



This Bill Analysis reflects the contents of the bill as it was presented in committee.

# SENATE BILL 735: Various OLB and Administrative Law Changes.

2017-2018 General Assembly

<b>Committee:</b>	House Rules, Calendar, and Operations of the House	<b>Date:</b>	June 14, 2018
<b>Introduced by:</b>	Sens. Wells, Daniel	<b>Prepared by:</b>	Amy Darden
<b>Analysis of:</b>	PCS to Third Edition S735-CSROf-9		Staff Attorney

### OVERVIEW: *The PCS to Senate Bill 735 would:*

- *Make various changes to the financial reporting requirements of occupational licensing boards.*
- *Merge the Barber and Electrolysis Boards.*
- *Authorize agencies to make technical corrections to the rules without review by the Rules Review Commission and authorize the Codifier of Rules to make technical corrections to the rules.*
- *Clarify that a party may commence a contested case in a dispute with an agency without petitioning the agency for rule making or seeking or obtaining a declaratory ruling.*
- *Revise the process for the review and periodic re-adoption of existing rules.*
- *Add two members to the North Carolina Board of Massage and Bodywork Therapy.*
- *Amend the Psychology Practice Act to establish an inactive licensure status, revise record retention requirements, and increase various licensing fees*
- *Increase the annual fee for podiatrists*
- *Increase the annual fee for pastoral counselors and pastoral counseling associates*
- *Require occupational licensing boards to adopt rules governing hearings in order to exercise the power to summarily suspend licenses and to increase oversight of occupational licensing boards and would make a number of changes to the statutes governing occupational licensing boards (OLBs) to increase oversight of the OLBs*
- *Require the Joint Legislative Administrative Procedure Oversight Committee to study obstacles to entry into licensed trades and professions and submit a report to the 2019 General Assembly*

### BACKGROUND and CURRENT LAW:

#### Part I.

This part of the PCS to Senate Bill 735 is a recommendation of the Joint Legislative Administrative Procedure Oversight Committee to the 2018 Regular Session of the General Assembly.

#### Part II.

Karen Cochrane-Brown  
Director



Legislative Analysis  
Division  
919-733-2578

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The State Board of Barber Examiners was originally established in the 1920s. "The Practice of Barbering" is any part of combination of shaving or trimming the beard or cutting hair, dyeing the hair or applying hair tonics, permanent waving or marcelling the hair, or giving facial or scalp massages, or treatments with oils, creams, lotions or other preparations either by hand or mechanical appliances. The provisions governing the licensure of barbers are contained in Chapter 86A of the General Statutes.

The North Carolina Board of Electrolysis Examiners was established in 1989. "Electrology" is the practice of hair removal by application of an electric current to the hair papilla by means of a needle so as to cause growth inactivity and thus permanently remove the hair. The provisions governing the licensure of electrologists and laser-hair practitioners are contained in Chapter 88A of the General Statutes.

## **Part III.**

This part of the PCS to Senate Bill 735 consists of several recommendations from the Joint Legislative Administrative Procedure Oversight Committee (APO) to the 2017 Regular Session of the 2017 General Assembly. These recommendations were proposed to APO by the Office of Administrative Hearings and the Rules Review Commission.

## **Part IV.**

The North Carolina Board of Massage and Bodywork Therapy's authority was expanded last year to regulate massage and bodywork therapy establishments.

## **Part V.**

Article 18A of Chapter 90 provides for the Psychology Practice Act. Article 12A of Chapter 90 pertains to podiatrists. Article 26 of Chapter 90 pertains to fee-based practicing pastoral counselors.

The most recent fee increases for licenses in the bill are:

- The last fee increase authorized by the General Assembly for the Psychology Practice Act was in 1993. S.L. 1993-375 authorized the fees currently contained in G.S. 90-270.18(b)(1)-(9).
- The last annual fee increase for podiatrists was in 1991 (S.L. 1991-457).
- The last annual fee increase for the pastoral counselors and associates was in 1991 (S.L.1991-670).

## **Part VI.**

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), the US Supreme Court found that the NC Dental Board was not protected from antitrust actions under the doctrine of state action immunity because the Board was controlled by active market participants and was not subject to active supervision by the State.

Sections 6.2-6.6 are a recommendation of the Joint Legislative Administrative Procedure Oversight Committee (APO) designed to respond to the supervision concerns raised in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.

## **BILL ANALYSIS:**

### **Part I:**

This part of the PCS to Senate Bill 735 would make various changes to the financial reporting requirements of occupational licensing boards as follows:

Section 1.1 would instruct the Joint Legislative Administrative Procedure Oversight Committee to study whether the definition of "occupational licensing board" under G.S. 93B-1 and the definition of

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"occupational licensing agency" under G.S. 150B-2 should include specific lists of occupational licensing boards in order to clarify which State agencies should be considered occupational licensing boards for purposes of Chapter 93B and Chapter 150B. The Committee will report the results of its study to the 2019 General Assembly.

Sections 1.2 and 1.3 would direct the State Controller to develop a uniform format for the reporting of the annual financial audits conducted by occupational licensing boards.

Section 1.4 would require all occupational licensing boards to operate on a fiscal year beginning July 1 and ending on June 30.

Section 1.5 would direct the State Controller to consider whether to integrate occupational licensing board financial audit reports into any new standard accounting system or accounting software acquired and utilized by the State.

Section 1.6 would require all occupational licensing boards to conduct an annual financial audit of their operations. Under current law, only those occupational licensing boards with budgets of at least \$50,000 are required to conduct such audits. Section 1.6 would also require that the audits be conducted in compliance with the Generally Accepted Government Auditing Standards developed by the United States Government Accountability Office and provided in a form as prescribed by the State Controller and limits the audit requirement to Boards with budgets greater than \$100,000.

This section would also require occupational licensing boards to include in their annual report the number of applicants who applied for initial licensure, and the number of initial licenses issued, pursuant to the fee waiver for military-trained applicants and military spouses.

Section 1.7 would provide that the State Auditor may perform an audit of an occupational licensing board upon the recommendation of the Joint Legislative Administrative Procedure Oversight Committee.

## **Part II.**

This part would consolidate the State Board of Barber Examiners and the Board of Electrolysis Examiners into a single board to be known as the "North Carolina Board of Barber and Electrolysis Examiners." There are no changes to the powers of the Board, licensure requirements, or fees unless specifically noted.

**Board Composition.** – The combined Board would consist of seven members as follows:

- Four licensed barbers.
- One electrologist who has engaged in the practice of electrolysis for at least five years.
- One physician licensed under Chapter 90 of the General Statutes, who shall be nominated by the North Carolina Medical Board.
- One public member, not licensed under this chapter or under Chapter 90 of the General Statutes.

**Fees.** – The fees are the same as under the current law with 3 exceptions:

- The fee for an initial license for electrolysis and laser, light source, and pulsed-light treatment would decrease from \$150 to \$125 – G.S. 86B-31(2).
- The fee for an examination or reexamination for electrolysis and laser, light source, and pulsed-light treatment would increase from \$125 to \$150 – G.S. 86B-31(3).
- The bill would establish a temporary permit for barbers at a fee of \$25.00.

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**Transitional Provisions.** – Sections 2.3 through 2.5 of the bill consist of various transitional provisions to address the handling of existing licenses, applications, and rules, the property and assets, and any pending litigation and disciplinary proceedings under the authority of the individual boards.

## **Part III.**

### **Sections 3.1(a) and 3.1(b): Authorize Rule Technical Changes**

Under current law, an agency can make certain types of technical changes to its rules without publishing notice of the text in the North Carolina Register or holding a public hearing, but such a change must still be submitted to the Rules Review Commission.

Section 3.1(a) would provide that these technical changes would not need to be submitted to the Rules Review Commission.

Section 3.1(b) would authorize the Codifier of Rules to make certain types of technical changes to an agency's rules. The Codifier could only do this after consulting with the agency.

### **Sections 3.2(a) and 3.2(b): Clarify Contested Case Policy**

Under current law, a person aggrieved by an agency action is not required to petition the agency for rule making or to seek or obtain a declaratory ruling before seeking judicial review.

Section 3.2(a) would provide that a person aggrieved by an agency action is not required to petition the agency for rule making or to seek or obtain a declaratory ruling before commencing a contested case.

Section 3.2(b) would make a conforming change.

### **Section 3.3: Amend Periodic Review of Rules Process**

Under the current process for the periodic review of rules, agencies must classify their rules as necessary with substantive public interest, necessary without substantive public interest, or unnecessary. Agencies must then readopt the rules that were classified as necessary with substantive public interest. Such rules are subject to notice and public comment requirements and review by the Rules Review Commission. Rules that are classified as unnecessary or necessary without substantive public interest are not subject to re Adoption.

Section 3.3 would eliminate the category of necessary without substantive public interest so that all rules would be classified as either necessary or unnecessary. Rules that are classified as necessary would be subject to re Adoption.

## **Part IV.**

This part of the PCS to Senate Bill 735 would expand the Board of Massage and Bodywork Therapy by two members. The two new members will be appointed by the General Assembly, one on the recommendation of the Speaker of the House and on the recommendation of the President Pro Tempore of the Senate, and will hold a license to operate a massage and bodywork therapy establishment.

## **Part V.**

Section 5.1(a) would add a new section, G.S. 90-270.14A, to the Psychology Practice Act. New G.S. 90-270.14A would allow a licensee to request the NC Psychology Board (Board) to place the licensee on inactive status. A licensee on inactive status would be required to pay a fee at every renewal period and would not be allowed to practice psychology without holding a current active license. A licensee on inactive status may reactivate a license by completing the application for reactivation; paying a reactivation fee; and completing other reactivation requirements which may include a criminal history record check, continuing education, fitness to practice evaluation, examination, and supervision.

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Section 5.1(b) would amend G.S. 90-270.15 pertaining to disciplinary actions; and denial, suspension and revocation of licenses to specifically allow the Board to act upon proof that a licensee has had a license or certification for any mental health profession in the State suspended or revoked, or who has been disciplined by a licensing or certification board in this State.

This section would also remove the language in the Code of Conduct that authorizes the Board to act on a psychologist failing to securely and confidentially retain the case record for three years from the date of the attainment of majority age by the patient. The bill requires a psychologist to securely and confidentially retain a complete case record for at least seven years from the date of the last provision of psychological services, except when prevented from doing so by circumstances beyond the psychologist's control.

Section 5.1(c) would amend G.S. 90-270.18(b) which authorizes the fees that may be charged by the Board for various activities. Below are the fee increases the bill would authorize.

- *Application fee* for licensed psychologists and licensed psychological associates is increased from \$100 to the cost of application as set by the vendor, if applicable, plus an additional fee not to exceed \$300. Additionally, the Board is authorized to require applicants to pay the fee directly to the vendor.
- *License renewal fee* is increased from a ceiling of \$250 to a ceiling of \$400 per biennium.
- *Late fee for license renewal* is increased from \$25 to \$75.
- *Reinstate a license fee* is being increased from a ceiling of \$100 to a ceiling of \$200.
- *Duplicate license fee* is increased from \$25 to \$75.
- *Temporary license fee* is increased from \$35 to \$50.
- Health services provider certification fee is increased from \$50 to \$100.
- A \$100 fee for each renewal period to place a *license on inactive status*, corresponding to Section 1 of the bill, is being added.
- A \$300 fee for *reactivating an inactive status license* is also being added.

Section 5.1(d) conforms to Section 5.1(a) by amending G.S. 90-270.22 pertaining to criminal history record checks. The amendments would authorize the Board to request an applicant for reactivation of a license to consent to a criminal history record check.

Section 5.2 amends G.S. 90-202.10 which authorizes the annual fee for podiatrists engaged in the practice of podiatry. The bill increases the fee from \$200 to \$350 per year.

Section 5.3 amends G.S. 90-389 pertaining to the renewal certificates for fee-based pastoral counselors and fee-based pastoral counseling associates. The bill increases the fee from \$100 to \$300 per year.

## **Part VI.**

Section 6.1 would provide that no licensing board must summarily suspend a license unless the licensing board has adopted rules governing the conduct of its hearings in accordance with the APA.

Section 6.2 would make a conforming change.

Section 6.3(a) and (b) would add several new sections to Chapter 93B as follows:

- G.S. 93B-17 would require OLBs to adopt rules for the receipt and resolution of complaints, for taking disciplinary or enforcement actions against its licensees, and for taking enforcement actions against persons not licensed by the board. This new statute would also require that any interpretation, clarification, or other delineation of the scope of practice of an OLB be adopted as a rule.

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- G.S. 93B-18 would clarify OLBs' authority to investigate unlicensed activity and to notify unlicensed person of possible violations of laws and rules. This section would also provide standardized language for notifying unlicensed persons and entities of possible violations of the law. The notification would not indicate that the OLB has made a finding of a violation, but may indicate the OLB's belief or opinion that an unlicensed activity may violate the OLB's enabling statutes, include factual information regarding legislation and court proceedings concerning the potential violation, and provide notice of the OLB's intent to pursue administrative remedies or court proceedings.
- G.S. 93B-19 would provide that the venue for injunctive relief sought by an OLB is the superior court of the county where the defendant resides or in the county where the OLB has its principal place of business.
- G.S. 93B-20 would authorize an OLB to appear in its own name in actions for injunctive relief and authorize the superior court to grant injunctions, restraining orders, or take other appropriate action even if criminal prosecution has been instituted. No OLB shall issue orders independently of the superior court unless specifically authorized to do so by law.
- G.S. 93B-21 would encourage the resolution of jurisdictional disputes among OLBs by informal procedures and would authorize the use of the administrative hearing process if informal procedures fail.
- G.S. 93B-22 would require each OLB to implement a complaint process, with the requirements specified, and implement that process no later than January 1, 2019.

Section 6.4 would clarify venue for superior court review of administrative final decisions.

Section 6.5 would provide that APO shall continue to monitor and study the effects of *North Carolina State Board of Dental Examiners v. Federal Trade Commission* and other issues related to the scope of practice jurisdiction of OLBs.

Section 6.6 would amend the membership of the Public Librarian Certification Commission by eliminating the chairman of the North Carolina Association of Library Trustees and giving the Governor an additional appointment upon nomination by the North Carolina Library Association.

## **Part VII.**

Section 7.1 requires The Joint Legislative Administrative Procedure Oversight Committee to study the issues related to obstacles to entry into licensed trades and professions.

Section 7.2 requires The Joint Legislative Administrative Procedure Oversight Committee to submit an interim report, including any legislative proposals, to the 2019 General Assembly, upon its convening, and a final report, including any legislative proposals, to the 2020 Regular Session of the 2019 General Assembly, upon its convening.

## **EFFECTIVE DATE:**

### **Part I.**

The requirement for occupational licensing boards to operate on a fiscal year beginning July 1 and ending on June 30 would become effective July 1, 2019. The remainder of the Part would become effective when it becomes law.

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## **Part II.**

Section 2.3 would be effective when the act becomes law. The remainder of Part II would be effective January 1, 2019, and apply to applications for licensure, examination, or renewal submitted on or after that date.

## **Part III.**

This Part of the act would be effective when it becomes law. The revisions to the process for the review and periodic readoption of existing rules would apply to agency rule reports submitted to the Office of Administrative Hearings on or after January 1, 2019.

## **Part IV.**

This part of the act would become effective July 1, 2018.

## **Part V.**

This part of the act would become effective October 1, 2018.

## **Part VI.**

Except as otherwise provided, the part would become effective when it becomes law and apply to licensing board actions occurring on or after that date.

## **Part VII.**

This part would become effective when it becomes law.

*Jeff Hudson, Staff Attorneys, substantially contributed to this summary.*