

Burgos, Alexander N

From: Cox, Paul
Sent: Wednesday, August 24, 2022 5:19 PM
To: Rules, Oah; Burgos, Alexander N; Peaslee, William W
Cc: Wakely, Lindsey; Love, Katelyn
Subject: Request for Waiver - re Special Meeting Aug. 25
Attachments: RE: 08 NCAC 10B .0101

Rules Review Commission,

By this message, the State Board of Elections is requesting a waiver, to the extent one is required, on the limitations in 26 NCAC 05 .0108 on technical changes to rules submitted to the Commission for review.

RRC staff, in its [Staff Opinion](#) regarding temporary rule 08 NCAC 10B .0101, objected to the reference to poll workers' adherence to State Board of Elections Numbered Memos. That addition was included in response to an initial objection raised by RRC staff in its Request for Changes to the purported ambiguity of the use of the word "policies" in reference to the things poll workers must adhere to. Agency staff were unaware that RRC staff would object to this replacement until it saw the Staff Opinion. Within hours of receiving the opinion, agency staff wrote back to suggest striking the language pertaining to Numbered Memos. RRC staff then responded that the time for submitting changes to the Rule under 26 NCAC 05 .0108 had expired and that a waiver would be required under 26 NCAC 05 .0112. Please see the attached email for background.

As an initial matter, agency staff is unsure which provision of 26 NCAC 05 .0108 bars the submission of this change, which was submitted within 48 hours of receiving the RRC staff's Request for Changes and on the same day the agency staff received RRC Staff Opinion. Nonetheless, the agency respectfully requests a waiver, pursuant to 26 NCAC 05 .0112, to be permitted to include this change in the Rule the Commission considers at the Special Meeting tomorrow, for the following reasons, addressing the factors in the waiver rule:

- The waiver is necessary to address a purported deficiency in the Rule raised by RRC Staff.
- The agency is providing this notice as soon as possible, given the objection raised in the Staff Opinion issued earlier today.
- The language requiring revision was prompted by an earlier RRC staff request for change, which perhaps the agency misunderstood. The period in which the agency had to respond to the Request for Changes was abbreviated, and therefore there was limited opportunity to engage with staff regarding the requests.
- The agency has not made any previous waiver requests.
- The undersigned has some experience with the rulemaking process, but has no experience regarding the application of 26 NCAC 05 .0108 to this situation, and submits that the rule does not clearly apply to forbid this amendment.
- The circumstances requiring the need for this waiver are fairly context specific, so the precedential value of the waiver is limited.
- The agency would be harmed without the waiver to the extent the Commission rejects the poll worker rule for the relevant reason raised in the Staff Opinion. The general election is fast approaching and the State Board, under its supervisory authority over the conduct of elections, has unanimously concluded that additional guidance through rule needs to be provided regarding the conduct of poll workers.

- The last factor is inapplicable because the agency is applying for the waiver.

We appreciate the Commission's consideration of this waiver application.

Paul Cox | Associate General Counsel
NORTH CAROLINA STATE BOARD OF ELECTIONS
430 N SALISBURY STREET
RALEIGH, NC 27611
919.814.0700
www.ncsbe.gov

Burgos, Alexander N

Subject: FW: 08 NCAC 20 .0101
Attachments: 08.2022 Special Meeting Staff Opinion 08 NCAC 20 .0101.pdf

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, August 24, 2022 2:33 PM
To: Cox, Paul <paul.cox@ncsbe.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Love, Katelyn <Katelyn.Love@ncsbe.gov>; Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>
Subject: RE: 08 NCAC 20 .0101

Good afternoon,

Attached please find the staff opinion regarding the above captioned rule.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: 08 NCAC 20 .0101

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Tuesday, August 23, 2022 6:41 PM

To: Cox, Paul <paul.cox@ncsbe.gov>; Rules, Oah <oah.rules@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Love, Katelyn <Katelyn.Love@ncsbe.gov>; Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>

Subject: RE: 08 NCAC 20 .0101

Thank you for the clarification.

William W. Peaslee

Rules Review Commission Counsel / Legislative Liaison

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

(984) 236-1939

Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: 08 NCAC 20 .0101
Attachments: 08.2022 Spec Meeting Request for Changes BOE Rule .0101 - SBE notes.docx

From: Cox, Paul <paul.cox@ncsbe.gov>
Sent: Tuesday, August 23, 2022 4:46 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Love, Katelyn <Katelyn.Love@ncsbe.gov>; Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>
Subject: RE: 08 NCAC 20 .0101

Bill,

I'm resending our responses to the request for changes to this rule, since we noticed a typo on page 4, marked in green highlighting.

Best,

Paul

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Burgos, Alexander N

Subject: FW: Temporary Rule Findings of Need Form
Attachments: Form 500 - 08 NCAC 10B .0101 - Circosta.pdf; Form 500 - 08 NCAC 20 .0101 - Circosta.pdf

From: Cox, Paul <paul.cox@ncsbe.gov>
Sent: Tuesday, August 23, 2022 11:53 AM
To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>; Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>
Cc: Peaslee, William W <bill.peaslee@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>
Subject: RE: Temporary Rule Findings of Need Form

Thank you for reaching out on this, Ashley.

Per your request, I'm resubmitting the agency's findings of need forms for the proposed temporary rules with the Chair of the State Board of Elections' signature.

Best regards,

Paul Cox | Associate General Counsel
NORTH CAROLINA STATE BOARD OF ELECTIONS
430 N SALISBURY STREET
RALEIGH, NC 27611
919.814.0700
www.ncsbe.gov

From: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Sent: Tuesday, August 23, 2022 10:13 AM
To: Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>; Cox, Paul <paul.cox@ncsbe.gov>
Cc: Peaslee, William W <bill.peaslee@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>
Subject: Temporary Rule Findings of Need Form

Good morning, Lindsey and Paul,

It has come to my attention that the findings of need forms for the State Board of Elections' proposed temporary rules have not been signed by the head of the agency. G.S. 150B-21.1 requires temporary rules to be signed by the head of the agency and G.S. 150B-21.19 mandates the signature prior to inclusion in the Code. The head of the agency is the head of the board. If RRC approves your temporary rules, please be aware that I need a signature from the head of the board prior to entry in the Code. Thank you for your attention to this matter.

§ 150B-21.1. Procedure for adopting a temporary rule.

...

(a4) An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. **The statement must be signed by the head of the agency adopting the temporary rule.**

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) **Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.**
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been approved by the Commission, if the rule is a permanent rule.
- (5) Have complied with the provisions of G.S. 12-3.1, if the rule establishes a new fee or increases an existing fee.

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

Ashley Snyder

Codifier of Rules

Office of Administrative Hearings

(984) 236-1941

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TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: State Board of Elections
2. Rule citation & name: 08 NCAC 20. 0101, ELECTION OBSERVERS
3. Action: <input type="checkbox"/> Adoption <input checked="" type="checkbox"/> Amendment <input type="checkbox"/> Repeal
4. Was this an Emergency Rule: <input type="checkbox"/> Yes Effective date: <input checked="" type="checkbox"/> No
5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: 7/15/2022 b. Proposed Temporary Rule published on the OAH website: 7/21/2022 c. Public Hearing date: 7/28/2022 and 8/11/2022 d. Comment Period: 7/22/2022 through 8/12/2022 e. Notice pursuant to G.S. 150B-21.1(a3)(2): 7/22/2022 (partial - distribution error) and 8/2/2022 (full) f. Adoption by agency on: 8/16/2022 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: As soon as possible h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: n/a
6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input type="checkbox"/> A recent federal regulation. Cite: Effective date: <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input checked="" type="checkbox"/> Other: To preserve the integrity of upcoming elections and the elections process. GS 150B-21.1(a)(11)c.
Explain: The State Board of Elections, in a public meeting, found unanimously that (1) adherence to the notice and hearing requirements of the permanent rulemaking process would be contrary to the public interest in this instance, and (2) the temporary rulemaking procedures and the notice and comment period provided for in the process for this rule amendment were necessary, because the rule amendment needs to become effective before the next general election to preserve the integrity of upcoming elections and the elections process. The rule amendment is based on input from county directors of elections who experienced new issues with party-appointed election observers in the May 2022 primary: both confusion over the appointment process and incidents of misconduct. Many of these directors want to ensure that there are clearly defined rules governing observers, and those rules are needed before the upcoming general election in which thousands of observers will be appearing on behalf of their political parties at the polls. It would not have been possible to have this rule amendment in place before the start of in-person voting on October 20, 2022, if the permanent rulemaking procedures were used. According to the OAH rulemaking calendar, a permanent rule would have to have been drafted, voted on, and noticed to the public by May 24, 2022, at the latest, for a permanent rule to possibly go into effect before in-person voting in the general election. County boards were canvassing the primary at that time, immediately followed by State Board canvass. It would not have been possible to gather sufficient county input on these issues in the immediate days after the primary, to propose well-considered rule amendments.

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

As noted above and as found unanimously by the State Board, the rule amendment needs to become effective before the next general election in order to preserve the integrity of upcoming elections and the elections process.

The need for this rule amendment became apparent based on feedback from county directors following the May primary. Dozens of county directors participated in a post-primary survey issued by the State Board regarding some of the issues they had been experiencing with observers, following a noticeable uptick in questions from counties to the State Board about observer appointment and conduct surrounding the May primary. The survey was designed to determine what was happening at polling places across the state, and to potentially revise administrative rules to address any issues that may compromise the orderly conduct of voting in our state.

The survey showed numerous concerns with the lack of clarity in the rules on the proper appointment of observers, sometimes resulting in unwitting local party leaders forfeiting their opportunity to have observers serve. The suggested revisions to the appointment provisions are designed to ensure that the parties are clear on how to appoint each type of observer, hopefully to avoid disqualification of observers based on technicalities. County staff also documented numerous instances in which partisan observers were disruptive to the orderly conduct of voting—posting materials at the voting place, repeatedly coming and going in and out of the voting enclosure, attempting to go into the ballot-marking area or behind voting equipment, interfering with voters submitting their voted ballots into the tabulator, etc. The suggested revisions are geared toward addressing this conduct to maintain order and a positive voting experience at the polls.

The State Board of Elections has multiple responsibilities when it comes to managing the conduct of in-person voting. Specifically, GS 163-166.7 empowers the Board to draft rules that “shall emphasize the appearance as well as the reality of dignity, good order, impartiality, and the convenience and privacy of the voter.” That statute also requires the Board to ensure the security of voting equipment and voting materials. Meanwhile, partisan observers are entitled to “make such observation and take such notes as the observer may desire,” but observers are specifically prohibited from “electioneering at the voting place” and may not “impede the voting process or interfere or communicate with or observe any voter in casting a ballot[.]” G.S. 163-45. And intimidating a voter or an election official is prohibited in our laws and is a criminal act. The State Board determined unanimously that fulfilling these duties with this proposed amendment should not await the passage of another general election.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

No

9. Rule-making Coordinator:

Paul Cox
Phone:
919-814-0717
E-Mail:
paul.cox@ncsbe.gov

Agency contact, if any:

Phone:
E-Mail:

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name:
Damon Circosta
Title:
Chair
E-Mail: damon.circosta.board@ncsbe.gov

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

Date returned to agency:

Print

Save

Reset

Burgos, Alexander N

Subject: FW: 08 NCAC 20 .0101
Attachments: 08 NCAC 20 .0101 - conforming changes.docx; 08.2022 Spec Meeting Request for Changes BOE Rule .0101 - SBE notes.docx

From: Cox, Paul <paul.cox@ncsbe.gov>
Sent: Tuesday, August 23, 2022 11:46 AM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Love, Katelyn <Katelyn.Love@ncsbe.gov>; Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>
Subject: RE: 08 NCAC 20 .0101

Hi Bill,

Please see the attached version of the temporary amendment to Rule 08 NCAC 20 .0101 with changes conforming to your suggestions, and the Change Request document with our responses interspersed in teal lettering. In that latter document, we've highlighted items that led to changes in the temporary rule.

Best regards,

Paul Cox | Associate General Counsel
NORTH CAROLINA STATE BOARD OF ELECTIONS
430 N SALISBURY STREET
RALEIGH, NC 27611
919.814.0700
www.ncsbe.gov

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina State Board of Elections

RULE CITATION: 08 NCAC 20 .0101

DEADLINE FOR RECEIPT: Tuesday, August 23, 2022, by 12:00 P.M.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Page 1, Lines 7-16, (a) and (b) and (c), generally to the paragraphs: Why are these lines necessary pursuant to G.S. 150B-21.9 as they appear to be a restatement of G.S. 163-45? What, if any, clarity is brought by this language? As an initial matter, most of this material exists in the permanent rule which was approved by the Commission, and by and large, the changes proposed for the temporary amendment are designed to break apart the existing text in a more lay-friendly structure. The specific requirements for how partisan election observer lists should be submitted to county boards of elections, the content required, and the categories that should be covered among the lists—all of which exist in the current permanent rule—are poorly understood among county political party chairs. Many—perhaps most—of these individuals are not lawyers and are often tripped up by the requirements that may seem straightforward to us lawyers but are not for a layperson. The idea behind the revisions to paragraphs (a), (b), and (c) is to help the lay person understand how to comply with the statute. Every election, failure to comply with the list submission requirements due to lack of understanding results in multiple county parties' observers being ineligible to serve. Accordingly, in the experience of the elections boards, this makes these rule amendments “reasonably necessary to implement or interpret an enactment of the General Assembly.” G.S. § 150B-21.9(a)(3).

Page 1, Line 7, (a): What does the agency intend by adding the word “specific”? It is unclear what, if any clarity, that brings to G.S. 163-45. The agency is proposing substituting the word “specific” for “precinct-specific” which is in the permanent rule. The permanent rule’s phrasing could be read incorrectly to refer only to Election Day observers when, in fact, the requirement applies to one-stop and Election Day observers—the statute speaks of designating “two observers to attend each voting place.” One-stop sites are not “precincts,” but they are voting places. By maintaining the word “specific,” the rule communicates to county party chairs that they must identify the names of specific individuals who are to be assigned to a specific voting place. **But the agency would not object to removing this word.**

Page 1, Line 12, (a): Are “one-stop sites” not a “voting place”? If there is not difference, explain the necessity for the additional language? If there is a difference, explain the agency’s

William W. Peaslee
Commission Counsel

Date submitted to agency: August 22, 2022

authority to expand the parameters of G.S. 163-45 to one-stops sites. They are voting places. This is to clarify to county political parties and to county boards of elections that the at-large observers may be designated to serve at one-stop sites in an at-large capacity, in addition to Election Day sites. This has generated confusion in the past. Whether a particular at-large observer is intended to serve both on Election Day and at one-stop also has implications for when that person must be identified to the county board of elections in advance of serving. This, in combination with the revisions to paragraph (b), are intended to make absolutely clear how a county party chair can ensure their observers are eligible to serve through the submission of timely lists. **But the agency would not object to removing this phrase.**

Page 1, Lines 18-22, (b)(1): Why are these lines necessary pursuant to G.S. 150B-21.9 as they appear to be a restatement of G.S. 163-45? What, if any, clarity is brought by the adoption? Please see response above to the first suggested change/question. In short, the permanent rule already provides the language in 18–21, as does G.S. 163-45, but in a form that is less lay-friendly. By clearly breaking out the different categories of lists, it is much easier for the layperson submitting a list to the county board of elections to understand how to provide a clear list that complies with the deadlines. Additionally, lines 21–22 are not in statute or rule. The statute could be read to require each party chair to deliver each precinct’s list to the chief judge of that particular precinct. G.S. 163-45(b) (“Before the opening of the voting place on the day of a primary or general election, the chair shall deliver one copy of the list to the chief judge for each affected precinct, except that the list of at-large observers shall be provided by the county director of elections to the chief judge.”). That would entail one person delivering lists to dozens of voting locations in most counties before polls open at 6:30 am. This change allows a county director of elections to share the lists with their chief judges for each precinct on behalf of the political party chair. This conforms with typical practice during elections, given the impossibility of carrying out the statute as it could be interpreted literally.

Page 1, Line 19, (b)(1): It is unclear what the phrase “for each precinct” means in this context. Is the agency requiring a separate list for each precinct? Is the agency requiring the county chair to have observers in every precinct? Paragraph (b) is intended to break apart the requirements pertaining to the submission of each type of observer list. Having the requirements listed together has led to considerable confusion about when and how certain observers must be identified to county boards. The State Board is not proposing to require county parties to submit any observers, as should be clear in the first sentence of the rule. Paragraph (b) is intended to communicate what party chairs need to do procedurally to ensure their lists are properly submitted and the various categories of observers are deemed eligible to serve, which is why the paragraph is entitled “Submission of Lists.” **If it would clarify matters, the agency would propose substituting “designated for particular precincts” in place of “for each precinct.” To avoid confusion about whether the State Board is suggesting the participation of observers is mandatory, we could insert “any” before “observers” in line 19.**

Page 1, Line 28, (b)(1): Change “may” to “shall”. **Happy to do that.**

Page 1, Line 17, (b)(4): Changes “must” to “shall”. **Happy to do that, assuming this refers to Page 2, not Page 1.**

Page 2, Line 24, (c): The Rule states, “Only one at-large observer from each political party may be in the voting enclosure at any time, **even if no precinct-specific observers are present.** (Emphasis added) Explain the agency’s authority to further limit the number of observers present. This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process.

Page 2, Line 28-29, (c): This sentence is unclear. By “first observer” does the agency mean the first observer of the day or the observer to be relieved? This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. The intent of the permanent rule when promulgated years back was to explain that if an observer leaves the voting location before their four-hour period ends, then they may not be replaced until the end of that four-hour period, per the statutory language allowing observers to “be relieved during the day of the primary or election after serving no less than four hours.” G.S. 163-45(a).

Page 2, Lines 29-32, (c): This sentence is unclear and ambiguous. How many times may an observer leave before the chief judge can remove the observer? By “disruptive conduct” does the agency mean the conduct of exiting and reentering or the observer’s conduct in general? Must the conduct actually “disrupt” the voting process or is impeding the voting process as prohibited by G.S. 163-45(c) the same? This is a clarification of existing permanent rule text, which already addresses disqualification of an observer for leaving the voting enclosure where it causes a disruption. In fact, the permanent rule could be applied more stringently to permit disqualification upon a single exit, but this clarification helps guide chief judges to not be too quick to dismiss an observer for leaving the voting enclosure and returning. Because every voting location and every situation is context-specific, in its subject-matter expertise, the State Board does suggest proposing a bright-line rule whereby an observer may leave only X-number of times. This is consistent with the State Board’s rulemaking authority which accounts for providing flexibility to county boards in the management of polling places. G.S. § 163-166.6(3). For example, the disruption involved with an observer coming and going when there is only 1 voter per hour and ample space in the voting enclosure is minimal. The same cannot be said for a very busy, cramped voting location. The statutes provide considerable discretion to chief judges to maintain order in the voting place, *see* G.S. §§ 163-47(a), -48, and the rules are not designed to limit that discretion. To the extent it is unclear that the authority to remove an observer under this provision pertains to the conduct of exiting and reentering, we can replace “conduct” with “repeated exit and reentry.” Whether a person’s conduct is causing a disruption in the voting enclosure or impeding the voting process, elections officials are authorized to address it. *See* G.S. §§ 163-45(c), 47(a), -48, -166.5(3), -166.7(c), -273(a)(3), -274(a)(5).

Page 2, Lines 33-34, (d): Change “may” to “shall” or identify the criteria that the chief judge will use in making the determination the observer must leave after the observer engaged in prohibited conduct and received a warning. Is there a difference between “conduct” and “activities”? If not, consistency in terminology is preferable. Happy to change “activities” to conduct.

William W. Peaslee
Commission Counsel

Date submitted to agency: August 22, 2022

Page 2, Lines 35-36, Page 3, Lines 1-20: Explain the agency’s authority to place additional restrictions on the eligibility to be an observer. Page 2, Lines 35–36 is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process.

Page 2, Line 35, (d)(1): Why is prohibiting “electioneering” reasonably necessary pursuant to G.S. 150B-21.9(a)(3) when electioneering is already prohibited by 163-45(c)? This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. The intent with this subparagraph is to provide notice to observers regarding the most common types of actions that could lead an observer to being disqualified, based on the restrictions on observers and the obligations placed on chief judges and the State Board to maintain order at the voting place. Leaving electioneering out of that list would raise questions as to whether poll workers were going to enforce that prohibition, as opposed to the ones specifically listed.

Page 2, Line 36, (d)(2): Explain the authority of the agency to prohibit “speaking” to election assistants when the communication is not impeding the voting process pursuant to G.S. 163-45(c)? As G.S. 163-45(c) already prohibits impeding the voting process, what additional prohibition is provided by the language “impeding or disrupting the voting process”? If an observer has disrupted the voting process, has the observer not already or simultaneously impeded it? As the term “election assistant” is not a defined term in the agency’s rules, does the agency mean election assistants appointed pursuant to G.S. 163-42? If so, that descriptive should be added. If not, define “election assistants”. This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. To promote order in the voting place and in recognition of the chief judge’s role in managing the polling place, G.S. §§ 163-47, -48, -166.6, the permanent rule limits communications with poll workers to be with the manager of the polling place. We are happy to define “election assistants” as they are in Chapter 163.

Page 3, Lines 1-8, (d)(3): The language in this subparagraph is unclear and ambiguous. Eg. “...positioning themselves so close...”. How does someone “interfere” with privacy? The prohibition on interference with the privacy of a voter is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. The agency could propose replacing “Interfering with” with “Compromising,” if that is clearer, since we do not believe that would substantively change the meaning of the existing prohibition. As for the standard for impermissible proximity, the test is as objective as it can be without providing a specific measurement (e.g., 6 feet), which would likely be too specific, since the typeface and nature of a document, screen, etc. could impact its readability from a certain distance. The judges of elections need some flexibility in administering these rules.

Page 3, Lines 9-11, (d)(4) and (5): Why are these prohibitions reasonably necessary pursuant to G.S. 150B-21.9(a)(3) when they already exist in G.S. 163-166.3(b)? This is language in the

William W. Peaslee
Commission Counsel

Date submitted to agency: August 22, 2022

permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. The intent with this subparagraph is to provide notice to observers regarding the most common types of actions that could lead an observer to being disqualified, based on the restrictions on observers and the obligations placed on chief judges and the State Board to maintain order at the voting place. Leaving these prohibitions out of that list would raise questions as to whether poll workers were going to enforce that prohibition, as opposed to the ones specifically listed.

Page 3, Line 12, (d)(6): Define or delete “voting booth area”. This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. Deleting this would permit partisan poll observers to roam freely within the area where voters are actively filling out their ballots, contravening the State Board’s duty to ensure “the appearance as well as the reality of dignity, good order, impartiality, and the convenience and privacy of the voter.” G.S. 163-166.7(c). To election officials, this is not an ambiguous phrase, since there is a specific area where the marking of ballots takes place among an array of voting booths. To address any ambiguity and without making any substantive alteration to this existing rule, the agency could propose replacing “voting booth area” with “space designated within the voting enclosure for the marking of ballots.”

Page 3, Line 13, (d)(7): Explain the agency’s authority to prohibit an observer from “boarding” a vehicle containing curbside voters when authorized to do so by the owner of the vehicle or to render voter assistance pursuant to G.S. 163-166.8? This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. Observers may not serve as voting assistants because they are not allowed to “communicate with or observe any voter in casting a ballot,” G.S. § 163-45(c), which is what assistants do.

Page 3, Line 14, (d)(8): Explain the agency’s authority to prohibit an observer from providing voter assistance to a voter otherwise qualified for assistance pursuant to G.S. 163-166.8 when G.S. 163-166.8 states that the qualified voter is “entitled” to assistance either pursuant to G.S. 163-166.8 (a) (1) or (2). This is language in the permanent rule that the agency has not proposed to be temporarily amended. The public has had no notice that any substantive change to this language was being considered in this temporary amendment process. Observers may not serve as voting assistants because they are not allowed to “communicate with or observe any voter in casting a ballot,” G.S. § 163-45(c), which is what assistants do.

Page 3, Line 17-19, (d)(10) Who designates the area to which observers are restricted and explain their authority to do so? We would be happy to change “county board of elections” to “chief judge,” pursuant to that official’s authority to maintain order in the voting place under G.S. §§ 163-47(a), -48, and -166.6. There is wide variation in the size and arrangement of voting places throughout the state. Some are not much larger than a typical one-car garage. Because such a space may have 20 people within it at one time, and to ensure good order and voter privacy, some chief judges require observers to stay within a particular area. This rule amendment recognizes that common practice in this state, while also making clear to chief

William W. Peaslee
Commission Counsel

Date submitted to agency: August 22, 2022

judges that such an area must permit an observer to observe each part of the voting process except the marking of ballots.

Page 3, Lines 21-26, (e): Please explain the agency’s authority to place further restrictions upon observers beyond those in G.S.163-45(c). The State Board has general supervisory authority over county elections officials, including county board members, county board staff, and poll workers. See G.S. §§ 163-22(a), -22(c), -35(c); 08 NCAC 03 .0101; 08 NCAC 03 .0202. The State Board also has authority to “promulgate rules for the process of voting” which “shall emphasize the appearance as well as the reality of dignity, good order, *impartiality*, and the convenience and privacy of the voter.” G.S. § 163-166.7(c) (emphasis added). County board members are duty-bound to “[e]nsure that adequate procedures are in place at each voting place for a safe, secure, *fair, and honest* election.” *Id.* § 163-166.1(2) (emphasis added). County board members and county board staff must meticulously limit their political activity to avoid running afoul of G.S. § 163-39’s limitations on such activity, which can be cause for removal, *id.* § 163-40. And precinct officials swear an oath to “administer the duties of [their] office . . . without fear or favor[.]” *Id.* § 163-41(e). Read together, these authorities demonstrate a clear legislative recognition that the public’s confidence in elections depends on the “appearance as well as the reality” of the “*impartiality*” of its election officials. G.S. § 163-166.7(c). An election official’s adoption of an explicitly partisan role as an observer in the election that they are overseeing is incompatible with their duty of impartiality and the need for them to appear impartial.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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.

Burgos, Alexander N

Subject: FW: Temporary Rule Findings of Need Form

From: Snyder, Ashley B <ashley.snyder@oah.nc.gov>

Sent: Tuesday, August 23, 2022 10:13 AM

To: Wakely, Lindsey <Lindsey.Wakely@ncsbe.gov>; Cox, Paul <paul.cox@ncsbe.gov>

Cc: Peaslee, William W <bill.peaslee@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>

Subject: Temporary Rule Findings of Need Form

Good morning, Lindsey and Paul,

It has come to my attention that the findings of need forms for the State Board of Elections' proposed temporary rules have not been signed by the head of the agency. G.S. 150B-21.1 requires temporary rules to be signed by the head of the agency and G.S. 150B-21.19 mandates the signature prior to inclusion in the Code. The head of the agency is the head of the board. If RRC approves your temporary rules, please be aware that I need a signature from the head of the board prior to entry in the Code. Thank you for your attention to this matter.

§ 150B-21.1. Procedure for adopting a temporary rule.

...

(a4) An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. **The statement must be signed by the head of the agency adopting the temporary rule.**

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) **Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.**
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been approved by the Commission, if the rule is a permanent rule.
- (5) Have complied with the provisions of G.S. 12-3.1, if the rule establishes a new fee or increases an existing fee.

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

Ashley Snyder

Codifier of Rules

Office of Administrative Hearings

(984) 236-1941

Burgos, Alexander N

Subject: FW: 08 NCAC 20 .0101
Attachments: 08.2022 Spec Meeting Request for Changes BOE Rule .0101.docx

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Monday, August 22, 2022 1:11 PM
To: Cox, Paul <paul.cox@ncsbe.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 08 NCAC 20 .0101

Good afternoon,

Attached please find a revised version of the Request for Changes. Please note that the only revision was the addition of the date the Request was sent to the agency. It was previously missing.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

From: Peaslee, William W
Sent: Monday, August 22, 2022 11:11 AM
To: Cox, Paul <paul.cox@ncsbe.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 08 NCAC 20 .0101

Good afternoon, Mr. Cox,

I'm the attorney who reviewed the Rule submitted by the State Board of Elections for the August 2022 Special RRC meeting. The RRC will formally review this Rule at its meeting on Thursday, August 25, 2022, at 10:30 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get invites out to them as well.

Please submit the revised Rule and forms to me via email, no later than 12:00 p.m. on August 23, 2022.

In the meantime, please let me know if you have any questions or concerns.

William W. Peaslee

Rules Review Commission Counsel / Legislative Liaison

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

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Bill.Peaslee@oah.nc.gov

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