed application, paragraph (c) of the Rule states that the Board "shall conduct a background investigation to determine if the qualifying agent is in a managerial position." The Board has declined to define the term "managerial position," stating in its response to staff's requests for changes that there is no way to define the term. However, a brief review of the North Carolina Administrative Code reveals that the term has been defined by the Office of State Human Resources.¹ In failing to define the term "managerial position" the Board fails to provide applicants with the information necessary to comply with the Rule; without a definition, an applicant has no way to determine if the person they have designated as a qualifying agent meets with the Board's approval until the Board issues a decision. Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

¹ Staff is not requesting that the Board adopt the OSHR definition of "managerial positions" in 25 NCAC 01L .0306, or "executive management position" or "middle management position" in 25 NCAC 01E .1802 and is not suggesting that these definitions would be apposite here. Rather, staff provides this information for the limited purpose of showing that the term is indeed susceptible to a definition that is currently in the Code. Staff declines to opine on the merits of either of the OSHR rules referenced here.

Brian Liebman
Commission Counsel

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

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

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

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

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

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

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

25 NCAC 01L .0306

ADMINISTRATION: DEFINITIONS

(a) "Supervisory positions" are defined as positions in which the majority of the work performed is directing the work of other positions. These employees have the authority to assign work and to evaluate work; to hire employees; to discipline or dismiss employees; or have significant input into such actions.

(b) "Managerial positions" are defined as positions which manage established divisions or subdivisions of a department, agency or university. These employees direct the work of one or more supervisors and have the authority to hire, reward, discipline, or discharge employees. These employees may also provide suggestions for changes in policy to senior executives with policy-making authority.

(c) "Executive managerial" positions are defined as policy making positions. Employees in these positions are agency/department heads, university chancellors, deputies, assistants, vice-chancellors, and other policy makers. The employees in executive managerial positions are usually appointed or elected. For the purposes of this policy, the definition of supervisors, managers, and executives also includes the setting of performance expectations, conducting performance appraisal conferences and evaluating performance.

(d) "Incumbent Executives, Managers and Supervisors" are defined as executive managers and supervisors hired or appointed into positions prior to July 1, 1991.

(e) "EEOI Candidates" are defined as:

- (1) Managers and supervisors hired on or after July 1, 1991 and who may or may not have served in a management role in state government.
- (2) Incumbent executives, managers and supervisors hired or appointed into current positions prior to July 1, 1991.
- (3) Incumbent executives, managers and supervisors promoted/appointed to a different management position on or after July 1, 1991.
- (4) Executive level managers who are hired or appointed with or without executive level experience in state government on or after July 1, 1991.

(f) "Training Level 1" is defined as the full EEOI Training designed for those managers and supervisors identified in Subparagraph (e)(1) of this Rule. Also, management level employees as identified in Subparagraphs (e)(2) and (e)(3) of this Rule may participate on a space availability basis.

(g) "Training Level 2" is defined as an abbreviated course designed for executive level managers as identified in Subparagraph (e)(4) of this Rule. Also, executive level managers as identified in Subparagraphs (e)(2) and (e)(3) of this Rule may participate on a space availability basis.

(h) "Enroll," for the purposes of this policy, shall be defined as the act of attending and completing the EEOI.

History Note: Authority G.S. 126-16.1;
Eff. January 1, 1992;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 4, 2016.

25 NCAC 01E .1802

DEFINITIONS

As used in this Section:

- (1) Employed Outside of State Government means employed with an organization that is not part of the State of North Carolina government or not an organization for which the State currently accepts transferred accrued vacation leave upon hire.
- (2) Executive Management Position means a senior management position that reports directly to an appointed or elected agency head and is delegated authority to make decisions that impact the overall direction of the agency and whose duties typically involve planning, strategy, policy-making and line management. Typical job titles include chief executive officer, chief operating officer, chief financial officer, and deputy secretary.
- (3) Middle Management Position means a position that reports directly to an executive management position and supervises lower level management positions and is delegated authority to make decisions that impact the overall direction of a department or division of an agency and whose duties typically involve program planning and coordination, organization structure, determining goals and standards, determination and interpretation of policy, and fiscal control.
- (4) Middle or Late Career Applicant means an applicant with 10 or more years of directly related experience in their profession.
- (5) Newly Appointed means the initial appointment as an employee of the State of North Carolina, or an appointment following a break in service of at least 12 months from a previous appointment as an employee of the State of North Carolina.
- (6) Recruitment Difficulties means positions that are highly competitive in the labor market due to specialized competencies, licenses, or certifications, or geographic location or those positions in which there is a high turnover which impacts the agency's efforts to recruit and provide services. Recruitment typically involves active recruitment efforts utilizing multiple recruitment resources that require an extended period of recruitment and results in a limited qualified applicant pool.

History Note:

Authority G.S. 126-4;
Eff. January 1, 2011;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 4, 2016.

1 14B NCAC 16 .0205 is amended as published in 37:19 NCR 1940 as follows:

2
3 **14B NCAC 16 .0205 COMPANY BUSINESS LICENSE**

4 (a) Any firm, association, or corporation required to be licensed pursuant to G.S. 74C-2(a) shall upload on the Board's
5 website an application for a company business license on a form provided by the Board. Only a sole proprietorship
6 that is owned and operated by an individual licensee shall be exempt from this Rule. This application for license shall
7 require [such information as] the firm, association, or corporation name; the address of its principal office within the
8 State; any past conviction for criminal offenses of any company director, or officer; information concerning the past
9 revocation, suspension, or denial of a business or professional license to any director or officer; a list of all directors
10 and officers of the firm, association, or corporation; a list of all persons, firms, associations, corporations or other
11 entities owning 10 percent or more of the outstanding shares of any class of stock; and the name and address of the
12 qualifying agent.

13 (b) In addition to the items required in Paragraph (a) of this Rule, an out-of-state corporation shall file with its
14 application for a license, a copy of its certificate of authority to transact business in this State issued by the North
15 Carolina Secretary of State in accordance with G.S. 55-15-01. The corporation shall also file a consent to service of
16 process and pleadings that shall be authenticated by its corporate seal and accompanied by a duly certified copy of the
17 resolution of the board of directors authorizing the proper officer or officers to execute the consent.

18 (c) After filing a completed application with the Board, the Board shall conduct a background investigation to
19 determine if the qualifying agent is in a management position. The Board shall also determine if the directors or
20 officers have the requisite good moral character as defined in G.S. 74C-8(d)(2). For purposes of this Rule, "conviction"
21 means and includes the entry of a plea of guilty or no contest or a verdict rendered in open court by a judge or jury.

22 (d) Upon satisfactory completion of the background investigation, a company business license shall be issued. This
23 license shall be conspicuously displayed at the [principle principal] place of business within North Carolina.

24 (e) The company business license shall be issued only to the business entity and shall not be construed to extend to
25 the licensing of its officers and employees.

26 (f) The issuance of the company business license is issued to the firm, association, or corporation in addition to the
27 license issued to the qualifying agent. The qualifying agent for the firm, association, or corporation which has been
28 issued the company business license shall be responsible for assuring compliance with G.S. 74C.

29 (g) Dissolution or administrative suspension of corporate status shall result in suspension of the company business
30 license by operation of law and may result in disciplinary action for unlicensed [activity; if it is determined that the
31 suspension was due to intentional disregard of the law or inaction.]

32
33 *History Note: Authority G.S. 74C-2(a); 74C-5;*
34 *Eff. April 1, 1993;*
35 *Amended Eff. February 1, 1995;*
36 *Transferred and Recodified from 12 NCAC 07D .0205 Eff. July 1, 2015;*
37 *Readopted Eff. March 1, 2020;*

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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0403

DATE ISSUED: September 13, 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:

This Rule outlines additional requirements that applicants for private investigator, electronic countermeasure, or digital forensic examiner trainee permits must fulfill in addition to those described in Section .0200.

Ambiguity

In paragraph (a), the Board requires that the trainee be supervised by "a licensee approved by the Board." The Rule does not state what grounds the Board will use to approve said supervisor. In response to staff's requests for changes, the Board responded that the proposed supervisor must submit a plan of supervision to the Board and may not supervise more than five trainees at a time. Despite the Board's claims to the contrary, these provisions are not contained in any Rule known to staff, and even if they were, it is unclear by what standards the Board would judge the plan of supervision.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

Failure to Comply with the APA

In paragraph (c), the Board requires trainees to maintain a "log on a form provided by the Board on its website as evidence of experience." The Rule does not state the contents or substantive requirements of this form, and the Board has not directed staff to any other relevant rule or statute. Similarly, in paragraph (d), the Board requires applicants for renewal of a trainee permit or for a

Brian Liebman
Commission Counsel

license to submit “an evaluation report of the trainee’s performance on a form provided by the Board on its website and submitted by the trainee’s supervisor.” Again, the Rule does not state the contents or substantive requirements of this form, and the Board has not directed staff to any other relevant rule or statute.

Pursuant to G.S. 150B-2(8a)d., a form is included in the definition of a “rule,” and thus is subject to rulemaking itself, except when “the contents or substantive requirements [of the form] are prescribed by rule or statute.”

Consequently, as the forms referenced in paragraphs (c) or (d) have not been adopted as rules, and their contents or substantive requirements are not described in any other rule or statute, staff recommends objection for failure to comply with the APA, pursuant to G.S. 150B-21.9(a)(4).

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

.....

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. **The term does not include the following:**
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. **A form, the contents or substantive requirements of which are prescribed by rule or statute.**

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

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

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

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

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

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

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

1 14B NCAC 16 .0403 is amended as published in 37:18 NCR 1883 with changes as follows:

2

3 **14B NCAC 16 .0403 TRAINEE PERMIT REQUIREMENTS**

4 (a) In addition to the requirements of Section .0200 of this Chapter, applicants for a trainee permit in private
5 ~~investigation or countermeasures~~ investigation, electronic countermeasures, or digital forensics examination shall be
6 directly supervised by a licensee approved by the Board and that supervisor shall be responsible for the training and
7 ~~investigations~~ other professional activities of the trainee.

8 (b) Trainees who wish to apply for a license must submit an application to the Board in accordance with Rule .0201
9 of this Chapter.

10 (c) Private ~~investigator~~ investigator, electronic countermeasures, or digital forensics examination trainees shall
11 maintain a log on a form provided by the Board on its website as evidence of experience. This log must be available
12 for inspection by Board staff when applying for a license.

13 (d) Any request for renewal of a trainee permit or for issuance of a license shall be accompanied by an evaluation
14 report of the trainee's performance on a form provided by the Board on its website and submitted by the trainee's
15 supervisor.

16

17 *History Note: Authority G.S. 74C-2; 74C-5;*

18 *Eff. June 1, 1984;*

19 *Amended Eff. December 1, 1985;*

20 *Transferred and Recodified from 12 NCAC 07D .0403 Eff. July 1, 2015;*

21 *Readopted Eff. August 1, 2020;*

22 *Temporary Amendment Eff. April 28, 2023;*

23 *Amended Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0807

DATE ISSUED: September 13, 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:

This Rule outlines training requirements for armed licensees and registrants.

*In paragraph (a), applicants for armed security guard firearm registration permits are required to take the basic unarmed security training course, which is set forth in Rule .0707. Paragraph (b) requires licensees applying for an armed permit to “complete a five hour training course consisting of the courses set forth in Rule .0707 (a)(1) and (2) of this Chapter **and all additional training requirements set forth in that Rule.**”*

Turning to Rule .0707, paragraph (a) requires a basic unarmed security guard training course of at least 16 hours. Topics required in (a)(1) and (2) are “The Security Officer in North Carolina” for a minimum of 1 hour, and “Legal Issues for Security Officers”, a minimum of three hours. Topics (3) through (7) cover emergency response, communications, patrol procedures, note taking and report writing, and department. The balance of the rule covers the logistics of training: paragraph (b) defines how the Board governs the delivery of the course and paragraph (c) allows for the 16 hour course to be delivered remotely under certain conditions.”

Thus, the language of Rule .0807(b) is ambiguous in that it appears to require that licensees must take the entire 16 hour course, given that there are no other training requirements in Rule .0707 beyond the course. Asked to clarify this language, the Board responded only that licensees “do not have to take the unarmed guard training; only the firearms and legal blocks.” Given the contents of Rule .0707, and the Board’s refusal to address the relevant language—“and all additional training

Brian Liebman
Commission Counsel

requirements set forth in that Rule”—the Board’s response sheds no further light on the issue. Moreover, the Board declined to make any clarifying changes to the instant rule.

*Additionally, in paragraph (e), the Rule requires that “all initial training required by this Section shall be administered by a certified trainer and shall be completed no more than 90 days prior to the date of application” for the permit. In response to staff’s requests for changes, the Board responded that “initial training” means the training required by paragraphs (a), (b), and (c) of this Rule. The Board declined to make any corresponding changes to the Rule. Moreover, the Board’s response adds a new layer of ambiguity, given that the text of the Rule refers to “training required by this **Section**”, referring to the entirety of Section .0800, rather than just Rule .0807. The Rule, as currently written, fails to specify what training must be administered by a certified trainer and fails to specify what training the applicant must complete within 90 days of the date of the permit application.*

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

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

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

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

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

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

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

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

1 14B NCAC 16 .0807 is amended as published in 37:18 NCR 1883 as follows:

2
3 **14B NCAC 16 .0807 TRAINING REQUIREMENTS FOR ARMED LICENSEES AND REGISTRANTS**

4 (a) Applicants for an armed security guard firearm registration permit shall first complete the basic unarmed security
5 guard training course set forth in Rule .0707 of this Chapter.

6 (b) Private ~~investigator~~ investigator, close personal protection, or any other **licensee licenses** applying for an armed
7 ~~security guard firearm registration~~ permit shall first complete a ~~five-hour~~ training course consisting of the courses set
8 forth in Rule .0707(a)(1) and (2) of this Chapter and all additional training requirements set forth in that Rule.

9 (c) Applicants for an armed security guard firearm registration permit shall complete a basic training course for armed
10 security guards which consists of at least 20 hours of classroom instruction including:

- 11 (1) legal limitations on the use of handguns and on the powers and authority of an armed security guard,
12 including familiarity with rules and regulations relating to armed security guards (minimum of four
13 hours);
14 (2) handgun safety, including range firing procedures (minimum of one hour);
15 (3) handgun operation and maintenance (minimum of three hours);
16 (4) handgun fundamentals (minimum of eight hours); and
17 (5) night firing (minimum of four hours).

18 Subparagraph (c)(2), "operation" under Subparagraph (c)(3), and Subparagraph (c)(4) of this Rule shall be completed
19 prior to the applicant's participation in range firing.

20 (d) Applicants for either an armed licensee permit or an armed security guard firearm registration permit shall attain
21 a score of at least 80 percent accuracy on a firearms range qualification course established by the Board and the
22 Secretary of Public Safety, a copy of which is on file in the Director's office, once in three consecutive attempts.
23 Should a student fail to attain a score of 80 percent accuracy, the student **may shall** be given a second opportunity to
24 qualify once in three consecutive attempts on the course of fire the student did not pass. Failure to qualify after the
25 second series of attempts shall require the student to repeat the entire basic training course for armed security guards.
26 All attempts must take place within 20 days of the completion of the initial 20 hour course. For rifle qualification all
27 shots shall be located on the target.

28 (e) All initial ~~armed security guard~~ training required by this **Chapter Section** shall be administered by a certified
29 trainer and shall be completed no more than 90 days prior to the date of ~~issuance of~~ application for the licensee permit
30 or armed security guard firearm registration permit.

31 (f) All applicants for an armed security guard firearm registration permit shall obtain training under the provisions of
32 this Section using their duty weapon and their duty ammunition or ballistic equivalent ammunition, to include lead-
33 free ammunition that meets the same point of aim, point of impact, and felt recoil of the duty ammunition, for all
34 ~~weapons, firearms~~.

35 (g) No more than six new or renewal licensee permit or armed security guard applicants per one instructor shall be
36 placed on the firing line at any one time during firearms range ~~training for armed security guards~~. training.

1 (h) Applicants for re-certification of a armed licensee permit or an armed security guard firearm registration permit
2 shall complete ~~a~~ the basic recertification training course for armed security guards that consists of at least four hours
3 of classroom instruction and is a review of the requirements set forth in Subparagraphs (c)(1) through (c)(5) of this
4 Rule. Subparagraphs Subparagraph (c)(2), operation under subparagraph (c)(3), and subparagraphs (c)(4) and (5) of
5 this Rule shall be reviewed prior to range firing firing; and however maintenance under Subparagraph (c)(3) may be
6 reviewed after range firing. The recertification course is valid for 180 days after completion of the course. Applicants
7 for recertification of a licensee permit or an armed security guard firearm registration permit shall also complete the
8 requirements of Paragraph (d) of this Rule.

9 (i) An armed guard registered with one company may be registered with a second company. The registration shall be
10 considered "dual." The registration with the second company shall expire at the same time that the registration expires
11 with the first company. An updated application shall be required to be submitted by the applicant, along with the
12 digital photograph, updated criminal records checks, and a forty dollar (\$40.00) registration fee. If the guard will be
13 carrying a firearm of guard's duty firearm for all companies is the same make, model, and caliber, then no additional
14 firearms training shall be required. The licensee shall submit a letter stating the guard will be carrying the same make
15 and model firearm. If the guard will be carrying a firearm of a different make and model, the licensee shall submit a
16 letter to the Board advising of the make, model, and caliber of the firearm the guard will be carrying and the guard
17 shall be required to qualify at the firing range on both the day and night qualification course. The qualification score
18 is valid for 180 days after completion of the course.

19 (j) To be authorized to carry a standard 12 gauge shotgun in the performance of his or her duties as an armed security
20 guard, an applicant shall complete, in addition to the requirements of Paragraphs (a), (c), and (d) of this Rule, six hours
21 of classroom training that shall include the following:

- 22 (1) legal limitations on the use of shotgun (minimum of one hour);
- 23 (2) shotgun safety, including range firing procedures (minimum of one hour);
- 24 (3) shotgun operation and maintenance (minimum of one hour);
- 25 (4) shotgun fundamentals (minimum of two hours); and
- 26 (5) night firing (minimum of one hour).

27 Subparagraph (j)(2), "operation" under Subparagraph (j)(3), and Subparagraph (j)(4) of this Rule shall be completed
28 prior to the applicant's participation in range firing.

29 (k) An armed security guard applicant may take the additional shotgun training at a time after the initial training in
30 this Rule. If the shotgun training is completed at a later time, the shotgun certification shall run concurrent with the
31 armed registration permit. In addition to the requirements set forth in Paragraph (j) of this Rule, applicants shall attain
32 a score of at least 80 percent accuracy on a shotgun range qualification course established by the Board and the
33 Secretary of Public Safety, a copy of which is on file in the Director's office.

34 (l) Applicants for shotgun recertification shall complete one hour of classroom training covering the topics set forth
35 in Paragraph (j) of this Rule and shall also complete the requirements of Paragraph (d) of this Rule.

1 (m) To be authorized to carry a rifle in the performance of his or her duties as an armed security guard, an applicant
2 shall complete, in addition to the requirements of Paragraphs (a), (c), and (d) of this Rule, 16 hours of classroom
3 training which shall include the following:

- 4 (1) legal limitations on the use of rifles (minimum of one hour);
- 5 (2) rifle safety, including range firing procedures (minimum of one hour);
- 6 (3) rifle operation and maintenance (minimum of two hours);
- 7 (4) rifle fundamentals (minimum of ten hours); and
- 8 (5) night firing (minimum two hours).

9 Subparagraph (m)(2), "operation" under Subparagraph (m)(3), and Subparagraph (m)(4) of this Rule shall be
10 completed prior to the applicant's participation in range firing.

11 (n) The applicant shall pass a skills course that tests each basic rifle skill and the test of each skill shall be completed
12 within three attempts.

13 (o) An applicant may take the additional rifle training at a time after the initial training in Subsection (c) of this Rule.
14 If the rifle training is completed at a later time, the rifle certification shall run concurrent with the armed registration
15 permit. In addition to the requirements set forth in Paragraphs (m) and (n) of this Rule, applicants shall attain a score
16 of at least 80 percent accuracy on a rifle range qualification course established by the Board and the Secretary of
17 Public Safety, a copy of which is on file in the Director's office.

18 (p) Applicants for rifle recertification shall complete an additional one hour of classroom training covering the topics
19 set forth in Paragraph (m) of this Rule and shall also complete the requirements of Paragraph (d) of this Rule.

20 (q) Upon written request, an applicant for a [armed] licensee permit or an armed security guard firearm registration
21 permit who possesses a current firearms trainer certificate shall be given a firearms licensee permit or registration
22 permit that will run concurrent with the trainer certificate upon completion of an annual qualification with the
23 applicant's duty firearms as set forth in Paragraph (d) of this Rule.

24 (r) An armed licensee or security guard is required to qualify annually both for day and night firing with his or her
25 duty handgun, shotgun, and rifle, if applicable. If the licensee or security guard fails to qualify on any course of fire,
26 [the] licensee or [the] security guard shall not carry the firearm until such time as he or she meets the qualification
27 requirements. Upon failure to qualify, the firearm instructor shall notify the licensee or security guard [verbally] that
28 he or she is no longer authorized to carry the firearm and the firearm instructor shall notify the employer and the
29 Private Protective Services Board staff [in writing] on the next business day.

30 (s) A firearm training certificate of an armed security guard remains valid even if the guard leaves the employment
31 of one company for the employment of another. The range qualifications shall remain valid if the guard will be carrying
32 a firearm of the same make, model, and caliber and no additional firearms training shall be required. The licensee shall
33 submit a letter stating the guard will be carrying the same make and model firearm. If the guard will be carrying a
34 firearm of a different make and model, the licensee shall submit a letter to the Board advising of the make, model, and
35 caliber of the firearm the guard will be carrying and the guard shall be required to qualify at the firing range on both
36 the day and night qualification course. The qualification score is valid for 180 days after completion of the course.
37 However, nothing herein shall extend the period of time the qualification is valid.

1 *History Note: Authority G.S. 74C-5; 74C-9; 74C-13;*
2 *Eff. June 1, 1984;*
3 *Amended Eff. November 1, 1991; February 1, 1990; July 1, 1987;*
4 *Temporary Amendment Eff. January 14, 2002;*
5 *Amended Eff. October 1, 2013; October 1, 2010; June 1, 2009; February 1, 2006; August 1, 2002;*
6 *Transferred and Recodified from 12 NCAC 07D .0807 Eff. July 1, 2015;*
7 *Amended Eff. January 1, 2018; February 1, 2016; October 1, 2015;*
8 *Readopted Eff. November 1, 2019;*
9 *Amended Eff. January 1, 2023; February 1, 2022;*
10 *Temporary Amendment Eff. April 28, 2023;*
11 *Amended Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1101

DATE ISSUED: September 13, 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:

This Rule defines terms to be used throughout Section .1100, which governs training and supervision for private investigator associates.

*In item (2), the Board defines "One-on-one Supervision" to require the sponsoring licensed private investigator or any licensed private investigator in the sponsor's firm, association, or corporation to personally and directly supervise an associate. The Rule allows that "one-on-one supervision may be also satisfied if the Associate undergoes training from an individual or educational course **approved by the Board's Director** prior to the Associate receiving the training" (emphasis added). In response to a multi-part request for clarification to this language, the Board responded—directly contradicting the language of the Rule—that "the Director does not approve the individual or educational course. He just must be notified of it." Thus, given that it is entirely divorced from the plain language of the Rule, the Board's response only adds further ambiguity to language that is already unclear.*

Moreover, the Board did not address whether the language functions as a waiver of the portions of Item (2) of this Rule which require the training investigator to be the associate's sponsor or to be a member of the sponsor's firm, association, or corporation. Nor did the Board address whether the language functions as a waiver of the training requirements throughout Section .1100 to the extent it allows the associate to be trained via educational course rather than through supervised experience. G.S. 150B-19(6) states that an agency "may not adopt a rule" that "allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the

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agency must follow in determining whether to waive or modify the requirement.” Neither the Rule nor the Board’s response provides any clarity as to what those specific guidelines may be.

In item (3), the Board defines “Training Checklist” to mean a document stating all areas of training and work the Associate has performed. The Rule requires the sponsoring private investigator and the associate to sign the checklist at the end of each “reporting period”. The Rule does not define the “reporting period.” Asked to clarify, the Board responded that there “is no set reporting period. The period is however long it takes to acquire the hours.” Staff can only assume that the “hours” means the various training requirements in Rules .1102, .1103, and .1104. If there is no “reporting period” and the supervisor and supervisor must sign the checklist only when these hourly requirements have been met, the Rule creates confusion by referring to a “reporting period” when none exists.

Finally, in item (4), the Board requires the associate to keep a log listing each case the associate worked, the number of hours spent on each case, and the type of work performed. The Rule goes on to require that “[d]etails of the one-on-one training must be documented” in the log. The Board was asked to specify what “details” were required, and stated in response “The details are just what the rest of the sentence says: What the one-on-one training consisted of, e.g. “I showed the trainee how to conduct surveillance.” “I showed the trainee how to research a person’s social media accounts.” If, as the Board claims, the details are already specified and required for inclusion by the first sentence, the meaning of the second sentence is called into question. Moreover, the examples provided by the Board appear to refer to details supplied by the supervisor rather than the associate.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

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

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

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

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

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

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

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

1 14B NCAC 16 .1101 is amended as published in 37:19 NCR 1940 as follows:

2
3 **14B NCAC 16 .1101 DEFINITIONS**

4 In addition to the definitions set forth in G.S. 74C, the following definitions shall apply to this Section:

- 5 (1) "Private Investigator Associate" refers to an individual training to become a Private Investigator. A
6 Private Investigator Associate may also be referred to as a "trainee" in these Rules. A Private
7 Investigator Associate must complete three training levels as set out in this Section.
- 8 (2) "One-on-one Supervision" means person-to-person contact whereby the licensed investigator is
9 personally and directly supervising or training the Associate. The training investigator must be the
10 sponsoring licensed Private Investigator or any licensed Private Investigator who is a member of the
11 sponsoring Private Investigator's firm, association, or corporation. The Private Investigator
12 Associate may not subcontract his or her employment to another Private Investigator. However, the
13 sponsoring Private Investigator may subcontract the Private Investigator Associate if the sponsor
14 obtains prior written approval from the Board's Director by showing that the Private Investigator
15 Associate will receive an educational benefit from the subcontract employment and the Associate
16 will receive one-on-one supervision from another licensed Private Investigator. One-on-one
17 supervision may also be satisfied if the Associate undergoes training from an individual or
18 educational course approved by the Board's Director prior to the Associate receiving the training.
- 19 (3) "Training Checklist" ~~refers to means~~ the ~~document(s) documents~~ that shall state all areas of
20 training and work that the Associate has performed. The ~~supervising sponsoring~~ Private
21 Investigator is responsible for maintaining the training checklist and providing a copy of the
22 checklist to the Associate. The Training Checklist must reflect the date the Associate advances from
23 one level to another. The training checklist must be signed by the Associate and the sponsoring
24 Private Investigator at the end of each reporting period. In the event the Associate transfers
25 employment to another Private Investigator, the Associate must provide the new ~~supervising~~
26 ~~sponsoring~~ Private Investigator with the training checklist and the new sponsoring Private
27 Investigator will then be responsible for the maintenance of the checklist. The Training Checklist
28 must be updated on a quarterly basis for Level One Associates and on a yearly basis for Level Two
29 and Level Three Associates. The training checklist must be maintained pursuant to Rule .0108 of
30 this Chapter. When an Associate completes Level Three, the Training Checklist must be made a
31 part of the Associate's application for a Private Investigator's license. The Board shall have
32 immediate access to the training ~~checklist. checklist upon request.~~
- 33 (4) "Associate Log" ~~refers to means~~ the ~~document(s) documents~~ maintained by the ~~sponsoring~~
34 ~~Private Investigator Associate~~ which shall list each case the Associate has worked, the number of
35 hours spent on the case, and the type of work performed. Details of the one-on-one training must be
36 documented within the Associate's log.

1 *History Note: Authority G.S. 74C-2(c); 74C-5(2);*
2 *Eff. July 1, 1994;*
3 *Transferred and Recodified from 12 NCAC 07D .1101 Eff. July 1, 2015;*
4 *Readopted Eff. July 1, 2020;*
5 *Amended Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1501

DATE ISSUED: September 13, 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:

Ambiguity

This Rule defines the Board's requirements a close personal protection license via a showing of experience, rather than training.

In (a)(1), (2), and (3), the requirements for licensure are couched in vague language, requiring the applicant not only to meet a certain level of experience, but to establish that fact "to the Board's satisfaction." Thus, under the language of the Rule, an applicant may indeed have the "verifiable experience" necessary for licensure but fail to "establish [that experience] to the Board's satisfaction" because it is not specified what evidence or documentation is required to satisfy the Board. Despite staff's request for clarification, the Board declined to respond.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

Failure to Comply with the APA

Following publication of the Rule in the North Carolina Register, the agency added an additional requirement for applicants seeking licensure through experience. In addition to the published requirements, applicants will now be required to "possess a basic first aid certificate from the American Red Cross, American Heart Association, American Safety and Health Institute, or National Safety Council." The published version of the Rule contained no requirement that the applicant have any kind of first aid training or experience. When asked about this post-publication change,

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the Board responded that the requirement was in the rule for licensure through training (Rule .1502) but not this Rule, and so was added at the request of “the industry.”

While this requirement was indeed published in Rule .1502, that rule contains an entirely separate pathway to licensure. It would not be reasonable to assume that the requirements in these two rules would be interchangeable, particularly where Rule .1502 explicitly governs licensure through training rather than experience, and applies only when the applicant cannot meet the requirements of Rule .1501.

Based on the foregoing, it is staff’s opinion that inclusion of the post-publication language in this Rule “produces an effect that could not reasonably have been expected based on the proposed text of the rule” and as such differs substantially from the proposed rule published in the Register. Staff recommends objection to this Rule for failure to comply with the APA pursuant to G.S. 150B-21.9(a)(4).

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

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

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

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

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

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

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

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

...

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

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

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

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

1 14B NCAC 16 .1501 is adopted as published in 37:18 NCR 1883 as follows:

2
3 **SECTION .1500 - CLOSE PERSONAL PROTECTION**

4
5 **14B NCAC 16 .1501 EXPERIENCE REQUIREMENTS FOR A CLOSE PERSONAL PROTECTION**
6 **LICENSE**

7 (a) In addition to the requirements of G.S. 74C-8 and Section .0200 of this Chapter, applicants for a close personal
8 protection license shall:

- 9 (1) establish to the Board's satisfaction three years of verifiable experience while conducting close
10 personal protection services as set forth in G.S. 74C-3(a)(3a) with a private person, firm, association,
11 or corporation within the last 10 years;
12 (2) establish to the Board's satisfaction three years of verifiable experience while conducting close
13 personal protection services as set forth in G.S. 74C-3(a)(3a) with any federal, state, county or
14 municipal law enforcement agency, or other governmental agency within the last 10 years;
15 (3) establish to the Board's satisfaction a military occupational specialty and two years of verifiable
16 experience within the past five years in the U.S. Armed Forces while conducting close personal
17 protection services as set forth in G.S. 74C-3(a)(3a) while serving in an official capacity; or
18 (4) have completed a course in close personal protection approved by the Board given by a school
19 specializing in close personal protection (or "executive protection") that consists of a minimum of
20 40 hours of actual classroom and practical instruction within the last 2 ~~years;~~ and years as required
21 by Rule .1502 of this Chapter.]
22 (5) possess a basic first aid certificate from the American Red Cross and a valid CPR and AED
23 certification from the American Red Cross, American Heart Association, American Safety and
24 Health Institute, or National Safety Council.

25 (b) In addition to the requirements of Section .0200 of this Chapter, an applicant for a close personal protection license
26 that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

- 27 (1) the spouse holds a current license, certification, or registration from another jurisdiction and the
28 other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements;
29 and
30 (2) the spouse has two years verifiable experience within the past five years while conducting close
31 personal protection as set forth in in G.S. 74C-3(a)(3a) while serving in an official capacity with
32 any entity described in Paragraph (a) of this rule.

33
34 *History Note: Authority G.S. 74C-5(2); 93B-15.1;*
35 *Temporary Adoption Eff. April 28, 2023;*
36 *Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1502

DATE ISSUED: September 13, 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:

This Rule defines the Board's requirements for licensure via training when the applicant cannot meet the experience requirements in Rule .1501.

*In (a), the applicant is required to complete a close personal protection course of at least 40 hours, which includes, "at a minimum," the fundamentals of personal protection, practical exercises, and legal issues. In a series of post-publication changes, the Board amended item (a)(3), permitting the minimum two hour legal issues requirement to be met by "the 3 hour unarmed guard block of instruction set forth in 14B NCAC 16 .0707 if performing services unarmed, or the 4 hour armed guard block of instruction set forth in 14B NCAC 16 .0807(c)(1) if performing services armed taught by a certified instructor, **or an equivalent block of instruction....**" Despite staff's requests for clarification, the Board refused to provide further information as to what would qualify as an "equivalent block of instruction".*

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

Brian Liebman
Commission Counsel

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

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

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

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

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

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

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

1 14B NCAC 16 .1502 is adopted as published in 37:18 NCR 1883 with changes as follows:

2
3 **14B NCAC 16 .1502 TRAINING REQUIREMENTS FOR CLOSE PERSONAL PROTECTION**
4 **LICENSE**

5 (a) Applicants for a close personal protection license who do not have the experience set forth in Rule .1501(a)(1)
6 through (3) or (b)(1) and (2) shall complete a basic close personal protection (or “executive protection”) training
7 course approved by the Board within the previous 24 months. The course shall consist of a minimum of 40 hours of
8 classroom and practical instruction [~~including:~~ including as a minimum:]

9 (1) Fundamentals of personal protection, including [as a minimum] mission planning, performing site
10 surveys, route selection (primary, secondary, etc.), medical evacuation, walking formations (single,
11 multiple, etc.), communications with protectees, and transitional movements (arrivals, departures,
12 plan changes, hasty movements, etc.) – (minimum of 26 hours);

13 (2) Practical exercises – (minimum of 12 hours); and

14 (3) Legal Issues, including the Rules [applicable to each of the below blocks of instruction and this
15 Section set forth in 14B NCAC 16 .1500] and North Carolina’s laws on use of force, and the federal
16 and state firearms law. The 3 hour unarmed guard block of instruction, [set forth in 14B NCAC 16
17 .0707] if performing services unarmed, or the 4 hour armed guard block of instruction [set forth in
18 14B NCAC 16 .0807(c)(1) if performing services armed] taught by a certified instructor, or an
19 equivalent block of instruction, shall fulfill this requirement – (minimum of 2 hours).

20 (b) In addition to the minimum classroom and practical instruction required by subsection (a) of this Rule, the
21 applicant must possess a basic first aid certificate from the American Red Cross and a valid CPR and AED certification
22 from the American Red Cross, American Heart Association, American Safety and Health Institute, or National Safety
23 Council.

24 (c) Subsection (a)(3) of this Rule may be conducted remotely as provided for by 14B NCAC 16 .0707(c).

25
26 *History Note: Authority G.S. 74C-5;*
27 *Temporary Adoption Eff. April 28, 2023;*
28 *Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1601

DATE ISSUED: September 13, 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:

This Rule defines the Board's requirements for licensure as a digital forensic examiner via a showing of experience, rather than training.

In (a)(1), (3), and (4), the requirements for licensure are couched in vague language, requiring the applicant not only to meet a certain level of experience, but to establish that fact "to the Board's satisfaction." Thus, under the language of the Rule, an applicant may indeed have the "verifiable experience" necessary for licensure but fail to "establish [that experience] to the Board's satisfaction" because it is not specified what evidence or documentation is required to satisfy the Board. In response to staff's request for clarification, the Board responded: "[a]s stated above regarding a similar rule, the Board needs 'proof;' documentary proof . . ." However, the Board declined to make a clarifying change to the rule specifying that "to the Board's satisfaction" means that the Board has received documentary evidence of the applicant's experience, or to outline what kind of documentary evidence the Board would find acceptable.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

Brian Liebman
Commission Counsel

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

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

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

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

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

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

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

1 14B NCAC 16 .1601 is adopted as published in 37:18 NCR 1883 with changes as follows:

2
3 **SECTION .1600 – DIGITAL FORENSICS EXAMINER**

4
5 **14B NCAC 16 .1601 EXPERIENCE REQUIREMENTS FOR A DIGITAL FORENSICS EXAMINER**
6 **LICENSE**

7 (a) In addition to the requirements of Section .0200 of this Chapter, applicants for a Digital Forensic Examiner
8 (D.F.E.) license shall:

- 9 (1) establish to the Board's satisfaction three years of verifiable experience within the past five years
10 conducting digital forensic examinations as defined by G.S. 74C-3(a)(5a) individually, or with any
11 private company or federal, state, county or municipal agency;
12 (2) hold a North Carolina private investigator license, or private investigator license from a state
13 reciprocal with North Carolina, [and] have completed a course of instruction consisting of not less
14 than 40 hours of live classroom and practical instruction in digital [forensics forensics,] and obtained
15 certification from a certifying entity approved by the Board within the previous two years;
16 (3) establish to the Board's satisfaction that the applicant has been qualified as an expert witness in an
17 area of digital forensics in a court of law using the standard set forth by the United States Supreme
18 Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny cases,
19 within the previous three years; or
20 (4) establish to the Board's satisfaction a military occupational specialty and two years of verifiable
21 experience conducting digital forensics examinations within the past five years in the U.S. Armed
22 Forces.

23 (b) In addition to the requirements of Section .0200 of this Chapter, an applicant for a D.F.E. license that is the spouse
24 of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

- 25 (1) the spouse holds a current license, certification, or registration from another jurisdiction and the
26 other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements;
27 and
28 (2) the spouse has two years of verifiable experience conducting digital forensics examinations within
29 the past five years.

30 (c) [Using the formula in Rule .0204(d) of this Chapter, the The] Board shall give credit toward the experience
31 requirements set forth in Paragraphs (a) and (b) of this Rule as follows:

- 32 (1) An applicant shall receive 400 hours of experience credit for an associate's degree. The Board shall
33 grant up to 100 additional hours if the applicant can demonstrate that further training or course-work
34 related to digital forensics examination was received while obtaining the associate's degree.
35 (2) An applicant shall receive 800 hours of experience credit for a bachelor's degree. The Board shall
36 grant up to 200 additional hours if the applicant can demonstrate that further training or course-work
37 related to digital forensics examination was received while obtaining the bachelor's degree.

1 (3) An applicant shall receive 1,200 hours of experience credit for a graduate degree. The Board shall
2 grant an additional 300 additional hours if the applicant can demonstrate that further training or
3 course-work related to digital forensics examination was received while obtaining the graduate
4 degree.

5
6 *History Note: Authority G.S. 74C-5; 93B-15.1;*
7 *Temporary Adoption Eff. April 28, 2023;*
8 *Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1701

DATE ISSUED: September 13, 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:

This Rule defines terms to be used throughout Section .1700, which governs the training and supervision of digital forensics examiner associates.

In item (3), the Board defines "Training Checklist" to mean a document stating all areas of training and work the Associate has performed. The Rule requires the sponsoring digital forensic examiner and the associate to sign the checklist at the end of each "reporting period". The Rule does not define the "reporting period." Asked to clarify, the Board responded that "there is no set period; [it's] however long it takes to get the hours." Staff can only assume that the "hours" means the various training requirements in Rules .1702, .1703, and .1704. Moreover, if there is no "reporting period" and the supervisor and supervisor must sign the checklist only when these hourly requirements have been met, the Rule creates confusion by referring to a "reporting period" when none exists.

In item (4), the Board requires the associate to keep a log listing each case the associate worked, the number of hours spent on each case, and the type of work performed. The Rule goes on to require that "[d]etails of the one-on-one training must be documented" in the log. The Board was asked to specify what "details" were required. The Board did not respond. However, in response to an identical provision in Rule .1101, the Board stated: "The details are just what the rest of the sentence says: What the one-on-one training consisted of, e.g. "I showed the trainee how to conduct surveillance." "I showed the trainee how to research a person's social media accounts." If, as the Board claimed with respect to Rule .1101, the details are already specified and required for inclusion by the first sentence, the meaning of the second sentence is called into question.

Brian Liebman
Commission Counsel

Moreover, the examples provided by the Board appear to refer to details supplied by the supervisor rather than the associate.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

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

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

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

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

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

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

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

1 14B NCAC 16 .1701 is adopted as published in 37:18 NCR 1883 as follows:
2

3 **SECTION .1700 – TRAINING AND SUPERVISION FOR DIGITAL FORENSICS**
4 **EXAMINER (D.F.E.) ASSOCIATES**
5

6 **14B NCAC 16 .1701 DEFINITIONS**

7 In addition to the definitions set forth in G.S. 74C, the following definitions shall apply to this Section:

- 8 (1) "Digital Forensics Examiner Associate" [refers to means] an individual training to become a digital
9 forensics examiner licensee. A Digital Forensics Examiner Associate may also be referred to as a
10 "trainee" in these Rules. A Digital Forensics Examiner Associate must complete three training levels
11 as set out in this Section.
- 12 (2) "One-on-one Supervision" means person-to-person contact whereby the licensee is personally and
13 directly supervising or training the Associate. The training licensee must be the sponsoring digital
14 forensics examiner licensee. The Digital Forensics Examiner Associate may not subcontract his or
15 her employment to another licensee. However, the sponsoring digital forensics examiner licensee
16 may subcontract the Digital Forensics Examiner Associate if the sponsor obtains prior written
17 approval from the Board's Director by showing that the Digital Forensics Examiner Associate will
18 receive an educational benefit from the subcontract employment and the Associate will receive one-
19 on-one supervision from another licensee.
- 20 (3) "Training Checklist" [refers to means] the [document(s) documents] that shall state all areas of
21 training and work that the Associate has performed. The [supervising licensee sponsor] is
22 responsible for maintaining the training checklist and providing a copy of the checklist to the
23 Associate. The Training Checklist must reflect the date the Associate advances from one level to
24 another. The training checklist must be signed by the Associate and the [sponsoring licensee
25 sponsor] at the end of each reporting period. In the event the Associate transfers employment to
26 another licensee, the Associate must provide the new [supervising licensee sponsor] with the
27 training checklist and the new [sponsoring licensee sponsor] will then be responsible for the
28 maintenance of the checklist. The Training Checklist must be updated on a quarterly basis for Level
29 One Associates and on a yearly basis for Level Two and Level Three Associates. The training
30 checklist must be maintained pursuant to Rule .0108 of this Chapter. When an Associate completes
31 Level Three, the Training Checklist must be made a part of the Associate's application for a digital
32 forensics examiner license. The Board shall have immediate access to the training [checklist
33 checklist upon request.]
- 34 (4) "Associate Log" [refers to means] the [document(s) documents] maintained by the Associate which
35 shall list each case the Associate has worked, the number of hours spent on the case, and the type of
36 work performed. Details of the one-on-one training must be documented within the Associate's log.
37

- 1 *History Note: Authority G.S. 74C-2(c); 74C-5(2);*
- 2 *Temporary Adoption Eff. April 28, 2023;*
- 3 *Eff. October 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1706

DATE ISSUED: September 13, 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:

Paragraph (a) of this Rule states that the "Board shall consider any practical experience gained by the applicant prior to the application date." While the Rule circumscribes certain types of practical experience that may not be considered, it provides no absolute definition of the term. Given that Rules .1702, .1703, and .1704 speak to "experience" gathered during training, staff can only speculate that "practical experience" is something other than experience gathered in training. When asked for clarification, the Board replied "'Practical experience' is a known descriptive phrase, in common usage, and does not necessitate defining." Thus, despite asserting that the definition is "known," the Board refuses to articulate the meaning here in the Rule.

Additionally, it is unclear from the text of the Rule for what the Board will consider both the "practical experience" referred to in paragraph (a) and the "educational experience" referred to in paragraph (b). Staff can only assume that it will count towards licensure requirements, but the Rule is silent as to this point. Moreover, as Rule .1705 already governs how the Board evaluates educational experience gained outside the training protocol set forth by these Rules, the language here introduces further ambiguity.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

Brian Liebman
Commission Counsel

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

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

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

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

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

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

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

1 14B NCAC 16 .1706 is adopted as published in 37:18 NCR 1883 with changes as follows:

2

3 **14B NCAC 16 .1706 CONSIDERATION OF EXPERIENCE**

4 (a) The Board shall consider any practical experience gained [by the applicant] prior to the application date. The
5 Board shall not consider experience claimed by the applicant if the experience was gained after December 1, 2022:

6 (1) by contracting private protective services to another person, firm, association, or corporation while
7 not in possession of a valid private protective services license; or

8 (2) when employed by a company contracting private protective services to another person, firm,
9 association, or corporation while the company is not in possession of a valid private protective
10 services license.

11 (b) The Board shall consider any educational experience referred to in Rule .1705 of this Section.

12

13 *History Note: Authority G.S. 74C-5(2);*
14 *Temporary Adoption Eff. April 28, 2023;*
15 *Eff. August 1, 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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .1707

DATE ISSUED: September 13, 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:

Here, the Board states that "violations" by the associate may be imputed to the sponsor if the violation is found to be the result of "insufficient supervision". Although staff asked the Board to articulate a definition of "insufficient supervision" or to add a cross-reference to another Rule or statute where such a definition could be found, the Board responded only that such a change was "unnecessary".

Thus, under the existing language, the Board is free to define—after the fact—what level of supervision is "sufficient" or "insufficient" and subject sponsors to discipline under G.S. 74C-17 as a result of that determination. To be clear, this does not mean that a sponsor deemed to have insufficiently supervised his or her associate may merely be subject to action against his or her license. To the contrary, G.S. 74C-17 states that a violation of the provisions of Chapter 74C is grounds for criminal liability, a Class 1 misdemeanor.¹ Licensees may also be subject to a civil penalty of up to \$2,000.00 per violation.

¹ Under the current iteration of North Carolina's sentencing guidelines, a person found guilty of a Class 1 misdemeanor may face anywhere from community punishment to 120 days in jail, depending on the number of their prior convictions, along with the imposition of a fine.

Brian Liebman
Commission Counsel

Additionally, although staff did not ask the agency to clarify this term in his requests for changes, it is now apparent that the term “a violation” is ambiguous, as it does not state whether this means a violation of the Rules, of the provisions of Chapter 74C, or both.

Based on the foregoing, staff recommends objection to this Rule for ambiguity pursuant to G.S. 150B-21.9(a)(2).

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

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

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

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

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

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

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

1 14B NCAC 16 .1707 is adopted as published in 37:18 NCR 1883 with changes as follows:

2

3 **14B NCAC 16 .1707 ENFORCEMENT**

4 A violation by the Associate may be deemed by the Board to be a violation [ef by] the sponsor if the violation is found
5 to be the result of insufficient supervision and may subject the sponsor to any enforcement actions pursuant to G.S.
6 74C-17.

7

8 *History Note: Authority G.S. 74C-2(e); 74C-5(2); 74C-12;*

9 *Temporary Adoption Eff. April 28, 2023;*

10 *Eff. August 1, 2023.*