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## MEMORANDUM

**TO:** Committee on Legal Services

**FROM:** Jennifer Berman, Office of Legislative Legal Services

**DATE:** November 8, 2017

**SUBJECT:** Rules of the State Electrical Board, Division of Professions and Occupations, Department of Regulatory Agencies, concerning the regulation of electricians, 3 CCR 710-1 (LLS Docket No. 170284; SOS Tracking No. 2017-00135).<sup>1</sup>

### Summary of Problems Identified and Recommendations

Section 12-23-118 (4)(c)(II), C.R.S., provides that, for good cause shown, the board may extend the period of time in which a person may request a hearing after receiving a citation from the board. However, the board, in Rule 8.3.3.1, did not allow for an extension of time to request a hearing for good cause shown. **Because the State Electrical Board omitted the statutory authorization to allow an extension of time for good cause shown, we recommend that Rule 8.3.3.1 of the rules of the board concerning the regulation of electricians not be extended.**

Section 12-23-106 (4)(d)(II), C.R.S., prohibits the Department of Regulatory Agencies from renewing or reinstating a license unless an applicant has completed 24 hours of

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<sup>1</sup> Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2018, unless the General Assembly acts by bill to postpone such expiration.

continuing education. The statute does not provide any exemptions from the continuing education requirement, but the board's Rules 11.3.7 and 11.3.7.2 authorize the board to grant an applicant an exemption from the continuing education requirement for good cause shown. **Because Rules 11.3.7 and 11.3.7.2 exceed the board's statutory authority, we recommend that Rules 11.3.7 and 11.3.7.2 of the rules of the State Electrical Board concerning the regulation of electricians not be extended.**

Section 12-23-118 (1)(c), C.R.S., authorizes the board to take disciplinary action against a licensee or registrant for failure or refusal to remove, within a reasonable time, a cause for disapproval of an electrical installation. The statute states that a reasonable time includes time for appeal to and a hearing before the board, but the board's Rule 7.2.5.9 defines "reasonable time" to mean 30 days. The 30-day limitation set in rule conflicts with the statute's allowance for time to appeal to the board and for the board to hold a hearing on the matter because, under the Administrative Procedure Act, article 4 of title 24, C.R.S., 30 days does not necessarily afford sufficient time for such actions. **Because Rule 7.2.5.9 conflicts with the statute, we recommend that Rule 7.2.5.9 of the rules of the State Electrical Board concerning the regulation of electricians not be extended.**

Section 24-34-102 (8)(d)(II), C.R.S., provides that a person with a license that has been expired for more than two years may demonstrate competency to have his or her license reinstated in one of a number of ways listed in the statute. Rule 11.2 provides that a person with a license that has been expired for more than three years may demonstrate competency to have his or her license reinstated in the same ways listed in statute. Pursuant to statute, a person whose license has been expired for more than two years, but less than three years, may demonstrate competency in ways other than the completion of continuing education requirements, but Rule 11.2 allows such a person to demonstrate competency only through completion of continuing education requirements. **Because Rule 11.2 conflicts with the statute, we recommend that Rule 11.2 of the rules of the State Electrical Board concerning the regulation of electricians not be extended.**

## Analysis

### 1. **The State Electrical Board omitted from its rules the statutory authorization to allow a licensee an extension of time to request a hearing for good cause shown.**

Pursuant to section 12-23-104, C.R.S., the board has broad authority to promulgate rules concerning the regulation of electricians. The provision states in pertinent part:

**12-23-104. Board powers and duties – rules.** (2) In addition to all other powers and duties conferred or imposed upon the board by this article, the board is authorized to:

(a) Adopt, and from time to time revise, such rules and regulations not inconsistent with the law as may be necessary to enable it to carry into effect the provisions of this article.

The authority to discipline licensees is included in the board's broad regulatory authority by virtue of section 12-23-118, C.R.S., which grants the board the authority to deny, suspend, revoke, or refuse to renew any license or place on probation or issue a citation to any licensee. That broad authority is limited by due process considerations, including the licensee's right to an opportunity to be heard. As part of that due process right, section 12-23-118 (4)(c)(II), C.R.S., provides:

**12-23-118. Violations – citations – settlement agreements – hearings – fines.** (4)(c)(II) For good cause the board may extend the period of time in which a person who has been cited may request a hearing.

The board, in Rule 8.3.3.1, addresses the time in which a citation issued to a licensee becomes final. The rule states:

#### **8.3.3 Fines**

8.3.3.1 If one of the following actions has not been taken by the citation recipient within ten (10) working days following the service of the citation, the citation shall become a final Board action:

- A. Full payment of the fine;
- B. Written request for negotiation of a stipulated settlement agreement; or
- C. Written request for a formal administrative hearing.

Rule 8.3.3.1 contains no mention of extending the time for an administrative hearing for good cause shown. Rather, the rule rigidly requires a licensee to make a request for a formal administrative hearing within ten working days following service of a citation to exercise his or her right to an opportunity to be heard. The statute, however, expressly grants licensees the opportunity for an extension of time to request a hearing

for good cause shown. Because the rule omits the statute’s provision allowing a licensee an extension of time to request an administrative hearing for good cause shown, Rule 8.3.3.1 should not be extended.

## **2. The State Electrical Board exceeded its authority by creating an exemption from continuing education requirements for good cause shown.**

Section 12-23-106, C.R.S., concerns license requirements including a continuing education requirement for license renewal. The statute does not provide any exemptions from the continuing education requirement. In pertinent part, section 12-23-106, C.R.S., provides:

**12-23-106. License requirements – rules – repeal.** (4)(d)(II) On or after January 1, 2018, the department shall not renew or reinstate a license unless the applicant has completed twenty-four hours of continuing education since the date of issuance of the applicant’s initial license or, if the applicant’s license was renewed or reinstated, the most recent renewal or reinstatement.<sup>2</sup>

The board, in Rule 11.3.7, created a good cause exemption from the continuing education requirement that is not authorized by the statute. The rule states:

### **11.3 Continuing Education Requirements.**

**11.3.7 Exemptions.** The Board may grant an exemption from continuing education requirements set out in Board Rule 11.3. It is within the sole discretion of the Board to decide whether good cause has been shown in order to grant an exemption.

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11.3.7.2 Licensees seeking exemption from continuing education requirements shall provide evidence and written explanation citing in as much detail as possible the inability of the licensee to comply with the continuing education requirements for the renewal period and why the license should remain in active status.<sup>3</sup>

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<sup>2</sup> S.B. 17-247, enacted in 2017, amended section 12-23-106 (4)(d)(II), C.R.S., by adding the following language in front of the paragraph cited above, “[e]xcept as otherwise provided in subsection (4)(d)(II)(B) of this section” and the bill added the following sub-subparagraph (4)(d)(II)(B): “Subsection (4)(d)(II)(A) of this section does not apply to the first renewal or reinstatement of a license for which, as a condition of issuance, the applicant successfully completed a licensing examination pursuant to subsection (4)(a) of this section.”. S.B. 17-247 will become effective on January 1, 2019.

<sup>3</sup> Rule 11.3.7.1 concerns an exemption from continuing education requirement for licensees who have been called to federally funded active duty for more than 120 days for the three-year renewal period that falls within the period of the licensee’s military service or within six months after the licensee’s completion of the military service. The Office of Legislative Legal Services does not challenge this

Here, the board has exceeded its statutory authority by creating an exemption from the continued education requirement for good cause shown. This exemption is not authorized by section 12-23-106 (4)(d)(II), C.R.S., which strictly requires each renewal or reinstatement applicant to have completed 24 hours of continuing education before application for renewal or reinstatement. Because the rule exceeds the board's statutory authority, Rules 11.3.7 and 11.3.7.2 should not be extended.

**3. The State Electrical Board promulgated a rule that conflicts with statute by providing that a “reasonable time” to remove a cause of disapproval of an electrical installation requires removal within thirty days.**

With respect to the board's authority to discipline licensees, section 12-23-118 (1)(c), C.R.S., authorizes the board to take disciplinary action against a licensee or registrant for failure or refusal to remove, within a reasonable time, a cause for disapproval of an electrical installation. The statute provides:

**12-23-118. Violations – citations – settlement agreements – hearings – fines.** (1) The board may deny, suspend, revoke, refuse to renew, or issue a letter of admonition in regard to any license or registration issued or applied for under the provisions of this article, may place a licensee or registrant on probation, or may issue a citation to a licensee, registrant, or applicant for licensure for any of the following reasons:

(c) Failure or refusal to remove within a reasonable time the cause of the disapproval of any electrical installation as reported on the notice of disapproval; but such reasonable time shall include time for appeal to and a hearing before the board;

The board promulgated Rule 8.4 establishing a fine schedule for the various types of offenses that a licensee might commit. The schedule includes a fine based on an inspection of electrical work for “[f]ailure to remove a cause for disapproval of any electrical installation within a reasonable time.” Additionally, the board promulgated Rule 7.2.5.9 related to inspections, which rule states:

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exemption because the exemption is expressly authorized by section 12-70-102, C.R.S., which requires a board to exempt licensed military personnel who have been called to federally funded active duty from continuing education requirements for a license renewal cycle that falls within the period of military service or within six months following the licensee's completion of the military service.

### **7.2.5 Reinspection Fees.**

7.2.5.9 As used in § 12-23-118 (1)(c), C.R.S., the term “reasonable time” shall mean thirty (30) calendar days.

The board, in defining “reasonable time” for purposes of removing a cause for disapproval of an electrical installation, to mean 30 days, promulgated a rule that conflicts with the statutory requirement that “such reasonable time shall include time for appeal to and a hearing before the board.” The board’s rigid interpretation of “reasonable time” in Rule 7.2.5.9 to mean 30 days conflicts with the statute’s allowance for time to appeal to and obtain a hearing before the board because, under section 24-4-105 (2)(b), C.R.S., of the Administrative Procedure Act, a person entitled to an opportunity for a hearing on an agency action has 30 days to request a hearing. Because Rule 7.2.5.9 conflicts with statute, Rule 7.2.5.9 should not be extended.

- 4. Rule 11.2, which allows only a person whose license has been expired for more than three years to demonstrate competency for licensure in one of a number of ways, conflicts with a statute that allows for the same demonstration of competency for a person whose license has been expired for more than two years.**

Section 24-34-102 (8)(d)(II), C.R.S., concerns license renewal or reinstatement and provides in pertinent part:

**24-34-102. Division of professions and occupations – creation – duties of division and department heads – license renewal, reinstatement, and endorsement – definitions – rules – review of functions.** (8) (d) Reinstatement. ... An expired license, registration, or certificate of any [ ] person [other than any active military personnel who is currently on active duty] may be reinstated at the discretion and pursuant to the authority of the director, licensing board, or commission pursuant to the following requirements:

(II) If the license, registration, or certificate has **expired for more than two years**, the person with the expired license, registration, or certificate shall ... satisfactorily demonstrate to the director, licensing board, or commission that the person is competent to practice within his or her profession. Pursuant to the authority of the director, the licensing board or commission, as it deems appropriate, shall accept one or more of the following as a demonstration of competency to practice:

(A) A license, registration, or certificate from another state that is in good standing for the applicant where the applicant demonstrates active practice;

(B) Practice for a specified time under a restricted license, registration, or certificate;

(C) Successful completion of prescribed remedial courses ordered by the director, licensing board, or commission that are within the authority of the director, licensing board, or commission to require;

(D) Successful completion of any continuing education requirements prescribed by the director, licensing board, or commission that are within the authority of the director, licensing board, or commission to require;

(E) Passage of an examination for licensure, registration, or certification as approved by the director, licensing board, or commission that the director, licensing board, or commission has the authority to acquire; or

(F) Other professional standards or measures of continued competency as determined by the director, licensing board, or commission. (**Emphasis added**)

Rule 11.2 generally mirrors the language of section 24-34-102, C.R.S., concerning ways in which a person with an expired license may demonstrate competency to practice; however, the rule treats a person whose license has been expired for more than two years, but less than three years, differently from a person whose license has been expired for more than three years. Rule 11.2 provides in pertinent part:

#### **11.0 RENEWAL AND REINSTATEMENT**

**11.2 Reinstatement.** An expired license may be reinstated by submitting a reinstatement application, paying the current reinstatement fee, and meeting the appropriate requirements below.

11.2. 1 Expired for Less Than Three (3) Years. To reinstate a license that has been **expired for less than three (3) years** the applicant must provide evidence of completion, since applicant's most recent licensing event (original license, renewal or reinstatement) preceding the application for reinstatement, of 24 hours of continuing education, as defined in Board Rule 11.3.

11.2.2 Expired for More than Three (3) Years. If the license has been **expired for more than three (3) years**, pursuant to § 24-34-102 (8)(d)(II), C.R.S., the applicant must demonstrate competency to practice by any of the following:

- A. Satisfactorily pass the state electrical examination;
- B. Provide verification of an active license with a state where a reciprocal agreement for an equivalent license exists;
- C. Provide verification of active licensure in a non-reciprocal state as follows:
  - 1. Verify an active residential wireman's license, journeyman electrician's license, or master electrician's license in [a] non-reciprocal state, respective to the license being reinstated; and

2. Evidence of completing 24 continuing education hours pursuant to Board Rule 11.3 since applicants most recent licensing event (original license, renewal or reinstatement) preceding the application for reinstatement.

D. By other means approved by the Board. (**Emphasis added**)

Pursuant to Rule 11.2, a person whose license has been expired for more than two years, but less than three years, can demonstrate competency for reinstatement of his or her license only by demonstrating completion of 24 hours of continuing education. Section 24-34-102 (8)(d)(II), C.R.S., however, allows a person whose license has been expired for more than two years, but less than three years, to demonstrate competency in other ways. Therefore, Rule 11.2 conflicts with statute because it deprives a person whose license has been expired between two and three years the ability to demonstrate competency in ways other than completion of continuing education requirements.<sup>4</sup> Because Rule 11.2 conflicts with statute, Rule 11.2 should not be extended.

## **Recommendations**

We therefore recommend that Rules 8.3.3.1, 11.3.7, 11.3.7.2, 7.2.5.9, and 11.2 of the rules of the board concerning the regulation of electricians not be extended because: Rule 8.3.3.1 omits a necessary statutory authorization; Rules 11.3.7 and 11.3.7.2 exceed the board's statutory authority; and Rules 7.2.5.9 and 11.2 conflict with statute.

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<sup>4</sup> Moreover, Rule 11.2 does not account for a person whose license has been expired for exactly three years; it is unclear whether such person would need to comply with Rule 11.2.1 or Rule 11.2.2.