

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: Criminal Justice Education and Training Standards Commission

RULE CITATION: 12 NCAC 09B .0404

RECOMMENDATION DATE: November 21, 2024

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.

In Paragraph (f), the Criminal Justice Education and Training Standards Commission (the "Agency") requires a school director to terminate or deny a trainee who is "habitually" tardy to or departs early from, class meetings or field exercises. ¹

"Habitually" is an unclear and ambiguous standard which would presumably be left to each school director's arbitrary interpretation.

Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguity.

¹ PLEASE NOTE THAT THE WORD "HABITUALLY" WAS ADDED AFTER PUBLICATION IN THE NORTH CAROLINA REGISTER BUT WAS NOT HIGHLIGHTED AS REQUIRED BY PURSUANT TO 26 NCAC 02C .0405. RULE .0405 IS DESIGNED TO PUT THE PUBLIC AND THE RULES REVIEW COMMISSION ON NOTICE OF CHANGES FROM THE PUBLISHED RULE. THE BEST CASE SCENARIO IS THAT IT WAS AN OVERSIGHT BY THE AGENCY.

William W. Peaslee
Commission Counsel

II.

Paragraph (g) is facially unclear as revised.

Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguity.

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

26 NCAC 02C .0405 BODY OF THE RULE

- (a) An agency shall prepare for publication in the Code any permanent rule not published in the Register or that does not differ in any way from the proposed rule published in the Register according to the general format instructions in Rule .0108 of this Subchapter.
- (b) If a permanent rule differs in any way from the proposed rule published in the Register, the following applies:
 - (1) An agency shall identify changes in an adopted rule by striking through deleted portions, and underlining added portions. The unchanged text shall not be underlined.
 - (2) An agency shall identify changes in an amended rule as follows:
 - (A) when text has been added, the text added shall be underlined and highlighted;
 - (B) when existing text has been deleted, the text deleted shall be struck through and highlighted;
 - (C) when text that was proposed to be deleted has been restored, the restored text shall be highlighted, but not underlined or struck through;
 - (D) when text that was proposed to be added has been deleted, the deleted proposed text shall be enclosed in brackets, struck through and highlighted; and
 - (E) when text is required to be highlighted, the highlighting shall be by highlight marker or shall be computer generated. The text shall show through the highlight and be clear and legible when reproduced.
 - (3) If the agency repeals a rule originally noticed to be amended, then the agency shall submit the rule as a permanent repeal.

12 NCAC 09B .0404 is amended, with changes, as published in 38:24 NCR 1638-1639 as follows:

12 NCAC 09B .0404 TRAINEE ATTENDANCE

(a) Each trainee enrolled in a ~~certified~~ Commission-accredited Basic Law Enforcement Training Course shall attend all class sessions. The school director shall monitor the trainee's attendance at criminal justice training courses in which the trainee is enrolled.

(b) The school director may excuse a trainee from attendance at specific class ~~sessions.~~ sessions for just cause. For purposes of this Rule, just cause means accident, illness, emergency, or other circumstances which precluded the trainee from attending a class session. However, in no case may excused ~~or unexcused~~ absences exceed five percent of the total class hours for the course offering. A trainee shall not be eligible for administration of the State comprehensive examination and shall be dismissed from the course if the cumulative total of class absences exceeds five percent regardless of the prior completion of make-up work.

(c) If the school director grants an excused absence from a class session, he or she shall schedule make-up work and ensure the completion of such work during the current course presentation. The school director shall schedule instructors and reimburse those instructors for the purpose of completion of the make-up work. ~~Absences that occur during the last 40 hours of the training course may be made up in a subsequent delivery; however, the school director shall notify the Standards Division prior to scheduling the make-up work.~~ Make-up work shall consist of an in-person, one-hour instruction period for each hour of missed training, in the lesson plan where the missing training occurred, and shall be taught by an instructor certified to teach that block of instruction. Make-up work shall be documented on the F-26 BLET Student Absence/Make Up Training Report. The F-26 BLET Student Absence/Make Up Training Report shall contain the following:

- (1) School/Academy Name;
- (2) Class Name;
- (3) Student name and ACADIS ID number;
- (4) Course topic, date, and hours missed;
- (5) Reason for missed time;
- (6) Student and School Director signatures;
- (7) Course topic and hours made up; and
- (8) Instructor name and signature

(d) If the Governor declares a State of Emergency pursuant to G.S. 166A-19.3(19), the Director of the Criminal Justice Standards Division shall allow additional breaks in instruction for an individual trainee in a specific course delivery, not to exceed 90 hours, when the Director determines that doing so is necessary based on consideration of the following factors:

- (1) Whether instruction has begun in the course or whether course initiation may be postponed;
- (2) The risk of harm to students that may be caused by continuation of the course;
- (3) Whether those enrolled in the course have been or will likely be called to action to help address the State of Emergency;

(4) The specific need for the waiver; and

(5) The degree of benefit to the public in allowing a break in instruction.

Notice of waivers granted pursuant to this Section shall be posted on the CJETS website at <https://ncdoj.gov/law-enforcement-training/criminal-justice/>. The waivers granted pursuant to this Section shall only apply to courses that began during the effective period of the State of Emergency.

(e) the School Director shall provide the following information to the Director of the Criminal Justice Standards Division for consideration of a waiver under Paragraph (d) of this Rule:

- (1) a memorandum justifying the absence waiver;
- (2) specific documentation related to the trainee's request; and
- (3) a training completion plan pursuant to Paragraph (c) of this Rule.

(f) A school director may shall terminate a trainee from course participation or may shall deny certification of successful course completion where the trainee is habitually tardy to or departs early from class meetings or field exercises.

(g) Notwithstanding any makeup work, where ~~Where~~ a trainee is enrolled in a program as required in 12 NCAC 09B .0212, .0213, .0214, .0215, .0218, .0219, .0220, .0221, .0222, .0237, .0238, .0239, or .0240, and the scheduled course hours exceed the requirements of the Commission, the trainee, upon the authorization of the school director, may shall be deemed to have satisfactorily completed the required number of hours for attendance provided the trainee's attendance is not less than 100 percent of the instructional hours as required by the Commission.

(h) A trainee enrolled in a presentation of the "Criminal Justice Instructor Training Course" under Rule .0209 of this Subchapter shall not be absent from class attendance for more than 10 percent of the total scheduled delivery period in order to receive successful course completion.

(i) A trainee, enrolled in a presentation of the "Specialized Firearms Instructor Training" course under Rule .0226 of this Subchapter, the "Specialized Driver Instructor Training" course under Rule .0227 of this Subchapter, the "Specialized ~~Subject Control Arrest Techniques~~ Compliance and Control Tactics Instructor Training" course under Rule .0232 of this Subchapter, ~~or the "Specialized Physical Fitness Instructor Training" course under Rule .0233 of this Subchapter,~~ the "Specialized Explosives and Hazardous Materials Emergencies Instructor Training" course under Rule .0417 of this Subchapter, or the "Juvenile Justice Specialized Instructor Training – Restraints, Controls and Defensive Techniques" course under Rule .0241 of this Subchapter shall not be absent from class attendance for more than 10 percent of the total scheduled delivery period in order to receive successful course completion. Make-up work must be completed during the current course presentation for all absenteeism. Make-up work shall consist of an in-person, one-hour instruction period for each hour of missed training, in the lesson plan where the missing training occurred, and shall be taught by an instructor certified to teach that block of instruction.

(j) Where a trainee is enrolled in a program as required in 12 NCAC 09B .0209, .0226, .0227, .0232, .0233, or .0417, the ~~The~~ Director of the Criminal Justice Standards Division may shall grant a waiver for completion of course requirements in a course delivery scheduled within 12 months, for just cause based upon the circumstances that created the need for the absence. For the purposes of this Rule, "just cause" includes an accident, illness,

1 emergency, or course cancellation that precluded the student from completing the entire course in one continuous
2 course delivery.

3 (k) A trainee, enrolled in a presentation of the "RADAR Instructor Training Course" under Rule .0210 of this
4 Subchapter, the "Time-Distance Instructor Training Course" under Rule .0211 of this Subchapter, or the "LIDAR
5 Instructor Training Course" under Rule .0237 of this Subchapter shall not be absent from class attendance for
6 more than 10 percent of the total scheduled delivery period in order to receive successful course completion.
7 Make-up work must be completed during the current course presentation for all absenteeism. Make-up work shall
8 consist of an in-person, one-hour instruction period for each hour of missed training, in the lesson plan where the
9 missing training occurred, and shall be taught by an instructor certified to teach that block of instruction.

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11 *History Note: Authority G.S. 17C-6; 17C-10;*

12 *Eff. January 1, 1981;*

13 *Amended Eff. November 1, 1981;*

14 *Readopted Eff. July 1, 1982;*

15 *Amended Eff. February 1, 2006; May 1, 2004; August 1, 2000; April 1, 1999; November 1,*
16 *1993;*

17 *July 1, 1989; February 1, 1987; June 1, 1986;*

18 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 25,*
19 *2019;*

20 *Amended Eff. January 1, 2025; April 1, 2022; August 1, 2021.*