



State of North Carolina
BOARD OF BARBER AND ELECTROLYSIS EXAMINERS
7001 Mail Service Center, Raleigh, North Carolina 27699-7000
Phone (919) 814-0640 • Fax (919) 981-5068
barbers.nc.gov • barbers@nc.gov • ncbee.com • electrolysis@nc.gov

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Members of the Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

**Sent only by email to bill.peaslee@oah.nc.gov, alexander.burgos@oah.nc.gov,
and rrc.comments@oah.nc.gov**

Dear Commissioners:

Please see the response below by the North Carolina Board of Barber and Electrolysis Examiners ("Board") to the staff opinions filed for some of the adopted temporary rules. Since several staff opinions address the same topic, this response is mostly organized by topic rather than rule-by-rule.

I will be available at the Commission meeting to address any questions or concerns you may have.

I. REQUIREMENT FOR LICENSED INSTRUCTOR MANAGERS AND LICENSED BARBER MANAGERS

Various staff opinions claim that the Board cannot adopt rules that require licensees to be ultimately responsible for the business's compliance with regulations. Below, the Board responds to the arguments in the staff opinion and explains the basis for the Board's clear authority to adopt these rules.

Affected rules

21 NCAC 06F .0102
21 NCAC 06H .0101
21 NCAC 06L .0112, .0116, and 06L .0204
21 NCAC 06N .0102, .0103, .0104, and .0116
21 NCAC 06O .0105, .0112, .0114, .0119, and .0122

Purpose of rules

A brief explanation of the industry practice will help the Commission understand the purpose of this rule and how it is related to the Board's statutory duties. Barber shops and barber schools often have multiple licensees (who may be co-owners) working in the businesses. For example, a barber shop might have 10 or 20 barbers. In these cases, the ability to enforce standards to protect consumers can be hindered where each person points to someone else within the business as the responsible party for noncompliance. The Board also has an interest in making sure that an individual accountable for compliance with regulations is knowledgeable about Board regulations, disinfection procedures, and sanitation requirements. Licensees receive this training in barber school and will have the requisite knowledge.

History of Rules Review Commission approval

It is important to note that the Commission has repeatedly reviewed the rules in question over many years, including quite recently, without any substantive change to the statutes for the issue in question. While there could be instances when the Commission makes an error in an approval, it is difficult to imagine the Commission reviewing rules time and time again and making the same error in interpretation. Instead, it is reasonable to believe that the Commission correctly determined on several occasions that the Board has statutory authority to adopt the rules.

If the Commission were to shift significantly on a question it has settled several times before, it would be destabilizing to an agency. Agencies may devote resources—such as communications, information technology, and staff training—based on well settled rules. Such a sudden shift could upend the agency's operations and waste government resources.

“Owner or manager” in G.S. 86B-31(a)

The staff opinion points to the phrase “owner or manager” in G.S. 86B-31(a) and interprets this phrase in a limiting sense. The statute states that “owners or managers” must comply with sanitary rules and regulations—which is not contradicted by any of the adopted rules. The staff opinion interprets this statute to mean that the Board cannot adopt any other rules or regulations that hold barbers responsible for noncompliance. There are two problems with this interpretation.

First, as indicated by the context, the term “manager” in G.S. 86B-31(a) refers to some individual a business may have to handle managerial responsibilities, which might include hiring personnel, making marketing decisions, developing policies, or overseeing finances. In other words, the term is a standard meaning of “manager.” In contrast, the Board's adopted rules refer to a licensed barber manager or licensed instructor manager. This “manager” is not necessarily the same person who handles the managerial responsibilities referred to above. Rather, this designation is simply to identify a licensee who is ultimately responsible for making sure that the business

complies with Board regulations. In this sense, the term “licensed barber manager” could have been replaced with other terms like “licensed barber compliance contact.” Therefore, the limitations the staff opinion believes are in G.S. 86B-31(a) do not apply to the licensed barber manager or licensed instructor manager.

Second, as suggested above, the reference G.S. 86B-31(a) only says that “owners or managers ... shall comply with ... sanitary rules and regulations.” The statute lists individuals who must comply with said rules but does not exclude the ability of the Board to hold other individuals responsible for compliance with said rules. The staff opinion would be more understandable if the statute said, “owners or managers, **and only owners and managers**, must comply with sanitary rules and regulations.” But the General Assembly did not introduce that limitation.

Explicit authority given by General Assembly in G.S. 86B-31(b)

More importantly, the General Assembly gave the Board explicit authority in G.S. 86B-31(b) to “to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section ...” That is exactly what the board is doing here: adopting “additional rules” that are directly related to the effort to enforce the sanitation and public-health requirements in G.S. 86B-31. The staff opinion’s interpretation of G.S. 86B-31(a) effectively reads this authority out of statute, contrary to the wishes of the General Assembly.

The staff opinion also misinterprets G.S. 86B-31(b). According to the opinion, the “additional rules and regulations” that the Board is authorized to adopt can only apply to institutions. There are two problems with this view.

First, the opinion overlooks the clear language of the statute, which says that the additional rules that the Board can adopt would govern “**barbers** and barbershops, mobile barbershops, and barber schools” (emphasis added). It is difficult to see how the statute refers only to institutions when the language explicitly refers to individuals, as well. In fact, the rules in question do indeed refer to barbers.¹

Second, the rules do apply to institutions: both barber shops and barber schools. The rules were adopted to promote sanitation and compliance with regulations in these institutions.

The staff opinion also suggests that even if the Board were able to adopt these rules dealing with **sanitation** in barber shops and barber schools, the Board could not adopt the rules that go **beyond** sanitation. However, the opinion minimizes the “powers and duties” the General Assembly gave to the Board in G.S. 86B-2 “to carry out and enforce the provisions of this Chapter.” Unlike the North Carolina Sheriffs' Education and Training Standards Commission rule—to which staff wrongly referred in the opinion as an analogue—the Board’s grant of authority is not limited to administration of the

¹ Under G.S. 86B-39(a), a person must be a licensed barber to get an instructor’s license.

Chapter. Instead, the General Assembly authorized the Board to adopt rules whose purpose is to enforce the provisions of the Chapter, including not only the sanitation requirements of G.S. 86B-31 but other statutes, as well. Again, the purpose of requiring a specific individual to be accountable for compliance with Board regulations is to maximize the likelihood of regulatory compliance.

Other issues

There are other issues or errors with the staff opinion:

- The opinion claims that the Board is “dictat[ing] that which is a structural or managerial prerogative of the owner or owners of barber schools.” The adopted rules do not dictate a managerial structure. Businesses can have as many or few managers (in the broader sense than our term), or even no managers, but there must be a licensee who is accountable for the business compliance with Board regulations, a person whom we call “licensed barber manager” or “licensed instructor manager” but who does not need to be the manager in the broader sense.
- The opinion claims that the Board is “determining which employees a barber school” or barber shop must have. But the rule does not do that. The individuals who would be designated a license barber manager or license instructor manager would be individuals already working at the business.
- The opinion claims that liability for violations of rules adopted under G.S. 86B-31(b) are limited to “existing principles of legal ownership” and that the Board’s rules are “set[ting] aside the protections afforded by the North Carolina Corporations Act and the North Carolina Limited Liability Act.” This is merely an assertion, with no explanation of how the rules “set aside” the North Carolina Corporations Act and the North Carolina Limited Liability Act. In reality, they do no such thing.
- The opinion claims that there is an analogue in the Commissions partial adoption of the staff opinion recommending objection to 12 NCAC 10B .0704. However, that was a different rule attempting a different regulatory approach with a different underlying statute. The opinion finds more similarity between the agencies’ rules than is justified.
- The staff opinion for 21 NCAC 06H .0101 says there is an ambiguity in the “vacancy” that would be filled under Paragraph (b). The Board believes the rule is clear to the regulated community but has submitted a revised rule to clarify this language in case the Commission believes the rule is ambiguous.
- The staff opinion for 21 NCAC 06L .0112 says there is ambiguity in the term “barbering services,” but the term is defined in 21 NCAC 06P .0103(10). In case the suggestion was that the regulated community would be confused by the difference between “barber services” and “barbering services,” the Board has revised 21 NCAC 06L .0112 to use the phrase “barber services.” The Board also struck Paragraph (b) to avoid any concern about whether the purpose of the rule was the equivalent of an internal policy.

- The opinion argues that there is ambiguity in rules 21 NCAC 06N .0102, .0103, .0104, and .0116 because they require “information concerning a position which may not exist...” But as discussed above, the position necessarily will exist because every shop will have a licensed barber and every school will have a licensed instructor. Therefore, there is not any ambiguity in the rules.

II. STAFF OPINION FOR 21 NCAC 06L .0113

Paragraph (c) is a provision that the Board has never relied on, and the Board has submitted a revised rule that removes the Paragraph. This revision avoids the question of whether the Board has the necessary authority.

III. STAFF OPINION FOR 21 NCAC 06O .0126

The staff opinion argues that the Board does not have statutory authority to adopt this rule because the “Board does not have the authority to establish penalties for any other federal, state, or local statutes or rules.” However, G.S. 86B-30(d) establishes requirements that mobile barber shops must meet under other federal, state, or local statutes and rules. Under G.S. 86B-2, the “Board shall have the powers and duties necessary to carry out and enforce the provisions of this Chapter. The Board may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out and enforce the provisions of this Chapter.” Chapter 86B includes G.S. 86B-30(d), and thus the Board has the “powers and duties” to “enforce the provisions” of that statute.

The staff opinion argues that the rule is ambiguous, but the relevant statutes and rules are cited in G.S. 86B-30(d).

IV. STAFF OPINION FOR 21 NCAC 06R .0101

G.S. 86B-31(b) states, “All barbershops, mobile barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board or its agents or assistants. . . . The Board shall have the right to make additional rules and regulations governing barbers and barbershops, mobile barbershops, and barber schools for the proper administration and enforcement of this section” This rule serves to ensure that the Board’s inspectors are properly entering a place of business for which they have the statutory obligation to inspect. Given that barbers may operate their businesses out of their home, this rule serves to ensure that the Board’s inspectors are not accused on trespassing on personal property, which is a very real concern based on experience. The rule’s requirements are reasonably related to the State’s interest in ensuring that businesses are subject to inspection during business hours.

The staff opinion implies some conflict with law but only offer vague explanations for its claims, making it difficult for the agency to respond. For example, the claims that the Board’s reasons for adopting the rule in 2008 are “tangential at best.”

The staff opinion also believes that phrasing such as “at [the establishment’s] entrance” is ambiguous, but the Board does not believe that anyone in the regulated community would be confused by the terminology. In the 15 years that this rule has been in existence, no applicant or licensee has found the rule to be unclear.

Sincerely,

Dennis Seavers

Dennis Seavers
Executive Director