

## Burgos, Alexander N

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**From:** Johnny Loper <jloper@loper-law.com>  
**Sent:** Saturday, June 22, 2024 9:32 PM  
**To:** Peaslee, William W  
**Cc:** Janice Peterson; Burgos, Alexander N; exdir@ncoptometry.org  
**Subject:** [External] RE: 21 NCAC 42D .0102

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Mr. Peaslee:

I write in response to your RRC Staff Opinion dated June 22, 2024, and your earlier emails of June 19, 2024. Thank you for your patience, as I had just returned to town after about a week out, and Dr. Rafferty also was out of town through June 20.

As referred to in your Staff Opinion, in one of your June 19 emails you had asked our Board whether “the Board has failed to conduct the analysis required by G.S. 150B-21.4(b1) prior to publication of the proposed text of the rule” at issue, and if the Board has conducted the analysis, on what date was the analysis completed.

In another of your June 19 emails, you asked us to “explain why G.S. 150B-21.4(b1) [is] inapplicable to those agencies which do not expend ‘State Funds.’ State funds are not mentioned in (b1).”

We do not believe to the Board has “failed” to conduct any analysis required by G.S. 150B-21.4. Let me try to answer your questions in the following way:

- As we interpret G.S. 150B-21.4, there are two circumstances in which a state agency such as our Board is required to prepare a fiscal note:
  - **G.S. 150B-21.4(a):** If the proposed permanent rule change “would require the expenditure or distribution of funds subject to the State Budget Act...” As indicated to you previously, our Board is funded entirely by fees and other monies collected from its licensees. It therefore has no funds subject to the Budget Act. Accordingly, we believed there was no requirement to prepare a fiscal note under G.S. 150B-21.4(a).
  - **G.S. 150B-21.4(b1):** The agency must submit a fiscal note before the agency publishes the text of a proposed rule change “that would have a substantial economic impact....” We believe the proposed rule would affect only a limited number of optometric practices in the state. Specifically, the Board Staff estimated that no more than 100 optometric practices offer remote/telemedicine eye exams when there is no optometrist physically present with the patient, and accordingly, fewer than 200 technicians would be required to become certified under the proposed rule. Given the estimated costs to become certified, we determined that the \$1,000,000/twelve-month threshold was not implicated, and we therefore did not prepare a fiscal note. Notably, we disagree with the contentions of the North Carolina Retail Merchants Association as to the scope of the language “all persons affected” by the rule as contained in G.S. 150B-21.4(b1) – but based on your recommendation discussed below, that may be an issue for resolution by or before the OSBM.

- So if your question is merely “Did the Board prepare a fiscal note?” our answer is no, because we clearly were not required to under G.S. 150B-21.4(a) and we believed we were not required to under G.S. 150B-21.4(b1). If your question is “When did you make the determination that the proposed rule would not have a substantial economic impact on those who would be affected by the rule?”, I cannot give you a specific date, but can tell you that such determination was made prior to the proposed rule being presented to the full Board for its approval for publication in the Register, which occurred at the Board’s March 6, 2023 meeting. This was the first iteration of the proposed rule containing the “certification” requirement.

On a separate point: In your June 22 Staff Opinion, you indicate that the Commission must ask OSBM for a determination of “substantial economic impact” if the Commission receives a written request for such determination under G.S. 150B-21.9, and you recommend sending the proposed rule to OSBM for such a determination. We agree that the language of G.S. 150B-21.9 is mandatory.

It does seem odd to me, however, that the Commission must make such a request of OSBM no matter who makes such a written request. For example, if the Commission receives such a written request in this matter from a non-citizen of North Carolina located in Neah Bay, Washington State, who has never set foot in the state of North Carolina, much less been examined by a licensee of our Board, would the Commission still feel it is required to send the matter to OSBM? It seems to me that the written request would need to be from someone who would be affected by the proposed rule—sort of a “standing” issue. And it seems to us that the entity submitting the request here is not one that would be affected by the RRC’s approval of the proposed rule. Again, maybe this too is an OSBM issue.

Thanks for your consideration. I plan to appear in person at the Commission’s meeting on Wednesday the 26<sup>th</sup> meeting in the event the Commission has any questions or would like additional information.

Johnny

Johnny M. Loper  
Loper Law, PLLC  
1212 Briar Patch Lane  
Raleigh, NC 27615

919-390-7749 (DD)  
919-390-3342 (F)  
[jloper@loper-law.com](mailto:jloper@loper-law.com)

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Sent:** Saturday, June 22, 2024 11:58 AM  
**To:** Johnny Loper <jloper@loper-law.com>  
**Cc:** Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** 21 NCAC 42D .0102

Good afternoon,

Attached please find a copy of the staff opinion on the above captioned rule which will be considered by the RRC at its June 26, 2024 meeting.

As always if you have any questions or concerns please feel free to contact me.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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