

REPORT
OF
GOVERNMENT ACCOUNTABILITY BOARD

Clearinghouse Rule 10-130
Chapter GAB 4
Wisconsin Administrative Code

The Wisconsin Government Accountability Board proposes an order to repeal and recreate chapter GAB 4, relating to observers at a polling place or other location where votes are being cast, counted, canvassed, or recounted.

This rule is not subject to s. 227.185, Stats. The statement of scope for this rule, published in Register 657, on September 30, 2010, was sent to the LRB prior to June 8, 2011.

ANALYSIS PREPARED BY THE GOVERNMENT ACCOUNTABILITY BOARD

- 1. Statutes interpreted:** s.7.41, Stats.
- 2. Statutory authority:** ss. 7.41(5), 5.05(1)(f), 227.11(2)(a), Stats.
- 3. Explanation of agency authority:** The Government Accountability Board, under s. 5.05(1)(f), Stats., has responsibility for the administration of chs. 5 to 12, Stats., and is authorized to promulgate rules under ch. 227, Stats., in order to interpret or implement the laws regulating the conduct of elections.

This rule repeals chapter GAB 4, Election Observers, which interprets s. 7.41 of the Wisconsin Statutes, Public's right to access, as amended by 2005 Wisconsin Act 451. 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.

Existing Chapter GAB 4 (formerly Chapter ElBd 4), was adopted to implement s. 7.39, Stats., relating to the appointment of election observers at polling places in a municipality. Subsequent to the enactment of s. 7.39, Stats., the legislature enacted a much broader statute, s. 7.41, Stats., that expanded the class of persons who may observe the proceedings at a polling place to include "any member of the public." Because any member of the public has the right to observe merely by being present, appointment as an observer was no longer necessary, thereby rendering s. 7.39, Stats., obsolete and necessitating its repeal. Consequently, the legislature repealed s. 7.39, Stats., in 1999 Wisconsin Act 182.

In 2005 Act 451, the Wisconsin Legislature amended s. 7.41(5), Stats. to expand the number of locations at which observers had the right to observe to include “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 on any day that absentee ballots may be cast at that site for the purpose of observation of an election and the absentee ballot voting process.” Additionally, Act 451 extended access of partisan election observers to nursing homes and other adult care facilities and complexes under s. 6.875, Stats. Finally, both the Assembly and Senate have recently passed Assembly Bill 202, expressing a legislative determination that election observers shall be located in an observation area between three and eight feet from the tables at which electors are registering or announcing their name and address in order to obtain a ballot.

The Government Accountability Board needs to promulgate a new rule implementing the provisions of ss. 6.875 and 7.41, Stats., by setting forth standards of conduct applicable to persons who are present at a polling place, or elsewhere, for the purpose of observing all public aspects of an election, including voting, and the counting and canvassing of ballots.

4. Related statute(s) or rule(s): Wisconsin Statutes ss. 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. The rule provides guidance to local election officials as well as members of the public by identifying acceptable and prohibited conduct by election observers while identifying the authority for enforcement at various voting locations. The focus of the rules related to observer conduct is the smooth administration of the election, regardless of the location that voting is exercised.

The rule enables the chief inspector to enforce the rules of observer conduct at a regular polling place and allows the inspector to warn and remove an observer who continues to engage in electioneering, or posting or distributing election-related materials, or engages in conduct that disrupts the operation of the polling place.

Under the rule observer conduct is regulated at voting locations other than a regular polling place. When voting is conducted at the municipal clerk’s office or an alternate site for absentee voting under s. 6.855, Stats., and when observers are at a central counting location, the municipal clerk has authority to enforce the rule regulating observer conduct. At central absentee ballot canvass locations, the board of absentee ballot canvassers has enforcement authority over observer conduct. When absentee voting is conducted in certain homes, facilities and complexes under s. 6.875, Stats., the special voting deputies are empowered with enforcement of observer conduct. In the case of a recount, the board of canvassers is charged with enforcement of observer conduct.

Disability advocates who observe in order to assess accessibility compliance of a polling place are permitted by the rule to be outside the designated observation area to take accessibility measurements. Additionally, disability advocate observers are permitted to take photos and video to document compliance with the accessibility requirements. The rule prohibits other observers from taking photos or videos where voting 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 laws that allow persons to observe the voting process in some manner, at the polling places in that state. (Minnesota law, for example, does not provide for election “observers,” but does provide for election “challengers.”) Generally the states have a process for appointment of observers in advance of the election, and some require observers to register with the municipal clerk before the election and receive authorization to observe.

Illinois: All poll watchers must be registered to vote in Illinois, are appointed by a designated authority (candidate, political party, qualified organization of citizens, proponents and opponents of a ballot proposition, and state nonpartisan civic organization), and credentialed by the county clerk or local board of election commissioners. The number of poll watchers allowed in the polling place at any one time is limited by statute, depending on the type of election occurring, but only one poll watcher may be present at absentee and early voting locations.

Poll watchers are permitted to observe all proceedings and view all reasonably requested records relating to the conduct of the election, provided the secrecy of the ballot is not impinged, but they are prohibited from touching any materials. Where ballots are centrally counted, each appointment authority is entitled to have one poll watcher for each panel of election judges.

Iowa: Poll watchers may be appointed by a political party executive or central committee, non-party political organizations (NPPO), candidates nominated by petition, and groups opposing or supporting public measures on the ballot, and must carry written permission from the appointment authority. Poll watchers acting as challengers must be registered voters in the county where the challenge occurs. The number of poll watchers that can be in a polling place is limited to three appointed by a political party that has a candidate on the ballot, one appointed by each NPPO that has a candidate on the ballot, one appointed by each candidate nominated by petition, and three for public measures on the ballot (except for primary and general elections). Generally the process of counting ballots is open to the public, however, statute limits the number of watchers who may observe the counting of absentee ballots on the Monday or Tuesday before the polls close.

Poll watchers are prohibited from engaging in certain specific activity. For example, poll watchers may look at the eligibility slips or voter rosters and write down the names of

people who have or have not voted, but may not handle ballots, voting equipment, or the election register. Additionally, poll watchers are prohibited from wearing buttons, stickers, jewelry or clothing of a political nature.

Michigan: Challengers must be a registered voter in the state of Michigan and are appointed by political parties and qualified groups that have been approved to make appointments by the local clerk. Challengers have the right: to observe voting and ballot counting; to inspect, without touching, applications to vote, poll books, registration lists and other materials used to process voters; to challenge a person's right to vote; and, to challenge the actions of the election inspectors. While challengers are given access behind the processing table, challengers are prohibited from engaging in certain specific activities such as obstructing or delaying the work of election inspectors, touching ballots, touching election materials, or handling voting equipment, campaigning, or acting in a disorderly manner.

Poll watchers, on the other hand, are not appointed in the manner of challengers and do not enjoy the same rights and privileges as qualified election challengers. Most notably, poll watchers may not make challenges to a person's eligibility to vote or to the actions of election inspectors. Additionally, their location and movement within the polling place is more restricted than that of challengers, though poll watchers are subject to the same conduct standards as challengers.

Minnesota: Minnesota statutes do not provide for poll watchers, however, election challengers are appointed by certificate by major political parties or candidates. The challenger must be a voter from that political party and a Minnesota resident. The number of challengers at a polling place is limited to one per major political party per precinct (or one per campaign per precinct in nonpartisan elections). Otherwise, Minnesota limits individuals at a polling place for purposes other than voting to representatives of the secretary of state's office, county auditor's office, and the municipal or school district clerk's office, as well as the election judge, sergeant-at-arms, and the news media. There is also a special educational activity allowance for teachers and students when authorized by the secretary of state.

The conduct of election challengers is regulated by law. The law provides that challengers may challenge an individual whom the challenger knows or reasonably believes is not an eligible voter. Otherwise, challengers may not handle or inspect registration cards, files, or lists; prepare a list of individuals who have or have not voted; attempt to influence voting; talk with a voter except, while in the presence of the election judge, to determine if the voter is eligible to vote in the precinct. Challengers may not wear anything that identifies them as being affiliated with a political party or candidate. Additionally, challengers are prohibited from taking pictures or videos in the polling place.

8. Summary of factual data and analytical methodologies: Adoption of the rule was not predicated on any factual data or analytical methodologies, but on the need to eliminate 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. The Government Accountability Board implemented an emergency rule consistent with the proposed permanent rule for use during the 2010 General Election. The emergency rule was created with the input of an ad hoc committee of election officials, and input regarding the effectiveness of the rule and suggested revisions was gathered at a public hearing on November 11, 2008. The provision of the emergency rule have been implemented over the past several years, and the rule has been credited with effectively balancing the public's right to observe elections with voters' privacy rights and the need to preserve order at polling locations.

9. Public hearing appearance and registrations: The Government Accountability Board held a public hearing on December 13, 2010. There were no appearances at the public hearing, however, the following individuals submitted comments electronically for or against the proposed rule and were entered in the record of public hearing:

Paul Malischke – for information
Noreen Johnson – in favor
Mary Ann Hanson – for information
Andrea Kaminski (League of Women Voters) – in favor

10. Summary of public comments and agency's response: The following suggestions were received by the Board during the public comment period.

Comment 1: Specify whether observers have the right to enter the polling place before the 7:00 a.m. starting time.

Response 1: Observers have the right to observe “public aspects of the voting process,” and s. 4.01(1)(h) defines that phrase to include “the opening of a polling place prior to commencement of voting.”

Comment 2: Specify that the poll closing procedures must remain open to observers, even those arriving past 8:00 p.m.

Response 2: Observers have the right to observe “public aspects of the voting process,” and s. 4.01(1)(h) defines that phrase to include “the counting and reconciliation process.”

Comment 3: Specify that observers have the right to see the serial number on all seals, see the signed zero tape, and also to receive a copy of the tabulator printout with the results.

Response 3: This suggestion was not incorporated into the rule. The emergency rule has been implemented to permit observers to view documents and records, if that can be done without disrupting the process of voting or counting ballots.

Comment 4: Limit the prohibition on the use of video or still cameras to while voting is in progress.

Response 4: This suggestion was incorporated into the rule.

Comment 5: Specify that before duplicating a ballot, the poll worker must announce that it is being done, and why (e.g. an absentee ballot contains an over-vote).

Response 5: This suggestion was incorporated into the rule.

Comment 6: Reduce the distance between observers and poll workers to four feet, instead of six to twelve feet.

Response 6: Given the legislative directive of 2013 Assembly Bill 202, the rule specifies that the observation area shall be between three and eight feet from the tables where electors register to vote and state their name and address.

Comment 7: Require the chief inspector to set up additional observation areas near the registration table and the area where challenges are handled.

Response 7: This suggestion was incorporated into the rule in s. 4.02(5).

Comment 8: Allow the Chief Inspector to appoint serving Election Inspectors to answer observer questions.

Response 8: GAB §4.01(1)(b) permits the Chief Inspector to designate another election official to carry out the responsibilities of the chief inspector under the rule.

Comment 9: Amend GAB §§4.02(3), 4.03(3) and 4.05(1) to incorporate the word “hear” because “[v]iewing and hearing are both necessary for meaningful observation.”

Response 9: This suggestion was not incorporated into the rule, but the closer proximity of the observation area should facilitate hearing voters state their name and address.

Comment 10: GAB § 4.08(2) should be expanded by the Board to “spell out” the circumstances in which use of cameras are authorized. Voters should be asked for permission before being photographed.

Response 10: This suggestion was not incorporated into the rule. The rule prohibits the use of cameras at the polling place except for use by the media and representatives of the Board.

11. Explanations of modifications to the proposed rule as a result of the public comments or testimony received at public hearings: The Government Accountability Board made modifications to this rule following the December 15, 2010 public hearing as described above.

Additionally, the Board made changes to the organization of the rule in response to the Legislative Council staff recommendations and to streamline organization of the rule, and following the passage of 2013 Assembly Bill 202 by the Legislature.

12. Legislative Council staff clearinghouse report: See Clearinghouse Report to Agency attached immediately following this report.

13. Response to Legislative Council staff recommendations in the clearinghouse report: The Government Accountability Board considered and adopted the Legislative Council staff recommendations, with the exception of Section 1.b., related to electioneering. The Board instead took a different approach to achieve a clear resolution that does not confuse the statutory definition of electioneering with rule provisions related to disruptive conversations.

14. Final regulatory flexibility analysis: The creation of this rule does not affect the normal operations of business.

15. Economic impact report: This rule is not subject s. 227.137, Stats., because the rule draft was sent to the Legislative Council under s. 227.15, Stats., prior to June 8, 2011.

16. Fiscal estimate: The creation of this rule has no new fiscal effect.

17. Changes to the proposed rule's plain language analysis or fiscal estimate: This analysis provides more detail of the statutory authority of the Board related to the regulation of election observers at locations not described in s. 7.41, Stats. Additionally, this analysis provides more detailed information about the laws in adjacent states.

18. Agency contact person: Michael R. Haas, Elections Division Administrator, Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984; Phone 266-0136; Michael.haas@wisconsin.gov.

CONCLUSION AND RECOMMENDED ACTION

The Government Accountability Board unanimously concludes that ch. GAB 4 should be repealed and recreated. The rule is necessary to effectuate the legislative policy set forth in ss. 5.35(5), 7.37(2), 7.41 and 12.13(3)(x), Stats., in which the legislature has determined that members of the public shall have the right to be present to observe elections, but that right must be balanced with the responsibility of election inspectors to maintain order at the polls. As demonstrated by the implementation of the emergency rule in recent election cycles, the permanent rule effectively balances those interests and provides sound guidance to local officials to address issues which routinely arise at polling locations and other sites where voting takes place or ballots are tabulated. The Government Accountability Board recommends promulgation of this rule.

Respectfully submitted,

March 24, 2014

GOVERNMENT ACCOUNTABILITY BOARD

Michael Haas

Michael Haas, Elections Division Administrator