

## 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: North Carolina Sheriffs' Education and Training Standards Commission

RULE CITATION: 12 NCAC 10B .0604

RECOMMENDATION DATE: August 15, 2023

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:

*In Paragraph (e), through the employment of the word "may," the Sheriffs' Education and Training Standards Commission, hereinafter "Commission," empowers the School Director<sup>1</sup> to terminate a trainee enrolled in the school's certification course program for being "habitually" tardy to or "regularly" departing early from class sessions or filed exercises<sup>2</sup>.*

*The Commission's employment of the word "may" implies that the School Director has discretion in whether he or she will terminate the trainee; however, the Rule offers no specific guidelines to exercise this discretion or factors for the School Director to consider as required by G.S. 150B-19(6).*

*The terms "habitually" and "regularly" are unclear and ambiguous, but easily quantifiable.*

*As written, the standards by which a School Director may terminate a trainee are unclear and ambiguous. Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(2).*

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<sup>1</sup> The Commission sets standards for the School Director. The School Director is an agent or employee of the regulated school.

<sup>2</sup> This empowerment is presumably so that the School Director can act as the Commission's agent in the termination of the trainee. If not, then the relationship between the trainee and the school providing the course is a matter of contract law, and the School Director would not need the Commission's empowerment nor permission to sever a contractual relationship.

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-19. Restrictions on what can be adopted as a rule.**

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
  - a. A service to a State, federal, or local governmental unit.
  - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
  - c. A transcript of a public hearing.
  - d. A conference, workshop, or course.
  - e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.
- (7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

1 12 NCAC 10B .0604 is amended with changes as published in 37:02 NCR 180:

2  
3 **12 NCAC 10B .0604 TRAINEE ATTENDANCE**

4 (a) Each trainee enrolled in ~~an any~~ accredited "~~Detention- Detention~~ Officer Certification ~~Course~~" Course shall  
5 attend all required class sessions. The sheriff shall be responsible for the trainee's regular attendance at all required  
6 sessions of the detention officer training course.

7 (b) The school director may recognize valid reasons for class absences and may excuse a trainee from attendance at  
8 specific class sessions. However, in no case may excused absences exceed **ten 10** percent of the total required class  
9 hours for the course offering.

10 (c) If the school director grants an excused absence from a class session, he shall schedule appropriate make-up  
11 work and ensure the satisfactory completion of such work during the current course presentation or in a subsequent  
12 course delivery as is permissible under 12 NCAC 10B .0605.

13 (d) A trainee shall not be eligible for administration of the State Comprehensive Examination nor certification for  
14 successful course completion if the cumulative total of class absences, with accepted make-up work, exceeds 10  
15 percent of the total required class hours of the accredited course offering and shall be expediently terminated from  
16 further course participation by the school director at the time of such occurrence.

17 (e) The school director may terminate a trainee from course participation or may deny certification of successful  
18 course completion where the trainee is habitually tardy to, or regularly departs early from, class meetings or field  
19 exercises.

20 (f) Where a trainee is enrolled in a program as required in 12 NCAC 10B .0601, attendance shall be 100 percent in  
21 order to receive a successful course completion.

22  
23 *History Note: Authority G.S. 17E-4; 17E-7;*  
24 *Eff. January 1, 1989;*  
25 *Amended Eff. January 1, 1996; January 1, 1992;*  
26 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. March 6,*  
27 *2018.*  
28 *Amended Eff. [November 1, 2022]November 1, 2023.*  
29  
30

## RRC STAFF OPINION

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AGENCY: North Carolina Sheriffs' Education and Training Standards Commission

RULE CITATION: 12 NCAC 10B .0605

RECOMMENDATION DATE: August 15, 2023

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:

*In Paragraph (a), the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "Commission") empowers the school director to "develop supplemental rules as set forth in Rule .0704(a)(6) of this Subchapter..."*

*While the Commission is authorized to make rules governing the administration of Chapter 17E of the North Carolina General Statutes, the Commission lacks authority to adopt a rule delegating that authority.*

*Assuming arguendo that the Commission had authority to delegate its rulemaking authority, it could not absolve the delegatee of compliance with the Administrative Procedure Act, hereinafter "APA," as the language in this Rule implies; however, that is unclear.*

*Staff counsel believes that the Commission is referring to policies and procedures which the school may have as an independent entity; however, if the Commission were to adopt a rule which required adherence to those rules, then those school policies and procedures would need to be adopted pursuant to the APA. Other wise they could be enforced as a matter of contract law between the school and the trainee.*

*Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(1) and (2)*

William W. Peaslee  
Commission Counsel

**§ 150B-2. Definitions.**

As used in this Chapter,

- (1b) "Adopt" means to take final action to create, amend, or repeal a rule.

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 17E-4. Powers and duties of the Commission.**

(a) The Commission shall have the following powers, duties, and responsibilities, which are enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17E-8 and G.S. 17E-9:

- (1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any agency of information with respect to the employment, education, and training of its justice officers, and (ii) the submission by any training school of information with respect to its programs that are required by this Chapter;
- (2) Establish minimum educational and training standards that may be met in order to qualify for entry level employment as an officer in temporary or probationary status or in a permanent position. The standards for entry level employment of officers shall include all of the following:
  - a. Training in response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions. For purposes of the domestic violence training requirement, the term "officers" shall include justice officers as defined in G.S. 17E-2(3)a., except that the term shall not include "special deputy sheriffs" as defined in G.S. 17E-2(3)a.
  - b. Training on juvenile justice issues, including (i) the handling and processing of juvenile matters for referrals, diversion, arrests, and detention; (ii) best practices for handling incidents involving juveniles; (iii) adolescent development and psychology; and (iv) promoting relationship building with youth as a key to delinquency prevention.
  - c. Education and training to develop knowledge and increase awareness of effective mental health and wellness strategies for justice officers.
- (3) Certify, pursuant to the standards that it may establish for the purpose, persons as qualified under the provisions of this Chapter who may be employed at entry level as officers;
- (4) Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter;
- (5) Certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction that are required by this Chapter;
- (6) Establish standards and levels of education or equivalent experience for teachers who participate in programs or courses of instruction that are required by this Chapter;

- (7) Certify, pursuant to the standards that it has established for the purpose, teachers who participate in programs or courses of instruction that are required by this Chapter;
- (8) Investigate and make such evaluations as may be necessary to determine if agencies are complying with the provision[s] of this Chapter;
- (9) Adopt and amend bylaws, consistent with law, for its internal management and control;
- (10) Enter into contracts incident to the administration of its authority pursuant to this Chapter;
- (11) Establish minimum standards for in-service training for justice officers. In-service training standards for sworn law enforcement officers shall include all of the following training topics:
  - a. Response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions. For purposes of the domestic violence training requirement, the term "justice officer" shall include those defined in G.S. 17E-2(3)a., except that the term shall not include "special deputy sheriffs" as defined in G.S. 17E-2(3)a.
  - b. Juvenile justice issues, including (i) the handling and processing of juvenile matters for referrals, diversion, arrests, and detention; (ii) best practices for handling incidents involving juveniles; (iii) adolescent development and psychology; and (iv) promoting relationship building with youth as a key to delinquency prevention.
  - c. Training to develop knowledge and increase awareness of effective mental health and wellness strategies for justice officers. The standards established shall include two hours of training on this issue every three years.
  - d. Ethics.
  - e. Mental health for justice officers.
  - f. Community policing.
  - g. Minority sensitivity.
  - h. Use of force.
  - i. The duty to intervene and report.
- (12) Establish minimum standards and levels of training for certification of instructors for the domestic violence training and juvenile justice training required by subdivisions (2) and (11) of this subsection.
- (13) Establish minimum educational and training standards for employment and continuing education for officers concerning:



- a. Recognizing and appropriately interacting with persons who are deaf or hard of hearing.
  - b. Drivers license and vehicle registration identifiers of persons who are deaf or hard of hearing, as authorized by G.S. 20-7(q2), including that those identifiers are optional.
- (14) Monitor compliance with G.S. 20-185.1(d).
- (15) Establish minimum standards and levels of training for certification of diversion investigators and diversion supervisors, as defined in G.S. 90-113.74(i). As part of these minimum standards, the Commission shall require that certified diversion investigators receive training in the following:
- a. Definition of drug diversion.
  - b. Categories of drugs most subject to diversion and misuse.
  - c. Methods used to divert drugs.
  - d. Proper investigation of drug diversion cases.
  - e. Appropriate use of the controlled substances reporting system to investigate drug diversion cases.
  - f. Requests of prescriptions and records related to prescriptions pursuant to G.S. 90-107.1, including best practices for working with pharmacies in a manner that minimizes disruption of customer service and pharmacy operations.
  - g. Data privacy and security provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other pertinent federal and State laws governing privacy and security of confidential data and records.
  - h. Proper handling of confidential data and records from any source.
  - i. Criminal and civil penalties under federal and State law for improperly accessing, handling, or disclosing confidential prescription data or other confidential data or records.
- (16) Certify and recertify at least once every three years, suspend, revoke, or deny, pursuant to the standards that it has established for the purpose, persons as qualified to be employed at entry level and retained as diversion investigators and diversion supervisors, as defined in G.S. 90-113.74(i).
- (17) Search the National Decertification Index (NDI) maintained by the International Association of Directors of Law Enforcement Standards and Training (IADLEST) using the name of every applicant for certification or applicant for lateral transfer, and any other personal identifying information necessary to complete the search, and shall utilize any record of conviction of a criminal offense received as a result

of the search during the application and lateral transfer process to determine if the applicant has any record that would disqualify the applicant for certification.

The Commission may certify, and no additional certification shall be required from it, programs, courses and teachers certified by the North Carolina Criminal Justice Education and Training Standards Commission. Where the Commission determines that a program, course, instructor or teacher is required for an area which is unique to the office of sheriff, the Commission may certify such program, course, instructor, or teacher under such standards and procedures as it may establish.

(b) [Recodified as G.S. 17E-4.1.] (1983, c. 558, s. 1; 1991, c. 265, s. 2; 1995, c. 103, ss. 4, 5; 2004-186, ss. 2.7, 2.9, 2.10, 2.12; 2017-57, s. 16D.4(cc); 2017-191, s. 3; 2018-5, s. 35.25(e); 2018-44, s. 14(b); 2018-142, s. 23(b); 2021-107, s. 3(a), (c); 2021-136, s. 1(b); 2021-137, s. 2(b); 2021-138, ss. 7(b), 11(b), 15(b).)

1 12 NCAC 10B .0605 is amended with changes as published in 37:02 NCR 181:

2  
3 **12 NCAC 10B .0605 COMPLETION OF DETENTION OFFICER CERTIFICATION COURSE**

4 (a) Each trainee shall attend and satisfactorily complete a full course during a single scheduled delivery as set forth  
5 in Rule .0601 of this Section unless a waiver has been granted as set forth in Rule .0603 or .1901 of this Subchapter.  
6 Satisfactory completion is achieved by completion of the required topics, passing the end of block tests and passing  
7 the state examination as set out in Rule .0606 of this Section. The school director may develop supplemental rules as  
8 set forth in Rule .0704(a)(6) of this Subchapter, but may not add substantive courses, or change or expand the  
9 substance of the courses set forth in Rule .0601 of this ~~Section~~ Section, except as provided by Rule .0603 of this  
10 Section. This Rule does not prevent the instruction on local agency rules or standards; however, such instruction shall  
11 not be considered or endorsed by the Commission for purposes of certification. The Director may issue prior written  
12 authorization for a specified trainee's limited enrollment in a subsequent delivery of the same course where the school  
13 director provides evidence that:

- 14 (1) The trainee attended and satisfactorily completed specified class hours and topics of the applicable  
15 "~~Detention~~ Detention Officer Certification Course" Course but through extended absence  
16 occasioned by illness, accident, or emergency was absent for more than 10 percent of the total class  
17 hours of the course offering;
- 18 (2) The trainee was granted excused absences by the school director that did not exceed **ten 10** percent  
19 of the total class hours for the course offering and the school director could not schedule appropriate  
20 make-up work during the current course offering as specified in Rule .0604(c) of this Section; or
- 21 (3) The trainee participated in an offering of the any "~~Detention~~ Detention Officer Certification Course"  
22 Course but had an identified deficiency in essential knowledge or skill in no more than three of the  
23 specified topic areas incorporated in the course content as set forth in Rule .0601(b) or .0603 of this  
24 Section.

25 (b) An authorization of limited enrollment in a subsequent course delivery may not be granted by the Director unless  
26 in addition to the evidence required by Paragraph (a) of this Rule:

- 27 (1) The trainee submits a written request to the Director, justifying the limited enrollment and certifying  
28 that the trainee's participation shall be accomplished pursuant to Paragraph (c) of this Rule; and
- 29 (2) The school director of the previous school offering submits to the director a certification of the  
30 particular topics and class hours attended and satisfactorily completed by the trainee during the  
31 original enrollment.

32 (c) An authorization of limited enrollment in a subsequent course delivery permits the trainee to attend an offering of  
33 ~~the any~~ "Detention Officer Certification Course" commencing within 180 calendar days from the last date of trainee  
34 participation in prior course delivery, but only if the trainee's enrollment with active course participation can be  
35 accomplished within the period of the trainee's probationary certification:

1 (1) The trainee need attend and satisfactorily complete only those portions of the course which were  
2 missed or identified by the school director as areas of trainee deficiency in the initial course  
3 participation.

4 (2) Following authorized enrollment in the subsequent course offering, scheduled class attendance and  
5 active participation with satisfactory achievement in the course, the trainee shall be eligible for  
6 administration of the State Comprehensive Examination by the Commission.

7 (3) A trainee shall be enrolled as a limited enrollee in only one subsequent course offering within the  
8 180 calendar days from the last date of trainee participation in prior course delivery. A trainee who  
9 fails to complete those limited portions of the course after one retest shall enroll in an entire delivery  
10 of the Detention Officer Certification Course.

11 (d) A trainee who is deficient in four or more subject-matter or topical areas at the conclusion of the course delivery  
12 shall complete a subsequent program in its entirety.

13  
14 *History Note: Authority G.S. 17E-4; 17E-7;*

15 *Eff. January 1, 1989;*

16 *Amended Eff. February 1, 2014; August 1, 1998; January 1, 1996; January 1, 1993; January 1,*  
17 *1992; January 1, 1991;*

18 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. March 6,*  
19 *2018.*

20 *Amended Eff. [~~November 1, 2022~~ November 1, 2023.]*  
21

## **RRC STAFF OPINION**

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AGENCY: North Carolina Sheriffs' Education and Training Standards Commission

RULE CITATION: 12 NCAC 10B .0606

RECOMMENDATION DATE: August 15, 2023

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:

*In Paragraph (e), the Sheriffs' Education and Training Standards Commission, hereinafter "Commission" sets forth the procedure and requirements by which a trainee may request re-examination. A pre-requisite to being eligible to request re-examination is that the trainee must have "fully participated in a scheduled delivery".*

*This prerequisite is unclear and ambiguous. If the Commission intends this to mean compliance with an attendance rule, it could easily cite to that rule. If it has other meanings, those need to be clearly stated.*

*As written, the standard for eligibility is unclear and ambiguous. Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(2).*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 12 NCAC 10B .0606 is amended with changes as published in 37:02 NCR 181-182:

2  
3 **12 NCAC 10B .0606 COMP WRITTEN EXAM – DETENTION OFFICER CERTIFICATION COURSE**

4 (a) At the conclusion of a school's offering of ~~the any "Detention~~ Detention Officer Certification ~~Course", Course,~~  
5 an authorized representative of the Commission shall administer a comprehensive written examination to each trainee  
6 who has satisfactorily completed all of the required course work. A trainee shall not be administered the  
7 comprehensive written examination until such time as all required course work is successfully completed.

8 (b) The examination shall be comprised of four units as specified in 12 NCAC 10B .0601(b). Each unit is designed  
9 to test the trainees' proficiency in that unit.

10 (c) The Commission's representative shall submit to the school director within 10 days of the administration of the  
11 examination a report of the results of the test for each trainee examined.

12 (d) A trainee shall successfully complete the comprehensive written examination upon achieving a minimum of 70  
13 percent correct answers on each of the four units as prescribed in 12 NCAC 10B .0601(b).

14 (e) A trainee who has fully participated in a scheduled delivery of ~~a certified training course~~ any Detention Officer  
15 Certification Course and has demonstrated satisfactory competence in each required motor-skill or performance area  
16 of the course curriculum but has failed to achieve the minimum score of 70 percent on any of the four units of the  
17 Commission's comprehensive written examination may request the Director to authorize a re-examination of the  
18 trainee in those units for which he or she has failed to make a passing score of 70 percent as follows:

- 19 (1) A trainee's request for re-examination shall be made in writing on the Commission's form within 30  
20 days after the original examination and shall be received by the Division before the expiration of  
21 the trainee's probationary certification as a detention officer.
- 22 (2) The trainee's request for re-examination shall include the favorable recommendation of the school  
23 director who administered the trainee's ~~"Detention~~ Detention Officer Certification ~~Course", Course.~~
- 24 (3) A trainee shall have only one opportunity for re-examination and shall satisfactorily complete the  
25 subsequent unit examination in its entirety within 90 days after the original examination.
- 26 (4) A trainee shall be assigned in writing by the Division a place, time, and date for re-examination.
- 27 (5) Should the trainee on re-examination not achieve the prescribed minimum score of 70 on the unit  
28 re-examination, the trainee shall not be given successful course completion and must enroll and  
29 successfully complete the unit(s) he or she failed upon re-examination in a subsequent course  
30 offering within 180 days of the second failure before further examination may be permitted.

31  
32 *History Note: Authority G.S. 17E-4; 17E-7;*  
33 *Eff. January 1, 1989;*  
34 *Amended Eff. August 1, 2011; August 1, 2002; January 1, 1996; January 1, 1994; January 1, 1992;*  
35 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. March 6,*  
36 *2018.*  
37 *Amended Eff. [November 1, 2022]November 1, 2023.*

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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: North Carolina Sheriffs' Education and Training Standards Commission

RULE CITATION: 12 NCAC 10B .0704

RECOMMENDATION DATE: August 15, 2023

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:

I.

*In Subparagraph (a)(3), The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "Commission") requires the training school to explain to each instructor his or her "duties and responsibilities as specified in ... and [the] Detention Officer Certification Course Management Guide pursuant to 12 NCAC 10B .0601."*

*In Subparagraph (a)(5) of this Rule, the Commission "incorporates by reference, including subsequent amendments and editions" the "Detention Officer Certification Course Management Guide published by the North Carolina Justice Academy" (hereinafter "Guide"). The Subparagraph further requires adherence by the School Director to the standards and requirements established in the Guide.*

*In Paragraph (c), the Commission requires itself to examine and approve the Guide "as setting the curriculum and course management requirements".*

*The North Carolina Justice Academy (hereinafter "Academy") is a Division of the North Carolina Department of Justice. The Academy has not "adopted" the Guide as a rule..*

William W. Peaslee  
Commission Counsel



*In response to the Request for Changes, the Commission averred that “The NC Justice Academy did not adopt the guide or manual. The Justice Academy developed the guide and manual and the [North Carolina Sheriffs’ Education and Training Standards Commission] adopted both.”<sup>1</sup> It does not appear that the Guide nor the standards which meet the definition of a rule were published or adopted pursuant to the APA.*

*Pursuant to G.S. 150B-21.6, an agency can adopt by reference language without repeating the language in two circumstances; when the language is another rule adopted by the agency or “all or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.”*

*In this Rule, the Commission is attempting to adopt language of an agency which has not adopted that language pursuant to the Administrative Procedures Act (hereinafter “APA”).*

*The Commission may aver that as the adoption of the Guide is already in the North Carolina Administrative Code<sup>2</sup> that it is adopting language from another one of its existing rules pursuant to G.S. 150B-21.6(1). However, those adoptions are just as impermissible as this Rule. The Commission cannot bootstrap one impermissible rule upon another.*

*Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(1) and (4) as the Commission does not have authority to adopt this rule pursuant to G.S. 150B-21.6 and its adoption would violate G.S. 150B-21.6.*

## *II.*

*In Paragraph (a)(6), the Commission implies that a regulated school has authority to adopt “rules, regulations, and requirements”. “Adopt” and “rules” have defined meanings pursuant to the APA.*

*While the Commission is authorized to make rules governing the administration of Chapter 17E of the North Carolina General Statutes, the school does not and the Commission is not authorized to delegate its rulemaking authority. Assuming arguendo that the Commission had authority to delegate its rulemaking authority, the Commission could not absolve the delegatee of compliance with the APA.*

*Staff counsel believes that the Commission is referring to policies and procedures which the school may have as an independent entity; however, that is unclear.*

*Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(1) and (4).*

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*1 Presumably the Commission is referring to 12 NCAC 10B .0601(e), which is not currently before the Rules Review Commission. “(E) THE “DETENTION OFFICER CERTIFICATION COURSE MANAGEMENT GUIDE” PUBLISHED BY THE NORTH CAROLINA JUSTICE ACADEMY IS HEREBY INCORPORATED BY REFERENCE, INCLUDING SUBSEQUENT AMENDMENTS AND EDITIONS, AND SHALL BE USED BY SCHOOL DIRECTORS IN PLANNING, IMPLEMENTING, AND DELIVERING BASIC DETENTION OFFICER TRAINING. THE STANDARDS AND REQUIREMENTS ESTABLISHED BY THE “DETENTION OFFICER CERTIFICATION COURSE MANAGEMENT GUIDE” SHALL BE ADHERED TO BY THE SCHOOL DIRECTOR.”*

*2 IBID.*

William W. Peaslee  
Commission Counsel

## § 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) **Adopt. - To take final action to create, amend, or repeal a rule.**
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within

a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
  - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

- d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    - 1. Declaratory rulings under G.S. 150B-4.
    - 2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
  - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
  - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
  - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
  - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

**§ 150B-21.6. Incorporating material in a rule by reference.**

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Repealed by Session Laws 1997-34, s. 5.

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64; 1981 (Reg. Sess., 1982), c. 1359, s. 5; 1983, c. 641, s. 3; c. 768, s. 19; 1985, c. 746, s. 1; 1987, c. 285, s. 13; 1991, c. 418, s. 1; 1997-34, s. 5.)

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 12 NCAC 10B .0704 is amended with changes as published in 37:13 NCR 933-935:

2  
3 **12 NCAC 10B .0704 RESPONSIBILITIES: ~~SCHOOL~~ SCHOOLS DIRECTORS, AND DETENTION**  
4 **OFFICER COURSE COURSES**

5 (a) In planning, developing, coordinating, and delivering any commission-certified Detention Officer Certification  
6 Courses, the school shall:

7 (1) Formalize and schedule the course curriculum in accordance with the curriculum standards  
8 established by the rules in this Chapter.

9 (A) Any Detention Officer Certification Course shall be presented with a minimum of 40 hours  
10 of instruction each week during consecutive calendar weeks until course requirements are  
11 completed, with the exception of weeks in which there are regularly scheduled holidays  
12 pursuant to G.S. 103-4.

13 (B) Upon written request by the school delivering a class, the Director shall grant a waiver of  
14 the minimum hours requirement to that particular delivery of the class when illness,  
15 adverse weather, staffing shortages at the school or law enforcement agency employing the  
16 students or hosting the course, a declared state of emergency, incident requiring an  
17 emergency response by law enforcement, or riot prevent students from attending class or  
18 the school from staffing instructors for the class for 40 hours of instruction a week.

19 (2) Select and schedule instructors who are certified by the Commission under 12 NCAC 10B .0901  
20 through 12 NCAC 10B .0909. The selecting and scheduling of instructors is subject to special  
21 requirements as follows:

22 (A) No single instructor may be scheduled to instruct more than 35 percent of the total hours  
23 of the curriculum during any Detention Officer Certification Course delivery except as set  
24 forth in Part (a)(2)(B) of this Rule.

25 (B) Where the school submits in writing to the Director of the Division a showing of  
26 exceptional or emergency circumstances, the Director of the Division shall grant written  
27 approval for the expansion of the individual instructional limitation. Emergencies  
28 justifying an instructor to teach more than 35 percent of a Detention Officer Certification  
29 Course are situations when illness, accident, or other exceptional circumstances make it  
30 unfeasible to staff the class with other certified instructors.

31 (C) The appropriate number of instructors for specific topic areas shall be scheduled as required  
32 in 12 NCAC 10B .0703.

33 (3) Provide each instructor with a Commission-approved course outline and inform each instructor of  
34 their duties and responsibilities as specified in the Commissions' regulations and Detention Officer  
35 Certification Course Manual and Course Management Guide.

36 (4) Review each instructor's lesson plans and other instructional materials for conformance to the rules  
37 in this Chapter and to minimize repetition and duplication of subject matter.

1 (5) Arrange for the timely availability of audiovisual aids and materials, publications, facilities and  
2 equipment for training in all topic areas as required in any [Detention] "Detention Officer  
3 Certification Course Management Guide" as published by the North Carolina Justice Academy  
4 which shall be used as the basic curriculum for [the] Detention Officer Certification [Course,  
5 Courses. Copies of this manual may be obtained by contacting the North Carolina Justice Academy,  
6 Post Office Box 99, Salemburg, North Carolina 28385-0099. The cost of this manual, CD, indexes  
7 and binder is [~~fifty one dollars and seventy five cents (\$51.75)] one hundred seven dollars and~~  
8 seventy cents (\$107.70) at the time this Rule was last amended. The "Detention Officer Certification  
9 Course Management Guide" published by the North Carolina Justice Academy is hereby  
10 incorporated by reference, including subsequent amendments and editions, and shall be used by  
11 school directors in planning, implementing, and delivering basic detention officer training. The  
12 standards and requirements established by the "Detention Officer Certification Course Management  
13 Guide" shall be adhered to by the school director. The Justice Academy shall issue to each certified  
14 school director a copy of the guide at the time of certification at no cost to the certified school.

15 (6) If the [School] school adopts [rules] rules, regulations, and requirements that [exceeds] exceed the  
16 minimum requirements of this Subchapter regarding the delivery of a Detention Officer  
17 Certification [course], Course, the school shall submit the rules, regulations, and requirements to  
18 the Director as an Attachment attachment to the Pre-Delivery Report of Training Course  
19 Presentation, Form F-7A. A copy of such rules shall also be given to each trainee and to the sheriff  
20 of each trainee's employing agency at the time the trainee enrolls in the course.

21 [~~(7) — A copy of such rules, regulations and requirements adopted by the school pursuant to Subparagraph~~  
22 ~~(a)(6) of this Rule shall be submitted to the Director as an attachment to the Pre-Delivery Report of~~  
23 ~~Training Course Presentation, Form F-7A. A copy of such rules shall also be given to each trainee~~  
24 ~~and to the sheriff or agency head of each trainee's employing agency at the time the trainee enrolls~~  
25 ~~in the course.]~~

26 [(8)](7) Not less than 30 days before commencing delivery of the course, submit to the Commission a  
27 Pre-Delivery Report of Training Course Presentation (Form F-7A) that shall contain information on  
28 the course delivery location, school director, class schedule, anticipated date of the State  
29 Comprehensive Exam, and any planned instructional hours in addition to the minimum requirements  
30 along with the following attachments:

31 (A) A comprehensive course schedule showing the arrangement of topical presentations and  
32 proposed instructional assignments;

33 (B) A copy of any rules, regulations, and requirements for the school and, when appropriate,  
34 completed applications for certification of instructors. The Director shall review the  
35 submitted Pre-Delivery Report together with all attachments to ensure that the school is in  
36 compliance with all Commission rules; if the school's rules are found to be in violation, the



1 Director shall notify the school of any deficiency, and approval shall be withheld until all  
2 matters are in compliance with the Commissions' rules.

3 ~~(9)~~(8) ~~[Shall have]~~ ~~Have~~ probationary instructors evaluated by an instructor certified pursuant to 12 NCAC  
4 10B .0905 or certified as a general instructor pursuant to 12 NCAC 09B .0301 using Form F-16. If  
5 a Limited Lecturer is evaluated during the practical portion of a block of instruction, the school must  
6 designate an instructor certified to instruct the practical portion of the block of instruction to evaluate  
7 the instructor using Form F-16. These evaluations on Form F-16 shall be submitted to the Division  
8 at the conclusion of each course delivery. Based on the evaluation referenced in 12 NCAC 10B  
9 .0905(b)(1), the school shall recommend approval or denial of requests for Detention Officer  
10 Instructor Certification, Limited Lecturer Certification, or Professional Lecturer Certification. The  
11 observations shall ensure the instructor is using the Instructional Systems Design model, as taught  
12 in Criminal Justice Instructor Training set out in 12 NCAC 09B .0209, and that the delivery follows  
13 the training objectives in the commission-approved lesson plan. For each topic area, the designee's  
14 evaluation shall be based on the course delivery observations, the instructor's use of the approved  
15 lesson plan, and the results of student evaluations of the instructor.

16 ~~(10)~~(9) ~~[Shall have]~~ ~~Have~~ all other instructors evaluated by an instructor certified pursuant to 12 NCAC  
17 10B .0905 or certified as a general instructor pursuant to 12 NCAC 09B .0301 using Form F-16. If  
18 a Limited Lecturer is evaluated during the practical portion of a block of instruction, the school must  
19 designate an instructor certified to instruct the practical portion of the block of instruction to evaluate  
20 the instructor using Form F-16. These evaluations on Form F-16 shall be submitted to the Division  
21 at the conclusion of each course delivery. The observations shall ensure the instructor is using the  
22 Instructional Systems Design model, as taught in Criminal Justice Instructor Training set out in 12  
23 NCAC 09B .0209, and that the delivery follows the training objectives in the commission-approved  
24 lesson plan. For each topic area, the designee's evaluation shall be based on the course delivery  
25 observations, the instructor's use of the approved lesson plan, and the results of student evaluations  
26 of the instructor. Form F-16 shall contain information on the instructor, evaluator, courses taught  
27 and observed, location and time of delivery, sponsoring agency, and evaluation of instructor  
28 performance based upon instructor ability and use of instructional strategies taught in the Criminal  
29 Justice Instructor Training.

30 ~~(11)~~(10) Ensure that any designated certified instructor who is evaluating the instructional presentation of  
31 another, holds certification in the same instructional topic area as that being taught.

32 ~~(12)~~(11) Administer tests at the end of each topic area as specified in 12 NCAC 10B .0601 during the course  
33 delivery delivery.

34 ~~(13)~~(12) Maintain supervision, direction, and control over the performance of all persons to whom any  
35 portion of the planning, development, presentation, or administration of a course has been assigned.

36 ~~(14)~~(13) Administer all course work pursuant to 12 NCAC 10B .0606.

1 ~~(15)~~(14) Submit to the Commission a Post-Delivery Report of Training Course Presentation (Form 7-B),  
2 which shall contain information on the sponsoring agency, course beginning and end date, and  
3 deviations from the planned course delivery as specified on Form 7-A, within 10 days of receiving  
4 the Commission's Report of Examination Scores.

5 (b) In addition to the requirements in Paragraph (a) of this Rule, the school shall designate a point of contact who  
6 shall be available to students and Division staff at all times during course delivery by telephone or other means.  
7 Available means that the point of contact may be contacted at any time of day or night by students, school personnel,  
8 or division staff and shall return the call or other means of communication within 12 hours of contact if initial contact  
9 is not successful. The means, and applicable numbers, shall be filed with the commission-certified training delivery  
10 site and the Division prior to the beginning of a scheduled course delivery.

11 (c) The Commission shall examine the Detention Officer Certification Course Management Guide and Detention  
12 Officer Certification Course Training Manual developed by the North Carolina Justice Academy and vote by simple  
13 majority on whether to approve them as setting the curriculum and course management requirements for ~~the~~ any  
14 Detention Officer Certification Course. Subsequent substantive changes to either the Training Manual or Course  
15 Management Guide must be approved by a majority vote by the Commission.

16  
17 *History Note: Authority G.S. 17E-4;*  
18 *Eff. January 1, 1989;*  
19 *Amended Eff. November 1, 2022, January 1, 2009; January 1, 2006; January 1, 2005; August 1,*  
20 *1998; January 1, 1996; January 1, 1994; January 1, 1992;*  
21 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. March 6,*  
22 *2018.*  
23 *RRC Objection July 21, 2022 and rule returned to agency on September 27, 2022.*  
24 *Amended Eff. ~~August 1, 2023.~~ September 1, 2023.*

## 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: North Carolina Sheriffs' Education and Training Standards Commission

RULE CITATION: 12 NCAC 10B .0714

RECOMMENDATION DATE: August 14, 2023

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:

*The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "Commission") has, in relevant part and pursuant to G.S. 17E-4(a)(4)(6)(7) and (12), the authority to establish standards for and the certification of training schools, programs or courses of instruction, and standards of education for and certification of instructors of courses.*

*Section .0800 of Subchapter 10B of the North Carolina Administrative Code sets forth the standards for and certification of schools, and training courses<sup>1</sup>.*

*Section .0900 of Subchapter 10B of the North Carolina Administrative Code sets forth the standards for and certification of instructors.*

*This Rule provides for "Pilot Courses" which the Rule defines as "courses approved by the Commission to develop new training course curricula."*

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*1 In relevant part, the Commission incorporates by reference Title 12, Subchapter 9C, Section .0400 of the North Carolina Administrative Code adopted by the North Carolina Criminal Justice Education and Training Standards Commission which includes 12 NCAC 09C .0404. 12 NCAC 09C .0404 is a rule substantially the same as 12 NCAC 10B .0714.*

William W. Peaslee  
Commission Counsel

*Pursuant to the Rule, the Commission shall designate a “developer” of a new course or a new version of an existing course subsequent to the Commission’s approval of the pilot course. The rule does not address or cite any procedure regarding how this approval is granted. The Rule is therefore unclear. The designation of the developer permits the developer to conduct the offerings of the course without having to comply with Section .0800.*

*It appears to counsel that this is a waiver or supplanting of the standards and procedures in Section .0800 and can be done so at the Commission’s whim merely by calling a course a “pilot”.*

*Presumably the instructors of the pilot courses would be required to be certified or bound by Section .0900 of Subchapter 10B as the Rule does not include language such as “notwithstanding Section .0900,” however this is unclear.*

*While the Rule states that this is merely the “[development of] new training course curricula”, it goes beyond development. Paragraph (c) allows the Pilot Course to supplant, in part, the course requirements in Section .0500 for applicants seeking certification. Accordingly, the Commission could provide an alternate path for applicants to satisfy the Commission’s training requirements and change the required curricula without the opportunity for public comment and without the other safeguards provided by adoption pursuant to the Administrative Procedures Act (hereinafter “APA”).*

*G.S. 150B-19(6) prohibits agencies from adopting a rule which will waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify a requirement. This Rule provides no such guidance. The adoption of this Rule would therefore be a failure to comply with the APA.*

*Further, it is unclear whether the “developer” is bound by the rules set forth for other course providers. If not, this would create another violation of G.S. 150B-19(6) as it creates a waiver of those rules.*

*Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(2) and (4)*

**§ 17E-4. Powers and duties of the Commission.**

(a) The Commission shall have the following powers, duties, and responsibilities, which are enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17E-8 and G.S. 17E-9:

- (1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any agency of information with respect to the employment, education, and training of its justice officers, and (ii) the submission by any training school of information with respect to its programs that are required by this Chapter;
- (2) Establish minimum educational and training standards that may be met in order to qualify for entry level employment as an officer in temporary or probationary status or in a permanent position. The standards for entry level employment of officers shall include all of the following:
  - a. Training in response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions. For purposes of the domestic violence training requirement, the term "officers" shall include justice officers as defined in G.S. 17E-2(3)a., except that the term shall not include "special deputy sheriffs" as defined in G.S. 17E-2(3)a.
  - b. Training on juvenile justice issues, including (i) the handling and processing of juvenile matters for referrals, diversion, arrests, and detention; (ii) best practices for handling incidents involving juveniles; (iii) adolescent development and psychology; and (iv) promoting relationship building with youth as a key to delinquency prevention.
  - c. Education and training to develop knowledge and increase awareness of effective mental health and wellness strategies for justice officers.
- (3) Certify, pursuant to the standards that it may establish for the purpose, persons as qualified under the provisions of this Chapter who may be employed at entry level as officers;
- (4) Establish minimum standards for the certification of training schools and programs or courses of instruction that are required by this Chapter;
- (5) Certify, pursuant to the standards that it has established for the purpose, training schools and programs or courses of instruction that are required by this Chapter;
- (6) Establish standards and levels of education or equivalent experience for teachers who participate in programs or courses of instruction that are required by this Chapter;

- (7) Certify, pursuant to the standards that it has established for the purpose, teachers who participate in programs or courses of instruction that are required by this Chapter;
- (8) Investigate and make such evaluations as may be necessary to determine if agencies are complying with the provision[s] of this Chapter;
- (9) Adopt and amend bylaws, consistent with law, for its internal management and control;
- (10) Enter into contracts incident to the administration of its authority pursuant to this Chapter;
- (11) Establish minimum standards for in-service training for justice officers. In-service training standards for sworn law enforcement officers shall include all of the following training topics:
  - a. Response to, and investigation of, domestic violence cases, as well as training in investigation for evidence-based prosecutions. For purposes of the domestic violence training requirement, the term "justice officer" shall include those defined in G.S. 17E-2(3)a., except that the term shall not include "special deputy sheriffs" as defined in G.S. 17E-2(3)a.
  - b. Juvenile justice issues, including (i) the handling and processing of juvenile matters for referrals, diversion, arrests, and detention; (ii) best practices for handling incidents involving juveniles; (iii) adolescent development and psychology; and (iv) promoting relationship building with youth as a key to delinquency prevention.
  - c. Training to develop knowledge and increase awareness of effective mental health and wellness strategies for justice officers. The standards established shall include two hours of training on this issue every three years.
  - d. Ethics.
  - e. Mental health for justice officers.
  - f. Community policing.
  - g. Minority sensitivity.
  - h. Use of force.
  - i. The duty to intervene and report.
- (12) Establish minimum standards and levels of training for certification of instructors for the domestic violence training and juvenile justice training required by subdivisions (2) and (11) of this subsection.
- (13) Establish minimum educational and training standards for employment and continuing education for officers concerning:

- a. Recognizing and appropriately interacting with persons who are deaf or hard of hearing.
  - b. Drivers license and vehicle registration identifiers of persons who are deaf or hard of hearing, as authorized by G.S. 20-7(q2), including that those identifiers are optional.
- (14) Monitor compliance with G.S. 20-185.1(d).
- (15) Establish minimum standards and levels of training for certification of diversion investigators and diversion supervisors, as defined in G.S. 90-113.74(i). As part of these minimum standards, the Commission shall require that certified diversion investigators receive training in the following:
- a. Definition of drug diversion.
  - b. Categories of drugs most subject to diversion and misuse.
  - c. Methods used to divert drugs.
  - d. Proper investigation of drug diversion cases.
  - e. Appropriate use of the controlled substances reporting system to investigate drug diversion cases.
  - f. Requests of prescriptions and records related to prescriptions pursuant to G.S. 90-107.1, including best practices for working with pharmacies in a manner that minimizes disruption of customer service and pharmacy operations.
  - g. Data privacy and security provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other pertinent federal and State laws governing privacy and security of confidential data and records.
  - h. Proper handling of confidential data and records from any source.
  - i. Criminal and civil penalties under federal and State law for improperly accessing, handling, or disclosing confidential prescription data or other confidential data or records.
- (16) Certify and recertify at least once every three years, suspend, revoke, or deny, pursuant to the standards that it has established for the purpose, persons as qualified to be employed at entry level and retained as diversion investigators and diversion supervisors, as defined in G.S. 90-113.74(i).
- (17) Search the National Decertification Index (NDI) maintained by the International Association of Directors of Law Enforcement Standards and Training (IADLEST) using the name of every applicant for certification or applicant for lateral transfer, and any other personal identifying information necessary to complete the search, and shall utilize any record of conviction of a criminal offense received as a result

of the search during the application and lateral transfer process to determine if the applicant has any record that would disqualify the applicant for certification.

The Commission may certify, and no additional certification shall be required from it, programs, courses and teachers certified by the North Carolina Criminal Justice Education and Training Standards Commission. Where the Commission determines that a program, course, instructor or teacher is required for an area which is unique to the office of sheriff, the Commission may certify such program, course, instructor, or teacher under such standards and procedures as it may establish.

(b) [Recodified as G.S. 17E-4.1.] (1983, c. 558, s. 1; 1991, c. 265, s. 2; 1995, c. 103, ss. 4, 5; 2004-186, ss. 2.7, 2.9, 2.10, 2.12; 2017-57, s. 16D.4(cc); 2017-191, s. 3; 2018-5, s. 35.25(e); 2018-44, s. 14(b); 2018-142, s. 23(b); 2021-107, s. 3(a), (c); 2021-136, s. 1(b); 2021-137, s. 2(b); 2021-138, ss. 7(b), 11(b), 15(b).)



**§ 150B-19. Restrictions on what can be adopted as a rule.**

**An agency may not adopt a rule that does one or more of the following:**

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
  - a. A service to a State, federal, or local governmental unit.
  - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
  - c. A transcript of a public hearing.
  - d. A conference, workshop, or course.
  - e. Data processing services.
- (6) **Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.**
- (7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 12 NCAC 10B .0714 is amended with changes as published in 37:02 NCR 187:

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3 **12 NCAC 10B .0714 PILOT COURSE PRESENTATION/PARTICIPATION**

4 (a) When the Commission approves the development of a new course or the development of a new version of an  
5 existing course, the Commission shall designate the developer, and such designation shall be deemed by the  
6 Commission as approval for the developer to conduct pilot offerings of the course. A minor or major revision to  
7 existing curriculum does not constitute a new version of an existing curriculum.

8 (b) Individuals who complete such a pilot course offering shall not be required by other rules of this Subchapter to  
9 complete additional training for that specific certification program. Such pilot training courses shall be recognized for  
10 purposes of certification or recertification.

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12 *History Note: Authority G.S. 17E-7;*

13 *Amended Eff. [~~November 1, 2022~~]/November 1, 2023.*

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