

**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: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06A .0301

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

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

COMMENT:

*The rule in (a) is unnecessary and may be misleading. There is nothing in the agency's statutory law that requires the executive director to hold a certificate or forbids the director from being a certificate holder. In fact, there are no qualifications listed in the statute for the director. The rule may be misleading if it somehow suggests that the director "should" have or is required to have a certificate.*

*Because there is no authority cited for setting the qualifications of the director (other than the director "shall not be a member of the board"), and counsel is not aware of any authority for the board to set qualification requirements for the director, there is no authority for the requirement in (b) that the director possess a specific college degree. In fact there is no authority to set any degree requirement for the director.*

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06A .0303

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- X Object, based on:
  - X Lack of statutory authority
  - X Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*This rule seems to be unnecessary. It primarily addresses the internal management and structure of the agency in setting out the functions of an agency employee. G.S. 143B-10(j)(3) specifies that "policies ... which reflect internal management procedures within the department ... shall not be adopted or filed pursuant to Chapter 150B."*

*If this is a rule that governs*

*... the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation [and] which affect private rights or procedures available to the public ... (G.S. 143B-10(j)(2))*

*then it must be approved by the governor, which this rule has not. Counsel does not believe this is such a rule. If it is it must be because it is a management and staffing rule that in some way does "affect private rights or procedures available to the public" such as receiving a certificate from the board. If that is the case then this rule requires the governor's approval.*

*If there is some other justification and authority for the rule, that is not sufficiently shown.*

**§ 143B-10. Powers and duties of heads of principal departments.**

(a) Assignment of Functions. – Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b) Reorganization by Department Heads. – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c) Department Staffs. – The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d) Appointment of Committees or Councils. – The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the

appointments shall be made to the Joint Legislative Commission on Governmental Operations by March 31 of each year.

- (e) Departmental Management Functions. – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.
- (f) Custody of Records. – The head of a principal State department shall have legal custody of all public records as defined in G.S. 132-1.
- (g) Budget Preparation. – The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.
- (h) Plans and Reports. – Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.
- (i) Reports to Governor; Public Hearings. – Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.
- (j) Departmental Rules and Policies. – The head of each principal State department and the Director of the Office of State Personnel may adopt:
  - (1) Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132-1, which pertain to department business;
  - (2) Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;
  - (3) Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15; 2006-203, s. 101.)

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06F .0101

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- X Object, based on:
  - X Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*Counsel is aware that some form of this rule has been in effect for over 36 years. Counsel is also aware that it was reviewed and approved in its present form by the RRC less than four years ago. But recently the barber board, its statutes and its rules have come under renewed interest by the legislature and I felt compelled to take a fresh look at the rules revisions that were filed in April. After taking a fresh look at these rules I am recommending that the RRC object to most of the provisions in this rule.*

*Counsel recommends objecting to (a)(1) – (6), (9) – (11) and (15) – (19); (b); (d); and (e) based on lack of statutory authority to dictate these elements concerning the physical requirements or structure of a barber school.*

*The board's authority is limited to making rules concerning the health and safety of a barber shop's customers and the persons working there. Paragraph (b) of the statute gives the board the authority*

*“to make additional rules and regulations governing barbers and barbershops and barber schools for the proper administration and enforcement of this section.”*

*However that authority is limited to rules “for the proper administration and enforcement of this section. This is a “section” of the law that covers sanitary rules, not the physical structure of the*

*shop or other building unrelated to sanitation issues. Counsel believes that the portions of this rule he has cited as objectionable do not relate to sanitation issues. If any of them are sanitation issues then the rule needs to be rewritten to make clear how they relate to sanitation and the standards used to determine whether they are met. This would also allow the possibility for a waiver if a person wished to establish that they met the standards for the rule, if not the specific requirements.*

**§ 86A-15. Sanitary rules and regulations; inspections.**

(a) Each barber and each owner or manager of a barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

- (1) Proper quarters. –
  - a. Every barbershop, or other place where barber service is rendered, shall be located in buildings or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
  - b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
  - c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
  - d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The lavatory must have a drain pipe to drain all waste water out of the building.
  - e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- (2) Equipment and instruments. –
  - a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a solution of fifty percent (50%) alcohol, five percent (5%) carbolic acid, twenty percent (20%) formaldehyde, or ten percent (10%) lysol or other product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
  - b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
  - c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.
  - d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.

- e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.
- (3) Barbers. –
  - a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.
  - b. Each person working as a barber shall be clean both as to person and dress.
  - c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.
- (4) Any person, other than a registered barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.
- (5) The owner or manager of a barbershop or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.
- (b) All barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board of Barber Examiners or its agents or assistants. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops and barber schools for the proper administration and enforcement of this section, but no such additional rules or regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.
- (c) Notwithstanding any other provision of law, a registered barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board of Barber Examiners shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1.)

**§ 86A-22. Licensing and regulating barber schools and colleges.**

The North Carolina State Board of Barber Examiners may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall employ at least two instructors for the first 40 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. Schools that are organized as nonprofits and have obtained a ruling from the Internal Revenue Service recognizing their tax-exempt status shall have at least one instructor for every 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present.
- (3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.

- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86A-15.
- (7) a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The North Carolina State Board of Barber Examiners may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

- b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars (\$10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

- c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:
1. An assignment of a savings account in an amount equal to the bond required (i) which is in a form acceptable to the Board; (ii) which is executed by the applicant; and (iii) which is executed by a state or federal savings and loan association, state bank, or national bank, that is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
  2. A certificate of deposit (i) which is executed by a state or federal savings and loan association, state bank, or national bank, which is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (ii) which is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.

(1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7.)

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06H .0101

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (2) the meaning and requirements of the rule are unclear. I am not sure whether it is simply the word "alike" and what it means that makes the rule unclear or whether the entire item is unclear; I believe it is the latter.*

*I am not sure why they even have this rule, since it is well known that different people learn subjects in different manners. For instance some people do well learning from pictures and diagrams, while others do well learning from text descriptions. Some other students may benefit from having an instructor holding their hand(s) while learning to use scissors, thinning shears, or electric clippers while others will not find any of that necessary.*

*Does this rule require that if one student has an instructor answer a question using a different approach or words, that all students must be offered or required to undergo the same "answer"?*

*I would be quite surprised if the board responds that is exactly what they mean to require. But if that is not what is meant by the board to be "instructed alike," then I have no idea what the rule means or requires.*

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06L .0103

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- X Object, based on:
  - X Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority cited for the provisions in (i) requiring that equipment and tools used to provide barbering services "must be manufactured specifically for barbering" and "maintained in ... good operating condition." The authority cited allows the board to make rules concerning the sanitary condition of equipment used in barbering.*

**§ 86A-15. Sanitary rules and regulations; inspections.**

(a) Each barber and each owner or manager of a barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

- (1) Proper quarters. –
  - a. Every barbershop, or other place where barber service is rendered, shall be located in buildings or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
  - b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.
  - c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
  - d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The lavatory must have a drain pipe to drain all waste water out of the building.
  - e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.
- (2) Equipment and instruments. –
  - a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a solution of fifty percent (50%) alcohol, five percent (5%) carbolic acid, twenty percent (20%) formaldehyde, or ten percent (10%) lysol or other product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
  - b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
  - c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.
  - d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
  - e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.
- (3) Barbers. –
  - a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.

b. Each person working as a barber shall be clean both as to person and dress.

c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a registered barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board of Barber Examiners or its agents or assistants. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops and barber schools for the proper administration and enforcement of this section, but no such additional rules or regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a registered barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board of Barber Examiners shall adopt rules to allow this exception.

(1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1.)

## **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: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06L .0118

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*The rule is unclear in two ways.*

*It is unclear whether a barber shop is allowed to remain open if it receives a sanitary inspection score of less than 80. The provision in (d) stating that a "barber shop shall [not] be permitted to operate without first having obtained a sanitary rating card with a grade of not less than 80 percent" is unclear whether it is intended to apply only to new shops undergoing their first inspection or to existing shops as well, although it does seem to apply to only new shops never before inspected. Paragraph (f) certainly implies that existing shops can continue to operate even with a sanitary rating of less than 80 percent since it provides that receiving a rating of less than that is "sufficient cause" to revoke or suspend the license, but does not require a suspension or revocation. The next paragraph, (g), also gives the same implication because it does refer to not re-inspecting a shop "within 30 days of the last inspection," unless the rating at the last inspection was less than 80 percent.*

*It is also unclear what rating the shop is supposed to receive or display if it receives an inspection score of less than 80 percent. There is no provision for awarding or displaying any grade other than an A or B. At the same time according to paragraph (c) the "sanitary rating given to a barber shop shall be posted ... at all times."*

## **RRC STAFF OPINION**

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06L .0119

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- X Object, based on:
  - X Lack of statutory authority
  - X Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*As mentioned in previous rules there is no authority cited for the provisions in this rule relating to the physical condition or structure of a barber shop unless it is related to sanitation. Counsel believes that at least the following provisions do not refer to sanitation:*

*(1) "... well-repaired" entrance and waiting area [Note that even if there were authority for this provision, it is unclear what constitutes "well-repaired."]*

*(2) the "general condition" of the shop*

*(4)(a) the "construction of a shop and (c) the "good repair" of the shop. [Also and again the term "good repair" is ambiguous.]*

*(5) Counsel believes the "adequacy" of the lighting may affect sanitation if there is not enough light to safely and cleanly cut someone's hair and does not recommend objecting to it on that basis. However there should be a clearer description of how to determine or what basis would be used to determine whether the lighting or ventilation is adequate. Otherwise the standard of "adequate" lighting and ventilation is ambiguous.*

## **RRC STAFF OPINION**

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06M .0101

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority cited to require that a barber inspector be a registered barber, let alone a registered barber instructor.*

*Even if there were such authority it is unclear what "experience" is necessary to qualify an applicant as an "experienced barber."*

*While at first glance it might seem that this would make some sense – that being a barber might somehow better qualify you to be a barber shop inspector, it is clear from a review of the authority that the emphasis of the general statutes is that the role of the inspector is not to make sure the licensee is performing the practice of barbering properly but ensuring that the barber shop is clean and sanitary. It would seem to make more sense to require that an inspector have some sort of health science background, but there would be no authority for that requirement either.*

*The most relevant statute on inspecting barbershops is G.S. 86A-15, previously reproduced. It is clear in that statute that the emphasis and role of inspections is on the compliance with health rules of the board and maintaining a clean and sanitary barber shop.*

*The authority cited by the board seems to have no relevance to the qualifications or employment of barbershop inspectors other than allowing the board to "employ such agents [and] assistants ... as it deems necessary."*

**§ 86A-7. Salary and expenses; employees; audits; annual reports to the Governor.**

(a) Each member of the Board of Barber Examiners shall be reimbursed for his actual expenses and shall receive compensation and travel allowance according to G.S. 93B-5 for the distance traveled in performance of his duties. The expenses, compensation and all other salaries and expenses in connection with the administration of this Chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from fees collected and received under this Chapter.

(b) The Board shall employ such agents, assistants and attorneys as it deems necessary.

(c) Repealed by Session Laws 1981, c. 884, s. 6.

(d) Repealed by Session Laws 1983, c. 913, s. 8.

(e) The Board shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3; 1957, c. 813, s. 2; 1979, c. 695, s. 1; 1981, c. 884, s. 6; 1983, c. 913, s. 8.)

**RRC STAFF OPINION**

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06Q .0101

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- X Object, based on:
  - X Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*Counsel does not believe the board has any authority to regulate the use or display of a barber pole, as set out in (3). The barber pole and its use predate by many centuries, perhaps even more than a millennium, the barber board. There is nothing in the authority cited that gives the board any authority over the barber pole. Counsel believes there is not even any reference to the barber pole in the board's substantive law. There is no authority cited that gives the board any authority over something that has been in the public domain for eons.*

## **RRC STAFF OPINION**

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AGENCY: N.C. BOARD OF BARBER EXAMINERS

RULE CITATION: 21 NCAC 06Q .0103

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*The rule is ambiguous in whether or not a person convicted of an offense requiring registration as a sex offender might still be able to receive or retain a license. The introductory paragraph to the items in the rule states that the board "may" refuse to "issue or renew, or shall revoke or suspend" any license or permit (license) issued under the board's governing statutes.*

*The first problem is that it is not clear what is to happen if the board does issue or renew a license or permit of a registered sex offender, which the language of the introduction obviously permits (notwithstanding the way item (9) takes all that away). It then appears that it "shall revoke or suspend" that same license. This is nonsensical and makes it unclear what actions the board "may" take and what actions it "shall" or must take.*

*It then goes on to list factors in (1) – (8) that the board "shall consider" in deciding whether to issue or renew that license, making it – seemingly – clear that the decision to issue or renew the license or permit is a discretionary one. However item (9) all of a sudden makes it mandatory that the board refrain from issuing a license to or renewing the license of a registered sex offender. This also makes all that preceded in the rule unnecessary.*

*On a picky note: the rule in the introduction and items (1) – (8) refers to an "applicant, licensee or permittee." In (9) it refers to a "certificate" that is issued. Again this is a picky issue but there is some ambiguity created as to whether a certificate also includes a license or permit. The board*

*should rewrite this rule to harmonize all the uses – if the RRC approves this amendment, which it should not.*

*It is counsel's opinion that based on new legislation there is no statutory authority for the amendment to this rule adding item (9) that mandates no "certificate" be issued. As a matter of fact, recently enacted legislation makes it clear that unless the General Assembly has instructed a board to deny any sort of occupational license based on criminal record, then the board cannot by rule refuse to issue that license:*

- (b) Unless the law governing a particular occupational licensing board provides otherwise, a board shall not automatically deny licensure on the basis of an applicant's criminal history.

*In counsel's opinion this rule would "automatically deny licensure" to an applicant for any type of board license, permit or certification. It is beyond the agency's authority to have such a rule.*

*This new law added to the chapter covering occupational licensing boards refers to "any crime" which would include a crime requiring registration as a sexual offender. There is no definition of "any crime" that would not include this particular type of crime and allow the agency to adopt the rule the board is attempting to adopt here.*

*Counsel would also note that this bill was a bi-partisan bill and received only two votes against it in the entire legislature at the time of passage.*

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2013**

**SESSION LAW 2013-24  
SENATE BILL 33**

AN ACT TO REQUIRE THAT OCCUPATIONAL LICENSING BOARDS CONSIDER  
CERTAIN FACTORS BEFORE DENYING LICENSES TO APPLICANTS WITH CRIMINAL  
RECORDS, AS RECOMMENDED BY THE JOINT LEGISLATIVE ADMINISTRATIVE  
PROCEDURE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 93B of the General Statutes is amended by adding a new section to read:

**"§ 93B-8.1. Use of criminal history records.**

- (a) The following definitions apply in this section:
  - (1) Applicant. – A person who makes application for licensure from an occupational licensing board.
  - (2) Board. – An occupational licensing board as defined in G.S. 93B-1.
  - (3) Criminal history record. – A State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon an applicant's or a licensee's fitness to be licensed or disciplined.
  - (4) Licensee. – A person who has obtained a license to engage in or represent himself or herself to be a member of a particular profession or occupation.
- (b) Unless the law governing a particular occupational licensing board provides otherwise, a board shall not automatically deny licensure on the basis of an applicant's criminal history. (Emphasis added.) If the board is authorized to deny a license to an applicant on the basis of conviction of any crime or for commission of a crime involving fraud or moral turpitude, and the

applicant's verified criminal history record reveals one or more convictions of any crime, the board may deny the license if it finds that denial is warranted after consideration of the following factors:

- (1) The level and seriousness of the crime.
  - (2) The date of the crime.
  - (3) The age of the person at the time of the crime.
  - (4) The circumstances surrounding the commission of the crime, if known.
  - (5) The nexus between the criminal conduct and the prospective duties of the applicant as a licensee.
  - (6) The prison, jail, probation, parole, rehabilitation, and employment records of the applicant since the date the crime was committed.
  - (7) The subsequent commission of a crime by the applicant.
  - (8) Any affidavits or other written documents, including character references.
- (c) The board may deny licensure to an applicant who refuses to consent to a criminal history record check or use of fingerprints or other identifying information required by the State or National Repositories of Criminal Histories.
- (d) This section does not apply to The North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission."

**SECTION 2.** This act becomes effective July 1, 2013, and applies to applications for licensure submitted on or after that date.

In the General Assembly read three times and ratified this the 3rd day of April, 2013.

s/ Daniel J. Forest  
President of the Senate

s/ Thom Tillis  
Speaker of the House of Representatives

s/ Pat McCrory  
Governor

Approved 4:42 p.m. this 9th day of April, 2013

## **RRC STAFF OPINION**

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AGENCY: Board of Podiatry Examiners

RULE CITATION: 21 NCAC 52 .0211

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:

*It does not appear that the Board has the authority to grant the temporary licensure contained in Paragraph (b). Unless the Board considers practice of podiatry on a federal military installation to be the equivalent of postgraduate clinical for residency, there is no authority cited to allow the Board to issue this license.*

*In addition, as the language within the Paragraph does not require that the applicant be a military trained applicant or military spouse, but instead practice on a military installation, the temporary licensure in Paragraph (b) is not governed by G.S. 93B-15.1.*

**§ 90-202.5. Applicants to be examined; examination fee; requirements; temporary licenses.**

(a) Any person not heretofore authorized to practice podiatry in this State shall file with the Board of Podiatry Examiners an application for examination accompanied by a fee not to exceed three hundred fifty dollars (\$350.00), together with proof that the applicant is of good moral character, and has obtained a preliminary education equivalent to four years of instruction in a high school and three years of instruction in a college or university approved by the American Association of Colleges and Universities. Before taking the examination, the applicant must be a graduate of a college of podiatric medicine accredited by the National Council on Education of the American Podiatry Association.

Effective January 1, 1992, every applicant, as a prerequisite for licensure under this Article, shall complete one year of clinical residency or other equivalent postgraduate clinical program approved by the North Carolina Board of Podiatry Examiners and, before taking the North Carolina podiatry licensure examination, shall present evidence to the Board that he has passed the National Board Examination.

Any person licensed to practice podiatry on or before January 1, 1992, who is actively involved in a postgraduate clinical program approved by the Board shall be permitted to practice podiatry in the approved program pending its completion.

(b) Effective January 1, 1992, the Board may issue a temporary license to practice podiatry to any applicant for licensure, for a period and under conditions established by the Board, while the person resides in North Carolina and is participating in a clinical residency or other equivalent postgraduate clinical program approved by the Board. A temporary license is valid only while the licensee is actively participating in the program and may not be extended beyond the determined length of training set by the Board. (1919, c. 78, s. 9; C.S., s. 6766; 1963, c. 1195, ss. 1, 2; 1967, c. 1217, s. 4; 1975, c. 672, s. 1; 1981, c. 659, s. 2; 1983, c. 217, s. 5; 1989, c. 214; 1991, c. 457, s. 1.)

**§ 93B-15.1. Licensure for individuals with military training and experience; licensure by endorsement for military spouses; temporary license.**

(a) Notwithstanding any other provision of law, an occupational licensing board, as defined in G.S. 93B-1, shall issue a license, certification, or registration to a military-trained applicant to allow the applicant to lawfully practice the applicant's occupation in this State if, upon application to an occupational licensing board, the applicant satisfies the following conditions:

- (1) Has been awarded a military occupational specialty and has done all of the following at a level that is substantially equivalent to or exceeds the requirements for licensure, certification, or registration of the occupational licensing board from which the applicant is seeking licensure, certification, or registration in this State: completed a military program of training, completed testing or equivalent training and experience as determined by the board, and performed in the occupational specialty.
- (2) Has engaged in the active practice of the occupation for which the person is seeking a license, certification, or permit from the occupational licensing board in this State for at least two of the five years preceding the date of the application under this section.
- (3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice that occupation in this State at the time the act was committed.

(4) Pays any fees required by the occupational licensing board for which the applicant is seeking licensure, certification, or registration in this State.

(b) Notwithstanding any other provision of law, an occupational licensing board, as defined in G.S. 93B-1, shall issue a license, certification, or registration to a military spouse to allow the military spouse to lawfully practice the military spouse's occupation in this State if, upon application to an occupational licensing board, the military spouse satisfies the following conditions:

(1) Holds a current license, certification, or registration from another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration are substantially equivalent to or exceed the requirements for licensure, certification, or registration of the occupational licensing board for which the applicant is seeking licensure, certification, or registration in this State.

(2) Can demonstrate competency in the occupation through methods as determined by the Board, such as having completed continuing education units or having had recent experience for at least two of the five years preceding the date of the application under this section.

(3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice that occupation in this State at the time the act was committed.

(4) Is in good standing and has not been disciplined by the agency that had jurisdiction to issue the license, certification, or permit.

(5) Pays any fees required by the occupational licensing board for which the applicant is seeking licensure, certification, or registration in this State.

(c) All relevant experience of a military service member in the discharge of official duties or, for a military spouse, all relevant experience, including full-time and part-time experience, regardless of whether in a paid or volunteer capacity, shall be credited in the calculation of years of practice in an occupation as required under subsection (a) or (b) of this section.

(d) A nonresident licensed, certified, or registered under this section shall be entitled to the same rights and subject to the same obligations as required of a resident licensed, certified, or registered by an occupational licensing board in this State.

(e) Nothing in this section shall be construed to apply to the practice of law as regulated under Chapter 84 of the General Statutes.

(f) An occupational licensing board may issue a temporary practice permit to a military-trained applicant or military spouse licensed, certified, or registered in another jurisdiction while the military-trained applicant or military spouse is satisfying the requirements for licensure under subsection (a) or (b) of this section if that jurisdiction has licensure, certification, or registration standards substantially equivalent to the standards for licensure, certification, or registration of an occupational licensing board in this State. The military-trained applicant or military spouse may practice under the temporary permit until a license, certification, or registration is granted or until a notice to deny a license, certification, or registration is issued in accordance with rules adopted by the occupational licensing board.

(g) An occupational licensing board may adopt rules necessary to implement this section.

(h) Nothing in this section shall be construed to prohibit a military-trained applicant or military spouse from proceeding under the existing licensure, certification, or registration requirements established by an occupational licensing board in this State.

(i) For the purposes of this section, the State Board of Education shall be considered an occupational licensing board when issuing teacher licenses under G.S. 115C-296.

(j) For the purposes of this section, the North Carolina Medical Board shall not be considered an occupational licensing board. (2012-196, s. 1.)