



**NORTH CAROLINA DEPARTMENT OF JUSTICE  
CRIMINAL JUSTICE STANDARDS DIVISION**

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January 31, 2022

Jeanette Doran, Chair  
Rules Review Commission  
Sent via email: [oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov)

Re: Objection Response to Rules 12 NCAC 09B .0101 and 09G .0205

Greetings Ms. Doran,

The North Carolina Criminal Justice Education and Training Standards Commission (CJETS) has come before the Rules Review Commission (RRC) on two separate occasions in support of rules which discuss the minimum standards for criminal justice officers with respect to psychological examination, 12 NCAC 09B .0101 and 12 NCAC 09G .0205. CJETS pursued permanent rulemaking in May of 2021, and then temporary rulemaking in November of 2021, pursuant to legislative action Senate Bill 300/Session Law 2021-138.

CJETS, anticipating that the legislature would take up the issue of psychological screening for criminal justice officers, pursued permanent rulemaking at its May 2021 Commission meeting in order to revise the rules according to what we believed would soon become law. The Planning and Standards Committee held a Public Hearing on May 19, 2021, to include 12 NCAC 09B .0101 and 12 NCAC 09G .0205. We received public comments during the hearing, and, after much discussion, the Committee voted to move forward with the proposed rules. The CJETS Commission voted to adopt the permanent rules on May 21, 2021. On July 15, 2021, the rules were presented to the RRC along with ten letters of objection. Amanda Reeder, former RRC Counsel, recommended approval, noting the rules would be subject to legislative review due to the letters of objection. The RRC approved the rules on July 15, 2021, with an effective date of August 1, 2021. These rules are currently pending with the legislative review committee.

On September 2, 2021, Senate Bill 300 was signed into law (Session Law 2021-138) and contained psychological screening requirements for criminal justice officers which were different from what CJETS had anticipated in our earlier rulemaking. CJETS consulted with former RRC Counsel Amanda Reeder on September 14, 2021, regarding the conflict between the rules approved by the RRC on July 15, 2021, and Session Law 2021-138.

This situation was a novel one in the experience of both RRC Counsel and CJETS staff. At its November 2021 meeting, CJETS decided to pursue temporary rulemaking. On November 22, 2021, CJETS submitted the request for temporary rulemaking to the Office of Administrative Hearings to begin the

temporary rulemaking process. On January 10, 2022, the full CJETS Commission voted to adopt the temporary rules, and on January 13, 2022, the approved rules were submitted to the RRC. On January 20, 2022, at the Rules Review Commission meeting, RRC Counsel Amber May recommended approval of the new rules, which not only complied with Session Law 2021-138, but also tracked the language of the new law. Counsel informed the RRC that the RRC approved a version of these rules in July 2021, and that those approved rules were currently subject to legislative review. RRC Counsel noted this was the first time such a situation had occurred. Despite the recommendation of Counsel, the RRC voted unanimously to object to the temporary rules, finding CJETS did not meet the required implementation date set forth in Session Law 2021-138, and therefore lacked the statutory authority to promulgate temporary rules under G.S. 150B-21.1(a)(2).

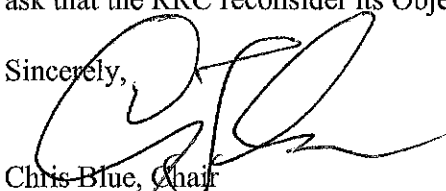
We disagree with the RRC that we lack the statutory authority to promulgate temporary rules and ask that you reconsider. N.C.G.S. § 150B-21.1(a) provides a list of triggering events, the existence of which allow an agency to promulgate temporary rules. The plain language of N.C.G.S. § 150B-21.1(a)(2) does not specify that an agency must adopt such temporary rules prior to the effective date of the act of the General Assembly that triggers rulemaking. If the legislature had desired to so specify, they would have stated this explicitly in the plain language of the statute. They did not. This analysis makes sense because it is possible that the General Assembly would enact legislation with an effective date that would make it impossible to pass a temporary rule in the time specified by N.C.G.S. § 150B-21.1(a3) and (b).

Such a scenario is contemplated by the language in N.C.G.S. § 150B-21.1(a2), which defines “recent act” as contained in N.C.G.S. § 150B-21.1(a)(2). A “recent act” is “an act...occurring or *made effective* no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission.” N.C.G.S. § 150B-21.1(a2)(emphasis added). This indicates clear legislative intent not to require that a temporary rule be sought before the effective date of any new law. Session Law 2021-138 was made effective 40 days after CJETS filed for temporary rulemaking with the RRC on November 22, 2021, and only 10 days prior to the full CJETS Commission vote to adopt the temporary rules on January 10, 2022. This is clearly within the timeframe contemplated by N.C.G.S. § 150B-21.1(a2), meaning that CJETS does not lack the statutory authority to adopt a temporary rule.

As noted in our report to the Joint Legislative Oversight Committee on Justice and Public Safety, submitted on December 29, 2021, and attached hereto, CJETS is currently in compliance with the requirements of Session Law 2021-138 as it relates to the psychological examination of criminal justice officers. All applicants for certification by CJETS must have the psychological examination contemplated in Session Law 2021-138 or they will not be certified. As demonstrated by our efforts to conduct permanent rulemaking in May of 2021, CJETS tried to comply with these requirements even before they were law. Further, CJETS has sought guidance throughout this process from RRC Counsel about the best way to proceed. It is certainly our intent that formal rules be put into place and we are proceeding with permanent rulemaking accordingly.

For the foregoing reasons, we do not believe that we lack the statutory authority to conduct temporary rulemaking, we believe that we are currently in compliance with Session Law 2021-138, and we would ask that the RRC reconsider its Objection issued on January 21, 2022.

Sincerely,



Chris Blue, Chair  
Criminal Justice Education Training and Standards Commission

cc: Amber May, Rule Review Commission Counsel