

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 Director¹ 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 exercises².

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).

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

² 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.

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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
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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 courses¹.

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."

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.

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- (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:

2

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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