

September 13, 2018

VIA Electronic Mail Only: kathie.trotter@dhhs.nc.gov

Kathie Trotter
NC Dept. of Health and
Human Services – Division of
Services for the Blind
2601 Mail Service Center
Raleigh, NC 27699-2601

RE: Elected Committee of Blind Vendors' Comments and Objections to Rules before
the Rules Review Commission proposed by the Commission for the Blind, 10A
NCAC 63

Dear Ms. Trotter:

McGuireWoods LLP is submitting comments on behalf of the Elected Committee of Blind Vendors ("ECBV"), pursuant to 26 NCAC 05.0103(a) and N.C. Gen. Stat. § 150B. ECBV was formed and is designated by the North Carolina Department of Health and Human Services ("DHHS") to represent the interests of blind vendors that provide services for federal, state and local government properties. Among other things, ECBV is intended to actively participate with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program. 34 CFR 395.14(b)(1). It is also intended to actively participate with the State licensing agency in the development and administration of a State system for the transfer and promotion of blind vendors. 34 CFR 395.14(b)(3). ECBV submits the comments below in furtherance of its intended purpose.

1. 10A NCAC 63C .0203 – Subparagraph (b) – Page 1, Line 13

ECBV objects to the term "conventional means" as it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The term "conventional means" is not defined anywhere in the proposed or existing rules, and if adopted would establish vague standards for when an operator's license would be subject to termination.

2. 10A NCAC 63C .0203 – Subparagraph (c) – Page 1, Line 15

ECBV objects to the term "conventional means" as it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The term "conventional means" is not defined anywhere in the proposed or existing rules, and if adopted would establish vague standards for when an operator's license would be subject to termination.

3. 10A NCAC 63C .0203 – Subparagraph (d) – Page 1, Line 17

ECBV objects to the term “may also be suspended or terminated” as it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not establish clear standards to guide the agency as to whether suspension or termination is appropriate. This lack of guidance would likely lead to inconsistent application of the rule. As written, the decision to suspend or terminate the operator’s license would be within the unfettered discretion of the Division of Services for the Blind (“Division”).

4. 10A NCAC 63C .0203 – Subparagraph (d) – Page 1, Lines 21 through 23

ECBV objects to the following language because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2):

“Suspension may be used when an apparent action or lack of action by an operator is not serious enough in the opinion of the Division to warrant termination of the license.”

This provision lacks sufficient guiding standards or criteria for determining when suspension of an operator’s license, as opposed to termination, is appropriate. The rule does not explain what actions or lack of actions would make an operator eligible for suspension versus the more severe punishment of termination. Additionally, the seriousness of the operator’s wrongdoing would not be determined by objective factors or criteria, but instead depend on the subjective assessment of the Division.

ECBV also notes that this subparagraph, if adopted, should be renamed subparagraph (e).

5. 10A NCAC 63C .0203 – Subparagraph (d)(1) – Page 2, Lines 19 through 22

ECBV objects to subparagraph (d)(1) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rules do not explain what qualifies as an “extended illness” or “incapacity.” Additionally, this rule implies that the Division has the authority to require operators to submit confidential and protected medical records. The agency can cite to no statutory authority granting it the authority to request this information; therefore, this rule also violates G.S. 150B-21(a)(1).

6. 10A NCAC 63C .0203 – Subparagraph (d)(4) – Page 1, Line 28

ECBV objects to subparagraph (d)(4) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not indicate what information or documents would be considered in the context of “eligibility requirements” to allow enforcement of this provision.

7. 10A NCAC 63C .0203 – Subparagraph (d)(6) – Page 2, Lines 30 through 33.

ECBV objects to subparagraph (d)(6) because the agency is not authorized by the General Assembly to demand that an operator provide a copy of his concealed weapons permit. No authorizing statute or regulation cited by the proposed rules gives the agency this authority. To the contrary, North Carolina law expressly makes records of concealed carry permits

confidential and they are not deemed public records. *See* G.S. 14-415.17(b). Further, only law enforcement agencies, which does not include the Commission of the Blind, have the authority to request concealed carry permits. Therefore, subparagraph (d)(6) violates G.S. 150B-21.9(a)(1).

8. 10A NCAC 63C .0203 – Subparagraph (d)(9) – Page 2, Lines 4 through 5

ECBV objects to subparagraph (d)(9) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not indicate how or even if operators will be put on notice of any outstanding debt to the Controller's Office.

9. 10A NCAC 63C .0203 – Subparagraph (d)(11) – Page 2, Lines 8 through 9

ECBV objects to subparagraph (d)(11) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not give criteria to determine how an operator could be "failing to cooperate".

10. 10A NCAC 63C .0203 – Subparagraph (d)(12) – Page 2, Lines 10 through 11

ECBV objects to subparagraph (d)(12) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not give criteria to determine how an operator could be "failing to cooperate".

11. 10A NCAC 63C .0203 – Subparagraph (d)(15) – Page 2, Lines 15 through 16

ECBV objects to subparagraph (d)(15) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule fails to provide criteria or standards to evaluate what is required to "maintain facility equipment in a sanitary and operable condition within the scope of the operator's level of maintenance authorization". Instead of providing objective standards, the proposed rule allows the determination of "sanitary and operable condition" to be based on the subjective opinion of the Division.

12. 10A NCAC 63C .0204 – Subparagraph (a)(2) – Page 1, Lines 9 through 10

ECBV objects to subparagraph (a)(2) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not indicate how or even if applicants will be put on notice of any outstanding debt to the Business Enterprises Program.

13. 10A NCAC 63C .0204 – Subparagraph (c) – Page 1, Lines 23 through 23

ECBV objects to subparagraph (c) because it is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The rule does not establish criteria or standards for how requests for "adjustments" are to be submitted, reviewed, or achieved.

14. 10A NCAC 63C .0204 – Subparagraph (d)(7) – Page 6, Line 34 through Page 7, Line 2

ECBV objects to subparagraph (d)(7) because the tie-breaking procedure is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The proposed rule does not account for a tiebreaker situation where two applicants have the same “seniority points.” Under the rule as proposed, the tiebreaker methodology would not resolve the tie (see example below).

Applicant #1 = 35 Points (of which 3 are “seniority points”)

Applicant #2 = 35 Points (of which 3 are “seniority points”)

Under subparagraph (d)(7), the seniority points of each applicant are deducted and the total points recalculated. The result:

Applicant #1 = 32 Points

Applicant #2 = 32 Points

Both applicants are still tied after the tiebreaker.

15. 10A NCAC 63C .0403 – Subparagraph (c) – Page 1, Lines 22 through 33

ECBV objects to the requirement that the request for a review by the operator relations committee prior to requesting an evidentiary hearing must be submitted to the operator relations committee within 15 business days after the event/incident occurred, on that basis this requirement is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). It is unclear and unambiguous because this deadline is the same for the time limits for requesting the full evidentiary hearing under subparagraph (f) of the rule, as noted in the next comment. This creates confusion as to whether the review by the operator relations committee is to occur prior to the full evidentiary hearing. These provision are also unclear and ambiguous in light of the applicable requirements for a full evidentiary hearing as provided in federal law at 20 U.S.C. 107b(6) and 106d-1(a) and federal rule at 34 CFR 395.13.

We would note the sentence contained on Line 21 – “This is not a mandatory review.” –is duplicative of the reference in subparagraph (e) at Page 2, Line 7.

16. 10A NCAC 63C .0403 – Subparagraph (f) – Page 2, Lines 18 and 19

For the reasons noted in the prior comment, ECBV objects to the requirement that the request for a full evidentiary hearing an evidentiary hearing must be submitted to the operator relations committee within 15 business days after the event/incident occurred, on that basis this requirement is unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). It is unclear and unambiguous because this deadline is the same for the time limits for requesting a review by the operator relations committee under subparagraph (c) of the rule, as noted in the prior comment. This creates confusion as to whether the review by the operator relations committee is to occur prior to the full evidentiary hearing. These provision are also unclear and ambiguous in light of the applicable requirements for a full evidentiary hearing as provided in federal law at 20 U.S.C. 107b(6) and 106d-1(a) and federal rule at 34 CFR 395.13.

17. 10A NCAC 63C .0601 – Subparagraph (a)(1) – Lines 7 through 8

ECBV objects to the phrase “perform to ensure the operation” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). If intended, the phrase should be replaced with the word “operate.”

18. 10A NCAC 63C .0601 – Subparagraph (a)(4) – Line 16

ECBV objects to the phrase “devote his full managerial attention to the responsibilities of operating” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The concept of “full managerial attention” is not clear and is undefined. If intended, the phrase should be replaced with the word “operate”.

19. 10A NCAC 63C .0601 – Subparagraph (a)(5) – Line 19

ECBV objects to the phrase “maintain professional relationships with customers” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The concepts of a “professional relationship” and the sufficiency of efforts to “maintain” them are not clear and are undefined. If needed, the current wording “good customer relations” should be kept unchanged.

20. 10A NCAC 63C .0601 – Subparagraph (a)(6) – Lines 21 through 22

ECBV objects to phrases “maintain a neat, business like appearance” and “orderly, business-like manner” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The concepts of a “neat, business-like appearance” and the sufficiency of efforts to “maintain” them are not clear and are undefined. Likewise, the concept of an “orderly, business-like manner” is not clear and is undefined. In addition, ECBV objects to these phrases as being not reasonably necessary to implement or interpret the applicable North Carolina statutes and federal laws and rules in violation of G.S. 150B-21.9(a)(3).

21. 10A NCAC 63C .0601 – Subparagraph (a)(7) – Lines 19 through 20

ECBV objects to the phrase “must assure that the business to be carried on at the facility shall be limited to that specified and authorized in” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). If needed, the phrase should be replaced with the phrase “shall comply with.” However, ECBV objects to the entire subparagraph (a)(7) as being not reasonably necessary to implement or interpret the applicable North Carolina statutes and federal laws and rules in violation of G.S. 150B-21.9(a)(3).

22. 10A NCAC 63C .0601 – Subparagraph (a)(8) – Line 26

ECBV objects to the phrase “in which are maintained to operate” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). Among other things, it is unclear whether this requires that all funds be placed in this account, and also whether a minimum balance is required to be maintained, none of which are specified. If intended, the phrase “in which are maintained to operate” should be replaced by the phrase “in connection with.” In any event, ECBV objects

to the entire subparagraph (a)(8) as being not reasonably necessary to implement or interpret the applicable North Carolina statutes and federal laws and rules in violation of G.S. 150B-21.9(a)(3).

23. 10A NCAC 63C .0601 – Subparagraph (a)(9) – Lines 27 through 29

ECBV objects to the requirement in subparagraph (a)(9) as being not reasonably necessary to implement or interpret the applicable North Carolina statutes and federal laws and rules in violation of G.S. 150B-21.9(a)(3), particularly in the case where some ECBV vendors approved prior to 2015 were not required to demonstrate the kind of computer skills needed to prepare and submit these documents, and many of which do not have such skills or reasonable access to such skills. The language providing an offer of assistance is, in effect, a recognition of the problem, without any showing of the necessity or authority for requiring such submittals in electronic formats

24. 10A NCAC 63C .0601 – Subparagraph (a)(12) – Lines 34 through 35

ECBV objects to the phrase “business consultation, and for” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The nature, scope, purpose, and meaning of the phrase “business consultation” is unclear and is not defined. In addition, ECBV objects to the use of this phrase as being not reasonably necessary to implement or interpret the applicable North Carolina statutes and federal laws and rules in violation of G.S. 150B-21.9(a)(3).

25. 10A NCAC 63C .0601 – Subparagraph (a)(13) – Lines 36 through 37

ECBV objects to the phrase “consultation to support operations” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The nature, scope, purpose, and meaning of the phrase “consultation to support operations” is unclear and is not defined. In addition, ECBV objects to the use of this phrase “consultation to support operations” as being not reasonably necessary to implement or interpret the applicable North Carolina statutes and federal laws and rules in violation of G.S. 150B-21.9(a)(3).

26. 10A NCAC 63C .0601 – Subparagraph (a)(15) – Page 2, Line 3

ECBV objects to the phrase “appropriate actions” as being unclear and ambiguous in violation of G.S. 150B-21.9(a)(2). The interpretation and application of this phrase involves judgment, but the phrase itself is unclear and undefined, providing no guidance as to what is required to satisfy its requirements. In addition, as noted by staff, the reference to “within 15 business days” is also unclear and ambiguous in violation of G.S. 150B-21.9(a)(2), because the language does not state what action begins the running of the time period.

ECBV desires the opportunity to make an oral statement on the rules proposed by the Commission for the Blind, including those addressed in these specific comments. As provided in 26 NCAC 05 .0105(b), the individual(s) making the oral statement will be one or both of the signatories to this letter, and their address, telephone number, fax number and email address are provided in the letterhead stationary and the signatory information below.

Ms. Kathie Trotter
September 13, 2018
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Sincerely,

McGuireWoods LLP

A handwritten signature in black ink, appearing to read "Charles D. Case". The signature is fluid and cursive, with a large initial "C" and "D".

Charles D. Case
W. Dixon Snukals

cc: Jason Thomas (jason.thomas@oah.nc.gov)
Steven Shores (shores.cafe@gmail.com)
Gerald Fisher (geraldfisher@gmail.com).