

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: Department of Public Safety

RULE CITATION: 14B NCAC 01C .0401

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 lack of statutory authority.

In the History Note, the agency cites to G.S. 160A-288.1 and 153A-212. G.S. 160A-288.1 states:

§ 160A-288.1. Assistance by State law-enforcement officers; rules; cost

(a) The governing body of any city or county may request the Governor to assign temporarily State law-enforcement officers with statewide authority to provide law-enforcement protection when local law-enforcement officers: (i) are engaged in a strike; (ii) are engaged in a slowdown; (iii) otherwise refuse to fulfill their law-enforcement responsibilities; or (iv) submit mass resignations. The request from the governing body of the city or county shall be in writing. The request from a county governing board shall be upon the advice of the sheriff of the county.

(b) The Governor shall formulate such rules, policies or guidelines as may be necessary to establish a plan under which temporary State law-enforcement assistance will be provided to cities and counties. The Governor may delegate the responsibility for developing appropriate rules, policies or guidelines to the head of any State department. The Governor may also delegate to a department head the authority to determine the number of officers to be assigned in a particular case, if any, and the length of time they are to be assigned.

(c) While providing assistance to a city or county, a State law-enforcement officer shall be considered an employee of the State for all purposes, including compensation and fringe benefits.

Amanda J. Reeder
Commission Counsel

(d) While providing assistance to the city or county, a State officer shall be subject to the lawful operational commands of his State superior officers. The ranking representative of each State law-enforcement agency providing assistance shall consult with the appropriate city or county officials prior to deployment of the State officers under his command.

Staff initially notes that G.S. 160A-288.1(b) gives rulemaking power to the Governor, not DPS. However, the statute allows the Governor to delegate this responsibility to “the head of any State Department,” so it is possible that the delegation has occurred, such that the Secretary of DPS has this rulemaking authority for these Rules.

However, the statute expressly states the rules shall be “necessary to establish a plan under which temporary State law-enforcement assistance will be provided to the cities and counties.” This Rule does not appear to do that; instead, it establishes agreements for the city or county to reimburse the costs after the Secretary entered into an agreement to provide the assistance. Therefore, staff is not aware that the agency has authority for this Rule.

In addition, G.S. 160A-288.1(c) states that all times, the State law-enforcement officer shall be considered an employee of the State for all purposes. However, in Items (1) through (3), the Rule states that the costs of employment, including pay, workers compensation, and fringe benefits, may be paid by the local government. Staff is not aware of any authority for the agency to offset all State employment requirements to local governments through rulemaking.

Amanda J. Reeder
Commission Counsel

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(c) While providing assistance to a city or county, a State law-enforcement officer shall be considered an employee of the State for all purposes, including compensation and fringe benefits.

(d) While providing assistance to the city or county, a State officer shall be subject to the lawful operational commands of his State superior officers. The ranking representative of each State law-enforcement agency providing assistance shall consult with the appropriate city or county officials prior to deployment of the State officers under his command.

Credits

Added by Laws 1979, c. 639, § 1.

§ 153A-212. Cooperation in law-enforcement matters

A county may cooperate with the State and other local governments in law-enforcement matters, as permitted by [G.S. 160A-283](#) (joint auxiliary police), by [G.S. 160A-288](#) (emergency aid), [G.S. 160A-288.1](#) (assistance by State law-enforcement officers), and by Chapter 160A, Article 20, Part 1.

Credits

Added by Laws 1973, c. 822, § 1. Amended by Laws 1979, c. 639, § 2.

1 14B NCAC 01C .0401 is proposed for reoption as follows:

2 **CHAPTER 01 – DEPARTMENT RULES**

3 **SUBCHAPTER 01C- STATE LAW ENFORCEMENT ASSISTANCE DURING LABOR DISPUTE**

4 **SECTION .0400 - COSTS**

5 **14B NCAC 01C .0401 AGREEMENT TO PAY COSTS**

6 The secretary, in consultation with the state law enforcement agency providing assistance, and the governing body
7 of the city or county requesting assistance may enter into an agreement to reimburse the state agency for the costs of
8 providing assistance or a portion thereof. The agreement may be entered into before or after assistance is provided.

9 The costs that may be included in the agreement are:

- 10 (1) The actual cost of compensation, including overtime pay, that the state department pays to each
11 officer during his period of assignment;
- 12 (2) Disability pay or workman's compensation pay to any officer disabled or injured while providing
13 such assistance to the local governing body. The local governing body shall be responsible for
14 such payments as long as the officer is entitled to them under state law;
- 15 (3) The costs of all fringe benefits, including retirement and health insurance, which the state
16 department actually pays to a state officer during his period of assignment;
- 17 (4) Costs of any state department property which has been lost, damaged, destroyed, stolen, used or
18 consumed during the period of assignment. The local governing body will not, however, be liable
19 for ordinary wear and tear or for loss or damage caused by the negligence of the state officer. The
20 local governing body must pay the amount of the costs of the property upon demand. If
21 subsequently the state department is reimbursed from other sources, the state department will
22 rebate to the local governing body the amount obtained from the other sources;
- 23 (5) Any other costs directly associated with providing this assistance, such as transportation and travel
24 subsistence expenses.

25

26 *History Note: Authority G.S. 160A-288.1; 153A-212;*

27 *Eff. December 1, 1979;*

28 *Transferred from 14A NCAC 01C .0401 Eff. June 1, 2013.*

29 *Readopted Eff. _____, 2017.*

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AGENCY: Department of Public Safety

RULE CITATION: 14B NCAC 01C .0402

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 to this Rule for lack of statutory authority and ambiguity.

One of the statutes cited in the History Note, G.S. 160A-288.1, states the rules shall be "necessary to establish a plan under which temporary State law-enforcement assistance will be provided to the cities and counties." This Rule does not do that, but instead establishes the billing method for payment of an agreement. Therefore, staff is not aware of any authority for the agency to promulgate this Rule. Further, staff is unsure why this Rule is necessary, as it seems this method would be addressed by the agreement.

In addition, the Rule is unclear as written, as it states that the Secretary shall send the notice "at such time as he determines." There is no guidance in the Rule as to when this will happen and it is left entirely within the discretion of the Secretary.

Therefore, staff recommends objection to this Rule for lack of statutory authority and ambiguity.

Amanda J. Reeder
Commission Counsel

1 14B NCAC 01C .0402 is proposed for readoption as follows:

2 **CHAPTER 01 – DEPARTMENT RULES**

3 **SECTION .0400 - COSTS**

4 **14B NCAC 01C .0402 STATEMENT OF COSTS**

5 Upon agreement, the secretary shall send to the local governing body receiving assistance, at such time as he
6 determines, a statement of the costs the local governing body agreed to pay. The statement will specify the number
7 of officers assigned, the hours assigned, any costs other than compensation and fringe benefits incurred by the state
8 department and the total amount due. The local governing body shall pay the amount due within 30 days of receipt.
9 Reimbursement for disability payments or workman's compensation claims will be billed as they become known and
10 in accordance with normal departmental procedures.

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12 *History Note: Authority G.S. 160A-288.1; 153A-212;*
13 *Eff. December 1, 1979;*
14 *Transferred from 14A NCAC 01C .0402 Eff. June 1, 2013.*
15 *Readopted Eff. _____, 2017.*

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