



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

November 21, 2019

Sue Hodgins, Rulemaking Coordinator
North Carolina State Board of Opticians
Sent via email only: shodgin@ncopticiansboard.org

Re: Continued Objection to Rule 21 NCAC 40 .0321

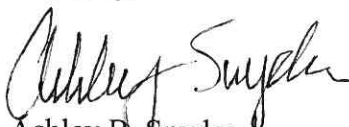
Dear Ms. Hodgins:

On November 21, 2019, the Rules Review Commission acted to continue its objection to 21 NCAC 40 .0321. The objection, originally entered on September 19, 2019, was as follows:

- The Commission objected to Rule .0321 for lack of statutory authority and ambiguity. Specifically, the Commission objected to ambiguity for failure to list the Board's factors for determining or provide a list of the "minimum equipment specified by the Board," the "curriculum approved by the board," "any test required by the Board," and for failure to delineate the scope or purpose of the on-site inspection requirement. The Commission objected for lack of statutory authority for failure to limit the Board's inspections to ensuring compliance with a training program.

Please respond to this objection in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,


Ashley B. Snyder
Commission Counsel

cc: Catherine Lee; Nichols, Choi & Lee, PLLC

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
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Clerk's Office
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Rules Review
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October 3, 2019

Sue Hodgin, Rulemaking Coordinator
North Carolina State Board of Opticians
Sent via email only: shodgin@ncopticiansboard.org

Re: Extension of the Period of Review for Rules 21 NCAC 40 .0104, .0209, .0314, .0319, and .0325 and Objection to Rules 21 NCAC 40 .0109, .0321, and .0323

Dear Ms. Hodgin:

At its September meeting, the Rules Review Commission extended the period of review for Rules 21 NCAC 40 .0104, .0209, .0314, .0319, and .0325 at the request of the agency. Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to the rules or call a public hearing on the same within 70 days.

In addition, the Commission objected to Rules 21 NCAC 40 .0109, .0321, and .0323 in accordance with G.S. 150B-21.12 as follows:

- The Commission objected to Rule .0109 for lack of statutory authority, ambiguity, and necessity. Specifically, the Commission objected to Paragraph (b) for lack of statutory authority for use of the language “eligible to vote;” Paragraph (d) for ambiguity related to the make-up of the Election Committee; Paragraph (e) for ambiguity, lack of statutory authority, and necessity related to the nomination process; and Paragraph (f) for lack of statutory authority and necessity for requiring the governor to make appointments to Board vacancies.
- The Commission objected to Rule .0321 for lack of statutory authority and ambiguity. Specifically, the Commission objected to ambiguity for failure to list the Board’s factors for determining or provide a list of the “minimum equipment specified by the Board,” the “curriculum approved by the board,” “any test required by the Board,” and for failure to delineate the scope or purpose of the on-site inspection requirement. The Commission objected for lack of statutory authority for failure to limit the Board’s inspections to ensuring compliance with a training program.

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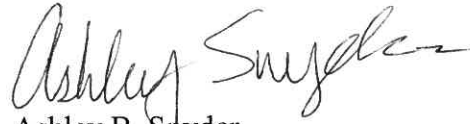
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- The Commission objected to Rule .0323 for ambiguity. Specifically, the Rule is unclear because it does not provide any guidance regarding under what circumstances the Board will conduct a background check. Additionally, the use of the term “applicants” is ambiguous.

Please respond to these objections in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ashley Snyder", written in black ink.

Ashley B. Snyder
Commission Counsel

cc: Catherine Lee; Nichols, Choi & Lee, PLLC

Burgos, Alexander N

Subject: FW: [External] RRC Request for Technical Changes
Attachments: 21 NCAC 40 .0101.docx; 21 NCAC 40 .0109.docx; 21 NCAC 40 .0212.docx; 21 NCAC 40 .0302.docx; 21 NCAC 40 .0303.docx; 21 NCAC 40 .0320.docx; Response to Request for Technical Changes 9.10.19.docx

Importance: High

From: Sue Hodgin <shodgin@ncopticiansboard.org>
Sent: Tuesday, September 10, 2019 4:18 PM
To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Cc: 'Catherine Lee' <Catherine@ncl-law.com>; 'Debbie Nowell' <Debbie@ncl-law.com>; 'Neet James' <njames@ncopticiansboard.org>
Subject: [External] RRC Request for Technical Changes
Importance: High

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Attached are 21 NCAC 40 .0101, .0109, .0212, .0302, .0303 and .0320, reviewed as specified in the Request for Technical Change for each, and the Request for Technical Change pages with answers to additional questions regarding these 6 rules.

As for 21 NCAC 40 .0104, .0209, .0314, .0319, .0321, .0323 and .0325, the NC State Board of Opticians requests an EXTENSION of time to continue working on those technical changes.

It's our understanding that we're to wait for you to let us know that we can deliver the rules' hard copies to OAH.

Please let us know if you have any questions regarding our submissions or our request for an extension. Thank you for your assistance in this matter.

Sue M. Hodgin, Executive Director
NC State Board of Opticians
PO Box 6758
Raleigh, NC 27628
919-420-1390 office
919-420-1361 fax
910-477-1808 cell

Continuous effort – not strength or intelligence – is the key to unlocking our potential. – Winston Churchill

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Burgos, Alexander N

Subject: FW: [External] RRC Request for Technical Changes

From: Sue Hodgins <shodgin@ncopticiansboard.org>

Sent: Friday, September 13, 2019 10:50 AM

To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>

Cc: 'Catherine Lee' <Catherine@ncl-law.com>; 'Debbie Nowell' <Debbie@ncl-law.com>; 'Neet James' <njames@ncopticiansboard.org>

Subject: RE: [External] RRC Request for Technical Changes

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Thank you for your email on the procedures for the Rules noted in your discussion below, Ashley. I understand what you've explained insofar as .0109; I'm not counter-objecting to your objection, and am not intending to speak at the Sept 19th RRC meeting on the Staff opinion. I will be available at the meeting for any questions that may come up.

Reference .0321 and .0323, we are not seeking an extension on these two Rules – the Board does want the objections heard at the meeting next week.

Sue M. Hodgins, Executive Director
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Continuous effort – not strength or intelligence – is the key to unlocking our potential. – Winston Churchill

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: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0321

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for ambiguity because the Rule does not list the Board's factors for determining or provide a list of the "minimum equipment specified by the Board," the "curriculum approved by the Board", or "any test required by the Board." In Subparagraph (3), at line 12, the Rule does not define "periodic." In Subparagraph (4), the Board does not delineate the scope or purpose of the on-site inspection of training establishments, making the inspection requirement ambiguous.

Staff also recommends objection for lack of statutory authority. Pursuant to G.S. 90-237(4) and 90-240(a)(3), an optician, optometrist, or ophthalmologist may train apprentices or interns training to become opticians. The Board has rulemaking authority over the registration of apprentices and interns working under opticians and rulemaking authority over the registration and training of interns.

§ 90-243. Registration of places of business, apprentices.

The Board may adopt rules requiring, as a condition of dispensing, the registration of places of business where ophthalmic dispensing is engaged in, and for **registration of apprentices and interns who are working under direct supervision of a licensed optician.** The Board may also require that any information furnished to it as required by law or regulation be furnished under oath. (1951, c. 1089, s. 10; 1967, c. 691, s. 49; 1979, c. 166, s. 1; 1981, c. 600, s. 11.)

Ashley Snyder
Commission Counsel

§ 90-249. Powers of the Board.

(a) The Board shall have the power to make rules, not inconsistent with this Article and the laws of the State of North Carolina, with respect to the following areas of the business of opticianry in North Carolina:

- (1) Misrepresentation to the public.
- (2) Baiting or deceptive advertising.
- (3) Continuing education of licensees.
- (4) Location of registrants in the State.
- (5) Registration of established optical places of business, but no rule restricting type or location of a business may be enacted.
- (6) Requiring photographs for purposes of identification of persons subject to this Article.
- (7) Content of licensure examination and reexamination.
- (8) Revocation, suspension, and reinstatement of licenses, probation, and reprimands of licensees, and other penalties.
- (9) Fees within the limits of G.S. 90-246.
- (10) Accreditation of schools of opticianry.
- (10a) Designation of accredited colleges, universities, and coursework that satisfy the qualifications for examination pursuant to G.S. 90-240(a1).
- (11) Registration and training of apprentices and interns.
- (12) Licenses and examinations pursuant to G.S. 90-241.

(b) through (d) Repealed by Session Laws 1997-424, s. 5. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19; 1973, c. 1331, s. 3; 1977, c. 755, s. 6; 1981, c. 600, s. 16; 1987, c. 827, s. 1; 1997-424, s. 5; 2016-117, s. 3(d).)

The Board's authority to regulate optometrists and ophthalmologists training apprentices and interns is limited by the following statute:

§ 90-253. Exemptions from Article.

Nothing in this Article shall be construed to apply to optometrists, or physicians trained in ophthalmology who are authorized to practice under the laws of this State, or to an unlicensed person working within the practice and under the direct supervision of the optometrist or physician trained in ophthalmology. An apprentice or intern registered with the Board and working under direct supervision of a licensed optician, optometrist or physician trained in ophthalmology will not be deemed to have engaged in opticianry by reason of performing acts defined as preparation and dispensing, provided the apprentice is in compliance with the rules of the Board respecting the training of apprentices.

As used in this section, "supervision" means the provision of general direction and control through immediate personal on-site inspection and evaluation of all work constituting the practice of opticianry and the provision of consultation and instruction by a licensed dispensing optician, except that on-site supervision is not required for minor adjustments or repairs to eyeglasses. (1951, c. 1089, s. 20; 1981, c. 600, s. 18.)

The Board has statutory authority over the training of apprentices and interns but does not have statutory authority over optometrists and ophthalmologists. As written, the Rule does not limit the Board's authority to ensuring compliance with a training program. The Rule imposes limitations on the businesses of optometrists and ophthalmologists used as training establishments. Staff recommends objection to Subparagraphs (1) and (4) for lack of statutory authority to require businesses of optometrists and ophthalmologists used as training establishments to have an unspecified list of equipment and be subject to inspections by the Board not limited in scope.

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0321

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

At line 4, please delete the space between 90-237 and (4).

What are the contents or substantive requirements of the application referenced in this Rule? Are the contents or substantive requirements of the application form in rule in accordance with G.S. 150B-2(8a)(d)?

At line 6, please change "must" to "shall."

In (1), what is included in the "minimum equipment specified by the Board?"

At line 10, please change "and/or" to either "and" or "or."

In (2), what is the "curriculum approved by the Board?" Is it in rule?

In (3), what tests are required by the Board?

In (3), line 12, define "periodic."

In (4), when will inspections occur? Upon application?

In (4), who conducts the inspections? Board staff?

In (4), what is the purpose of the inspection? What are you looking for? Compliance with these Rules or something else?

In (4), where is your statutory authority to conduct inspections of training establishments, specifically those run by optometrists and ophthalmologists?

In your history note, please reference 90-240(a)(3) instead of 90-240(3).

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

21 NCAC 40 .0321 is amended as published in 33:23 NCR 2258-2262 as follows:

21 NCAC 40 .0321 TRAINING ESTABLISHMENT REQUIREMENTS

Any North Carolina licensed optician, ophthalmologist, or optometrist as provided in G.S. 90-237 (4) and G.S. 90-240(a)(2) and (3) who proposes to train an apprentice or intern to become an optician shall fill out and sign ~~under oath~~ an application to do so. In addition, the training establishment must meet the requirements of the Board to train an apprentice or intern in opticianry. These requirements are:

- (1) providing the list of minimum equipment specified by the Board;
- (2) submitting a schedule of work processes and indicating the number of hours to be devoted to each work process for the apprentice and/or intern as outlined in the curriculum approved by the Board;
- (3) administering and returning any test required by the Board for trainees and submitting requested periodic statements regarding compliance; and
- (4) allowing on-site inspection of the training establishment by the Board.

*History Note: Authority G.S. 90-237(4); 90-240(3); 90-243; 90-249;
Eff. November 1, 1981;
Amended Eff. February 1, 1989;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 22, ~~2018~~; 2018;
Amended Eff. October 1, 2019.*