



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 24-032

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. In the agency’s analysis for the proposed rule, the agency identifies s. 227.11 (2) (a), Stats., as one of the statutes that provides rulemaking authority to the agency. The authority cited in s. 227.11 (2) (a), Stats., grants authority to all agencies, including the Wisconsin Elections Commission, to promulgate rules interpreting statutes administered by each agency. Consider clarifying that the statute is a general grant of authority that is not limited to the commission. For example, rather than stating “authorizes the commission”, the description could be revised to state that the provision “authorizes an agency”.

b. In the agency’s analysis for the proposed rule, the relevance of citing s. 7.08 (3), Stats., as a source of statutory authority is unclear. The proposed rule does not make reference to an election manual. Consider explaining the relevance of this rule to an election manual or deleting this citation.

c. The provision relating to challenging an elector, s. EL 4.04 (5), mentions that a challenge may be brought by a “qualified observer”. That term is not defined and there is nothing in the statutes or in ch. EL 9 that requires an observer to be “qualified” in order to challenge an elector. Does the agency mean an observer who has met the basic standards of conduct in s. 7.41, Stats., and s. EL 4.04? Or an observer who has signed the election log and shown photo identification under s. EL 4.04 (1)? The agency should review the use of the term “qualified observer” and clarify its meaning.

d. It is not entirely clear that s. EL 4.07 falls into the realm of regulating election observers, as authorized by s. 7.41 (5), Stats. The provision does not regulate the conduct of an election observer, which is the subject matter of the proposed chapter. The relationship to the regulation of election observers should be explained. For example, is media access viewed as a form of the public’s right to access? Or that the role of media is similar to an observer’s, in observing and reporting on an election?

2. Form, Style and Placement in Administrative Code

a. In the agency's analysis for the proposed rule, an entry should be inserted to describe the factual data and analytical methodologies used in preparing the proposed rule. The description should provide a narrative summary of the steps taken and sources considered in preparing the proposed rule.

b. Throughout the proposed rule, the agency should review and update the format of cross-references to statutes and rules. In particular, a number of cross-references to statutes and other sections in the Elections Commission rules should be revised to include the abbreviation "s.". Also, in citations to statutes and rules, spaces should be inserted between each unit within a reference. For example, in s. EL 4.03 (2) (intro.), the format for the reference to "EL 4.04(1)" should be revised to "s. EL 4.04 (1)".

c. In the rule text, a chapter title should be added for the proposed chapter. [s. 1.10 (2) (a) 2. and (b) 1., Manual.]

d. The following comments apply in s. EL 4.02:

(1) The definitions should be placed in alphabetical order. In particular, the definitions for "chief inspector" and "clerk" should appear before "commission".

(2) In sub. (6), the agency name "Department of Transportation" should not be capitalized. Also, "Social Security" should not be capitalized. [s. 1.06 (2), Manual.]

(3) In sub. (11), a quotation mark should be inserted before the word "Member".

e. In s. EL 4.03 (2) (intro.), the abbreviation "ID" should be spelled out.

f. The structure of s. EL 4.03 (2) should be revised. Either the introduction should be revised to introduce and indicate the applicability of pars. (a) and (b), or the introduction should itself be numbered as a paragraph. [s. 1.11 (2) and (5), Manual.]

g. In s. EL 4.03 (14) (intro.), add an introductory statement to indicate the applicability of the subunits. The introductory statement should end in a colon and include a phrase such as "any of the following:". [s. 1.11 (2) and (3), Manual.]

h. The following comments apply in s. EL 4.04 (5):

(1) The word "and" should be inserted before the reference to "6.935".

(2) The abbreviation "Ch." should be revised to lowercase "ch.".

(3) The source designation "Wis. Admin. Code" should be removed. [s. 1.15 (2) (a) 2., Manual.]

i. In s. EL 4.04 (15), the plural abbreviation "ss." should be revised to the singular abbreviation "s.". [s. 1.15 (2) (d), Manual.]

j. In s. EL 4.05 (2) (b), the format for the cross-reference at the end of the sentence should appear as "par. (a)".

k. In s. EL 4.05 (4) (f), the format for the cross-reference should appear as "par. (d)".

l. In s. EL 4.06, the designation for sub. (1) should be removed as there are no other subsections in the provision.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the agency's analysis for the proposed rule, consider adding s. 5.25 (4) (a), Stats., as a related statute or rule, as it is cited in s. EL 4.02 (1).

b. Under the analysis for the proposed rule, in the agency's description of related statutes or rules, consider explaining the different statutory requirements for observers of special voting deputies and observers for recount procedures.

c. In s. EL 4.02 (9), consider cross-referencing the existing definition for "election official" given in s. 5.02 (3m), Stats.

d. In s. EL 4.04 (13), the cross-reference to sub. (13) is referencing back to itself. Is this instead intended to cross-reference to sub. (15)? Also, the word "subsection" should be revised to the abbreviation "sub."

e. In s. EL 4.05 (5) and (6), it is not entirely clear which of the requirements from ss. EL 4.03 and 4.04 apply to election officials and observers in a recount. For example, s. EL 4.05 (5) (c) requires the designated election official to establish at least one observation area but it is not clear whether the siting requirements are the same as for polling places. It is unclear whether observers need to sign in, acquire a badge or name tag, are subject to removal, etc. Consider either specifying that all of the rules in ss. EL 4.03 and 4.04 apply "except as provided in" the relevant sections that are site-specific, or cross-referencing in s. EL 4.05 (5) and (6) the rules that do apply.

f. In s. EL 4.07 (3), it appears the cross-reference to "this rule" should be revised to require a communications media member to comply with "this chapter". [s. 1.15 (2) (c) (Examples Table), Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the agency's plain language analysis for the proposed rule, the third sentence of the first paragraph has a typographical error: remove the word "the" after "clarify".

b. In the agency's plain language analysis for the proposed rule, the third paragraph could be rewritten to correct typographical errors and to clarify that the rule establishes procedures for election officials, rather than addresses the conduct of election officials. Section 7.41 (5), Stats., requires the commission to promulgate rules relating to the conduct of election observers, not officials. For example, the description could be phrased as:

Section EL 4.03 establishes procedures for election officials so that they may designate areas for observers to observe election processes, make observation areas accessible, limit the number of observers, check in and provide information to observers, warn observers of disruptive or disallowed conduct, and remove observers from the location.

c. In the agency's plain language analysis, the description for s. EL 4.07 should be updated to revise the plural word "Sections" to the singular "Section".

d. In the agency's summary of comments received during the preliminary comment period, the phrase "Election Observer" is capitalized; it is not capitalized elsewhere in the proposed rule.

e. In the agency's comparison of neighboring states' rules, the description could be rewritten so that each state has its own paragraph.

f. Throughout the text of the proposed rule, the word "Commission" should not be capitalized. While the word "Commission" is capitalized in the proposed rule, other Ethics Commission administrative rules do not capitalize the phrase. In administrative rules, an agency name should not be capitalized. Compare, for example, current rule s. EL 12.01 (1). [s. 1.06 (2), Manual.]

g. The text of the proposed rule in some instances uses the term "elector", and in some instances "voter". Consider whether reader understanding would be improved by using one term consistently, particularly for consistency within a provision. For example, in s. EL 4.04, subs. (5) and (13) refer to a "voter", but subs. (8) and (15) refer to an "elector".

h. The text of the proposed rule uses passive voice in several instances, which can cause ambiguity. Consider rewriting the rule to ensure that each provision assigns a particular action or requirement to a specific actor. For example, s. EL 4.03 (2) (a) could be written to say "The designated election official [or an election official] shall offer to an observer a summary of the rules . . .". Additional instances are noted below, but consider reviewing the rule in its entirety to ensure that the rule uses the active voice.

i. Consider moving the definition of "accessibility reviewer", and its exclusion from the definition of "observer", to the section that defines "observer".

j. In the definition of "chief inspector", consider revising the word "under" to the phrase "appointed pursuant to".

k. The definition of "clerk" is confusing and not entirely consistent with the statutes. Consider changing the definition to read: "Clerk" has the same meaning as "municipal clerk" under s. 5.02 (10), Stats."

l. In the last sentence of the definition of "confidential information", consider changing "a proof of residency document" to "proof of residency", to avoid redundancy.

m. In the definition of "member of the public", consider deleting the material relating to a candidate or a registered write-in candidate and creating a separate section stating that a candidate or registered write-in candidate may not serve as an observer at a polling place where he or she appears on a ballot. Alternatively, it may not be necessary to define "member of the public".

n. Consider changing the title of s. EL 4.03 to "Procedures for election officials".

o. In s. EL 4.03, sub. (1) could be moved to a later subsection so that the rule tracks the timeline for election officials more closely. Additionally, the provision could be rewritten for clarity and to eliminate the passive voice. For example, the provision could be phrased as:

A designated election official may reasonably limit the number of observers representing the same organization who are present at any one time at an observable location due to physical limitations or the orderly administration of elections, or both. If a designated election official acts under this subsection, he or she shall limit observers from all organizations in a uniform manner. The designated official shall document the actions taken and the reasons therefore on a copy of an inspectors' statement or other incident log.

p. In s. EL 4.03 (2) (a) (intro.), revise the passive voice to active voice. Second, the phrase “of all” should be inserted before “of the following:”. Third, subs. 1. and 2. should each be revised to end in a period. [s. 1.11 (2) and (3), Manual.]

q. In s. EL 4.03 (1) (b), revise the passive voice and consider moving the last sentence to a separate subsection.

r. In s. EL 4.03 (4) to (9), the duties of the designated election official in establishing observation areas are mixed with other rights and duties relating to observers. Consider combining subs. (4), (6), and (7) and creating an introduction. For example, the provisions could be combined under sub. (4) along the following lines:

(4) Except as provided in sub. (9) [would need to be renumbered], the designated election official shall do all of the following:

(a) Establish at least one observation area to ensure observers may readily observe all public aspects of the voting process during the election without disrupting the voting process. To the extent practicable, the official shall position an observation area in a manner that minimizes contact between observers, voters, and election officials.

(b) Ensure that an observation area is not less than 3 feet nor more than 8 feet from any of the following:

1. Each table at which electors announce their names and addresses to be issued voter numbers or at which election officials announce the name of absentee voters.
2. Each table at which electors may register to vote.
3. Each table at which election inspectors remake any ballots.

(c) Ensure that an observation area is accessible to observers with disabilities and includes sufficient space for mobility equipment, chairs, or other disability aids brought by an observer.

s. In s. EL 4.03 (14) (a), both instances of the term “Chief Inspector” should not be capitalized.

t. Section EL 4.03 (14) (c) could be rewritten to assign the duty to offer an opportunity to sign a written order to a specific person. Additionally, the language is confusing. Consider revising to read something like:

If the designated election official who has issued an order to an observer to depart has been appointed from a list provided by a political party under s. 7.30 (4) Stats., the chief inspector or municipal clerk shall offer the opportunity to sign the written order to an election official representing the opposite political party than the designated election official, if he or she is available on a timely basis, and to note any concurrence or disagreement with that order. Failure of that election official to sign the written order, or the unavailability of an

official to review the order in a timely fashion, does not affect the enforceability of that order.

u. Section EL 4.03 (14) (d) could be rewritten to assign the duty to record an incident to the designated election official or to another person.

v. Consider changing the language in s. EL 4.04 (9) to something like: “No observer may engage in electioneering, as defined in s. 12.03, Stats., or post or distribute any election-related material as defined in s. 12.035, Stats.”.

w. The proposed rules relating to audio and video recordings are confusing and seemingly inconsistent. Consider placing all of the requirements and restrictions on audio and video recordings into a separate section of ch. EL 4 by creating a separate section that encompasses ss. EL 4.04 (12), 4.05 (1) (b), (3) (b), (5) (d), and (6) (b), and 4.06.

x. Consider placing the prohibition on candidates and write-in candidates being election observers at the end of s. EL 4.04.

y. Section EL 4.05 (1) (a) could be simplified to state that an observer may remain at a polling place until all election-related activities are concluded. The reference to the open meetings law is confusing and may not be necessary. Additionally, the term “Election Day” should not be capitalized.

z. In s. EL 4.05 (2) (a), the agency name “Postal Service” should not be capitalized.

aa. In s. EL 4.05 (2) (a) and (b), (4) (b) and (d), (5) (a), and (6) (a), consider changing each instance of the phrase “An observer shall be permitted to” to either “An observer may” or “An election official shall permit an election observer to”.

bb. In s. EL 4.05 (4) (e), each instance of the term “Special Voting Deputies” and “Special Voting Deputy” should not be capitalized.

cc. Consider eliminating s. EL 4.05 (4) (f) and rewriting (4) (d) to state “An observer shall be permitted to observe the process of absentee ballot distribution in the common areas of the home or facility, but may not enter a voter’s private room. A voter may opt to close his or her door or otherwise secure his or her voting privacy.”.

dd. In s. EL 4.07 (title), a period should be inserted at the end of the title.

ee. In s. EL 4.07 (1), what does it mean to “use video and still cameras outside of the voting area”? Does this mean that the recording equipment must be placed outside of the voting area, but may capture videos or images of actions within the voting area, so long as there is no disruption or interference, or recording of confidential information? Or does it mean that the physical placement of equipment and the images of actions must both be outside the voting area? It may be helpful to differentiate between the location of physical equipment and the location of the actions being captured.

ff. In s. EL 4.07 (2), consider rewording the last sentence to the active voice.