

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 State Board of Examiners in Optometry

RULE CITATION: 21 NCAC 42D .0102

RECOMMENDATION DATE: October 13, 2023

RECOMMENDED ACTION:

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

COMMENT:

Pursuant to G.S. 90-115, it is unlawful for anyone to practice optometry without a certificate of registration.

*Pursuant to G.S. 90-115.1(6), the acts of an **optometric assistants or technicians** are not considered the unlawful practice of optometry when said acts are authorized and permitted by rules promulgated by the N.C. State Board of Examiners in Optometry (hereafter "Board").*

This Rule regulates "paraoptometric personnel" which Paragraph (a) of the Rule defines as an "optometric assistant, optometric technician or similarly titled person." Neither optometric assistant nor technician is defined by statute or rule.¹ The Board uses undefined titles and ambiguous terms to define the regulated public; paraoptometric personnel.

¹ OTHER THAN THE RULE UNDER CONSIDERATION, THE BOARD'S RULES ONLY USE THE TERMS OPTOMETRIC ASSISTANT AND OPTOMETRIC TECHNICIAN IN 21 NCAC 42J .0101 WHICH SETS APPLICATION FEES FOR THOSE POSITIONS; A RULE WHICH IS UNNECESSARY CONSIDERING G.S. 90-123. IT IS ENTIRELY UNCLEAR WHAT, IF ANY, QUALIFICATIONS A PERSON MUST HAVE TO SUBMIT A REGISTRATION APPLICATION OR THE BASIS UPON WHICH A REGISTRATION WOULD BE GRANTED OR DENIED; HOWEVER, THAT ISSUE IS NOT BEFORE THE RULES REVIEW COMMISSION.

William W. Peaslee
Commission Counsel

Further, the “optometric assistant, optometric technician or similarly titled person” must be “[qualified] by training and experience to perform duties of an administrative, technical, or clinical nature” to meet the definition of paraoptometric personnel and thus regulated. Whether someone is qualified is “in the discretion of the supervising optometrist,” which is a completely subjective standard providing no guidance to the regulated community.

The rule then requires paraoptometric personnel to perform their “functions” under the direction and supervision of a licensed optometrist. Which functions are unclear.

Paragraph (b) requires that paraoptometric personnel who wish or need to be “certified” as optometric assistants or optometric technicians “be certified by the American Optometric Association.” It is unclear whether this is a prerequisite to certification by the Board or whether it supplants the Board’s certification. The Board’s rules do not otherwise establish a certification process.

In Paragraph (c), the Board “shall require”² paraoptometric personnel “be certified in environments where there is no on-site optometrist present.” Again, it is unclear whether the Board has a certification process or whether a certification by the American Optometric Association is the process.

It is unclear who is regulated and under what circumstances. Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguity.

² STAFF BELIEVES THIS TO BE A PREREQUISITE BUT THE WORDING IS OPEN TO INTERPRETATION. FURTHER, BY A PLAIN READING OF THE LANGUAGE, THE BOARD IS REGULATING ITSELF.

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

§ 90-115.1. Acts not constituting the unlawful practice of optometry.

In addition to the exemptions from this Article otherwise existing the following acts or practices shall not constitute the unlawful practice of optometry:

- (1) The practice of optometry, in the discharge of their official duties, by optometrists in any branch of the Armed Forces of the United States or in the full employ of any agency of the United States.
- (2) The teaching of optometry, in optometry schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Examiners in Optometry, by any person or persons licensed to practice optometry anywhere in the United States or in any country, territory or other recognized jurisdiction; provided, however, that such teaching of optometry by any person or persons licensed in any jurisdiction other than a place in the United States must first be approved by the North Carolina State Board of Examiners in Optometry.
- (3) The practice of optometry by students enrolled in optometry schools or colleges approved by the North Carolina State Board of Examiners in Optometry when such practice is performed as a part of the student's course of instruction, is under the direct supervision of an optometrist who is either duly licensed in North Carolina or qualified under subdivision (2) above as a teacher, and is conducted in accordance with such rules as may be established for such practice by the North Carolina State Board of Examiners in Optometry. Additionally, the practice of optometry by such students at any location upon patients or inmates of institutions wholly owned or operated by the State of North Carolina or any political subdivision or subdivisions thereof when, in the opinion of the dean of such optometry school or college or his designee, the student's optometric education and experience is adequate therefor, subject to review and approval by the said Board of Examiners in Optometry, and such practice is a part of the course of instruction of such students, is performed under the supervision of a duly licensed optometrist acting as a teacher or instructor and is without remuneration except for expenses and subsistence as defined and permitted by the rules and regulations of said Board of Examiners in Optometry.
- (4) The temporary practice of optometry by licensed optometrists of another state or of any territory or country when the same is performed, as clinicians, at meetings or organized optometric societies, associations, colleges or similar optometric organizations, or when such optometrists appear in emergency cases upon the specific call of and in consultation with an optometrist duly licensed to practice in this State.
- (5) The practice of optometry by a person who is a graduate of an optometric school or college approved by the North Carolina State Board of Examiners in Optometry and who is not licensed to practice optometry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Examiners in Optometry pursuant to the terms and provisions of this Article, and when such practice of optometry complies with the conditions of said intern permit, or provisional license.
- (6) Any act or acts performed by an optometric assistant or technician to an optometrist licensed to practice in this State when said act or acts are authorized

and permitted by and performed in accordance with rules and regulations promulgated by the Board.

- (7) Optometric assisting and related functions as a part of their instructions by optometric assistant students enrolled in a course conducted in this State and approved by the Board, when such functions are performed under the supervision of an optometrist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of optometry pursuant to the provisions of subdivision (2) above. (1975, c. 733; 1989, c. 321; 2011-183, s. 61.)

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~~ PARAOPTOMETRIC PERSONNEL**

4 (a) For the purposes of this Rule, "paraoptometric personnel" means ~~an optometric assistant, optometric technician,~~
5 ~~or similarly titled position personnel who~~ who, in the discretion of the supervising optometrist, qualifies by training
6 and experience to perform duties of an administrative, technical, or clinical nature and is directed and supervised by a
7 licensed optometrist. Paraoptometric personnel shall perform his or her functions ~~within the scope of his or her~~
8 ~~training, as directed by and assigned by an optometrist, so long as those functions are~~ at the specific direction and
9 under the supervision of the licensee.

10 **(b)** Paraoptometric personnel who wish or need to become certified as optometric assistants or optometric technicians
11 must be certified by the American Optometric Association and maintain such certification.

12 **(b) (c)** The Board may shall require that paraoptometric personnel be certified in environments where there is no on-
13 site optometrist presence and optometric supervision is remote. supervision is limited.

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

16 *Eff. February 1, 1976;*

17 *Readopted Eff. May 30, 1978;*

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

19 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,*
20 *2015;*

21 *Amended Eff. November 1, 2023.*

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