

## RRC STAFF OPINION

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

AGENCY: North Carolina Board of Optometric Examiners

RULE CITATION: 21 NCAC 42D .0102

RECOMMENDATION DATE: November 1, 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:

I.

*Pursuant to the rule optometric assistants and optometric technicians may be delegated "duties and responsibilities of an administrative, technical, or clinical nature" if they have two prerequisites: the duties must be "within their scope of their education, training, and experience, and certification," and they must be directed and "appropriately supervised."*

*It is unclear what duties can be delegated.*

*It is unclear what standard will be used to judge whether the delegated duties are within the assistants' or technicians' scope of "education, training, and experience" as a prerequisite to delegation.*

*It is unclear what "certification" is required as a prerequisite to the delegation of duties.*

*It is unclear what "appropriate" supervision is.*

*The above standards are subjective and provide neither the regulator nor the regulated an unambiguous rule. Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.*

William W. Peaslee  
Commission Counsel

*II.*

*Paragraph (c) of the Rule requires that an optometric technician be present when an optometrist is “interacting” with a patient remotely.*

*The proposed rule published in the North Carolina Register did not contain this mandate.*

*Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(1) for lack of authority and (4) for failure to adopt the rule in accordance with Part 2 of Article 2A of Chapter 150B, as the adopted rule is substantially different from the proposed rule pursuant to G.S. 150B-21.2(g)*

William W. Peaslee  
Commission Counsel

**Proposed Rule**  
**Volume 37, Issue 22**  
**North Carolina Register**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 21 NCAC 42D .0102 is adopted with changes as published in 37:22 NCR 2129-2130 as follows:

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3 **21 NCAC 42D .0102      FUNCTION OPTOMETRIC ASSISTANT; OPTOMETRIC TECHNICIAN**

4 (a) ~~For the purposes of this Rule, "paraoptometric personnel" means an optometric assistant, optometric technician,~~  
5 ~~or similarly titled position who qualifies by training and experience to perform duties of an administrative, technical,~~  
6 ~~or clinical nature and is directed and supervised by a licensed optometrist. Optometric assistants and optometric~~  
7 ~~technicians are employees of an optometric practice or where optometry is practiced who have successfully completed~~  
8 ~~the testing and certification process for Certified Paraoptometric Assistant and Certified Paraoptometric Technician~~  
9 ~~respectively by the American Optometric Association.~~

10 (b) ~~Paraoptometric personnel shall perform his or her functions within the scope of his or her training, as directed by~~  
11 ~~and assigned by an optometrist, so long as those functions are at the specific direction and under the supervision of~~  
12 ~~the licensee. Optometric assistants and optometric technicians may be delegated duties and responsibilities of an~~  
13 ~~administrative, technical, or clinical nature so long as such are within the scope of their education, training, experience,~~  
14 ~~and certification, and so long as such activities are directed and appropriately supervised by a licensed optometrist.~~  
15 ~~The supervising optometrist is responsible for all activities undertaken by the optometric assistant and optometric~~  
16 ~~technician.~~

17 (c) ~~In practices or situations where there is no on-site optometrist present, an optometric technician must be present~~  
18 ~~during all patient interactions with the remote optometrist.~~

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20 *History Note:      Authority G.S. 90-115.1(6); 90-117.5;*

21 *Eff. February 1, 1976;*

22 *Readopted Eff. May 30, 1978;*

23 *Amended Eff. June 1, 1989; September 30, 1981;*

24 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,*  
25 *2015;*

26 *Amended Eff. March 1, 2023.*

27 *Amended Eff. December 1, 2023*