

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 Examiners of Plumbing, Heating, and Fire Sprinkler Contractors

RULE CITATION: 21 NCAC 50 .0313 and 21 NCAC 50 .1104

RECOMMENDED ACTION:

- X 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:

Both of the above-identified Rules contain fees and may have delayed effective dates. 21 NCAC 50 .0313 creates two new fees and 21 NCAC 50 .1104 is updating one fee, which may or may not be an increase to the fee. In accordance with G.S. 12-3.1, the Submission for Permanent Rule form indicates that the agency has submitted a request for consultation on these rules to the Joint Legislative Commission on Governmental Operations.

§ 12-3.1. Fees and charges by agencies.

(a) Authority. – Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public. In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service. Notwithstanding any other law, a rule adopted by an agency to establish or increase a fee or charge shall not go

into effect until the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established or increased. Where a rule provides for a periodic automatic adjustment to a fee, the agency that adopts the rule is not required to consult with the Commission every time the fee automatically adjusts. The agency shall submit a request for consultation to all members of the Commission, the Commission Assistant, and the Fiscal Research Division of the General Assembly on the same date the notice of text of the rule is published. The request for consultation shall consist of a written report stating (i) the amount of the current fee or charge, if applicable, (ii) the amount of the proposed new or increased fee or charge, (iii) the statutory authority for the fee or charge, and (iv) a detailed explanation of the need for the establishment or increase of the fee or charge.

(a1) If the Commission does not hold a meeting to hear the consultation required by subsection (a) of this section within 90 days after the notice of text of the rule has been published and the consultation request required by subsection (a) of this section has been submitted, the consultation requirement is satisfied.

(b) Definitions. – The following definitions apply in this section:

(1) Agency. – Every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government. The term does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of these subdivisions, the University of North Carolina, community colleges, hospitals, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(2) Rule. – Every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency, including rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor.

(c) Exceptions. – This section does not apply to any of the following:

(1) Rules establishing fees or charges to State, federal or local governmental units.

(2) A reasonable fee or charge for copying, transcripts of public hearings, State publications, or mailing a document or other item.

(3) Reasonable registration fees covering the cost of a conference or workshop.

(4) Reasonable user fees covering the cost of providing data processing services.

(d) In lieu of the requirements of subsections (a) and (a1) of this section, the North Carolina State Ports Authority shall report the establishment or increase of any fee to the Joint Legislative Commission on Governmental Operations as provided in G.S. 136-262(a)(11). (1979, c. 559, s. 1; 1981, c. 695, ss. 1, 2; 1987, c. 564, s. 35; 1991, c. 418, s. 6; 2001-427, s. 8(a); 2002-99, s. 7(c); 2005-276, s. 6.8(b); 2011-145, s. 14.6(k); 2015-241, s. 6.18.)

Based upon representation by legislative staff assigned to the Joint Legislative Commission on Government Operations, this consultation will not be satisfied until reviewed or the passage of the 90-day review period. Please see G.S. 150B-21.19 regarding a legislative constraint on the Codifier of Rules for entry of these rules into the North Carolina Administrative Code:

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been approved by the Commission, if the rule is a permanent rule.
- (5) Have complied with the provisions of G.S. 12-3.1, if the rule establishes a new fee or increases an existing fee.

The consultation with the Joint Legislative Commission on Government Operations may delay the effective dates of the above-identified Rules: 21 NCAC 50 .0313 and 21 NCAC 50 .1104.

1 **21 NCAC 50 .0313 RESPONSIBILITIES OF STATE AND LOCAL GOVERNMENT TECHNICIAN**

2 **LICENSEES** is proposed to be adopted as follows:

3 (a) A licensed state & local government technician licensee shall be required to list their license with the Board
4 in the name of the state & local government agency by whom the licensee is employed.

5 (b) The holder of license as a State & Local Government Heating, Group 1 Technician, Heating, Group 2
6 Technician, Heating Group 3 Technician or Plumbing Technician shall be a full-time employee of a State or Local
7 Government agency.

8 (c) A licensed state & local government technician licensee shall ensure that a permit is obtained from the
9 appropriate state or local Code Enforcement official before commencing any work for which a license is required by
10 the Board. The licensee shall also ensure that a request for final inspection of the work for which a license is
11 required is made within 10 days of the earlier of the system being made operational or placed in service, absent
12 agreement with the appropriate state or local Code Enforcement official. Absent agreement with the local Code
13 Enforcement official the licensee is not relieved of responsibility to the Board to arrange inspection until a certificate
14 of compliance or the equivalent is obtained from the appropriate state or local code enforcement official or the
15 license has clear and convincing evidence of his effort to obtain the same.

16 (d) The failure of a licensee to comply with the permit and inspection obligations outlined in this Rule shall be
17 considered by the Board as evidence of incompetence or misconduct in the use of license from the Board.

18 (e) A licensed state & local government technician licensee is responsible for general supervision to the extent
19 of his qualifications, compliance with all applicable codes and standards, and assurance that permits and inspections
20 are obtained.

21 (f) The general supervision required by G.S. 87-26 is that degree of supervision which is necessary and
22 sufficient to ensure that the work is performed in a workmanlike manner and with the requisite skill and that the
23 installation is made properly, safely and in accordance with applicable codes and rules. General supervision
24 requires that review of the work done pursuant to the state and local government technician license be performed by
25 the state and local government technician licensee while the work is in progress.

26 (g) In each state or local government agency location, branch or facility of any kind from which work requiring
27 a license pursuant to G.S. 87, Article 2 is carried out there shall be on duty the lesser of 1500 hours annually, or all
28 hours during which the activities described herein are carried out, at least one individual who holds the appropriate
29 state & local government technician license in the classification required for the work being proposed or performed,
30 whose license is listed in the name of the particular state or local government agency at that location, and who is
31 engaged in the work of the state or local government at the agency location or at an agency job site and who has the
32 responsibility to exercise general supervision over the work and who has been empowered to act for the state or
33 local government agency, as defined in Rule 21 NCAC .0505 of this Chapter, of all work falling within his license
34 qualification. Evidence of compliance shall be required as a condition of renewal or retention of license and
35 falsification shall constitute fraud in obtaining license. The standards set forth in Rule 21 NCAC 50 .0512 shall be
36 applied.

37 (h) An unlicensed person who is directly and regularly employed by state & local government agency licensed
38 pursuant to G.S. 87, Article 2 is not required to have a license and shall not be subject to an action for injunctive
39 relief brought by the Board if the unlicensed person is a bona-fide employee of the state & local government.

40 (i) The annual license fee for a State & Local Government Technician license is one hundred thirty dollars
41 (\$130.00), except as provided in subsection (j) below.

42 (j) The annual license fee for a State & Local Government Technician Plumbing or Heating Technician license
43 which is listed as the second or subsequent licensee at the same agency location is sixty-five dollars (\$65.00).

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46 History Note: Authority G.S. 87-18; 87-21(a)(5); 87-21(a)(6); 87-21(a)(10)87-21(b)(3); 87-22; 87-22.1;87-26;

47 Eff. February 1, 2017

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51 310040-001.3991258

1 **21 NCAC 50 .1104 FEES FOR COPIES OF RECORDS AND RETURNED CHECKS** is proposed to be
2 amended as follows:

3 The Board charges the following fees:

- | | | | |
|----|-----|---|--|
| 4 | (1) | copies of license | \$20.00 |
| 5 | (2) | abstract of license record | \$25.00 per license record |
| 6 | | | search |
| 7 | (3) | processing fee for returned checks | maximum allowed by law |
| 8 | (4) | copy of Board rules | \$10.00 |
| 9 | (5) | processing fee for late renewal | \$25.00 |
| 10 | (6) | Business and Project Management for Contractors | \$45.00 <u>Publisher's Retail Price</u> |

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12 *History Note: Authority G.S. 25-3-506; 87-18; 87-22; 150B-19;*
13 *Eff. September 1, 1994;*
14 *Amended Eff. February 1, 2017; July 1, 1998; November 1, 1994;*
15 *Temporary Amendment Eff. August 31, 2001;*
16 *Amended Eff. July 1, 2010; December 1, 2003; December 4, 2002;*
17 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. August 22,*
18 *2015.*

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21 310040-2261/3987396

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AGENCY: State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors

RULE CITATION: 21 NCAC 50 .1104

RECOMMENDED ACTION:

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

COMMENT:

The above-identified Rule contains fees that do not appear to be within the statutory authority of the agency to charge. The agency published and adopted the following rule for review by the Rules Review Commission:

21 NCAC 50 .1104 FEES FOR COPIES OF RECORDS AND RETURNED CHECKS

The Board charges the following fees:

(1) copies of license	\$20.00
(2) abstract of license record per license record search	\$25.00
(3) processing fee for returned checks	maximum allowed by law
(4) copy of Board rules	\$10.00
(5) processing fee for late renewal	\$25.00
(6) Business and Project Management for Contractors	\$45.00 <u>Publisher's Retail Price</u>

Authority G.S. 25-3-506; 87-18; 87-22; 150B-19.

The following statute is the constraint placed on agencies by the Administrative Procedure Act in adoption of fees in rules:

§ 150B-19. Restrictions on what can be adopted as a rule.

Abigail M. Hammond
Commission Counsel

An agency may not adopt a rule that does one or more of the following:

....

(5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

- a. A service to a State, federal, or local governmental unit.
- b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
- c. A transcript of a public hearing.
- d. A conference, workshop, or course.
- e. Data processing services.

The following two statutes appear to be the only statutes authorizing fees in Article 2 of G.S. 87:

§ 87-22. License fee; expiration and renewal; reinstatement.

All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, shall pay an annual license fee not to exceed one hundred fifty dollars (\$150.00). The annual fee for a piping or restricted classification license shall not exceed that for a plumbing or heating license. All persons, firms, or corporations engaged in the business of fire sprinkler contracting shall pay an initial application fee not to exceed seventy-five dollars (\$75.00) and an annual license fee not to exceed three hundred dollars (\$300.00). In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. Persons who obtain a license by passing an examination on or after October 1 of any year may receive a license for the remainder of the year by paying one-half of the usual license fee for that classification of license. It shall be the duty of the secretary and treasurer to send by United States mail or e-mail to every licensee registered with the Board, notice to the licensee's last known address reflected on the records of the Board of the amount of fee required for renewal of license, the notice to be mailed at least one month in advance of the expiration of the license. The Board may require payment of all unpaid annual fees before reissuing a license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the required fee during the month of January in each year, the Board shall increase the license fee by twenty-five dollars (\$25.00) to cover any additional expense associated with late renewal. The Board shall require reexamination upon failure of a licensee to renew license within three years after expiration. The Board may adopt regulations requiring attendance at programs of continuing education as a condition of license renewal. A licensee employed full time as a local government plumbing, heating, or mechanical inspector and holding qualifications from the Code Officials Qualifications Board may renew the license at a fee not to exceed twenty-five dollars (\$25.00). (1931, c. 52, s. 7; 1939, c. 224, s. 4; 1971, c. 768, s. 5; 1979, c. 834, s. 8; 1981, c. 332, s. 2; 1989, c. 623, s. 2; 1989 (Reg. Sess., 1990), c. 842, s. 4; 1997-382, s. 2; 2001-270, s. 3; 2005-131, s. 2.)

§ 87-22.1. Examination fees; funds disbursed upon warrant of chairman and secretary-treasurer.

The Board shall charge a nonrefundable application and examination fee not to exceed one hundred fifty dollars (\$150.00) for each examination or any part of an examination, and the funds collected shall be disbursed upon warrant of the chairman and secretary-treasurer, to partially defray general expenses of the Board. The application and examination fee shall be retained by the Board whether or not the applicant is granted a license. Until changed by the Board pursuant to rules adopted by the Board, the fee for each examination or any part taken on a particular day shall be one hundred dollars (\$100.00). (1959, c. 865, s. 2; 1989, c. 623, s. 3; 2001-270, s. 4; 2005-131, s. 3.)

In light of G.S. 150B-19(5), the Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors does not appear to have statutory authority to charge the following fees:

- copies of license \$20.00
- abstract of license record per license record search \$25.00

The copy of Board rules for \$10.00 should qualify as “a copy of a part of all of a State publication or other document,” as allowed by G.S. 150B-19(5)b.

PLEASE NOTE: A technical change has requested that the “processing fee for returned checks” be clarified by stating the \$25.00 fee allowed by G.S. 25-3-506. A technical change has also inquired as to the current “publisher’s retail price” and the payee of the “Business and Project Management for Contractors” cost.

Summary:

As written, this Rule contains two fees that are not specifically authorized in Article 2 of G.S. 87, or in any authority cited by the agency in the history note. Therefore, it is staff’s recommendation to object to this Rule as lacking statutory authority for the fees for “copies of license” or “abstract of license record per license record search.”

1 **21 NCAC 50 .1104 FEES FOR COPIES OF RECORDS AND RETURNED CHECKS** is proposed to be
2 amended as follows:

3 The Board charges the following fees:

4	(1)	copies of license	\$20.00
5	(2)	abstract of license record	\$25.00 per license record
6			search
7	(3)	processing fee for returned checks	maximum allowed by law
8	(4)	copy of Board rules	\$10.00
9	(5)	processing fee for late renewal	\$25.00
10	(6)	Business and Project Management for Contractors	\$45.00 <u>Publisher's Retail Price</u>

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