



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

April 1, 2024

Ryan Collins, Rulemaking Coordinator
State Board of Education
Sent via email only to: ryan.collins@dpi.nc.gov

Re: Objection to State Board of Education Temporary Rule

Dear Mr. Collins:

This letter will serve as the written notice of objection pursuant to G.S. 150B-21.1(b1).

At its meeting on March 27, 2024, the Rules Review Commission (RRC) objected to 16 NCAC 06C .0602. Specifically, the Commission objected for the rule failing to meet the standard in G.S. 150B-21.9(a)(2). The attached staff opinion provides additional context for the Commission's objection.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

/s/ Seth Ascher
Seth Ascher
Commission Counsel

CC: Denyse Brewington, denyse.brewington@dpi.nc.gov

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

John C. Evans
Senior Administrative Law Judge

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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 Education

RULE CITATION: 16 NCAC 06C .0602

RECOMMENDATION DATE: March 27, 2023

RECOMMENDED ACTION:

Note staff's comment for discussion

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:

The language of 16 NCAC 06C .0602(2) raises a potentially novel question related to clarity. It is my opinion that there are non-frivolous legal arguments that would support either objection or approval. Based on the limited time afforded to temporary rules, I have not formed a definite recommendation. Instead, it is my intent to outline the problem in this staff opinion to aid the Commission in exercising their judgment on the issue.

G.S. 150B-21.8(b) charges this Commission with reviewing temporary and permanent rules under the standards of G.S. 150B-21.9.

G.S. 150B-21.9(a)(2) requires this Commission to determine whether a rule is "clear and unambiguous." As a result, if a rule is unclear or ambiguous, this Commission should object.

At issue is the language of 16 NCAC 06C .0602(2), which states that: "The educator is entrusted with the care and education of children and adolescents. As a result, the educator shall demonstrate a high standard of personal character and conduct and shall serve as a positive role model for students, parents, and the community."

On its face the language of this item appears to be ambiguous. The phrase "a high standard of personal character and conduct," without further specifics, could be subject to multiple contradictory applications based on the political, religious, or personal views of moral conduct.

Seth Ascher
Commission Counsel

Furthermore, the potential ambiguity of “serv[ing] as a positive role model for . . . parents, and the community” raises an authority question. Specifically, G.S. 115C-307(b), the heading of “Duties of teachers” provides:

(b) To Provide for General Well-Being of Students. – It shall be the duty of all teachers, including student teachers, substitute teachers, voluntary teachers, and teacher assistants when given authority over some part of the school program by the principal or supervising teacher, to encourage temperance, morality, industry, and neatness; to promote the health of all pupils, especially of children in the first three grades, by providing frequent periods of recreation, to supervise the play activities during recess, and to encourage wholesome exercises for all children.

The language of the rule suggests that a teacher has a responsibility to serve as a role model in their personal parenting decisions or in community activities unrelated to their role at the school. This has the potential to be read to allow Boards of Education to evaluate behavior in areas well outside of the school or student view.

In a vacuum, this would lead me to recommend objection for lack of clarity. However, in their response to my request for changes the State Board of Education has identified a line of cases which appear to support their use of this potentially ambiguous language. While their position is more fully elaborated in their response, I will attempt to summarize some of the highlights here as well as some counter-veiling considerations.

*The State Board of Education derived this language from a 1984 decision of the Supreme Court of North Carolina, *Faulkner v. New Bern-Craven Board of Education*. This case concerned a teacher’s dismissal for excessive alcohol use under a statute that has since been revised. In upholding the dismissal of that teacher, the Supreme Court considered the meaning of G.S. 115C-307(b) and opined that:*

We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold our teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate.

While the language of 16 NCAC 06C .0602(2) is not identical to the Court’s language, it does appear that the rule is reasonably based on the Court’s language. However, it does not appear that the Court was considering the application of the Administrative Procedure Act in this case, and in fact the Court did not establish that the APA and RRC Review applied to the State Board of Education until nearly forty years later in 2018. As a result, while the State Board of Education could certainly reasonably argue that the Court’s language allows for the language at issue in this rule, it does not appear that the 1984 case directly considered the requirements of the APA in making such a determination.

*The State Board of Education also points to a 1996 Court of Appeals case, *Barringer v. Caldwell County Board of Education*. In relevant part, the Court of Appeals noted that the Supreme Court “has stated that terminology such as ‘good moral character’ denoting acceptable and unacceptable standards of behavior has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard.”*

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Again, it does not appear that the Court of Appeals was considering the NC APA in evaluating the issue in Barringer. Further, Barringer v. Caldwell (and the cases cited therein) considered the minimum constitutional requirements for clarity of statutes related to discipline or denying licensure, it does not appear that those cases considered the statutory requirements for clarity of rules under the APA. To my knowledge, there is no case law which deals with the question of whether the clarity requirement in the APA is satisfied by constitutional minimums, or whether it requires something more. Generally, I would assume that by passing a statute the General Assembly intended to impose a higher requirement than already existed in the Constitution, but it does not appear that any Court has weighed in on this particular issue.

Finally, the State Board of Education has identified a number of other state agencies which currently use the phrase “good moral character” in their rules. However, this kind of argument is of limited value when considering rules currently before the RRC. There are any number of reasons which could explain this. Ultimately, the RRC must consider the application of the APA to the rules in front of them.

Two examples from other agencies do bear a brief mention. The State Board of Education is correct that the Supreme Court has in cases law explicitly approved the use of “good moral character” in the context of licensing lawyers. However, the state bar is not subject to the review requirements of the APA.

Second, this Commission approved a rule last year from CJETS that used the phrase “good moral character” while providing additional specificity as to the meaning of that phrase. That rule is 12 NCAC 09G. 0208(11), which requires that correctional officer:

be of good moral character, including possessing the characteristics of honesty, maturity, discipline, attention to detail, and respect for the rights of others, as more fully discussed and interpreted as defined in: In re Willis 288 N.C. 1.215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E. 2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E. 2d 29 174 (1989); in re Applicants for License, 143 N.C.1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C.30 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E. 2d 47 (1983); and later court decisions.

I bring this rule up not because this language is the only correct way to define good moral character, or even one which would be appropriate in an educational context. But, as an example of how an agency can incorporate judicial explanation into a rule to support clarity. The elements included in good moral character in the text of this rule came from an administrative law decision and the agency avoided potential ambiguity in the text of the rule by incorporating their desired standards into the rule itself. It is possible that a similar solution could apply here, although it may not be possible for the agency to find such a solution in the timeframe of review of a temporary rule.

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Ultimately, because of the novel legal questions at issue in this rule and the agency’s response, I do not have a recommendation as to the appropriate action for the RRC to take. Instead, I recommend that the RRC consider the full context of this temporary rule and exercise its judgment to determine whether the statement that “The educator is entrusted with the care and education of children and adolescents. As a result, the educator shall demonstrate a high standard of personal character and conduct and shall serve as a positive role model for students, parents, and the community” is “clear and unambiguous.” If you determine that it is “clear and unambiguous,” you should approve the

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rule. If you determine that it is unclear or ambiguous, you should object for failing to meet the 21.9(a)(2) standard.