

## RRC STAFF OPINION

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: North Carolina Board of Elections

RULE CITATION: 08 NCAC 10B .0101

RECOMMENDED ACTION:

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

COMMENT:

The staff recommends objection to the Temporary Rule for the reasons herein stated.

This rule defines the tasks and duties of "precinct officials", which are defined in the Rule as the Precinct Chief Judge, the precinct judge, assistants, emergency election-day assistants, and ballot counters.

In subparagraph (h)(8), the agency has added new language prohibiting precinct officials from "[f]ailing to abide by the election rules, laws, and Numbered Memos, which are posted on the State Board of Elections' website, applicable to precinct officials." Review of the State Board of Elections' website indicates that Numbered Memos are issued by the executive director and "provide guidance and updates about elections administration to the county boards of elections. Memos may concern updates to laws, preparations for upcoming elections, and more." Thus, Numbered Memos may best be characterized as "nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule[.]" G.S. 150B-19.1(a)(1) states, "An agency may adopt only **rules (emphasis added)** that are expressly authorized by federal and State law and that are necessary to serve the public interest." Because the Rule does not meet the definition of a "Rule" pursuant to G.S.150B-2(8a), the agency lacks statutory authority to adopt it. Moreover, adoption of this Rule is not in accordance with Article 2A of G.S.150B as only "Rules" can be adopted. Lastly, as the Rule does not meet the statutory definition of a rule, it cannot be "reasonably necessary" pursuant to G.S. 150B-21.9(a)(3) as only "Rules" can be reasonably necessary.

Further, by adopting the temporary rule requiring the precinct officials to abide by the Numbered Memos, the agency is seeking to implement or enforce guidelines that meet the definition of a rule with adopting them pursuant to Article 2A of Chapter 150B. See G.S. 150B-18.

William W. Peaslee  
Commission Counsel

As such, staff recommends that RRC object to this Rule on the grounds that the agency lacks statutory authority to adopt it pursuant to G.S. 150B-21.9(a)(1), that the rule is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2), that the Rule is not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and that the Rule was not adopted in accordance with Part 2 of Article 2A of the APA, pursuant to G.S. 150B-21.9(a)(4).

Assuming arguendo that the Rule meets the definition of a Rule pursuant to G.S. 150B-2(8a), staff further recommends objection on the basis that the Rule is otherwise not reasonably necessary and is unclear and ambiguous.

In defining the role of precinct officials, the agency frequently re-states provisions of Chapter 163 of the General Statutes and other portions of the Administrative Code. Among other things, the Rule re-states statutory language—sometimes verbatim— relating to attendance at instructional meetings, appointing replacement officials, opening the polls, administration of and taking of oaths, ballot counting, maintenance of good order at the polls, imposition of criminal penalties, reporting returns, certifying the integrity of the vote, and returning ballots and equipment to the county board of elections.

In response to staff's requests for changes related to existing language, the agency has asserted that RRC may not review portions of the Rule that the agency has not sought to amend through temporary rulemaking. This is contrary to the plain language of the APA, which places no such limits on the Commission's authority. G.S. 150B-21.1 states that an agency that engages in temporary rulemaking must "submit **the rule** and the agency's written statement of its findings of need for the rule to the Rules Review Commission." Thereafter, the Commission "shall review ... **the rule**" to determine whether "**the rule** meets the standards in G.S. 150B-21.9," which similarly directs the Commission to review "**a rule**." While the agency may argue that the scope of the Commission's review of a temporary rule is confined by G.S. 150B-21.8(c), it is staff's opinion that this permissive language related to permanent rulemaking does not allow the agency to limit the scope of the Commission's review of a temporary rule.

The agency asserts that "[t]he public has had no notice that any change to [existing language] was being considered in this temporary amendment process." It is staff's opinion that this argument is unpersuasive, particularly where the agency has complied with the notice and hearing requirements of G.S. 150B-21.1(a3), published the text of the entire rule on both OAH's website and its own, and presumably received both written and oral comment on the rule as required by G.S. 150B-21.1(a3)(3) and (4). As made clear by the text of G.S. 150B-21.1, which does not differentiate between "the rule" and an amendment to the rule, the agency submitted the entire rule for comment, hearing, and review when it initiated temporary rulemaking.

As such, it is staff's opinion that to the extent the existing language of the Rule repeats statutory language, RRC should object to the Rule as not reasonably necessary pursuant to G.S. 150B-21.9(a)(3).

Additionally, a portion of the existing language of the Rule is impermissibly ambiguous and unclear. Subparagraph (g)(12) requires that all precinct officials "ensure that registration records can only be accessed by precinct officials[.]" The agency has refused to respond to staff's request to define the term "registration records," and it appears that the Rule, as written, requires precinct officials to protect information that is otherwise publicly available, as certain voter registration information, such as party affiliation, voter history, and a voter's precinct, may be accessed on the State Board of Elections' website.

William W. Peaslee  
Commission Counsel

As such, it is staff's opinion that to the extent the existing language of the Rule is ambiguous and unclear, RRC should object to the Rule pursuant to G.S. 150B-21.9(a)(2).

1 **INTRODUCTORY STATEMENT**

2 The following temporary rule amendment to 08 NCAC 10B .0101 was adopted by the State Board of Elections on  
3 August 16, 2022 with changes. Notice of the proposed temporary amendment was published on the Office of  
4 Administrative Hearings website on July 21, 2022, in accordance with G.S. 150B-21.1(a3).

5  
6 **08 NCAC 10B .0101 TASKS AND DUTIES OF PRECINCT OFFICIALS AT VOTING PLACES**

7 (a) For purposes of this Chapter, unless otherwise noted, the term "precinct officials" shall mean chief judge, precinct  
8 judge, assistants, emergency election-day assistants, and ballot counters.

9 (b) Tasks of Precinct Chief Judge - Precinct Chief Judges, in accordance with election statutes, within the Rules of  
10 the State Board of Elections, and under the supervision of the county board of elections, shall have the following tasks  
11 to perform as to each primary or election:

- 12 (1) attend an instructional meeting presented by the county board of elections prior to each primary or  
13 election as required by G.S. 163-46;
- 14 (2) upon learning that any parent, spouse, child, or sibling of the Precinct Chief Judge has filed for  
15 elective office, inform the county board of elections so that the county board of elections may  
16 disqualify the Precinct Chief Judge under G.S. 163-41.1(b) for the specific primary or election  
17 involved;
- 18 (3) upon learning that any parent, parent in-law, spouse, child, child in-law, sibling, or sibling in-law of  
19 the Precinct Chief Judge has been appointed to serve in the same precinct, inform the county board  
20 of elections so that the county board of elections may appoint an emergency election-day assistant;
- 21 (4) receive and review the signed list of the appointed observers as provided in G.S. 163-45;
- 22 (5) receive and post a sample ballot in the voting place as provided in G.S. 163-165.2;
- 23 (6) notify the county board of elections of any sickness, emergency, or other circumstances that will or  
24 might prevent the person from performing as precinct chief judge on a primary or election day;
- 25 (7) receive, prior to the day of the primary or election, from the county board of elections any security  
26 keys or codes as to any voting systems or units that are to be operated at the precinct;
- 27 (8) prior to the opening of the polls, administer to any precinct official, not previously sworn, the oath  
28 of office as set out in G.S. 163-41;
- 29 (9) prior to the opening of the polls, ensure the technology and connectivity requirements of 08 NCAC  
30 10B .0109(b) are met;
- 31 (10) if at the time of opening the voting place, a judge has not appeared, appoint another person to act as  
32 precinct judge until the chair of the county board of elections appoints a replacement as set out in  
33 G.S. 163-41;
- 34 (11) be present at the voting place at 6:00 a.m., and ensure the opening of the polls at 6:30 a.m. as  
35 mandated by G.S. ~~163-166~~ 163-166.01 and 08 NCAC 10B .0102;
- 36 (12) respond to any voter's request to have assistance to vote as set out in the provisions of G.S. 163-  
37 166.8(b);

- 1 (13) ensure the continued arrangement of the voting enclosure as required in G.S. 163-166.2;
- 2 (14) supervise the closing of the voting place at 7:30 p.m. in compliance with procedures set out in G.S.
- 3 163-166.10 and 08 NCAC 10B .0105;
- 4 (15) handle challenges made on election or primary day in accordance with G.S. 163-87, and conduct
- 5 the hearing upon said challenge in accordance with G.S. 163-88;
- 6 (16) be responsible, as mandated by G.S. 163-182.3, for adherence to all rules pertaining to counting,
- 7 reporting, and transmitting official ballots under 08 NCAC 10B .0105 and .0106;
- 8 (17) ensure the maintenance of and appearance of efficient, impartial, and honest election administration
- 9 at the precinct as required by G.S. 163-166.5(3);
- 10 (18) monitor the grounds around the voting place to ensure compliance with the limitation on activity in
- 11 the buffer zone under G.S. 163-166.4(a);
- 12 (19) ensure peace and good order at the voting place as required by G.S. 163-48. Examples of peace and
- 13 good order include:
- 14 (A) keeping open and unobstructed the place at which voters or persons seeking to register or
- 15 vote have access to the place of registration and voting;
- 16 (B) preventing and stopping attempts to obstruct, intimidate, or interfere with any person in
- 17 registering or voting;
- 18 (C) protecting challengers and witnesses against molestation and violence in the performance
- 19 of their duties; and
- 20 (D) ejecting from the place of registration or voting any challenger or witness for violation of
- 21 any provisions of the election laws or rules.
- 22 (20) ensure that voters are able to cast their votes in dignity, good order, impartiality, convenience, and
- 23 privacy as required in G.S. 163-166.7(c) and 08 NCAC 10B .0101;
- 24 (21) if needed, check or assist in checking the registration of voters at the voting place;
- 25 (22) if ballot counters are authorized by the county board of elections under G.S. 163-43, receive the list
- 26 of counters from the county board, or appoint counters if authorized to do so by the county board.
- 27 Prior to a ballot counter performing duties and tasks, administer the oath required by G.S. 163-43.
- 28 Report to the county board of elections the names and addresses of any ballot counters to the county
- 29 board at the county canvass as set out in G.S. 163-43.
- 30 (23) perform the required legal duties of chief precinct judge/judge or face criminal consequences as set
- 31 out in G.S. 163-274 (1); ~~and~~
- 32 (24) not accept money from candidates, commit fraud, false statements, or false writings in performing
- 33 election duties, or face the criminal consequences set out in G.S. ~~163-275(3),(8),(9) and (12).~~ 163-
- 34 275(3), (8), (9), (12), (14), and (18); and
- 35 (25) prior to performing duties and tasks after being duly appointed, take the oath required by G.S. 163-
- 36 41.

1 Where the precinct chief judge does not have the exclusive statutory mandate to perform a task or duty, a precinct  
2 judge may be designated to perform such task or duty.

3 (c) Tasks of Precinct Judge - Precinct Judges, in accordance with election statutes, within rules of the State Board of  
4 Elections, and under the supervision of the county board of elections, shall have the following tasks to perform as to  
5 each primary or election:

- 6 (1) attend an instructional meeting presented by the county board of elections prior to each primary or  
7 election as required by G.S. 163-46;
- 8 (2) upon learning that any parent, spouse, child, or sibling of the Precinct Judge has filed for elective  
9 office, inform the county board of elections so that the county board of elections may disqualify the  
10 Precinct Judge under G.S. 163-41.1(b) for the specific primary or election involved;
- 11 (3) upon learning that any parent, parent in-law, spouse, child, child in-law, sibling, sibling in-law or  
12 first cousin of the Precinct Judge has been appointed to serve in the same precinct, inform the county  
13 board of elections so that the county board of elections may appoint an emergency election-day  
14 assistant;
- 15 (4) if the chief judge fails to appear at the opening of poll, appoint, with the other precinct judge, a  
16 person to act as chief judge until the chairman of the county board appoints a new chief judge as per  
17 G.S. 163-41;
- 18 (5) notify the county board of elections of any sickness, emergency, or other circumstances that will or  
19 might prevent the person from performing as precinct chief judge on a primary or election day;
- 20 (6) be present at the voting place at 6:00 a.m., and ensure the prompt opening of the polls at 6:30 a.m.  
21 as mandated by G.S. 163- ~~166~~ 166.01 and any rules promulgated under 08 NCAC 10B .0102;
- 22 (7) perform the required legal duties of chief precinct judge/judge or face criminal consequences as set  
23 out in G.S. 163-274(1);
- 24 (8) not accept money from candidates, commit fraud, false statements, or false writings in performing  
25 election duties, or face the criminal consequences set out in G.S. ~~163-275(3)(8)(9) and (12)~~. 163-  
26 275(3), (8), (9), (12), (14), and (18);
- 27 (9) aid and cooperate with the precinct chief judge, as requested or needed, as to those duties noted in  
28 Subparagraphs (12) through (21) of Paragraph (b) of this ~~Rule~~. Rule; and
- 29 (10) prior to performing duties and tasks after being duly appointed, take the oath required by G.S. 163-  
30 41.

31 A precinct judge may be designated to perform tasks and duties of a chief precinct judge, where those duties are not  
32 statutorily made exclusive to the chief precinct judge.

33 (d) Tasks of Election Assistants - Election Assistants, in accordance with election statutes, within the rules of the  
34 State Board of Elections, and under the supervision of the county board of elections, shall have the following tasks to  
35 perform as to each primary or election:

- 36 (1) check the registration of voters at the voting place as per G.S. 163-166.7(a);
- 37 (2) guide voters to voting units or provide voters ballots as per G.S. 163-166.7(b);

- 1 (3) prior to performing duties and tasks after being duly appointed, take the oath required by G.S. 163-  
2 41;
- 3 (4) notify the county board of elections of any sickness, emergency, or other circumstances that will or  
4 might prevent the person from performing as an election assistant on a primary or election day;
- 5 (5) upon learning that any parent, spouse, child, or sibling of the Election Assistant has filed for elective  
6 office, inform the county board of elections so that the county board of elections may disqualify the  
7 Election Assistant under G.S. 163-41.1(b) for the specific primary or election involved;
- 8 (6) upon learning that any parent, parent in-law, spouse, child, child in-law, sibling, sibling in-law or  
9 first cousin of the Election Assistant has been appointed to serve in the same precinct, inform the  
10 county board of elections so that the county board of elections may appoint an emergency election-  
11 day assistant; and
- 12 (7) aid the chief judge and other precinct judges in the performances of their tasks and duties as needed  
13 or directed.

14 (e) Tasks of Emergency Election – Day Assistant - Emergency Election-Day Assistants, in accordance with election  
15 statutes, within the rules of the State Board of Elections, and under the supervision of the county board of elections,  
16 shall have the following tasks to perform as to each primary or election:

- 17 (1) be prepared prior to and on the day of a primary or election to serve, on notice given by the county  
18 board of elections, to travel to and work at any voting place within the county;
- 19 (2) perform all the tasks and duties of an election assistant as set out in Paragraph (d) of this Rule;
- 20 (3) notify the county board of elections of any sickness, emergency, or other circumstances that will or  
21 might prevent the person from performing as an election assistant on a primary or election day;
- 22 (4) upon learning that any parent, spouse, child, or sibling of the emergency election-day assistant has  
23 filed for elective office, to inform the county board of elections so that the county board of elections  
24 may disqualify the emergency election-day assistant under G.S. 163-41.1(b) for the specific primary  
25 or election involved; and
- 26 (5) upon learning that any parent, parent in-law, spouse, child, child in-law, sibling, sibling in-law or  
27 first cousin of the emergency election-day assistant has been appointed to serve in the same precinct,  
28 inform the county board of elections.

29 (f) Tasks of Ballot Counters - All ballot counters, in accordance with election statutes, with the rules of the State  
30 Board of Elections and under supervision of the county board of elections, shall perform all the following:

- 31 (1) after appointment, appear at the poll at close of the polls and to be prepared to count ballots under  
32 the direction and control of the chief and other precinct judges;
- 33 (2) prior to a ballot counter performing duties and tasks, take the oath required by G.S. 163-43;
- 34 (3) upon learning that any parent, spouse, child, or sibling of the ballot counter has filed for elective  
35 office, inform the county board of elections so that the county board of elections may disqualify the  
36 ballot counter under G.S. 163-41.1(b) for the specific primary or election involved; and

- 1 (4) upon learning that any parent, parent in-law, spouse, child, child in-law, sibling, sibling in-law or  
2 first cousin of the ballot counter has been appointed to serve in the same precinct, inform the county  
3 board of elections.

4 There is no requirement to have ballot counters appointed or used by a county board of elections. The county board  
5 of elections of any county may authorize the use of precinct ballot counters to aid the chief judges and judges of  
6 election in the counting of ballots in any precinct or precincts within the county. The county board of elections shall  
7 appoint the ballot counters it authorizes for each precinct or, in its discretion, the board may delegate authority to make  
8 such appointments to the precinct chief judge, specifying the number of ballot counters to be appointed for each  
9 precinct.

10 (g) General duties of all Precinct Officials - All precinct officials, in accordance with election statutes, with the rules  
11 of the State Board of Elections and under the supervision of the county board of elections, shall perform all of the  
12 following:

- 13 (1) count votes when votes are required to be counted at the voting place, G.S. 163-182.2;  
14 (2) make an unofficial report of returns to the county board of elections, G.S. 163-182.2;  
15 (3) certify the integrity of the vote and the security of the official ballots at the voting place, G.S. 163-  
16 182.2;  
17 (4) return official ballots and equipment to the county board of elections, G.S. 163-182.2;  
18 (5) ensure that the voting system cannot be tampered with throughout the period voting is being  
19 conducted;  
20 (6) ensure that only properly voted official ballots are introduced into the voting system;  
21 (7) ensure that, except as provided by G.S. 163-166.9, no official ballots leave the voting enclosure  
22 during the time voting is being conducted there;  
23 (8) ensure that all improperly voted official ballots are returned to the precinct officials and marked as  
24 spoiled;  
25 (9) ensure that voters leave the voting place after voting;  
26 (10) ensure that voters not eligible to vote in the precinct but who seek to vote there are given assistance  
27 in voting a provisional official ballot or guidance to another voting place where they are eligible to  
28 vote;  
29 (11) ensure that information gleaned through the voting process that would be helpful to the accurate  
30 maintenance of the voter registration records, including any updates to a voter's voter registration,  
31 is recorded and delivered to the county board of elections;  
32 (12) ensure that registration records can only be accessed by precinct officials;  
33 (13) ensure that party observers are given access as provided by G.S. 163-45 to current information about  
34 which voters have voted;  
35 (14) aid any voter, as needed, in curbside voting as provided for in G.S. 163-166.9;



- 1 (15) provide Spanish ballot instructions when such instructions are required by Section 203 of the Voting  
2 Rights Act of 1965, and direct all language needs that can not be handled at the precinct to the  
3 county board office;
- 4 (16) register and help, at the voting place, those persons eligible to register and vote on election day as  
5 allowed by G.S. 163-258.28 and G.S. 163-82.6(d);
- 6 (17) report to the county board of elections, any physical or mental ailment, impairment, or deterioration  
7 that may adversely affect the performance of an election related task or duty. Report any such  
8 conditions known in any other precinct officials to the county board;
- 9 (18) report any violation of election laws or regulations to the chief judge, or report such violation to the  
10 county board of elections if the chief precinct judge is involved in the violation;
- 11 (19) provide any person who requests it any information on how to contact the county director of  
12 elections, the county board of elections, or the office of the State Board of Elections; ~~and~~
- 13 (20) work and stay at the voting place, at all times during the voting day, until closure. By prior agreement  
14 with the county board of elections and pursuant to G.S. 163-42, election assistants and emergency  
15 election-day assistants may work less than the entire voting ~~day.~~ day; and
- 16 (21) Upon learning that any of the following statements are true, inform the county board of elections so  
17 that the county board of elections may disqualify the precinct official under G.S. 163-41:
  - 18 (A) The precinct official holds any elective office under the government of the United States,  
19 or of the State of North Carolina or any political subdivision thereof;
  - 20 (B) The precinct official is a candidate for nomination or election; or
  - 21 (C) The precinct official holds any office in a state, congressional district, county, or precinct  
22 political party or political organization, or is a manager or treasurer for any candidate or  
23 political party, provided however that the position of delegate to a political party  
24 convention shall not be considered an office for the purpose of this subsection.

25 (h) Prohibited acts by precinct officials. Prohibited acts by precinct officials include:

- 26 (1) [Tampering with voting equipment; ]Altering, adjusting or manipulating voting equipment without  
27 the explicit instructions of the Chief Judge or the election official designated to act in the absence  
28 of the Chief Judge;
- 29 (2) Permitting unauthorized access to voting facilities or equipment;
- 30 (3) Intentionally interfering with, delaying, or preventing a voter from lawfully casting [their ballot; ]a  
31 ballot unless done pursuant to a voter challenge under Article 8 of Chapter 163;
- 32 (4) Making statements about personal [political-]views about candidates, political issues pertaining to  
33 the contests on the ballot, or referenda while on [duty; ]duty as a precinct official; however,  
34 providing technical information about voting, including how to mark a ballot, is permitted;
- 35 (5) Failing to attend trainings required by the county board of elections pursuant to G.S. 163-82.24, 08  
36 NCAC 04 .0305, or Paragraph (b)(1) or (c)(1) of this Rule;

- 1 (6) Failing to follow lawful instructions of the county board, county board staff, chief judge, judges, or  
2 one-stop site ~~manager;~~ manager, as applicable;
- 3 (7) ~~Intentionally providing inaccurate~~ Providing false information about the administration of the  
4 ~~election;~~ election or the voting process, contrary to training or instruction provided by the county  
5 board of elections, chief judge, judges, or one-stop site manager, as applicable, or providing false  
6 information about the occurrence of an incident at the voting place;
- 7 (8) Failing to abide by the election rules, laws, and ~~policies;~~ Numbered Memos, which are posted on  
8 the State Board of Elections' website, applicable to precinct officials;
- 9 (9) ~~Intentionally;~~ Knowingly failing to report incidents occurring at the voting place to the chief judge,  
10 one-stop site manager, or county board of elections. ~~elections, as instructed;~~ For the purpose of  
11 this Subparagraph, "incident" includes the occurrence of an irregularity such as a legal violation,  
12 accident, emergency, equipment malfunction, or other situation that is documented on an Incident  
13 Report form;
- 14 (10) Providing confidential voter information, vote tallies before the close of the polls, or ~~confidential~~  
15 information on security features of voting equipment or voting facilities to non-elections officials;  
16 "Confidential voter information" includes a voter's date of birth, the identity of the public agency  
17 where they registered to vote, email address, full or partial Social Security number, driver's license  
18 number, an image or copy of the voter's signature, and retrievable ballot identification number  
19 assigned for official use by the county board (e.g., CIV, OS, MIL, or OVR numbers);
- 20 (11) Discriminating against voters on the basis of race, color, ethnicity, religion, sex, national origin, age,  
21 disability, or political affiliation (except for the purposes of lawfully determining eligibility to  
22 participate in partisan primaries); and
- 23 (12) ~~Engage in any political activities;~~ Requesting or seeking to persuade or induce any voter to vote  
24 for or against any particular candidate or proposition between the start of one-stop early voting and  
25 11:59 p.m. on Election Day during the election in which a precinct official is serving.

26 For the purpose of this Paragraph, "precinct officials" includes one-stop workers.

27  
28 *History Note: Authority G.S. 163-22; 163-41; 163-42; 163-47; 163-166.6; 163-166.7; 163-273; 163-274;*  
29 *Temporary Adoption Eff. April 15, 2002;*  
30 *Eff. August 1, 2004;*  
31 *Readopted Eff. September 1, 2019; Temporary Amendment Eff.*