

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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0109

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:

Staff recommends objection to this Rule for ambiguity and lack of necessity. This Rule is being readopted pursuant to G.S. 150B-21.3A, and purports to govern rulemaking and administrative hearing procedures.

As written, it is unclear what this Rule is governing regarding administrative hearings, as it incorporates all of OAH's rules, many of which are specific to the work of Administrative Law Judges and OAH staff.

The agency also incorporates by reference OAH rules for publication of proposed rules. As those rules are binding upon all agencies seeking to publish rules, the incorporation by reference is unnecessary.

Therefore, staff recommends objection to this Rule for lack of clarity and necessity.

Amanda J. Reeder
Commission Counsel
Issued April 14, 2020

1 14B NCAC 16 .0109 is readopted as published in 33:15 NCR 1544 as follows:

2
3 **14B NCAC 16 .0109 RULEMAKING AND ADMINISTRATIVE HEARING PROCEDURES**

4 The Administrative Procedures for rulemaking and hearings, codified as Title 26, Subchapters 2 and 3 of the North
5 Carolina Administrative Code, effective August 1, 1986, are hereby adopted by reference to apply to actions of the
6 Private Protective Services Board. Pursuant to G.S. 150B-14(c) this reference shall automatically include any later
7 amendments and editions to Title 26 Subchapters 2 and 3 of the North Carolina Administrative Code.

8
9 *History Note: Authority G.S. 74C-5; 74C-12;*

10 *Eff. May 1, 1988;*

11 *Transferred and Recodified from 12 NCAC 07D .0111 Eff. July 1, ~~2015~~; 2015;*

12 *Readopted Eff. August 1, 2020.*
13
14
15

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: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0704

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:

Staff recommends objection to this Rule for ambiguity and lack of statutory authority. This Rule is being readopted pursuant to G.S. 150B-21.3A, and appears to be governing applications to register as an unarmed security guard.

In the History Note, the Board cites only to G.S. 74C-5, which is the general rulemaking authority of the Board.

The language throughout the Rule states that the "administrator" will make a determination. However, there is no longer an "administrator" following changes to G.S. 74C by SL 2001-487, which established the position of Director. Therefore, staff believes the Rule is ambiguous when it uses the term "administrator," as the position does not appear to exist.

In Paragraph (a), the Rule states that there shall be "such further investigation of the applicant as deemed necessary." The Rule does not say who will deem the investigation necessary, nor how the necessity will be determined. Staff believes that the agency is relying upon G.S. 74C-5(5) to approve the individual applicants, so staff is not recommending objection to this Paragraph based upon lack of statutory authority at this time. However, there is no guidance in this Rule as to how or when this investigation will occur. Therefore, staff believes this Paragraph is ambiguous as written.

In Paragraph (b), the Rule states that any denial of the registration by the administrator will be subject to review of the Board. However, G.S. 74C-12 states that any denial of an application will

Amanda J. Reeder
Commission Counsel

be made by the Board. The agency does not cite to any authority for the administrator to issue a denial such that it is reviewable by the Board, nor any authority of the Board to delegate this decision. Further, staff believes the law is clear that the Board must make the decision. Therefore, staff believes the agency lacks statutory authority for this Paragraph.

Staff notes that as part of this readoption process, the agency also readopted and then submitted Rule 14B NCAC 16 .0804 to the RRC last fall. That Rule was almost a verbatim recitation of the language in this Rule. The RRC objected to that Rule at its September 2019 meeting. In response, the agency repealed Rule 14B NCAC 16 .0804 and it was removed from the Code. The history of that Rule is attached beginning on Page 7 of this packet.

§ 74C-5. Powers of the Board.

In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to do all of the following:

- (1) Adopt rules necessary to carry out and administer the provisions of this Chapter including the authority to require the submission of reports and information by licensees under this Chapter.
- (2) Determine minimum qualifications, establish and require written or oral examinations, and establish minimum education, experience, and training standards for applicants and licensees under this Chapter.
- (3) Conduct investigations regarding alleged violations and to make evaluations as may be necessary to determine if licensees and trainees under this Chapter are complying with the provisions of this Chapter.
- (4) Adopt and amend bylaws, consistent with law, for its internal management and control.
- (5) Approve individual applicants to be licensed or registered according to this Chapter.
- (6) Deny, suspend, or revoke any license or trainee permit issued or to be issued under this Chapter to any applicant, licensee, or permit holder who fails to satisfy the requirements of this Chapter or the rules established by the Board. The denial, suspension, or revocation shall be in accordance with Chapter 150B of the General Statutes of North Carolina.
- (7) Issue subpoenas to compel the attendance of witnesses and the production of pertinent books, accounts, records, and documents. The district court shall have the power to impose punishment pursuant to G.S. Chapter 5A, Article 2, for acts occurring in matters pending before the Private Protective Services Board which would constitute civil contempt if the acts occurred in an action pending in court.
- (8) Repealed by Session Laws 1989, c. 759, s. 5.
- (9) Adopt rules governing detection of deception schools, and charge fees for reimbursement of costs incurred pursuant to approval of the schools.
- (10) Contract for services as necessary to carry out the functions of the Board.
- (11) Approve training schools, instructors, and course materials for any person, firm, association, or corporation wishing to provide training described in this Chapter.
- (12) Approve a design for a badge or shield that indicates a person is licensed or registered to engage in private protective services. The badge or shield shall be approved by the North Carolina Sheriffs' Association and the North Carolina Association of Chiefs of Police. (1973, c. 528, s. 1; c. 1331, s. 3; 1979, c. 818, s. 2; 1981 (Reg. Sess., 1982), c. 1359, s. 3; 1983, c. 794, s. 2; c. 810; 1989, c. 759, s. 5; 1999-456, s. 19; 2007-511, s. 2.)

§ 74C-12. Denial, suspension, or revocation of license, registration, or permit; duty to report criminal arrests.

(a) The Board may, after compliance with Chapter 150B of the General Statutes, deny, suspend or revoke a license, registration, or permit issued under this Chapter if it is determined that the applicant, licensee, registrant, or permit holder has done any of the following acts:

- (1) Made any false statement or given any false information in connection with any application for a license, registration, or permit or for the renewal or reinstatement of a license, registration, or permit.
- (2) Violated any provision of this Chapter.
- (3) Violated any rule adopted by the Board pursuant to the authority contained in this Chapter.
- (4) Repealed by Session Laws 1989, c. 759, s. 10.
- (5) Impersonated or permitted or aided and abetted any other person to impersonate a law enforcement officer of the United States, this State, any other state, or any political subdivision of a state.
- (6) Engaged in or permitted any employee to engage in a private protective services profession when not lawfully in possession of a valid license issued under the provisions of this Chapter.
- (7) Willfully failed or refused to render to a client service as agreed between the parties and for which compensation has been paid or tendered in accordance with the agreement of the parties.
- (8) Knowingly made any false report to the employer or client for whom information is being obtained.
- (9) Committed an unlawful breaking or entering, assault, battery, or kidnapping.
- (10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee.
- (11) Repealed by Session Laws 1989, c. 759, s. 10.
- (12) Undertaken to give legal advice or counsel or to in any way falsely represent that he or she is representing any attorney or he or she is appearing or will appear as an attorney in any legal proceeding.
- (13) Issued, delivered, or uttered any simulation of process of any nature which might lead a person to believe that such simulation - written, printed, or typed - may be a summons, warrant, writ or court process, or any pleading in any court proceeding.
- (14) Failed to make the required contribution to the Private Protective Services Education Fund or failed to maintain the certificate of liability insurance required by this Chapter.

- (15) Violated the firearm provisions set forth in this Chapter.
- (16) Repealed by Session Laws 1989, c. 759, s. 10.
- (17) Failed to notify the Director by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter.
- (18) Failed to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent.
- (19) Been judged incompetent by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or committed to a mental health facility for treatment of mental illness, as defined in G.S. 122C-3, by a court under G.S. 122C-271.
- (20) Failed or refused to offer a report to a client within 30 days of the client's written request after the client has paid for services rendered.
- (21) Been previously denied a license, registration, or permit under this Chapter or previously had a license, registration, or permit revoked for cause. The denial or revocation shall include a principal in the applicant's business.
- (22) Engaged in a private protective services profession under a name other than the name under which the license was obtained under the provisions of this Chapter.
- (23) Divulged to any person, except as required by law, any information acquired by the license holder except at the direction of the employer or client for whom the information was obtained. A licensee may divulge to any law enforcement officer or district attorney or district attorney's representative any information the law enforcement officer may require to investigate a criminal offense with the prior approval and consent of the client.
- (24) Fraudulently held himself or herself out as employed by or licensed by the State Bureau of Investigation or any other governmental authority.
- (25) Demonstrated intemperate habits or a lack of good moral character. The acts that are prima facie evidence of intemperate habits or lack of good moral character under G.S. 74C-8(d)(2) are prima facie evidence of the same under this subdivision.
- (26) Advertised or solicited business using a name other than that in which the license was issued.
- (27) Worn, carried, or accepted any badge or shield purporting to indicate that the person is a law enforcement officer while licensed under the provisions of this Chapter as a private investigator.
- (28) Possessed or displayed a badge or shield while providing private protective services that was not designed and approved by the Board pursuant to G.S. 74C-5(12).
- (29) Failed or refused to reasonably cooperate with the Board or its agents during an investigation of any complaint, allegation, suspicion of wrongdoing, or violation of this Chapter.

(30) Failed to properly make any disclosure to the Board or provide documents or information required by this Chapter or rules adopted by the Board.

(31) Engaged in conduct constituting dereliction of duty or otherwise deceived, defrauded, or harmed the public in the course of professional activities or services.

(32) Demonstrated a lack of financial responsibility.

(b) The denial, revocation, or suspension of a license, registration, or permit by the Board shall be in writing, be signed by the Director of the Board, and state the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from this decision as provided in Chapter 150B of the General Statutes. The aggrieved person shall file the appeal within 60 days of receipt of the Board's decision.

(c) The following persons may not be issued a license under this Chapter:

(1) A sworn court official.

(2) A holder of a company police commission under Chapter 74E of the General Statutes.

(d) A licensee shall report to the Board in writing within 30 days any charge, arrest for, or conviction of a misdemeanor or felony for any of the following:

(1) Crimes that have as an essential element dishonesty, deceit, fraud, or misrepresentation.

(2) Illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage.

(3) Illegal use, carrying, or possession of a firearm.

(4) Acts involving assault.

(5) Acts involving unlawful breaking or entering, burglary, or larceny.

(6) Any offense involving moral turpitude.

For purposes of this section, the term "conviction" includes the entry of a plea of guilty, a plea of nolo contendere, prayer for judgment continued, or a finding of guilt by a court of competent jurisdiction. The licensee's failure to report a charge, arrest for, or conviction of a misdemeanor or felony is grounds for revocation of the license. (1979, c. 818, s. 2; 1981, c. 807, s. 6; 1987, c. 550, s. 20; c. 657, s. 6; 1989, c. 759, s. 10; 1991 (Reg. Sess., 1992), c. 1043, s. 5; 2001-487, s. 64(g); 2007-511, s. 7; 2009-328, ss. 8, 9.)

1 14B NCAC 16 .0804 was proposed for readoption in 33:15 NCR 1544 but is now repealed as follows:

2
3 **14B NCAC 16 .0804 INVESTIGATION/ARMED SECURITY GUARD FIREARM REGISTRATION**
4 **PERMIT**

5 ~~(a) After the administrator receives a complete application for registration, the administrator may cause to be made~~
6 ~~such further investigation of the applicant as deemed necessary.~~

7 ~~(b) Any denial of an applicant for registration by the administrator shall be subject to review by the Board.~~

8
9 *History Note: Authority G.S. 74C-5;*

10 *Eff. June 1, 1984;*

11 *Transferred and Recodified from 12 NCAC 07D .0804 Eff. July 1, 2015;*

12 *Repealed Eff. December 1, 2019.*



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

September 19, 2019

Jeff Gray, Rulemaking Coordinator
Private Protective Services Board
Sent via email only: jgray@bdixon.com

Re: Objection to Rules 14B NCAC 16 .0804, .0901, and .0909
Extension of the Period of Review of 14B NCAC 16 .0110, .0805, .0806, .0807,
.0808, .0809, .0904, and .0906.

Dear Mr. Gray:

At its meeting today, the Rules Review Commission objected to Rules 14B NCAC 16 .0804, .0901, and .0909 in accordance with G.S. 150B-21.10.

The Commission objected to Rule 14B NCAC 16 .0804 for lack of statutory authority and ambiguity. Specifically, the Commission found that Paragraph (a) of the Rule states that there shall be "such further investigation of the applicant as deemed necessary." The Rule does not say who will deem the investigation necessary, nor how the necessity will be determined. The Commission found that this language was ambiguous.

In Paragraph (b), the Rule states that any denial of the registration by the Director will be subject to review of the Board. However, G.S. 74C-13(f) requires the Board to determine whether to issue or deny an applicant for a firearm registration permit. The agency did not cite to any authority for the Director to issue a denial such that it is reviewable by the Board, nor any authority of the Board to delegate this decision. Therefore, the Commission found that the agency lacks statutory authority for this Paragraph.

The Commission objected to Rules 14B NCAC 16 .0901 and .0909 for lack of statutory authority. Specifically, both rules require applicants seeking licensure pursuant to G.S. 93B-15.1 (military trained applicants and spouses of those individuals) to submit application fees. The assessment of an application fee against those individuals is forbidden by G.S. 93B-15.1(k). The Commission found that the agency does not have authority to charge these fees in either rule.

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

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

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk's Office
919/431-3000
fax: 919/431-3100

Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

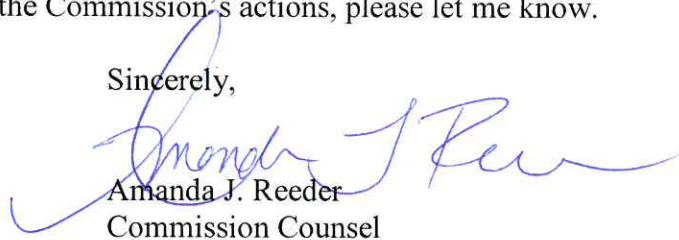
Please respond to the objections in accordance with the provisions of G.S. 150B-21.12.

In addition, the Rules Review Commission extended the period of review for 14B NCAC 16 .0110, .0805, .0806, .0807, .0808, .0809, .0904, and .0906 in accordance with G.S. 150B-21.10. They did so in response to a request from the agency to extend the period in order to allow the agency to address the Requests for Technical Changes and submit the rewritten rules at a later meeting.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days.

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

Sincerely,



Amanda J. Reeder
Commission Counsel

cc: Phillip Stephenson
Charles McDarris

REQUEST FOR TECHNICAL CHANGE

AGENCY: Private Protective Services Board

RULE CITATION: 14B NCAC 16 .0804

DEADLINE FOR RECEIPT: Friday, September 13, 2019

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:

In the Submission for Permanent Rule form, Box 3, remove the check from "Amendment" This is a Readoption only.

In the Introductory Statement of the Rule, line 1, this is a readoption, not an amendment. Please change the language to reflect that.

In (a), line 5, who is the "administrator"? Should this be changed to "Director" to address the change to G.S. 74C-6 made by SL 2001-487(64.)(b)?

On line 5, what is "complete" here? Are the requirements of the application in another rule or law?

In the History Note, line 12, state "Readopted Eff."

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

Amanda J. Reeder
Commission Counsel
Date submitted to agency: August 30, 2019

1 14B NCAC 16 .0804 is amended as published in 33:15 NCR 1544 as follows:

2
3 **14B NCAC 16 .0804 INVESTIGATION/ARMED SECURITY GUARD FIREARM REGISTRATION**
4 **PERMIT**

5 (a) After the administrator receives a complete application for registration, the ~~administrator~~ Director may cause to be
6 made such further investigation of the applicant as deemed necessary.

7 (b) Any denial of an applicant for registration by the ~~administrator~~ Director shall be subject to review by the Board.

8
9 *History Note: Authority G.S. 74C-5;*

10 *Eff. June 1, 1984;*

11 *Transferred and Recodified from 12 NCAC 07D .0804 Eff. July 1, ~~2015~~. 2015;*

12 *Amended Eff. October 1, 2019.*

1 14B NCAC 16 .0704 is readopted as published in 33:15 NCR 1544 as follows:

2
3 **14B NCAC 16 .0704 INVESTIGATION FOR UNARMED SECURITY GUARD REGISTRATION**

4 (a) After the administrator receives a complete application for registration, the administrator may cause to be made
5 such further investigation of the applicant as deemed necessary.

6 (b) Any denial of an applicant for registration by the administrator shall be subject to review by the Board.

7
8 *History Note: Authority G.S. 74C-5;*

9 *Eff. June 1, 1984;*

10 *Transferred and Recodified from 12 NCAC 07D .0704 Eff. July 1, ~~2015~~; 2015;*

11 *Readopted Eff. August 1, 2020.*
12
13
14