

## **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 20 .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.*

*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.*

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### Reasonable Necessity

Paragraphs (a), (b), and (c) are restatements of G.S. 163-45. In response to the Request for Changes inquiry about necessity pursuant to G.S. 150B-21.9(a)(3), the Board has stated that the temporary rule was reasonably necessary due to lay people's misunderstanding of the statute and the Board was attempting to put the substantive law "in a more lay-friendly structure."

Notwithstanding any lay misunderstanding of the statute, a "rule" is any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly, or that describes the procedure or practice requirements of the agency.

Here there is no substantive difference between the Rule and the statute, and the Board has made no averment that the language makes any addition to the substantive law established by the statute. Explanations of the law or restatements in "lay" terms should be placed in manuals, guides, or on a website. Pursuant to G.S. 150B-2(8a)(c), they do not meet the definition of a rule, and their adoption as such is in violation of G.S. 150B-21.9(4).

Lastly, Subparagraphs (d) (1), (2), (4), (5), and (6) prohibit conduct which is already prohibited by statute.

Accordingly, staff recommends objection as the language in Paragraphs (a), (b), (c) and in Subparagraphs (d) (1), (2), (4), (5), and (6) are not reasonably necessary pursuant to G.S. 150B-21.9(3), except as follows:

Subparagraph (b)(1) contains additional substantive language not previously proscribed in the statute.

### Authority

G.S. 163-45 states, "Not more than two observers from the same political party shall be permitted in the voting enclosure at any time, except that in addition one of the at-large observers from each party may also be in the voting enclosure." Equally important is what the statute does not state. Note that the General Assembly did not say "not more than two precinct specific observers..." or "observers appointed by a county party chairman." The language of the statute clearly bends toward transparency and openness in the election process.

Paragraph (c) limits the number of "at-large" observers for each political party to one "even if no - precinct-specific observers are present." The General Assembly has already determined that the maximum number of observers permitted in the voting enclosure is three. As the General Assembly has already addressed the number and composition of observers permitted in the voting enclosure, the Board is without authority to promulgate rules which to alter or add to the statute.

In Paragraph (d), the Board lists what "prohibited conduct by observers **includes.**" (emphasis added) Presumably there is more prohibited conduct which is not listed. Subparagraphs (d)(3), (6) and (10) contain language that both exceeds the Board's authority and is ambiguous.

G.S. 163-45(c) states, "An observer shall do no electioneering at the voting place, and in no manner impede the voting process or interfere or communicate with or observe any voter casting a ballot, **but subject to these restrictions,** (emphasis added) the chief judge and judges **shall** permit the observer to make such observation and take such notes **as the observer may desire.**" (emphasis added) While the General Assembly has prescribed restrictions not contained in G.S. 163-45 which

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are applicable to both observers and non-observers, the General Assembly has limited the ability of the Board to further regulate observers. It is evident that the General Assembly wants polling observers to be able to observe the voting process “as the observer may desire”.

Subparagraph (d)(3) prohibits an observer from “compromising” the privacy of the voter by either accessing “confidential voter information” or the seeing the voter’s marked ballot. This is consistent with other statutes, and to the extent that it a restatement of the statutory law, not reasonably necessary. However, Subparagraph (d)(3) goes further. It prohibits the observers from “positioning themselves” in such a way that they are **able** to compromise the privacy of the voter. While the Board has broad authority to empower a chief judge to effectuate the voting process and enforce election law, the Board’s authority does not extend to precluding observers from “positioning themselves” where they could, but are not, violating election law. Assuming arguendo that the Board has authority, and the language is reasonably necessary, the language is ambiguous. Whether an observer was too close would be completely subjective. Without a standard, the observer would be subject to caprice and inequity, and could be restricted from observing by the very officials they are entitled to observe.

Subparagraph (d)(6) restricts observers from entering “the voting enclosure for marking ballots”. “Voting enclosure” is not defined in the Board’s rules; however, Chapter 163 defines “voting enclosure” as “the room within the voting place that is used for voting” and the voting place is the building or area of the building that contains the voting enclosure. As written, the Subparagraph would preclude the observer from observing the voting process where the entire voting process is in one room. As with Subparagraph (d)(3), the Board does not have the authority to preclude an observer from inspecting the voting enclosure or an area where ballots are cast so long as the observer does not violate other law. The observer is already prohibited from observing voted ballots or speaking with voters.

Subparagraph (d)(10) prohibits an observer from “leaving the designated area for observers”. Pursuant to this subparagraph, county boards of elections could literally put observers in their place. While this subparagraph establishes criteria for the designated location (to wit: requiring the observers be able to observe the voting process) unlike subparagraphs (d)(3) and (6), the Board does not have authority to empower a county board to designate observer areas from which an observer may not leave. There could be multiple locations within a voting enclosure from which an observer could observe that would not impede the voting process, or interfere with a voter casting a ballot, or compromise the privacy of the voters or their confidential information. Observers are entitled to observe “as the observer may desire” so long as the observer does not otherwise violate the law.

Accordingly, staff recommends objection to the temporary rule as the Board is not within its delegated authority pursuant to G.S. 150B-21.9(a)(1).

### Ambiguity

Pursuant to paragraph (c), the chief judge “may” remove an observer that causes a “disruption.” The operative term “disruption” is undefined, and the Board did not reply to staff’s inquiry about the difference between “impede” as is used in the statute as the basis for removal and “disrupt.” . While a chief judge has broad powers in conducting the voting process in the precinct and maintaining order, his or her discretion is not unfettered. In the absence of guiding criteria, a chief judge could arbitrarily label any conduct as “disruptive” and deprive the public from its opportunity to observe that the voting process is being lawfully carried out. This opens the door to caprice and inequity in the law’s application.

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*In Paragraph (d), the Board states that observers who engage in “prohibited conduct” “may” be required by the chief judge to leave the voting enclosure. By the Board’s use of the word “may” in Paragraph (d), the Board provides the chief judge complete discretion in determining if and when an observer will be removed from the voting enclosure for “prohibited conduct”. The Board provides no guidance to the regulated public and no criteria upon which a chief judge should exercise his or her discretion to remove an observer after prohibited conduct has been established. The paragraph is facially ambiguous and as such makes the regulated public subject to caprice and inequity.*

*Accordingly, staff recommends objection to the temporary rule as the rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Staff recommends objection to the above-captioned temporary rule for not meeting the standards of G.S. 150B-21.9 as set forth herein.*

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1 **INTRODUCTORY STATEMENT**

2 The following temporary rule amendment to 08 NCAC 20 .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 20 .0101 ELECTION OBSERVERS**

7 (a) Observer Lists. The chair of each political party in a county may designate two specific ~~precinct specific~~  
8 observers to attend each voting place at any one time on Election Day and each one-stop site at any one time during a  
9 primary or general election in accordance with this Rule. The ~~precinct specific observer list~~ lists of observers assigned  
10 to particular precincts or one-stop sites may include up to eight names per voting place and shall include the times and  
11 days that each observer shall serve ~~at each voting place~~. The county party chair may designate 10 additional at-large  
12 observers who may attend any voting place in the county. County ~~County~~ [, including one stop sites]. The list of observers for  
13 ~~one stop must designate the names of the observers who will be present on each day of early voting and, for precinct-~~  
14 ~~specific observers, at each one stop site. At large observers may serve at any one stop site.~~ The chair of each State  
15 political party may designate up to 100 additional at-large observers who are residents of the State who may attend  
16 any voting place in the State.

17 (b) Submission of Lists.

18 (1) Precinct-specific observers. The county party chair shall submit a written, signed list of ~~county at-~~  
19 ~~large~~ any observers designated for particular precincts ~~[for each precinct]~~ to the county director of  
20 ~~elections~~ elections, with two copies provided to the chair of the county board of elections, prior to  
21 10:00 a.m. on the fifth day prior to Election Day. The county director of elections, on behalf of the  
22 county party chair, shall provide the list to the chief judge of each precinct on or before Election  
23 Day. [On Election Day, the county party chair shall provide the same signed list to the chief judge  
24 of each precinct, and the list may be delivered by a party appointed observer.] The county party  
25 chair shall submit a written, signed list of the observers appointed for each precinct to the chief  
26 judge of each precinct, with two copies provided to the chair of the county board of elections, prior  
27 to 10:00 a.m. on the fifth day prior to Election Day; the list may be delivered in care of the county  
28 director of elections. The list of precinct-specific observers to serve on Election Day shall ~~may~~ not  
29 be amended after 10:00 a.m. on the fifth day prior to Election Day.

30 (2) One-stop observers. The county party chair shall submit ~~the~~ a written, signed list of observers for  
31 each one-stop site to the county director of elections before 10:00 a.m. on the fifth day before the  
32 observer is to observe. Any changes to the list of one-stop observers submitted after 10:00 a.m. on  
33 the fifth day before the start of one-stop voting will not take effect until the fifth day after submission  
34 if submitted before 10:00 a.m., or on the sixth day after submission if submitted after 10:00 a.m.

35 (3) County at-large observers. The county party chair shall submit a written, signed list of county at-  
36 large observers to the county director of elections prior to 10:00 a.m. on the fifth day prior to Election  
37 Day. The list of at-large observers to serve on Election Day may be amended prior to Election Day

1 to substitute one or all of the at-large observers, but no later than 5:00 p.m. on the day before Election  
2 Day. For any at-large observers to serve during one-stop voting, the county party chair must submit  
3 the at-large observer list by 10:00 a.m. on the fifth day before any at-large observer on the list is to  
4 observe.

5 (4) State at-large observers. The list of at large observers to serve on Election Day may be amended  
6 prior to Election Day to substitute one or all of the at large observers. The list of at large observers  
7 who serve during early voting may not be amended after 10:00 a.m. on the fifth day before the at-  
8 large observer is to observe. The list of precinct specific observers to serve on Election Day may  
9 not be amended after 10:00 a.m. on the fifth day prior to Election Day. The State party chair shall  
10 submit the written, signed list of State at-large observers to the State Board of Elections by 10:00  
11 a.m. on the fifth day prior to Election Day. ~~to the State Board, which~~ The State Board shall  
12 disseminate the list to the county boards of elections. The list shall include the full name of each at-  
13 large observer and the county in which the observer is registered. The State Board shall confirm that  
14 each State at-large observer is a registered voter of the State. ~~The list of State at-large observers to~~  
15 serve on Election Day may be amended prior to Election Day to substitute one or all of the at-large  
16 observers, but no later than 5:00 p.m. on the day before Election Day. For any at-large observers to  
17 serve during one-stop voting, the state party chair shall~~must~~ submit the at-large observer list by  
18 10:00 a.m. on the fifth day before any at-large observer on the list is to observe.

19 The county director shall provide copies of each list they receive to the chair of the county board of elections. Party  
20 chairs may provide the lists by facsimile or email provided the letters are signed. ~~Scanned~~ Typed signatures are  
21 permissible. ~~When a deadline to submit an observer list falls on a weekend, a holiday, or another day when the county~~  
22 board office is closed, the list may be submitted on the next day the office is open, consistent with G.S. 103-5.

23 (c) Observers at Voting Place. No more than two precinct-specific observers from each political party may be in the  
24 voting enclosure at any time. Only one at-large observer from each political party may be in the voting enclosure at  
25 any time, even if no precinct-specific observers are present. All observers, whether precinct-specific or at-large, may  
26 be relieved after serving no less than four hours; however, the total number of observers from each party cannot exceed  
27 three total observers in the voting enclosure at one time: two precinct-specific observers and one county or State at-  
28 large observer. An observer may leave the voting place without having served for four hours, but the observer cannot  
29 be replaced by a new observer until at least four hours have passed since the first observer began serving. An observer  
30 who ~~repeatedly exits and reenters~~ leaves the voting place ~~for any reason~~ may be ~~prohibited~~ removed from observing  
31 at the voting location by the chief judge ~~from returning~~ if the observer's ~~return would cause~~ repeated exit and  
32 reentry~~conduct~~ is causing a disruption in the voting enclosure.

33 (d) Observer Conduct. Observers who engage in prohibited conduct after receiving a warning may be required by the  
34 chief judge to leave the voting enclosure. Prohibited conduct~~activities~~ by observers includes:

- 35 (1) Wearing or distributing campaign material or electioneering;  
36 (2) Impeding or disrupting the voting process or speaking with voters or election assistants appointed  
37 pursuant to G.S. 163-42;

- (3) Compromising~~[Interfering with]~~ the privacy of the voter, including positioning themselves in such a way that they can so close to a tabulator, laptop, pollbook~~;~~ or other voting official document used in the voting process that they are able to view confidential voter information ~~on poll books or laptops or standing in such a way that they can view~~ or the contents of marked ballots inserted into a tabulator. “Confidential voter information” includes a voter’s date of birth, the identity of the public agency where they registered to vote, their email address, full or partial Social Security number, driver’s license number, and retrievable ballot identification number assigned for official use by the county board (e.g., CIV, OS, MIL, or OVR numbers);
- (4) Using an electronic device to film or take photographs inside the voting enclosure;
- (5) Taking photographs, videos, or recording a voter without the consent of the voter and the chief judge;
- (6) Entering the space designated within the voting enclosure for the marking of ballots~~[voting booth area]~~ or attempting to view voted ballots;
- (7) Boarding a vehicle containing curbside voters; ~~and~~
- (8) Providing voter ~~assistance~~. assistance;
- (9) Using doors designated for precinct officials or one-stop workers, unless authorized by the chief judge at the voting place. Observers need not wait in the voting line to enter the voting enclosure;
- (10) Leaving the area designated for observers by the county board of elections, provided the area designated allows the observer to observe each part of the voting process except for the marking of ballots; and
- (11) Distributing or posting any written material in the voting enclosure.

(e) Eligibility. No person who is a candidate on the ballot in a primary or general election may serve as an observer or runner in that primary or that general election. No person who serves ~~as an observer or runner in a primary or general election may serve~~ as a county board member, county board staff, precinct official official, or one-stop election official in ~~that a primary or that general election.~~ election may serve as an observer or runner in that primary or general election. ~~[No person who is a parent, parent in law, spouse, child, child in law, sibling, or sibling in law of a precinct official or one stop election official may serve as an observer or runner in that primary or that general election.]~~

(f) Observers for unaffiliated candidates. An unaffiliated candidate or the candidate's campaign manager may appoint two observers at each voting place as set forth in this Rule.

(g) The use of the term "chief judge" includes one-stop site managers.

*History Note:* Authority G.S. 163-22; 163-45; 163-47; 163-166.6; 163-166.7; 163-273; 163-274;  
 Eff. October 1, 2018;  
 Amended Eff. September 1, 2021; Temporary Amendment Eff.