

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: Addictions Specialist Professional Practice Board

RULE CITATION: 21 NCAC 68 .0216

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for lack of statutory authority. Paragraph (f) automatically subjects applicants to "sanctions" based on their criminal history. Depending on the crimes at issue, the Rule requires applicants to wait a set number of years since the applicant has completed his or her sentence to be eligible for licensure.

G.S. 93B-8.1, which was amended in 2019, prohibits occupational licensing boards from automatically denying licensure to an applicant based upon the applicant's criminal history. G.S. 93B-8.1(b). Instead, G.S. 93B-8.1(b1) requires occupational licensing boards to consider a list of factors prior to denying licensure. Additionally, the Board is required to make written findings and provide a copy of those findings to the applicant in order to deny an applicant licensure on the basis of his or her criminal history.

Therefore, staff recommends objection for lack of statutory authority for failure to comply with G.S. 93B-8.1.

Ashley Snyder
Commission Counsel

§ 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 or a State agency 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 federal law governing a particular board provides otherwise, a board may deny an applicant on the basis of a conviction of a crime only if the board finds that the applicant's criminal conviction history is directly related to the duties and responsibilities for the licensed occupation or the conviction is for a crime that is violent or sexual in nature. Notwithstanding any other provision of law, a board shall not automatically deny licensure on the basis of an applicant's criminal history, and no board may deny an applicant a license based on a determination that a conviction is for a crime of moral turpitude. The board shall make its determination based on the factors specified in subsection (b1).

(b1) Before a board may deny an applicant a license due to a criminal conviction under subsection (b) of this section, the board must specifically consider all 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.
- (6a) The completion of, or active participation in, rehabilitative drug or alcohol treatment.
- (6b) A Certificate of Relief granted pursuant to G.S. 15A-173.2.
- (7) The subsequent commission of a crime by the applicant.
- (8) Any affidavits or other written documents, including character references.

(b2) If the board denies an applicant a license under this section, the board shall:

- (1) Make written findings specifying the factors in subsection (b1) of this section the board deemed relevant to the applicant and explaining the reason for the denial. The board's presiding officer must sign the findings.
- (2) Provide or serve a signed copy of the written findings to the applicant within 60 days of the denial.
- (3) Retain a signed copy of the written findings for no less than five years.

(b3) Each board shall include in its application for licensure and on its public Web site all of the following information:

- (1) Whether the board requires applicants to consent to a criminal history record check.

- (2) The factors under subsection (b1) of this section which the board shall consider when making a determination of licensure.
- (3) The appeals process pursuant to Chapter 150B of the General Statutes if the board denies an applicant licensure in whole or in part because of a criminal conviction.

(b4) If a board requires an applicant to submit a criminal history record, the board shall require the provider of the criminal history record to provide the applicant with access to the applicant's criminal history record or otherwise deliver a copy of the criminal history record to the applicant. If an applicant's criminal history includes matters that will or may prevent the board from issuing a license to the applicant, the board shall notify the applicant in writing of the specific issues in sufficient time for the applicant to provide additional documentation supporting the application for consideration by the board prior to any final decision to deny the application. After being notified of any potential issue with licensure due to criminal conviction(s), an applicant shall have 30 days to respond by either correcting any inaccuracy in the criminal history record or submitting evidence of mitigation or rehabilitation for consideration by the board.

(b5) If, following a hearing, a board denies an application for licensure, the board's written order shall include specific reference to any criminal conviction(s) considered as part or all of any basis for the denial and the rationale for the denial, as well as a reference to the appeal process and the applicant's ability to reapply. No applicant shall be restricted from reapplying for licensure for more than two years from the date of the most recent application.

(b6) Notwithstanding any other provisions in the law, an individual with a criminal history may petition a board at any time, including before an individual starts or completes any mandatory education or training requirements, for a predetermination of whether the individual's criminal history will likely disqualify the individual from obtaining a license. This petition shall include a criminal history record report obtained by the individual from a reporting service designated by the board, the cost of which shall be borne by the applicant. Criminal history records relating to a predetermination petition shall not be considered public records under Chapter 132 of the General Statutes. A board may predetermine that the petitioner's criminal history is likely grounds for denial of a license only after the board has applied the requirements of subsection (b) of this section. Each board shall delegate authority for such a predetermination to its Executive Director or their equivalent, or a committee of the board, so that the predeterminations can be made in a timely manner. No board member having served on a predetermination committee for an individual shall be required to recuse in any later determinations or hearings involving the same applicant. The board shall inform the individual of the board's determination within 45 days of receiving the petition from the individual. The board may charge a fee to recoup its costs not to exceed forty-five dollars (\$45.00) for each petition. If the board determines an applicant would likely be denied licensure based on their criminal history, the board shall notify the individual in writing of the following:

- (1) The grounds and reasons for the predetermination.
- (2) That the petitioner has the right to complete any requirements for licensure and apply to the board and have their application considered by the board under its application process.
- (3) That further evidence of rehabilitation will be considered upon application.

(b7) A predetermination made under this section that a petitioner's criminal history would likely prevent them from licensure is not a final agency decision and shall not entitle the individual to any right to judicial review under Article 4 of Chapter 150B of the General Statutes.

(b8) A predetermination made under subsection (b6) of this section that a petitioner is eligible for a license shall be binding if the petitioner applies for licensure and fulfills all other requirements for the occupational license and the applicant's submitted criminal history was correct and remains unchanged at the time of application for a license.

(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.

1 21 NCAC 68 .0216 is readopted as published in 34:24 NCR 2384 as follows:

2
3 **21 NCAC 68 .0216 BACKGROUND INVESTIGATION**

4 (a) Every applicant for ~~an initial credential~~ Registration issued pursuant to Article 5C of Chapter 90 of the General
5 Statutes shall ~~provide, at her or his expense, a completed~~ complete a fingerprint ~~and background check~~ and
6 accompanying release of information ~~form, provided by the Board,~~ meeting the standards set by the State Bureau of
7 Investigation and obtained within 60 days of the date the applicant submits all the prerequisites for his or her credential.

8 (b) The applicant shall provide any additional information regarding any pending charge or conviction as requested
9 by the Board.

10 (c) An applicant shall submit a verified statement listing all criminal convictions received by the applicant, subsequent
11 to the date of the application. Failure to make full and accurate disclosure shall be grounds for immediate application
12 denial or other disciplinary action applicable to registration, certification, or licensure pursuant to G.S. 90-113.44.

13 (d) Criminal histories from any jurisdiction shall be categorized as defined by North Carolina law.

14 (e) The categories of crimes (committed as separate incidents) are as follows:

15 (1) Category I. The following crimes:

16 (A) Murder, attempted murder, or manslaughter of a child 16 or under; or

17 (B) Sexual assault, including attempted sexual assault, rape, indecent liberties with a child,
18 molestation, or sexual assault of a child, or the attempt to commit any of the
19 aforementioned crimes.

20 (2) Category II. Crimes that primarily result in bodily or emotional harm to others, including:

21 (A) Manslaughter of a person over 16 years of age;

22 (B) Kidnapping or attempted kidnapping;

23 (C) Arson of an occupied dwelling;

24 (D) Robbery with a dangerous weapon or attempted robbery with a dangerous weapon;

25 (E) Felony assault other than a sexual assault;

26 (F) First degree burglary;

27 (G) Trafficking in controlled substances as it is defined in Article 5 of Chapter 90 of the General
28 Statutes; or

29 (H) Any other felony that results in bodily or emotional harm to another.

30 (3) Category III. The following misdemeanors and felonies that do not primarily result in bodily or
31 emotional harm to others:

32 (A) Three or more DWIs within the most recent seven years;

33 (B) Assault (misdemeanor);

34 (C) Felony larceny;

35 (D) Fraud, obtaining property by false pretenses, financial transaction card theft;

36 (E) Unauthorized use of an aircraft;

37 (F) Unlawfully carrying a weapon;

- 1 (G) Theft of a vehicle;
- 2 (H) Falsification of government documentation (felony);
- 3 (I) Arson of an unoccupied dwelling or other building within the curtilage;
- 4 (J) Burglary other than in the first degree;
- 5 (K) Sale and delivery violations of the North Carolina Controlled Substances Act resulting in
- 6 a felony conviction;
- 7 (L) Embezzlement;
- 8 (M) Forgery;
- 9 (N) Any burning of property prosecuted as a felony;
- 10 (O) Robbery not with a dangerous weapon;
- 11 (P) Perjury;
- 12 (Q) Felony receiving and possessing stolen goods;
- 13 (R) Breaking and entering; or
- 14 (S) Any other felony not otherwise categorized.
- 15 (4) Category IV. The following misdemeanors:
 - 16 (A) Any combination of three or more Category V offenses, except offenses occurring within
 - 17 the same incident shall be considered a single offense;
 - 18 (B) Two DWIs within the most recent seven years;
 - 19 (C) Possession of a controlled substance;
 - 20 (D) Injury or damage to property;
 - 21 (E) Resisting arrest;
 - 22 (F) Larceny;
 - 23 (G) Prostitution;
 - 24 (H) Criminal mischief;
 - 25 (I) Driving while license suspended or revoked;
 - 26 (J) Falsification of government documents;
 - 27 (K) Any misdemeanor burning; or
 - 28 (L) Any other misdemeanor not otherwise categorized.
- 29 (5) Category V. Category V offenses are:
 - 30 (A) One DWI within the most recent seven years;
 - 31 (B) Disorderly conduct;
 - 32 (C) Intoxicated and disruptive in public;
 - 33 (D) Three or more incidents resulting in worthless check convictions; or
 - 34 (E) Shoplifting or concealment.
- 35 (f) The following sanctions have been established by the Board according to the categories of crimes:

1 (1) An applicant with a Category I conviction shall have at least 15 years elapsed since the applicant
2 has completed all aspects of his or her sentence received as a result of the last Category I conviction
3 to be eligible for registration, certification, or licensure.

4 (2) An applicant with a Category II conviction shall have at least 10 years elapsed since the applicant
5 has completed all aspects of his or her sentence received as a result of the last Category II conviction
6 to be eligible for certification or licensure. Notwithstanding a Category II conviction, an applicant
7 may be registered no sooner than five years following the date the applicant has completed all
8 aspects of his or her sentence.

9 (3) An applicant with a Category III conviction shall have at least five years elapsed since the applicant
10 has completed all aspects of his or her sentence received as a result of the last Category III conviction
11 to be eligible for certification or licensure. Notwithstanding a Category III conviction, an applicant
12 may be registered immediately following the date the applicant has completed all aspects of his or
13 her sentence.

14 (4) An applicant with a Category IV conviction shall have at least three years elapsed since the applicant
15 has completed all aspects of his or her sentence received as a result of the last Category IV conviction
16 to be eligible for certification or licensure. Notwithstanding a Category IV conviction, an applicant
17 may register immediately following the date the applicant has completed all aspects of his or her
18 sentence.

19 (5) An applicant with a Category V conviction shall have at least one year elapsed since the applicant
20 has completed all aspects of his or her sentence received as a result of the last Category V conviction
21 to be eligible for certification or licensure. Notwithstanding a Category V conviction, an applicant
22 may register immediately following the date the applicant has completed all aspects of his or her
23 sentence.

24 (g) If a waiting period prior to licensure as a driver of a motor vehicle results from a conviction for a DWI offense,
25 this waiting period shall not be considered an aspect of an applicant's sentence required to be completed prior to the
26 awarding of a credential.

27 (h) An individual whose application is denied or whose registration is suspended or revoked may request a hearing
28 under the procedure established in Article 5C of Chapter 90 and Chapter 150B of the North Carolina General Statutes
29 and the North Carolina Administrative Code.

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31 *History Note:* Authority G.S. 90-113.30; 90-113.31; 90-113.33; 90-113.40; 90-113.41A; 90-113.44;
32 *Temporary Adoption Eff. May 15, 2002;*
33 *Temporary Adoption Eff. July 1, 2002;*
34 *Eff. April 1, 2003;*
35 *Amended Eff. ~~January 1, 2010~~; ~~January 1, 2010~~;*
36 *Readopted Eff. October 1, 2020.*

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AGENCY: Addictions Specialist Professional Practice Board

RULE CITATION: 21 NCAC 68 .0227 and .0228

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection to Rules .0227 and .0228 for lack of statutory authority. Specifically, in .0227(a)(2) and .0228(a)(2), the Board states that applicants based on military service or status as a military spouse shall submit an application fee. Both rules list G.S. 93B-15.1 in their history notes. That statute was amended in 2017 to specifically forbid a licensing board from charging an application fee in Subsection (k), which states:

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

(k) An occupational licensing board shall not charge a military-trained applicant or a military spouse an initial application fee for a license, certification, registration, or temporary practice permit issued pursuant to this section. Nothing in this subsection shall be construed to prohibit an occupational licensing board from charging its ordinary fee for a renewal application or prohibit a third party from charging actual costs for a service such as a background check

Therefore, staff believes that the requirement for these applicants to pay an application fee is beyond the statutory authority of the Board.

Ashley Snyder
Commission Counsel
Amended September 8, 2020

1 21 NCAC 68 .0227 is readopted with changes as published in 34:24 NCR 2384 as follows:

2
3 **21 NCAC 68 .0227 CREDENTIAL BY ENDORSEMENT OR RECIPROCITY BASED ON MILITARY**
4 **SERVICE**

5 (a) An applicant for a ~~substance abuse~~ substance use disorder professional credential by endorsement or reciprocity
6 based on military service shall have ~~his or her~~ their training honored automatically pursuant to the standards of the
7 International Certification and Reciprocity Consortium/~~Alcohol and Other Drug Abuse, Incorporated.~~ Consortium
8 (IC&RC). The applicant shall apply for a credential by using the Board's credentialing software, Learning Builder,
9 and submit to the Board:

- 10 (1) a reciprocity application form prescribed by the ~~International Certification and Reciprocity~~
11 ~~Consortium/Alcohol and Other Drug Abuse, Incorporated~~ IC&RC and provided by the Board as
12 found at its website: www.ncsappb.org that shall be found accompanying the reciprocity
13 information on the website;
- 14 (2) the application fee required by rule applicable to the specific credential as set forth in this Chapter;
- 15 (3) written evidence demonstrating that the applicant has been awarded a military occupational
16 specialty as a substance abuse professional and that the applicant has engaged in practice as a
17 substance ~~abuse~~ use disorder professional for at least 1,500 clinical hours per year during at least
18 two of the five years preceding the date of application; and
- 19 (4) a statement disclosing and explaining the commission of any act set out in G.S. 90-113.46A, any
20 disciplinary actions, investigations, malpractice claims, state or federal agency complaints,
21 judgments, settlements, or criminal charges.

22 (b) All information required shall be received by the Board office.

23 (c) All applicants shall submit to the Board an electronic copy of the applicant's fingerprints as described on the
24 Board's website.

25
26 *History Note: Authority G.S. 90-113.31A(14); 90-113.33; 90-113.38; 90-113.39; 90-113.46; 90-113.46A; 93B-*
27 *15.1;*

28 *Eff. ~~August 1, 2015.~~ August 1, 2015;*

29 *Readopted Eff. October 1, 2020.*

21 NCAC 68 .0228 is readopted with changes as published in 34:24 NCR 2384 as follows:

**21 NCAC 68 .0228 SUBSTANCE ABUSE USE DISORDER CREDENTIAL BY ENDORSEMENT OR
RECIPROCITY BASED ON STATUS AS MILITARY SPOUSE**

(a) An applicant for a substance ~~abuse use disorder~~ ABUSE USE DISORDER credential by endorsement or reciprocity based on the applicant's status as a military spouse shall have his or her training honored automatically pursuant to the standards of the International Certification and Reciprocity Consortium/~~Alcohol and Other Drug Abuse, Incorporated.~~ Consortium (IC&RC). The applicant shall apply for a credential by using the Board's credentialing software, Learning Builder, and submit to the Board:

- (1) a reciprocity application form prescribed by the ~~International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated~~ IC&RC and provided by the Board as found at its website: <http://www.ncsappb.org> that shall be found accompanying the reciprocity information on the website;
- (2) the application fee required by rule applicable to the specific credential as set forth in this Chapter;
- (3) written evidence demonstrating that the applicant is married to an active member of the U.S. military and that such applicant:
 - (A) holds a current substance ~~abuse use disorder~~ ABUSE USE DISORDER credential from another jurisdiction whose standards for the credential are substantially equivalent to or greater than those required for the credential described in G.S. 90, Article 5C, this Chapter, and is the subject of the application; and
 - (B) has engaged in practice as a substance ~~abuse use disorder~~ ABUSE USE DISORDER professional demonstrating the scope of practice as defined by G.S. 90-113.31B for at least 1,500 hours per year during at least two of the five years preceding the date of application; and
- (4) a statement disclosing and explaining the commission of an act set out in G.S. 90-113.46A, any disciplinary actions, investigations, malpractice claims, state or federal agency complaints, judgments, settlements, or criminal charges.

(b) All information required shall be received by the Board office.

(c) All applicants shall submit to the Board an electronic copy of the applicant's fingerprints as described on the Board's website.

*History Note: Authority G.S. 90-113.31A(14); 90-113.31B; 90-113.33; 90-113.38; 90-113.39; 90-113.46; 90-113.46A; 93B-15.1;
Eff. ~~August 1, 2015.~~ August 1, 2015.
Readopted Eff. October 1, 2020.*