

Publication Date: September 24, 2010
Effective Dates: September 24, 2010 through February 20, 2011

**NOTICE OF ORDER
OF THE
GOVERNMENT ACCOUNTABILITY BOARD**

To adopt an emergency rule repealing and re-creating chapter GAB 4, relating to observers at a polling place or other location where votes are being cast, counted or recounted.

FINDING OF EMERGENCY:

The Government Accountability Board repeals and recreates chapter GAB 4, Election observers, to establish guidelines for election inspectors and observers alike regarding observation by “any member of the public” of the public aspects of the voting process and regarding the conduct of observers at polling places and other locations where observation of the public aspects of the voting process may take place. The Board finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of the facts constituting the emergency is:

Pursuant to §227.24, Stats., the Government Accountability Board finds that an emergency exists in the Board’s May 5, 2008 decision to decline to reaffirm the administrative rule EIBd 4.01 because the rule was inconsistent with the requirements of its enabling statute, s. 7.41, Stats. The statute states that any member of the public is allowed to be present at the polls on Election Day to observe; however, it does not specify standards of conduct by which observers must abide.

The Board further finds that given the public interest in the 2010 General Election, the expected high turnout, the increasing use of observers in the polling place, and the comments of municipal and county clerks regarding the obstacles observers can pose to the orderly conduct of elections, it is necessary to codify standards to regulate the observers’ conduct and that the attached rule governing observer conduct must be adopted prior to the General Election to ensure the public peace and safety with respect to the administration of the fall elections.

ANALYSIS PREPARED BY THE GOVERNMENT ACCOUNTABILITY BOARD:

1. Statutes interpreted: Section 7.41 of the Wisconsin Statutes
2. Statutory authority: ss.5.05(1)(f), 7.41(5), and 227.11(2)(a), Stats.
3. Explanation of agency authority: This rule repeals and re-creates Chapter GAB 4, Election observers, interpreting s.7.41 of the Wisconsin Statutes – Public’s right to access. Express rule-making authority to interpret the provisions of statutes the Board enforces or administers is conferred on it pursuant to s. 227.11(2)(a), Stats. In addition, s. 5.05(1)(f), Stats., provides that the Board may promulgate rules under ch. 227, Stats., for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration. Furthermore, the Board is empowered by s. 7.41(5), Stats., to promulgate rules consistent with the supervisory authority of a chief inspector at any polling place on election day, regarding the proper conduct of individuals exercising the right under s. 7.41, Stats., to readily observe all public aspects of the voting process in an election.
4. Related statute(s) or rule(s): Sections 5.35 (5), 7.37 (2) and 12.13 (3) (x), Stats., relating to maintaining order at the polling place, and other locations where observation of the public aspects of the voting process is taking place, and enforcing compliance with the lawful commands of the inspectors at the polling place.
5. Plain language analysis: This rule repeals and recreates rule chapter GAB 4, relating to observers and observation of the public aspects of the voting process at polling places and other locations where observation of the public aspects of the voting process is taking place.

6. Summary of, and comparison with, existing or proposed federal regulations: Observers and observation of the voting process is a matter of state regulation, not federal regulation. Consequently, no federal legislation or regulation applies to observers in Wisconsin or any other state.
7. Comparison with rules in adjacent states: The States of Illinois, Iowa, Michigan and Minnesota all have legislation that allows persons to observe at the polling places in that state, but none of those states allows any member of the public to show up at a polling place and observe because each of those states requires prospective observers to register with the municipal clerk before the election and receive authorization to observe.
8. Summary of factual data and analytical methodologies: Adoption of the rule was not predicated on any factual data or analytical methodologies, but on observation eliminating provisions of the former Ethics Board's and Elections Board's rules that were inconsistent with the provisions or intent of the new law merging those agencies into the new Government Accountability Board.
9. Analysis and supporting documents used to determine effect on small business: Preparation of an economic impact report is not required. The Government Accountability Board does not anticipate that the repeal and recreation of the described provisions will have an economic impact.
10. Small Business Impact: The creation of this rule does not affect business.
11. Agency Contact Person: Michael Haas, Staff Counsel, Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, Madison, Wisconsin 53707-7984; Phone 608-266-0136; Michael.haas@wi.gov.
12. Submission of Written Comments: Comments may be submitted by October 10, 2010, to the Government Accountability Board, 212 E. Washington Ave. Third Floor, P.O. Box 7984, Madison, WI 53707-7984; (gab.wi.gov).
13. Fiscal Estimate: The creation of this rule has no fiscal effect.
14. Initial Regulatory Flexibility Analysis: The creation of this rule does not affect the normal operations of business.

TEXT OF PROPOSED RULE:

Pursuant to the authority vested in the State of Wisconsin Government Accountability Board by ss.5.05(1)(f) and 227.11(2)(a), Stats., the Government Accountability Board hereby repeals Chapter GAB 4, Election observers, and creates new Chapter GAB 4, Election observers, as follows:

SECTION 1. Chapter GAB 4 is repealed.

SECTION 2. Chapter GAB 4 is created to read:

Chapter GAB 4 Election Observers

GAB 4.01 Observers at the polling place.

(1) In this chapter:

(a) "Board" means the Government Accountability Board.

(b) "Chief inspector" means the chief inspector at a polling place, under s. 7.30 (6) (b), Stats., or the election official that the chief inspector designates to carry out the responsibilities of the chief inspector under this chapter.

(c) "Clerk" means the municipal or county clerk, the executive director of the board of election commissioners, or the official designated by the clerk or director to carry out the election responsibilities under this chapter.

(d) “Communications media” has the meaning given in s. 11.01(5), Stats.

(e) “Electioneering” has the meaning given in s. 12.03 (4), Stats.

(f) “Member of the public” means any individual who is present at any polling place, or in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855, Stats., on any day that absentee ballots may be cast at that site, for the purpose of observation of an election or the absentee ballot voting process, excluding a candidate appearing on the ballot at that polling place or a registered write-in candidate, for an office voted on at that polling place or other location.

(g) “Public aspects of the voting process” means the election activities that take place at a polling place, or other observation location, that includes waiting in line to vote by inspectors, the election day registration process, the recording of electors under s. 6.79 Stats., the elector’s receipt of a ballot, the deposit of the ballot into the ballot box, a challenge to an elector’s right to vote, the issuing of a provisional ballot, and the counting and reconciliation process.

(2) Any member of the public intending to exercise the right to observe an election under s. 7.41, Stats., shall notify the chief inspector of that intent upon entering the voting area of a polling place. The observers shall sign a form acknowledging they understand the applicable rules and will abide by them. The observers shall also list their full name, street address and municipality, and the name of the organization or candidate the observer represents, if any, on the form. The inspector shall attach the form to the Inspectors’ Statement, EB-104. The chief inspector shall provide the observer with a name tag supplied by the board which reads “Election Observer.” Observers shall wear this name tag at all times when they are inside the polling place.

(3) To ensure the orderly conduct of the election, the chief inspector may reasonably limit the number of observers representing a particular organization or candidate.

(4) The chief inspector shall direct the observer to an area of the polling place designated by the chief inspector as an observation area.

(5) The observation area shall be situated to enable observers to observe all public aspects of the voting process during the election. When physically feasible within the polling place, the observation area shall be not less than 6 feet nor more than 12 feet from the table at which electors are announcing their name and address and being issued a voter number. If observers are unable to hear the electors stating their name and address, the poll workers shall repeat the name and address. If necessary to ensure all public aspects of the process are readily observable, the chief inspector shall set up additional observation areas near the election-day registration table and area where elector challenges are handled.

(6) Observers shall comply with the chief inspector’s lawful commands or shall be subject to removal from the polling place.

(7) All of the observers’ questions and challenges shall be directed to the chief inspector.

(8) Upon receiving a challenge to a voter’s ballot at the polling place, the chief inspector shall follow the challenge procedure in Chapter GAB 9, Wis. Adm. Code. The challenge shall be recorded on the Challenge Documentation Form, EB-104c.

(9) If any observer engages in any loud, boisterous, or otherwise disruptive behavior that, in the opinion of the chief inspector, threatens the orderly conduct of the election or interferes with voting, the chief inspector shall warn the offending observer(s) that such conduct shall cease or the observer shall have to leave the polling place.

(10) If, after receiving the warning provided in sub. 9, the offending observer does not cease the offending conduct, the chief inspector shall order the offending observer to depart the polling place. If the offending observer declines or otherwise fails to comply with the chief inspector’s order to depart, the chief inspector shall summon local law enforcement to remove the offending observer.

(11) While in the polling place, observers shall keep conversation to a minimum and shall try to conduct whatever conversation is necessary at a low enough volume to minimize distraction to electors and to the election inspectors and any other election officials. Failure to adhere to this subsection shall result in a warning under sub. 9 and, if the conduct continues, removal under sub. 10.

(12) Observers shall be permitted to view the poll lists, excluding the confidential portions of the lists maintained under ss. 6.35 (4) and 6.79 (6), Stats., as long as doing so does not interfere with or distract electors under s. 5.35 (5) Stats. Observers shall not be permitted to make a photocopy or take photographs of the poll lists on election-day.

(13) Observers shall not be permitted to handle an original version of any official election document.

(14) Observers shall not engage in electioneering as defined in s.12.03, Stats. If an observer violates s. 12.03, Stats., the chief inspector shall issue a warning under sub. 9 and, if the conduct continues, shall order the offending observer to depart the polling place or suffer removal under sub. 10.

(15) Observers shall not use a cellular telephone or other wireless communication device inside the voting area to make voice calls. Such use shall result in a warning under sub. 9 and, if the conduct continues, shall result in removal under sub. 10. Text messaging and other non-audible uses of such a device are permissible.

(16) Observers shall not engage in any conversation with election officials or other electors concerning a candidate, party, or question appearing on the ballot. Such conversation constitutes electioneering under s. 12.03, Stats., and shall result in a warning under sub. 9 and, if the conduct continues, removal under sub. 10. The chief inspector may order that other conversation be minimized if it is disruptive or interferes with the orderly conduct of the election.

(17) The restrictions on voter contact under sub. 16 shall not be construed to prevent any observer from assisting an elector under s. 6.82, Stats., provided that the elector requests the observer's assistance, and provided that the assistance meets the other requirements of s. 6.82, Stats., and the observer qualifies to provide assistance under that statute.

(18) Observers shall not wear any clothing or buttons having the name or likeness of, or text related to, a candidate, party, or referendum group appearing on the ballot or having text which describes, states, or implies that the observer is a governmental official or has any authority related to the voting process. Wearing such apparel at the polling place constitutes a violation of s. 12.03, Stats., and shall result in a warning under sub. 9 and, if the observer refuses to comply with the chief inspector's order, shall result in removal under sub. 10.

(19) Observers may not use any video or still cameras inside the polling place while the polls are open for voting. Failure to adhere to this subsection shall result in a warning under sub. 9 and, if the conduct continues, removal under sub. 10.

(20) After the polls close, candidates are allowed to be present and the prohibition of video and still cameras does not apply unless it is disruptive or interferes with the administration of the election.

GAB 4.02 Observers at the municipal clerk's office.

(1) Observers shall be permitted to be present at the municipal clerk's office, provided the clerk's office is located in a public building, or an alternate site for absentee voting designated under s. 6.855, Stats., on any day that absentee ballots may be cast in the office.

(2) Observers shall conform their conduct to the requirements of s. GAB 4.01. The municipal clerk shall exercise the authority of the chief inspector under s. GAB 4.01 to regulate observer conduct.

(3) The clerk shall establish observation areas to allow observers to view all public aspects of the absentee voting process. The observers need not be allowed behind the counter in the clerk's office.

(4) All of the observers' questions shall be directed to the clerk.

(5) If any observer engages in any loud, boisterous, or otherwise disruptive behavior that, in the opinion of the clerk, threatens the orderly conduct of the election or interferes with voting, the clerk shall issue a warning under s. GAB 4.01 (9) and, if the observer does not cease the offending conduct, order the observer's removal under s. GAB 4.01 (10). (6) Observers may not use any video or still camera inside the clerk's office.

GAB 4.03 Observers at the central counting location.

- (1) In a municipality using a central counting location under s. 5.86, Stats., observers shall be permitted to be present at the central counting location.
- (2) Observers shall conform their conduct to the requirements of s. GAB 4.01. The municipal clerk shall exercise the authority of the chief inspector under s. GAB 4.01 to regulate observer conduct.
- (3) The clerk shall establish observation areas to allow observers to view all public aspects of the counting process.
- (4) If any observer engages in any loud, boisterous, or otherwise disruptive behavior that, in the opinion of the clerk, threatens the orderly conduct of the count, the clerk shall issue a warning under s. GAB 4.01 (9) and, if the observer does not cease the offending conduct, order the observer's removal under s. GAB 4.01 (10).
- (5) Observers shall be permitted to use a video or still camera inside the central count location unless it is disruptive or interferes with the administration of the election.
- (6) All of the observers' questions and challenges shall be directed to the clerk.

GAB 4.04 Observers at absentee ballot canvass.

- (1) In a municipality using a central absentee ballot canvass location under s. 7.52, Stats., observers shall be permitted to be present at the canvass location.
- (2) Observers shall conform their conduct to the requirements of s. GAB 4.01. The board of absentee ballot canvassers shall exercise the authority of the chief inspector under s. GAB 4.01 to regulate observer conduct.
- (3) The board of absentee ballot canvassers shall establish observation areas to allow observers to view all public aspects of the canvassing process.
- (4) If any observer engages in any loud, boisterous, or otherwise disruptive behavior that, in the opinion of the board of absentee ballot canvassers, threatens the orderly conduct of the count, the board of absentee ballot canvassers shall issue a warning under s. GAB 4.01 (9) and, if the observer does not cease the offending conduct, order the observer's removal under s. GAB 4.01 (10).
- (5) Observers shall be permitted to use a video or still camera inside the absentee canvass location unless it is disruptive or interferes with the administration of the absentee ballot canvass.
- (6) All of the observers' questions and challenges shall be directed to the member of the board of absentee ballot canvassers designated to receive questions and challenges.

GAB 4.05 Observers at absentee voting locations described in s. 6.875, Stats.

- (1) One observer from each of the two political parties whose candidate for governor or president received the greatest number of votes in the municipality, in the last general election, may accompany the special voting deputies to absentee voting locations described in s. 6.875, Stats.
- (2) Observers shall conform their conduct to the requirements of s. GAB 4.01. The special voting deputies shall exercise the authority of the chief inspector under s. GAB 4.01 to regulate observer conduct.
- (3) The special voting deputies shall establish observation areas to allow observers to view all public aspects of the absentee voting process.
- (4) If any observer engages in any loud, boisterous, or otherwise disruptive behavior that, in the opinion of the special voting deputies, threatens the orderly conduct of the absentee voting process, the special voting deputies shall issue a warning under s. GAB 4.01 (9) and, if the observer does not cease the offending conduct, order the observer's removal under s. GAB 4.01 (10).

(5) Observers shall not be permitted to use a video or still camera inside the voting location.

(6) All of the observers' questions shall be directed to the special voting deputies.

GAB 4.06 Observers at a recount.

(1) Pursuant to s. 9.01 (1) (b) 11., Stats., the recount of any election shall be open to any interested member of the public including candidates and their counsel.

(2) Observers shall conform their conduct to the requirements of s. GAB 4.01. The board of canvassers shall exercise the authority of the chief inspector under s. GAB 4.01 to regulate observer conduct.

(3) The board of canvassers may limit observers to a designated area, but the observers shall be positioned so that they can see the poll lists and each individual ballot as it is counted. If there is not room for all observers to view the ballots as they are being counted, visual preference shall be given to the candidates or their representatives.

(4) If any observer engages in any loud, boisterous, or otherwise disruptive behavior that, in the opinion of the board of canvassers, threatens the orderly conduct of the count, the board of canvassers shall issue a warning under s. GAB 4.01 (9) and, if the observer does not cease the offending conduct, order the observer's removal under s. GAB 4.01 (10).

(5) Observers shall be permitted to use a video or still camera inside the recount location unless it is disruptive or interferes with the administration of the election.

(6) All of the observers' questions and challenges shall be directed to the member of the board of canvassers designated to receive questions and challenges.

GAB 4.07 Communications media observers.

(1) Observers from communications media organizations shall identify themselves and the organization they represent to the chief inspector upon arriving at the polling place. The inspector shall record that information on the inspectors' statement, EB-104.

(2) Communications media observers shall be permitted to use video and still cameras provided the cameras are not used in a manner that allows the observer to see or record how an elector has voted and provided the cameras do not interfere with voting or disrupt the orderly conduct of the election.

GAB 4.08 Polling Place Accessibility Assessments.

(1) This section applies to disability advocates and other individuals authorized by the board to assess the compliance of a polling place with s. 5.25 (4) (a), Stats.

(2) When practical, groups and individuals observing under this section shall notify the clerk at least 24 hours in advance of their intent to assess polling place accessibility.

(3) Disability advocate observers shall be allowed out of the designated observation area to take accessibility measurements to ensure compliance with polling place accessibility requirements unless it is disruptive or interferes with the administration of the election.

(4) Disability advocate observers shall be allowed to take photos and video to document compliance with the accessibility requirements unless it is disruptive or interferes with the administration of the election.

(5) Disability advocate observers shall be allowed to wear shirts or name tags identifying themselves as disability advocate observers.

(6) Election officials, including poll workers, shall facilitate the work of disability advocates in making their accessibility assessments.

This emergency rule will take effect upon its publication in the official state newspaper, the Wisconsin State Journal, pursuant to s.227.24, Stats.

Dated September 13, 2010

KEVIN J. KENNEDY
Director and General Counsel
Government Accountability Board