

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?

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.

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 authority to expand the parameters of G.S. 163-45 to one-stops sites.

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?

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?

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

Page 1, Line 17, (b)(4): Changes “must” to “shall”.

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.

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?

William W. Peaslee
Commission Counsel
Date submitted to agency: August 22, 2022

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?

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.

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, 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)?

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”.

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?

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)?

Page 3, Line 12, (d)(6): Define or delete “voting booth area”.

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?

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).

William W. Peaslee
Commission Counsel

Date submitted to agency: August 22, 2022

Page 3, Line 17-19, (d)(10) Who designates the area to which observers are restricted and explain their authority to do so?

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).

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



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:

☐ Adoption

☒ Amendment

☐ Repeal

4. Was this an Emergency Rule:

☐ Yes

Effective date:

☒ 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.

☐ A serious and unforeseen threat to the public health, safety or welfare.

☐ The effective date of a recent act of the General Assembly or of the U.S. Congress.

Cite:

Effective date:

☐ A recent change in federal or state budgetary policy.

Effective date of change:

☐ A recent federal regulation.

Cite:

Effective date:

☐ A recent court order.

Cite order:

☐ State Medical Facilities Plan.

☒ 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:

Karen Brinson Bell

Title:

Executive Director

E-Mail: karen.bell@ncsbe.gov

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

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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).

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 observers
8 to attend each voting place at any one time on Election Day and each one-stop site at any one time during a primary
9 or general election in accordance with this Rule. The ~~precinct-specific observer list lists of observers assigned to~~
10 ~~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, 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~~ observers for each precinct to the county director of ~~elections~~ elections, ~~with two copies~~
20 ~~provided to the chair of the county board of elections, prior to 10:00 a.m. on the fifth day prior to~~
21 ~~Election Day.~~ The county director of elections, on behalf of the county party chair, shall provide the
22 list to the chief judge of each precinct on or before Election Day. [On Election Day, the county party
23 chair shall provide the same signed list to the chief judge of each precinct, and the list may be
24 delivered by a party-appointed observer.] ~~The county party chair shall submit a written, signed list~~
25 ~~of the observers appointed for each precinct to the chief judge of each precinct, with two copies~~
26 ~~provided to the chair of the county board of elections, prior to 10:00 a.m. on the fifth day prior to~~
27 ~~Election Day; the list may be delivered in care of the county director of elections. The list of~~
28 ~~precinct-specific observers to serve on Election Day may not be amended after 10:00 a.m. on the~~
29 ~~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 observer.

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 must submit the at-large observer list by 10:00
18 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~~ conduct is causing a
32 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 activities by observers include:

- 35 (1) Wearing or distributing campaign material or electioneering;
36 (2) Impeding or disrupting the voting process or speaking with voters or election assistants;

- (3) 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 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, or one-stop election official in that 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.