



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 (Challenge to Appointment of an Observer), 08 NCAC 20 .0102 (Appeal of Removal of an Observer From a Voting Site), 08 NCAC 20 .0103 (Identification of Observers)
3. Action: <input checked="" 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: November 29, 2023 b. Proposed Temporary Rule published on the OAH website: December 1, 2023 c. Public Hearing date: December 15, 2023 d. Comment Period: November 29, 2023 – December 19, 2023 e. Notice pursuant to G.S. 150B-21.1(a3)(2): November 29, 2023 f. Adoption by agency on: January 2, 2024 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 (early voting starts Feb. 15, 2024) 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 checked="" type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: S.L. 2023-140, sec. 7(a)–(b) Effective date: Jan. 1, 2024 <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: Pursuant to GS 150B-21.1(a)(11), the need for the State Board of Elections to adopt a temporary rule upon any abbreviated notice or hearing the agency finds practical for the following: To implement provisions of state law for which the State Board of Elections has been authorized to adopt rules, and the need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process. Explain: With the enactment of S.L. 2023-140, the existing statute governing election observers has been completely rewritten. The current rule governing observers, 08 NCAC 20 .0101, has been rendered largely obsolete. The subjects that the current rule addresses—the appointment procedures for observers and rules governing their conduct—have been addressed in specific ways by the new observer law—G.S. 163-45.1, once codified. The new law requires the State Board to issue rules to address the following specific items: how to handle challenges to the appointment of observers brought by those who are authorized in statute to issue such challenges, how to handle appeals of those challenge decisions, how to handle appeals from a chief judge’s decision to remove an observer from service, and whether to require observers to wear identification badges so that voters and poll workers can identify them and their purpose at the polls. Temporary procedures were required because there was not enough time before the start of early voting in the 2024 primary—February 15—to complete the permanent rulemaking process.

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

The State Board of Elections unanimously found the following, at an open meeting conducted on November 28, 2023, regarding the use of temporary rulemaking procedures for these proposed rules:

- (1) adherence to the notice and hearing requirements of permanent rulemaking would be contrary to the public interest in this instance, because it would mean that the rules could not go into effect for the next round of in-person voting, leaving obsolete observer rules in place and providing no rules for new challenge and appeal procedures set forth in a recent session law;
- (2) the immediate adoption of the proposed rules is required to implement provisions addressing election observers that were recently enacted by the General Assembly and which the State Board has been authorized to adopt rules for;
- (3) the abbreviated notice and hearing schedule adopted by the State Board are of practical necessity, to gather public input on the proposed rules in enough time to propose their adoption in advance of voting in the 2024 primary; and
- (4) the rules need to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

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, General Counsel

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: Alan Hirsch

Title: Chair

E-Mail: alan.hirsch.board@ncsbe.gov

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

Date returned to agency:

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

AGENCY: State Board of Elections

RULE CITATION: 08 NCAC 20 .0101

DEADLINE FOR RECEIPT: January 26, 2024

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 2, Lines 22-37: As written, a county board of elections would hold two meetings on its own motion to remove an observer. The first meeting is to challenge the observer and the second is a hearing on its challenge motion. Is that correct?

Page 2, Line 35: Business days or calendar days?

Page 2, Line 35: As G.S. 143-318.12 requires notice "at least 48 hours before the time of the meeting", doesn't the requirement of a hearing "no later than two days after the challenge is filed" create a conflict? For example, if a challenge is filed by email at 10:30 PM on Monday, pursuant to the rule the hearing would need to be held no later than 11:59 PM Wednesday (two days). The county board then opens the email Tuesday at 9:00 AM and must give 48 hours notice of a hearing which could be no sooner than 9:00 AM Thursday. Thus, compliance with the rule and the statute are not possible.

Page 2, Lines 36-37, Page 2, Lines 1-5: It is unclear whether the Board is augmenting or supplanting the requirements of G.S. 143-318.12. If the latter, explain how this is lawful. Consider, "In addition to the requirements of G.S. 143-318.12..."

Page 3, Line 5: Change "may" to "shall" or state the criteria the county board shall use to make the determination whether to accept submissions. When will notice be provided of determination? Before the hearing?

Page 3, Line 13: If it meets the Board's intention, add "only" between "may" and "be". If that is not the Board's intention, it is unclear who can appeal. Can the observer appeal?

Page 3, Line 15: Add "pursuant to Paragraph (b) of this Rule" after "served".

Page 3, Line 18: Change "must" to "shall".

William W. Peaslee
Commission Counsel

Date submitted to agency: January 11, 2024

Page 3, Line 19: Change “may” to “shall” or state the criteria the Board use to make the determination to accept oral argument.

Page 3, Lines 24-26: What is the time frame within which the decision must be served?

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

William W. Peaslee
Commission Counsel

Date submitted to agency: January 11, 2024

1 08 NCAC 20 .0101 is amended under temporary procedures with changes as follows:

2
3 **CHAPTER 20 – ELECTION OBSERVERS**

4
5 **08 NCAC 20 .0101 ELECTION OBSERVERS – CHALLENGE TO THE APPOINTMENT OF AN**
6 **OBSERVER**

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

15 ~~(b) Submission of Lists. The county party chair shall submit a written, signed list of county at large observers to the~~
16 ~~county director of elections, with two copies provided to the chair of the county board of elections, prior to 10:00 a.m.~~
17 ~~on the fifth day prior to Election Day. The county party chair shall submit a written, signed list of the observers~~
18 ~~appointed for each precinct to the chief judge of each precinct, with two copies provided to the chair of the county~~
19 ~~board of elections, prior to 10:00 a.m. on the fifth day prior to Election Day; the list may be delivered in care of the~~
20 ~~county director of elections. The county party chair shall submit the list of observers for one stop before 10:00 a.m.~~
21 ~~on the fifth day before the observer is to observe. The list of at large observers to serve on Election Day may be~~
22 ~~amended prior to Election Day to substitute one or all of the at large observers. The list of at large observers who~~
23 ~~serve during early voting may not be amended after 10:00 a.m. on the fifth day before the at large observer is to~~
24 ~~observe. The list of precinct specific observers to serve on Election Day may not be amended after 10:00 a.m. on the~~
25 ~~fifth day prior to Election Day. The State party chair shall submit the written, signed list of State at large observers by~~
26 ~~10:00 a.m. on the fifth day prior to Election Day to the State Board, which shall disseminate the list to the county~~
27 ~~boards of elections. The list shall include the full name of each at large observer and the county in which the observer~~
28 ~~is registered. The State Board shall confirm that each State at large observer is a registered voter of the State. Party~~
29 ~~chairs may provide the lists by facsimile or email provided the letters are signed. Scanned signatures are permissible.~~

30 ~~(c) Observers at Voting Place. No more than two precinct specific observers from each political party may be in the~~
31 ~~voting enclosure at any time. Only one at large observer from each political party may be in the voting enclosure at~~
32 ~~any time, even if no precinct specific observers are present. All observers, whether precinct specific or at large, may~~
33 ~~be relieved after serving no less than four hours; however, the total number of observers from each party cannot exceed~~
34 ~~three total observers in the voting enclosure at one time: two precinct specific observers and one county or State at~~
35 ~~large observer. An observer may leave the voting place without having served for four hours, but the observer cannot~~
36 ~~be replaced by a new observer until at least four hours have passed since the first observer began serving. An observer~~

1 who leaves the voting place for any reason may be prohibited by the chief judge from returning if the observer's return
2 would cause a disruption in the voting enclosure.

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

- 5 (1) ~~Wearing or distributing campaign material or electioneering;~~
- 6 (2) ~~Impeding or disrupting the voting process or speaking with voters or election assistants;~~
- 7 (3) ~~Interfering with the privacy of the voter, including positioning themselves in such a way that they~~
8 ~~can view confidential voter information on poll books or laptops or standing in such a way that they~~
9 ~~can view the contents of ballots inserted into a tabulator;~~
- 10 (4) ~~Using an electronic device to film or take photographs inside the voting enclosure;~~
- 11 (5) ~~Taking photographs, videos, or recording a voter without the consent of the voter and the chief~~
12 ~~judge;~~
- 13 (6) ~~Entering the voting booth area or attempting to view voted ballots;~~
- 14 (7) ~~Boarding a vehicle containing curbside voters; and~~
- 15 (8) ~~Providing voter assistance.~~

16 (e) ~~Eligibility.~~ No person who is a candidate on the ballot in a primary or general election may serve as an observer
17 or runner in that primary or that general election. No person who serves as an observer or runner in a primary or
18 general election may serve as a precinct official or one stop election official in that primary or that general election.

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

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

22 (a) Filing of Challenges. A county board of elections, by a majority vote and documented through a written statement
23 made by any board member, may challenge the appointment of any observer appointed to serve in that county, and a
24 chief judge of a voting place may challenge the appointment of any observer who is eligible to serve in that voting
25 place. The challenge shall be submitted electronically or in writing to the county board of elections office before the
26 observer is scheduled to serve. The challenge shall contain the following information:

- 27 (1) the name of the observer;
- 28 (2) the party or unaffiliated candidate that appointed the observer; and
- 29 (3) the basis for the challenge pursuant to G.S. 163-45.1(f).

30 The county board of elections office shall immediately provide a copy of the challenge to the chair of the political
31 party or candidate that appointed the observer. A notification sent within three business hours of receipt of the
32 challenge to an email address provided by the chair of the political party or by the candidate appointing the observer
33 is a method of providing immediate notice.

34 (b) Hearing of Challenges. Upon receiving a challenge pursuant to Paragraph (a) of this Rule, the county board of
35 elections shall hold a hearing and decide the challenge as expeditiously as possible but no later than two days after the
36 challenge is filed. The chair of the county board of elections shall set the time of the hearing. The hearing may be held
37 remotely, including by telephone. The county board shall provide notice of the hearing by electronic mail or telephone

1 to the chair of the political party or the unaffiliated candidate that appointed the observer. If notice is by telephone,
2 the county board shall also provide the notice by electronic mail or text message. The notice shall inform the chair of
3 the political party or the candidate that they may waive the hearing or decline to contest the challenge, in which case
4 no hearing shall be held, and the county board may decide the challenge, as submitted, at a meeting held at the same
5 time as the noticed hearing. At the hearing, the county board may accept written or oral submissions from elections
6 officials, observers, witnesses, and other individuals with pertinent information. If a majority of board members is
7 unable to attend the meeting to consider the challenge, the chair of the county board of elections shall act on behalf of
8 the county board of elections and decide on the challenge. The decision on the challenge shall be rendered at the
9 meeting for which the challenge was noticed. The decision shall be reduced to writing and served within 24 hours
10 of the same day as the meeting, either electronically or by personal service, in person, to the chair of the political
11 party or on the candidate appointing the observer.

12 (c) Appeals on Challenges. The decision by a county board of elections on a challenge to the appointment of an
13 observer pursuant to Paragraph (b) of this Rule may be appealed by the political party or candidate that appointed the
14 observer. The county board's decision shall not be stayed pending appeal. The appeal shall be filed with the State
15 Board of Elections via email to legal@ncsbe.gov no later than two hours after the county board's decision is served.
16 The appeal shall contain an argument explaining why the county board's decision should be reversed on account of
17 one or more of the grounds listed in G.S. 150B-51(b) and shall be signed by the person filing the appeal. A copy of
18 the county board decision must be filed with the appeal. Upon receiving an appeal, the State Board shall decide the
19 appeal on the basis of the record and may permit oral argument on the appeal. The appeal shall be decided as
20 expeditiously as possible. The executive director of the State Board may inspect any appeals filed under this Paragraph
21 and, within one business day after the receipt of an appeal, transmit a copy of the appeal to the State Board members
22 along with a written statement indicating the executive director's recommendation either to grant or to deny the appeal.
23 The executive director's recommendation shall become final unless any State Board member raises an oral or written
24 objection within one calendar day, in which case the full State Board shall decide the appeal at a meeting. The decision
25 of the State Board, Board or the executive director's recommendation if it becomes final, shall be served electronically
26 on the chair of the political party or on the candidate appointing the observer.

27 (d) An observer who is successfully challenged pursuant to this Rule shall not be permitted to serve as an observer in
28 the primary or election during which they were challenged.

29
30 *History Note: Authority G.S. 163-22; 163-45; 163-166.6; 163-166.7; 163-22.2; 163-45.1;*

31 *Eff. October 1, 2018;*

32 *Amended Eff. September 1, 2021-2021;*

33 *Temporary Amendment Eff.*

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

AGENCY: State Board of Elections

RULE CITATION: 08 NCAC 20 .0102

DEADLINE FOR RECEIPT: January 26, 2024

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:

Line 4: The Board uses the permissive language of “may” when there is no limiting language. It appears the Board intends that exclusivity in who can file an appeal. If that is the Board’s intention, add “only” between “may” and “be”. Consider changing “may” to “shall”.

Line 6: Is there a difference between “submitted” and “filed”? If not, the language should be consistent.

Line 6-7: As written, the appeal can be emailed to any county board employee. Is that correct?

Line 18: As G.S. 143-318.12 requires notice “at least 48 hours before the time of the meeting”, doesn’t the requirement of a decision “no later than two days after the appeal was received” create a conflict? For example, if an appeal is filed by email at 10:30 PM on Monday, pursuant to the rule the decision would need to be rendered no later than 11:59 PM Wednesday (two days). The county board then opens the email on Tuesday at 9:00 AM and must give 48 hour notice of a meeting to render a decision which could be no sooner than 9:00 AM Thursday. Thus, compliance with the rule and the statute are not possible.

Line 20: See the comment regarding Line 18 above concerning G.S. 143-318.12.

Line 21-23: It is unclear whether the Board is augmenting or supplanting the requirements of G.S. 143-318.12. If the latter, explain how this is lawful. Consider, “In addition to the requirements of G.S. 143-318.12...”

Line 24: Change “may” to “shall” or state the criteria upon which this discretion will be exercised.

William W. Peaslee
Commission Counsel

Date submitted to agency: January 11, 2024

Line 26: Change “may” to “shall” or state the criteria upon which this discretion will be exercised.

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

William W. Peaslee
Commission Counsel
Date submitted to agency: January 11, 2024

08 NCAC 20 .0102 is adopted under temporary procedures with changes as follows:

08 NCAC 20 .0102 APPEAL OF REMOVAL OF AN OBSERVER FROM A VOTING SITE

(a) Filing of Appeal. The decision by a chief judge to remove an observer pursuant to G.S. 163-45.1(j) may be appealed by the chair of the political party or the candidate that appointed the observer. The appeal shall be filed with the county board of elections in the county where the observer was removed. The appeal shall be submitted electronically or in writing to the county board of elections office as follows:

- (1) If the observer was removed from an early voting site, the appeal shall be filed within one ~~business~~ day of when the observer was removed.
- (2) If the observer was removed from an Election Day voting site, the appeal shall be filed within two hours of when the observer was removed.

The appeal shall contain an argument explaining why the chief judge's decision should be reversed on account of one or more of the grounds listed in G.S. 150B-51(b). It shall state whether a hearing is requested and shall be signed by the person filing the appeal. The decision to remove an observer shall not be stayed pending appeal.

(b) Hearing of Appeal. ~~Pursuant to Paragraph (a) of this Rule, the~~ The county board shall consider the appeal appeals filed pursuant to Paragraph (a) of this Rule as follows:

- (1) If the observer was removed from an early voting site, the county board shall decide the appeal as expeditiously as possible but no later than two days after the appeal was received.
- (2) If the observer was removed from an Election Day voting site, the county board shall decide the appeal as expeditiously as possible but no later than four hours after the appeal was received.

The county board shall provide notice of the meeting at which the appeal will be decided by electronic mail or telephone to the chair of the political party or the unaffiliated candidate that appointed the observer. If notice is by telephone, the county board shall also provide the notice by email or text message. The county board's meeting may be held remotely, including by telephone. The county board may accept written or oral submissions from elections officials, observers, witnesses, and other individuals with pertinent information. If no hearing is requested, the county board may decide the appeal, based on written submissions only, at a meeting held at the same time as the noticed hearing. ~~If a majority of board members is unable to attend the meeting to consider the appeal, the chair of the county board of elections shall act on behalf of the county board of elections and decide the appeal on his or her own.~~ The decision shall be reduced to writing and served ~~the same day as~~ within 24 hours after the meeting, meeting for early voting, and 2 hours after the meeting on Election Day, either electronically or ~~by personal service, in person, on~~ to the chair of the political party or on the candidate appointing the observer.

(c) An observer who is removed from serving as an observer pursuant to G.S. 163-45.1(j) or this Rule shall not be permitted to serve as an observer in the primary or election during which they were removed.

History Note: Authority G.S. 163-22; 163-22.2; 163-45.1;

Temporary Adoption Eff.

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

AGENCY: State Board of Elections

RULE CITATION: 08 NCAC 20 .0103

DEADLINE FOR RECEIPT: January 26, 2024

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

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

William W. Peaslee
Commission Counsel
Date submitted to agency: January 11, 2024

1 08 NCAC 20 .0103 is adopted under temporary procedures as follows:

2

3 **08 NCAC 20 .0103 IDENTIFICATION OF OBSERVERS**

4 Every appointed observer serving at a voting site pursuant to G.S. 163-45.1 shall wear an identification tag to make
5 voters and elections officials aware of the observer’s role in the voting site. The tag shall read “Observer for [Name]
6 Party” or “Observer for Candidate [Name]” with the “[Name]” being the name of the political party or the candidate,
7 as applicable.

8

9 *History Note: Authority G.S. 163-22; 163-22.2; 163-45.1;*

10 *Temporary Adoption Eff.*