



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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1711 New Hope Church Rd
Raleigh, NC 27609-6285

April 20, 2017

Barden Culbreth
Locksmith Licensing Board
Sent via email only: barden@recanc.com

Re: Objection to Rules 21 NCAC 29 .0402 and .0601.

Dear Mr. Culbreth:

At its meeting today, the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule 21 NCAC 29 .0402 based upon lack of statutory authority and ambiguity.

Specifically, the Commission found that the Board lacks statutory authority to refuse to license applicants based solely upon past convictions. The Rule addresses the use of criminal convictions to determine if the applicant may be licensed. In Subparagraph (g)(1) of the Rule, it states that an applicant with any Class A or B felony conviction is ineligible for licensure. Further, the Rule states that a licensed locksmith who is convicted of a Class A or B felony shall be subject to immediate revocation of licensure. However, G.S. 74F-18(c) states that a conviction cannot automatically bar licensure. The Board does not have authority to write a rule that contradicts the statute.

Further, G.S. 74F-15 allows the Board to deny or refuse to renew, suspend, or revoke a license if the licensee is convicted or pleads guilty or no contest to any of the crimes listed in G.S. 74F-18. However, the Board does not have authority to take these actions without considering the factors in G.S. 74F-18.

In addition, G.S. 74F-18(c) lists seven factors that the Board is required to consider to determine whether the applicant may be disqualified based upon criminal conviction. This Rule addresses some of the factors in Paragraphs (d) and (h), but not all of them.

Administration
919/431-3000
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Rules Division
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Judges and
Assistants
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Clerk's Office
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Rules Review
Commission
919/431-3000
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Civil Rights
Division
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In addition, those Paragraphs state that the Board only “may” consider the factors, when the Board is required to do so pursuant to G.S. 74F-18(c). If the Board is implementing the statutory factors without listing them in Rule, the Rule is unclear as written as it addresses some, but not all, of the factors required by statute.

The Commission further found that Paragraph (h) of the Rule is unclear as written, as it says the Board may also consider additional factors to determine the present fitness of a person who has been convicted of a crime that relates to the duties and responsibilities of a locksmith. The Rule does not state what those crimes are. G.S. 74F-18(a)(2) defines criminal history as “A history of conviction of [a crime] that bears on an applicant’s fitness for licensure to practice locksmithing.” Given the language of Paragraph (h), it is unclear if Paragraph (c) of the Rule is addressing crimes that do not affect the fitness for licensure, and therefore, Paragraph (c) is in excess of the Board’s statutory authority.

In addition, since Paragraph (c) of the Rule appears to encompass every level of felony and misdemeanor in the State, it is unclear what crimes the Board is referring to in Paragraph (h). However, for these crimes, the Board states that it “may” consider what appears to be four of the seven statutory factors, as well as two additional factors that are not in statute.

The Commission objected to Rule 21 NCAC 29 .0601 based upon lack of statutory authority and ambiguity.

Specifically, the Commission found that the Board lacks statutory authority to require some of the additional information set forth in the Rule in a petition for rulemaking. In the text of the rule, the agency is requiring that a petitioner submit the effect of a proposed new rule or amendment on existing rules or decisions, practices likely to be affected, and an identification of the persons or class of persons most likely to be affected by the proposal in Subparagraphs (a)(5), (6), and (7) of the Rule. The Commission found that the agency does not have statutory authority to require these items from a petitioner, as they are beyond the authority conferred by G.S. 150B-20.

The Commission further found that Subparagraphs (a)(5) or (a)(6) of the Rule may have been intended to address the “effect of the proposed new rule or amendment of the proposed change” expressly allowed by G.S. 150B-20(a). However, as the Rule is written, this is not clear. In addition, (a)(6), which addresses “practices likely to be affected” is unclear as written.

The Commission also found that Paragraph (b), which states that “The Board may request additional information” is unclear, as it does not state how the information will be requested, to whom the request will be made, or under what circumstances the request will be made.

Please respond to this letter 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,



Amanda J. Reeder
Commission Counsel

REQUEST FOR TECHNICAL CHANGE

AGENCY: Locksmith Licensing Board

RULE CITATION: All rules submitted

DEADLINE FOR RECEIPT: Monday April 10, 2017

NOTE: This request when viewed on computer extends 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 this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

On the Submission for Permanent Rule form:

- *Please add the name of the Rule after the citation on Box 2.*
- *In Box 8, please confirm that this was approved by OSBM, since this is not how you published the fiscal impact in the NC Register.*

On every Rule:

- *Please insert an introductory statement on the first line. You may say for every readoption, "Rule 21 NCAC 29 .XXXX is readopted as published in 31:12 NCR 1244-1246 as follows:" [See 26 NCAC 02C .0404]*
- *For any rule where you make a change to the text in response to these Requests for Technical Changes or the text differs from that published in the NC Register, state "...readopted with changes as published in..."*
- *Please be sure to apply 1.5 line spacing and 10 point font. [See 26 NCAC 02C .0108(1)(d) and (g)]*
- *Please insert an effective date in the History Note for every rule. You will add a line at the bottom of the History Note, "Readopted Eff." The earliest date you can have is May 1, 2017.*

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: March 24, 2017

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: Locksmith Licensing Board

RULE CITATION: 21 NCAC 29 .0402

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 because staff does not believe the Board has statutory authority to refuse to license applicants based solely upon past convictions. In addition, staff believes the Rule is unclear as written.

This Rule is named "Establishment of Moral and Ethical Character" and in the History Note, the Board cites to 74F-7. That statute states, in relevant part:

§ 74F-7. Qualifications for license.

An applicant shall be licensed as a locksmith if the applicant meets all of the following qualifications:

- (1) Is of good moral and ethical character, as evidenced in part by a criminal history record check conducted in accordance with G.S. 74F-18.

Therefore, it appears that the Board is using this Rule to establish what is "good moral and ethical character" as set forth in law.

G.S. 74F-7(1) states that part of the determination of moral and ethical character shall be as evidenced by the applicant's criminal background check, as set forth in G.S. 74F-18. That statute states, in relevant part:

Amanda J. Reeder
Commission Counsel

§ 74F-18. Criminal history record checks of applicants for licensure or apprentice designation.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

- (1) The level of seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the conviction.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
- (6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
- (7) The subsequent commission by the person of a crime listed in subdivision (a)(2) of this section.

If, after reviewing these factors, the Board determines that the applicant's criminal history disqualifies the applicant for licensure, the Board may deny licensure or apprentice designation of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

The Rule mainly addresses the use of criminal convictions to determine if the applicant may be licensed. In Subparagraph (g)(1), it states that an applicant with any Class A or B felony conviction is ineligible for licensure. Further, the Rule states that a licensed locksmith who is convicted of a Class A or B felony shall be subject to immediate revocation of licensure. However, G.S. 74F-18(c) states that a conviction cannot automatically bar licensure. Staff does not believe that the Board has authority to write a rule that contradicts the statute.

Staff notes that G.S. 74F-15 states, in relevant part:

§ 74F-15. Disciplinary procedures.

- (a) The Board may deny or refuse to renew, suspend, or revoke a license or apprenticeship designation if the licensee, apprentice, or applicant:
 - (2) Has been convicted of or pled guilty or no contest to any of the crimes listed in G.S. 74F-18(a)(2).

This statute allows the Board to deny or refuse to renew, suspend, or revoke a license if the licensee is convicted or pleads guilty or no contest to any of the crimes listed in G.S. 74F-18. However, staff does not believe that the Board has authority to take these actions without considering the factors in G.S. 74F-18. Further, even if the Commission were to determine that G.S. 74F-18 applies to only initial applicants, then Subparagraph (g)(1) of the Rule still contradicts the statute as it relates to those individuals.

In addition, G.S. 74F-18(c) lists seven factors that the Board is required to consider to determine whether the applicant may be disqualified based upon criminal conviction. This Rule appears to address some of the factors in Paragraphs (d) and (h), but not all of them. In addition, those Paragraphs state that the Board only "may" consider the factors, when the Board is required to do

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Commission Counsel

so pursuant to G.S. 74F-18(c). It may be that the Board is implementing the statutory factors without listing them in Rule, but if that is the case, it appears that they are addressing at least some of them in this Rule; therefore, the Rule is unclear as written.

Paragraph (h) of the Rule is unclear as written, as it says the Board may also consider additional factors to determine the present fitness of a person who has been convicted of a crime that relates to the duties and responsibilities of a locksmith. The Rule does not state what those crimes are. Staff notes that G.S. 74F-18(a)(2) defines criminal history as "A history of conviction of [a crime] that bears on an applicant's fitness for licensure to practice locksmithing." Given the language of Paragraph (h), It is unclear if Paragraph (c) of the Rule is addressing crimes that do not affect the fitness for licensure, and therefore, Paragraph (c) is in excess of the Board's statutory authority.

In addition, since Paragraph (c) of the Rule appears to encompass every level of felony and misdemeanor in the State, it is unclear what crimes the Board is referring to in Paragraph (h). However, for these unknown crimes, the Board states that it "may" consider what appears to be four of the seven statutory factors, as well as two additional factors that are not in statute.

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

§ 74F-6. Powers of the Board.

The Board shall have the power and duty to:

- (1) Administer and enforce the provisions of this Chapter.
- (2) Adopt rules as may be necessary to carry out the provisions of this Chapter.
- (3) Examine and determine the qualifications and fitness of applicants for licensure and renewal of licensure.
- (4) Issue, renew, deny, suspend, or revoke licenses or apprenticeship designations and conduct any disciplinary actions authorized by this Chapter.
- (5) Set fees as provided in G.S. 74F-9.
- (6) Establish and approve continuing education requirements for persons licensed under this Chapter.
- (7) Receive and investigate complaints from members of the public.
- (8) Conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining licensees exist.
- (9) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes.
- (10) Maintain a record of all proceedings conducted by the Board and make available to licensees and other concerned parties an annual report of all Board action.
- (11) Maintain a list of the names and addresses of all persons licensed by the Board.
- (12) Employ and fix the compensation of personnel that the Board determines is necessary to carry out the provisions of this Chapter and incur other expenses necessary to perform the duties of the Board.
- (13) Adopt and publish a code of ethics.
- (14) Adopt a seal containing the name of the Board for use on all licenses and official reports issued by the Board.
- (15) Employ an attorney to assist or represent the Board in enforcing this Chapter.
- (16) Request that the Department of Public Safety conduct criminal history record checks of applicants for licensure and apprenticeships pursuant to G.S. 143B-946.
- (17) Authorize the chair, by majority vote, to issue subpoenas allowing the Board to obtain the records of a person or company offering locksmith services, including an employee of a company, a contractor, or a subcontractor. The records obtained shall include invoices and receipts, specifically any invoices and receipts that pertain to locksmith tools, equipment, or parts. (2001-369, s. 1; 2003-350, ss. 3, 4; 2004-177, s. 1; 2013-370, s. 4; 2014-100, s. 17.1(gg).)

§ 74F-7. Qualifications for license.

An applicant shall be licensed as a locksmith if the applicant meets all of the following qualifications:

- (1) Is of good moral and ethical character, as evidenced in part by a criminal history record check conducted in accordance with G.S. 74F-18.
- (2) Is at least 18 years of age.

Amanda J. Reeder
Commission Counsel

- (3) Successfully completes an examination administered by the Board that measures the knowledge and skill of the applicant in locksmith services and the laws applicable to licensed locksmiths.
- (4) Pays the required fee under G.S. 74F-9. (2001-369, s. 1; 2003-350, s. 5.)

§ 74F-15. Disciplinary procedures.

- (a) The Board may deny or refuse to renew, suspend, or revoke a license or apprenticeship designation if the licensee, apprentice, or applicant:
 - (1) Gives false information to or withholds information from the Board in procuring or attempting to procure a license.
 - (2) Has been convicted of or pled guilty or no contest to any of the crimes listed in G.S. 74F-18(a)(2).
 - (3) Has demonstrated gross negligence, incompetency, or misconduct in performing locksmith services.
 - (4) Has willfully violated any of the provisions of this Chapter.
- (b) The Board may assess the costs of disciplinary action, including attorneys' fees, against an applicant or licensee found to be in violation of this Chapter or rules adopted by the Board. (2001-369, s. 1; 2003-350, s. 8; 2013-370, s. 8.)

§ 74F-18. Criminal history record checks of applicants for licensure or apprentice designation.

- (a) Definitions. – The following definitions shall apply in this section:
 - (1) Applicant. – A person applying for licensure as a locksmith pursuant to G.S. 74F-7 or apprentice designation pursuant to G.S. 74F-7.1.
 - (2) Criminal history. – A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice locksmithing. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7B, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots, Civil Disorders, and Emergencies; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses including sale to underage persons in violation of G.S.

18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5. In addition to the North Carolina crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.

(b) All applicants for licensure or apprentice designation shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure or apprentice designation to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Public Safety the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Public Safety. The Board shall keep all information obtained pursuant to this section confidential. The Board shall collect any fees required by the Department of Public Safety and shall remit the fees to the Department of Public Safety for expenses associated with conducting the criminal history record check.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

- (1) The level of seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the conviction.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
- (6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
- (7) The subsequent commission by the person of a crime listed in subdivision (a)(2) of this section.

If, after reviewing these factors, the Board determines that the applicant's criminal history disqualifies the applicant for licensure, the Board may deny licensure or apprentice designation of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) Limited Immunity. – The Board, its officers, and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying licensure or apprentice designation to an applicant based on information provided in the applicant's criminal history record check. (2003-350, s. 11; 2004-177, s. 2; 2012-12, s. 2(ee); 2014-100, s. 17.1(o); 2015-181, s. 47.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Locksmith Licensing Board

RULE CITATION: 21 NCAC 29 .0402

DEADLINE FOR RECEIPT: Monday April 10, 2017

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 this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

Please insert page numbers in this Rule as it is more than one page. Also, please reset the line numbers on each Page at 1. [See Rule 26 NCAC 02C .0108(1)(f) and (h)]

In (a), line 2, what is in the application and where is it obtained?

On line 2, define "truthful"

On lines 3-4, what matters "reflect on the applicant's suitability for licensure"?

In (b), so that I'm clear – if an applicant has several convictions, the person shall be placed into a category that is determined by the most serious offense? So, an applicant with a Class A felony, and several Class A-I misdemeanors shall be classified as a "Category I" applicant?

In (c)(1), "Class" is capitalized but it is not in the rest of (c). I believe it should be capitalized everywhere, but please be consistent in the Rule.

In (d), define "directly"

In (d), line 16, you state the Board "may" consider the factors, but factors (d)(1) and (2) are required to be reviewed pursuant to G.S. 74-18(c). So, do you mean "shall"? If you do mean "may" then when will the Board not consider these factors?

In (e), how will the Board make this determination?

In (f), line 25, I suggest replacing "does relate" with "relates"

In (g)(1), Page 2, line 29, and (g)(2) on line 33, define "immediate" Are you doing this pursuant to G.S. 150B-3 or after hearing in G.S. 74F-15?

In (g)(2), line 30, (g)(3), line 34, and (g)(4), line 38, generally "at least" is not favored language in rules, as they set the minimum requirements. However, I take the Board needs to retain the language here?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: March 24, 2017

In (g)(3), line 34, please replace “7” with “seven” [See Rule 26 NCAC 02C .0108(9)(a)]

In (g)(3), line 36, and (g)(4), line 40, since you say they “may” when will the individuals not be subject to “immediate license revocation” and please see my question for (g)(1) and (2) regarding the immediate revocation.

In (h), line 42, you state that the Board “may” consider the factors, but (h)(1), (2), (3) and (4) are at least part of the requirements that the Board must consider as set forth in G.S. 74F-18(c). So, do you mean “shall”? And if not, then when will the Board not consider these?

On line 43, replace “which” with “that”

On line 43, what are the crimes that relate to the duties and responsibilities of being a locksmith? Who determines this?

In (h)(1), you refer to the applicant’s age when crime was committed, but the statute refers to date of conviction.

In (h)(3), what will serve as evidence of this?

In (h)(5), are these required? Or only if submitted?

In (h)(6), who determines relevance? If it’s the Board, how will the Board determine this? And when will it be requested?

In (i), define “history of chemical dependency”

On lines 52 and 53, I take it you need to retain “at least”? What is the evidence needed, and what is “continuous”?

In (j), wouldn’t the Board’s action to revoke or suspend a license be taken pursuant to G.S. 150B, Article 3A?

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: March 24, 2017

1 **21 NCAC 29 .0402 ESTABLISHMENT OF MORAL AND ETHICAL CHARACTER**

2 (a) Information supplied on the application and in supporting documents must be truthful. Falsification or concealment
3 of facts relating to employment, military service, criminal conviction or court-martial, age or other matters that reflect on
4 the applicant's suitability for licensure shall be grounds for license denial, revocation, or suspension.

5 (b) Applicants with criminal histories from any jurisdiction shall be categorized according to the seriousness of the
6 offense. The category shall be determined by the most serious offense.

7 (c) These categories are as follows:

8 (1) Category I. This Category consists of all Class A and B felonies.

9 (2) Category II. This Category consists of all felonies of classes C-F.

10 (3) Category III. This Category consists of all felonies of classes G or lesser, and all misdemeanors of
11 classes A1 and 1. Three or more Category III convictions (committed as separate incidents) shall be
12 reclassified as a Category II offense.

13 (4) Category IV. This Category consists of misdemeanors of classes 2 and 3. Three or more Category IV
14 convictions (committed as separate incidents) shall be reclassified as a Category III offense.

15 (d) The Board shall determine if the conviction is directly related to the duties and responsibilities of a locksmith. The
16 Board may consider the following factors:

17 (1) The nature and seriousness of the crime;

18 (2) The relationship of the crime to the purposes for requiring a license as a locksmith;

19 (3) The extent to which a license might offer an opportunity to engage in further criminal activity of the
20 same type; and

21 (4) The relationship of the crime to the ability, capacity, or fitness required to perform the duties and
22 discharge the responsibilities of a licensed locksmith.

23 (e) If the Board determines that the conviction does not relate to the duties and responsibilities of a locksmith, the Board
24 shall process the application according to standard procedures.

25 (f) If the Board determines that the conviction does relate to the duties and responsibilities of a locksmith, the Board
26 shall evaluate the present fitness of the individual to provide locksmith services.

27 (g) The Board shall use the following guidelines in evaluating an individual's present fitness:

28 (1) An applicant with a Category I conviction is ineligible for licensure. A licensed locksmith with a
29 Category I conviction shall be subject to immediate revocation of license.

30 (2) An applicant with a Category II conviction shall have at least 12 years since the applicant has
31 completed all aspects of his or her sentence received as a result of the last Category II conviction to be
32 eligible for licensure. A licensed locksmith convicted of a Category II offense shall be subject to
33 immediate license revocation.

34 (3) An applicant with a Category III conviction shall have at least 7 years since the applicant has
35 completed all aspects of his or her sentence received as a result of the last Category III conviction to
36 be eligible for licensure. A licensed locksmith convicted of a Category III offense may be subject to
37 immediate license revocation.

38 (4) An applicant with a Category IV conviction shall have at least three years since the applicant has
39 completed all aspects of his or her sentence received as a result of the last Category IV conviction to
40 be eligible for licensure. A licensed locksmith convicted of a Category IV offense may be subject to
41 immediate license revocation.

42 (h) The Board may also consider the following factors in determining the present fitness of a person who has been
43 convicted of a crime which relates to the duties and responsibilities of a locksmith:

- 44 (1) The age at the time each crime was committed;
- 45 (2) The conduct and work history of the person before and after the criminal conviction;
- 46 (3) Evidence of the person's rehabilitation efforts and outcome;
- 47 (4) The extent and nature of the past criminal history;
- 48 (5) Two letters of recommendation from licensed locksmiths; and
- 49 (6) Other evidence of fitness that may be relevant to the Board's assessment, such as a psychological test,
50 mental health status report or substance abuse assessment.

51 (i) If the person's criminal activity is related to a history of chemical dependency, the Board shall also consider the
52 person's efforts and success in achieving and maintaining recovery. Applicants with a history of chemical dependency
53 shall demonstrate evidence of treatment or rehabilitation and at least two years of continuous recovery.

54 (j) An individual whose application is denied or whose license is suspended or revoked may request a hearing under the
55 procedures established in of G.S. 150B, Article 3A.

56

57 *History Note: Authority G.S. 74F-6; 74F-7;*

58 *Temporary Adoption Eff. August 13, 2002;*

59 *Eff. August 1, 2004.*

60

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: Locksmith Licensing Board

RULE CITATION: 21 NCAC 29 .0601

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 because staff does not believe the Board has statutory authority to require some of the additional information set forth in the Rule in a petition for rulemaking. Further, staff believes the Rule is unclear as written.

Petitions for rulemaking are governed by G.S. 150B-20. The statute states, in relevant part:

§ 150B-20. Petitioning an agency to adopt a rule.

- (a) Petition. - A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

In the text of the readopted rule, the agency is requiring that a petitioner submit the effect of a proposed new rule or amendment on existing rules or decisions, practices likely to be affected, and an identification of the persons or class of persons most likely to be affected by the proposal. [See Subparagraphs (a)(5), (6), and (7)]

Amanda J. Reeder
Commission Counsel

Staff does not believe the agency has the authority to request all of this information from a petitioner.

Staff notes that this rule is being readopted with no changes to the text that has been in the NC Administrative Code since 2004. However, in 2011, the General Assembly implemented G.S. 150B-19.1, which states in relevant part:

§ 150B-19.1. Requirements for agencies in the rule-making process.

- (a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:
 - (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.

Staff believes that requiring the petitioner submit the information in (a)(5), (6), and (7) of this Rule creates burdens upon the petitioner. Staff does not believe that the agency has authority to establish additional burdens upon the public in this Rule that are not included in the governing statute.

Staff notes that (a)(5) or (a)(6) may be intended to address the “effect of the proposed new rule or amendment of the proposed change” expressly allowed by G.S. 150B-20(a). However, as the Rule is written, this is not clear.

In addition, staff believes that (a)(6), which references “practices likely to be affected” is unclear as written. Does this address industry standards? If so, if a member of the general public submits a petition for rulemaking, how will they know these standards?

Also, staff believes that Paragraph (b), which states that “The Board may request additional information” is unclear, as it does not state how the information will be requested, to whom the request will be made, or under what circumstances the request will be made. It may be that the Board will request additional information from the petitioner if it determines it necessary to do so in order to grant or deny the petition, but the Rule does not say this. Therefore, staff believes this Paragraph is unclear as written.

§ 150B-19.1. Requirements for agencies in the rule-making process.

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

§ 150B-20. Petitioning an agency to adopt a rule.

(a) **Petition.** – A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) **Time.** – An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) **Action.** – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) **Review.** – Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b). (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; c. 477, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 7.10(b); 1997-34, s. 2; 2003-229, s. 1.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Locksmith Licensing Board

RULE CITATION: 21 NCAC 29 .0601

DEADLINE FOR RECEIPT: Monday April 10, 2017

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 this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In (a), line 5, what is the Board's address? I do not see it set forth anywhere in Chapter 29.

In (a)(2), line 8, I suggest replacing "to" after "citation" with "for"

What is your authority to require (a)(4)? If you wish to allow this to be submitted, rather than require it, you need to state that.

In (a)(5) or (a)(6), is the intent of "on existing rules or decisions" to address the highlighted portion of G.S. 150B-20?

§ 150B-20. Petitioning an agency to adopt a rule.

(a) Petition. - A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. **If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change.** Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

In (a)(6), what are these practices?

In (b), when will the Board request this? From whom? How will the request be sent?

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: March 24, 2017

