

## 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: NC Board of Licensed Professional Counselors

RULE CITATION: All of the rules - 21 NCAC 53 .0102, 21 NCAC 53 .0204, 21 NCAC 53 .0205, 21 NCAC 53 .0206, 21 NCAC 53 .0208, 21 NCAC 53 .0209, 21 NCAC 53 .0210, 21 NCAC 53 .0211, 21 NCAC 53 .0212, 21 NCAC 53 .0301, 21 NCAC 53 .0302, 21 NCAC 53 .0304, 21 NCAC 53 .0305, 21 NCAC 53 .0307, 21 NCAC 53 .0308, 21 NCAC 53 .0310, 21 NCAC 53 .0311, 21 NCAC 53 .0403, 21 NCAC 53 .0501, 21 NCAC 53 .0503, 21 NCAC 53 .0601, 21 NCAC 53 .0602, 21 NCAC 53 .0603, 21 NCAC 53 .0604, 21 NCAC 53 .0701, 21 NCAC 53 .0702, 21 NCAC 53 .0801, 21 NCAC 53 .0901, and 21 NCAC 53 .0902

RECOMMENDED ACTION:

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

COMMENT:

It is staff's recommendation that the Commission object to the all of the adopted rules filed by the NC Board of Licensed Professional Counselors, as the Board filed to comply with G.S. 150B-19.1 and 150B-21.2.

**Failure to comply with G.S. 150B-19.1(c):**

The statute requires the following:

Abigail M. Hammond  
Commission Counsel

(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.

Attached for your review is the website announcement of the Board's rule making effort. First, please note that the notice does not comply with G.S. 150B-19.1(c)(4), as the instructions fail to provide a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.

Second, please note that by clicking the link provided on the Board's website, the user is redirected to the main page for the indexing cite of the North Carolina Register maintained by the Rules Review Commission's Rules Division. The notice on the Board's website provides no additional location information, such as identifying the volume and issue numbers. It is staff's opinion that this notice fails to comply with G.S. 150B-19.1(c)(1), as the Board's website fails to provide the text of the proposed rules.

**Failure to comply with G.S. 150B-21.2(c)(2a):**

The statute requires the following:

- (c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:
- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
  - (2) A short explanation of the reason for the proposed rule.
  - (2a) A link to the agency's Web site containing the information required by G.S. 150B-19.1(c).
  - (3) A citation to the law that gives the agency the authority to adopt the rule.
  - (4) The proposed effective date of the rule.
  - (5) The date, time, and place of any public hearing scheduled on the rule.
  - (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
  - (7) The period of time during which and the person within the agency to whom written comments may be submitted on the proposed rule.
  - (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
  - (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

The link on the Board's notice of text filing on the Submission of Permanent Rule form indicates the website as [www.ncoah.com/rules/register](http://www.ncoah.com/rules/register). This is not the Board's or agency's website, as required by G.S. 150B-21.2(c)(2a). It is staff's opinion that the Board failed to comply with G.S. 150B-21.2(c)(2a).

**Failure to comply with G.S. 150B-21.2(f):**

The statute requires the following:

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

Attached for your review is the website announcement of the Board's rule making effort. The comment period, as reflected on the Board's website, is from November 30, 2013 through January 14, 2014. By staff's calculation, the comment period was not the statutorily required minimum 60 days, but was 46 days. Staff did request additional information from the Board, specifically regarding proof of notice to interested parties. Staff did obtain additional information, but does not have official copies of the notices. The unofficial letters reflect a mailing date of November 25, 2013, with the same comment period as provided on the Board's website, November 30, 2013 through January 14, 2014. If the Commission would like official copies of the letters, staff will request that official copies of the letters be filed with the Rules Review Commission. It is staff's opinion that the comment period fails to comply with G.S. 150B-21.2(f), as the Board's website reflects a comment period of only 46 days and not the statutory minimum of 60 days.

**Summary:**

Staff is concerned that the Board's website failed to comply with G.S. 150B-19.1(c)(1) in providing sufficient notice of the text of the proposed rules. Staff is further concerned that the Board failed to comply with G.S. 150B-21.2(f) in allowing the statutory minimum comment period of 60 days. The combination of these two areas may have substantially impacted the Board's regulated public with the ability to review and to provide constructive feedback through comments on the proposed rules. It is staff's opinion that all of the rules filed by the Board should be objected to by the Commission for failure to comply with the Administrative Procedure Act.

Abigail M. Hammond  
Commission Counsel

## 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: NC Board of Licensed Professional Counselors

RULE CITATION: 21 NCAC 53 .0304

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:

This Rule is setting forth the requirements for military personnel and military spouses to become licensed in North Carolina by the Board to practice counseling. This Rule, as written, fails to cite to the appropriate statutory authority, G.S. 93B-15.1, and significantly alters the statutory requirements.

First, a review of the statutes illustrates a different standard to be applied to “military-trained applicants” and “military spouse.” This Rule, as written, fails to consider this statutory distinction and applies a uniform standard to both military personnel and military spouses.

Second, this Rule requires “full time” counseling experience for at least two of the prior five years. For military personnel, the requirement in G.S. 93B-15.1(a)(2) is to have “engaged in the active practice.” The statute specifically uses the term “active practice” and that term may be interpreted differently than the Board’s term of “full time.” The Board’s term may be unduly burdensome and outside the authority of the Board under the statutory authority. A similar argument applies for the use of the term “full time” for military spouses, as the requirement in G.S. 93B-15.1(b)(2) is for the military spouse to be able to demonstrate competency in the occupation. The military spouse is not required to

Abigail M. Hammond  
Commission Counsel

have “engaged in the active practice” or to have “full time counseling experience.” Staff believes that Subparagraph (b)(1) exceeds the Board’s statutory authority under G.S. 93B-15.1.

Third, Subparagraphs (b)(2) and (b)(3) also appear to place a more significant burden on military personnel and military spouses than authorized by G.S. 93B-15.1 that specifically provides the following:

Military-trained applicant statutory requirement:

Has been awarded a military occupational specialty and has done all of the following at a level that is substantially equivalent to or exceeds the requirements for licensure...

See G.S. 93B-15.1(a)(1).

Military spouse statutory requirement:

Holds a current license, certification, or registration from another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration are substantially equivalent to or exceed the requirements for licensure...

*See* G.S. 93B-15.1 (b)(1). The burden created by Subparagraphs (b)(2) and (b)(3) appear to be a heightened standard that exceeds the statutory authority of G.S. 93B-15.1(a)(1) and (b)(1).

**Summary:**

Staff is concerned that this Rule, as written, exceeds the statutory authority provided by the General Assembly to regulated military personnel and military spouses, and increases the burden on those identified applicants. This Rule also fails to account for the General Assembly’s statutory directive to review the applications of military personnel and military spouses under different standards. It is staff’s opinion that this Rule should be objected to by the Commission for lack of statutory authority.