



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

November 26, 2024

Michelle Schilling, Rulemaking Coordinator
N.C. Criminal Justice Training and Standards Commission
Sent via email only to: MSchilling@ncdoj.gov

Re: Objection to 12 NCAC 09B .0232 and .0404

Dear Ms. Schilling:

This letter will serve as the written notice of objection pursuant to G.S. 150B-21.12(a).

At its meeting on November 26, 2024, the Rules Review Commission objected to the above captioned rules finding that the rules did not satisfy G.S. 150B-21.9(a). Specifically, the Commission adopted the written opinion of staff attached hereto.

Please respond to these objections pursuant to G.S. 150B-21.12(a)(1) or (2), and (b).

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

Sincerely,

/s/ William W. Peaslee
William W. Peaslee
Commission Counsel

Attachment

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

John C. Evans
Senior Administrative Law Judge

An Equal Employment Opportunity Employer

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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 .0232

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 (d), Subparagraphs (3), (5), and (8), the Criminal Justice Education and Training Standards Commission (the "Agency") has not followed 26 NCAC 02C .0405 which sets forth how rules are to be formatted for publication in the North Carolina Code (the "Code").¹ Rule .0405 specifies how changes are to be displayed from the version published in the North Carolina Register (the "Register"). If the adopted rule is not formatted pursuant to Rule .0405, the adopted language cannot be determined without assumption.²

For instance, on page 2, line 15, the Agency has highlighted both "4" and "8" but only "8" is underlined. It is unclear whether the Agency intends the number to be "8" or "48."

¹ 26 NCAC 02C .0405 IS AN OFFICE OF ADMINISTRATIVE HEARINGS RULE.

² THIS ISSUE OF FORMATTING WAS BROUGHT TO THE ATTENTION OF THE AGENCY IN THE REQUEST FOR CHANGES AND IN A SUBSEQUENT TELEPHONE CONVERSATION ON NOVEMBER 14, 2024.

William W. Peaslee
Commission Counsel

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

II.

Paragraph (d) of the Rule sets forth requirements for “Specialized Compliance and Control Tactics Instructor Training” courses. While Subparagraphs (1)-(8) establish the specific hours of instruction required for each topic, Subparagraph (9) bases the number of hours required for “Compliance and Control Tactics Instructional Methods and Demonstrations” upon an undefined formula considering the number of students and instructors. It appears that the requirement is based upon instructor availability considering 12 NCAC 09B .0202 and/or some arbitrary instructor/student ratio. In addition to the ambiguity surrounding the establishment of the number of hours required, it is unclear who makes the determination.

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

III.

Subparagraphs (1)-(8) of Paragraph (d) in the proposed Rule published in the Register do not offer any changes from the Rule currently in the Code. After publication the Agency not only changed the hour requirement for each subparagraph but also changed the courses required, specifically Subparagraphs (d)(5) and (7).

Pursuant to G.S. 150B-21.2(g) an agency cannot adopt a rule which differs substantially from the text of the proposed rule. Here, the Agency made substantial changes post-publication which address a subject matter that was not addressed in the proposed text of the rule; to wit, the new courses in Subparagraphs (d)(5) and (7), and produced an effect that could not reasonably have been expected; to wit, the changes in hours and the aforesaid new courses.

Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(4) for adoption contrary to Part 2, Article 2 of the Administrative Procedures Act.

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.)

§ 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 but not later than 60 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; 2023-134, s. 21.2(b).)

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.

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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

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