LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **02-071**

AN ORDER to create chapter ElBd 9, relating to the procedure for challenging the ballot of an elector at a polling place.

Submitted by **ELECTIONS BOARD**

05-24-2002 RECEIVED BY LEGISLATIVE COUNCIL.

06-17-2002 REPORT SENT TO AGENCY.

RS:RJC

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701–2536
(608) 266–1304 • Fax: (608) 266–3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☑ NO ☐

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☑ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

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CLEARINGHOUSE RULE 02-071

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

General Comment

Because newly created ss. ElBd 9.01 and 9.02 are very similar in their structure, the following comments relating to s. ElBd 9.01 also apply to s. ElBd 9.02.

2. Form, Style and Placement in Administrative Code

a. The treatment clause in SECTION 1 of the rule could be simplified by indicating that "Chapter ElBd 9 is created to read:". In addition, a title to the newly created chapter needs to be provided.

b. In s. ElBd 9.01 (intro.), because the term "cause" is used in several places throughout the entire rule, the definition of that term should be placed in a separate section which defines the term for the entire chapter. In the alternative, it would seem to make some sense, for purposes of clarity, to simply provide in a provision applicable to the entire chapter that "an elector or inspector has cause to challenge a person as being unqualified to vote if the challenging elector or inspector knows or suspects that any one of the following criteria applying to the person: (1) the person is not a citizen; (2) the person is not at least 18 years of age; (3) the person is not a resident of the election district; (4) the person has a felony conviction and has not been restored to civil rights; (5) the person has been adjudicated incompetent; (6) the person has placed a bet or wager on the election outcome; or (7) the person has voted previously in the same election." Finally, the phrase "the following procedure shall be followed," or a substantially similar phrase, should be inserted immediately preceding the colon.

c. If the language of s. ElBd 9.01 (2) is retained, the subdivisions of par. (d) should conclude with questions marks. Also, in par. (d) 1., the phrase "or extended supervision" should be inserted after the word "parole."

d. Generally, section titles should be written with an initial capital letter and in bold print. [See s. 1.05 (2) (b), Manual.] The entire rule should be reviewed for proper use of titles.

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

a. In s. ElBd 9.01 (2), the subunits numbered a. to d. should be renumbered as pars. (a) to (d).

b. In s. ElBd 9.01 (3), the rule directs readers to "see s. 9.05 of this chapter." First, this direction should not be placed in a parenthetical expression. Second, the cross-reference should be worked into the substantive provision of the rule. For example, in the substantive provision of the text, the cross-reference could be included as follows: ". . . but a written record of the procedural steps taken, up to the withdrawal, shall be preserved in accordance with s. ElBd 9.05." Lastly, internal cross-references should not refer to a particular provision "of this chapter." Instead, the cross-reference should refer to "s. ElBd 9.05." This last comment applies throughout the rule.

c. In s. ElBd 9.01 (4), the rule provides for a certain procedure if a challenge is not withdrawn after the person offering to vote "has answered the questions." What questions are these? An appropriate cross-reference, perhaps to sub. (2), should be provided.

d. In s. ElBd 9.01 (5), the rule refers to the "oath or affirmation of eligibility." What oath or affirmation is this referring to? An appropriate cross-reference, perhaps to the oath or affirmation under sub. (4), should be included.

e. Section ElBd 9.01 (6) conditions certain actions upon the challenged person refusing to answer any relevant questions put to him or her "under this chapter." A more specific cross-reference should be provided. For example, is this referring to the questions under sub. (2)? In addition, the rule also refers to "voting qualification requirements." What requirements are these? An appropriate cross-reference should be provided. These comments also apply to s. ElBd 9.01 (7).

f. In s. ElBd 9.03, the last occurrence of the notation "ss." should be replaced by the notation "s." because of the use of the disjunctive word "or."

g. Section ElBd 9.04 provides that inspectors have "all the power and authority given to them." What power and authority and by whom is it given? An appropriate cross-reference should be provided. For example, is this referring to the power of inspectors under s. ElBd 9.01? The rule needs to be clarified. Finally, the rule refers to "s. 9.01 (2) of this chapter." This should be a reference to "s. ElBd 9.01 (2)."

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

a. In s. ElBd 9.01 (intro.), the phrase "the challenged elector is not at least 18 years of age" should not be used in a parenthetical expression. Generally, parenthesis should be avoided. If the material is important to the thought or concept expressed in the rule, the material should be set apart with commas, not parentheses. Otherwise, the material should be placed, if necessary, in an explanatory note following the rule itself. [s. 1.01 (6), Manual.] But see comment 2. b., above.

b. In s. ElBd 9.01 (1), why does the oath use the word "truthfully" rather than the word "truly"? [See ss. 6.92 and 6.925, Stats.]

c. In s. ElBd 9.01 (2) (a), the term "citizen" should not be capitalized.

d. In s. ElBd 9.01 (3), the use of the term "is" should be changed to the phrase "shall be." In addition, the beginning of the sentence should be modified to make it clear that the inspector is the one withdrawing the challenge. For example, the first clause could be rewritten substantially as follows: "If the inspector withdraws his or her challenge . . . ."

e. Section ElBd 9.03 provides that before giving the elector a ballot, the inspector must write on the back of the ballot the serial number of the challenged person. It is noted that s. 6.94, Stats., indicates that such information must be noted on the ballot "before depositing" the ballot. Is there a reason for this discrepancy?

f. In s. ElBd 9.04, the rule indicates that the vote of an absent elector shall be challenged for cause. By whom may such a vote be challenged? The second sentence of the provision appears to indicate that it is an elector who challenges the absentee elector's ballot. May an inspector also make such a challenge? The rule should be clarified.

NOTICE OF PROPOSED RULE

STATE ELECTIONS BOARD

NOTICE IS HEREBY GIVEN that pursuant to ss.5.05(1)(f), 5.93, and 227.11(2)(a), Stats., and interpreting ss. 6.02, 6,03, 6.92, 6.93, 6.935, 6.94, and 6.95, Stats., and according to the procedure set forth in s.227.16(2)(e), Stats., the State of Wisconsin Elections Board will adopt the following rule as proposed in this notice without public hearing unless within 30 days after publication of this notice, the Elections Board is petitioned for a public hearing by 25 persons who will be affected by the rule; by a municipality which will be affected by the rule; or by an association which is representative of a farm, labor, business, or professional group which will be affected by the rule.

ANALYSIS PREPARED BY STATE ELECTIONS BOARD:

Statutory authority: s.5.05(1)(f), s.5.93 and s.227.11(2)(a), Stats.

Statutes interpreted: ss.6.02, 6,03, 6.92, 6.93, 6.935, 6.94, and 6.95, Stats.

The rule interprets ss.6.02, 6.03, 6.92, 6.93, 6.935, 6.94, and 6.95, Stats. The rule establishes the procedure for and the method by which an elector's ballot is challenged at a polling place and the method by which the elector's eligibility to vote is tested. The rule also codifies the method used to process the ballot of a challenged elector, including the creation of a written record for each challenge.

Section 6.92 of the Wisconsin Statutes provides that the Elections Board shall determine, by rule, the questions which are appropriate to test a person's qualifications to vote if that person is challenged as unqualified at a polling place. ElBd ch. 9 establishes those questions based on the voting qualification provisions of ss.6.02 and 6.03, Stats. The rule establishes the specific procedure whereby an inspector or an elector may challenge a voter's qualifications at a polling place; the procedure for determining the voter's eligibility to vote; and the procedure for identifying, by mark, and voting the challenged voter's ballot. The rule also establishes what shall be included in the written record that must be made by the polling place inspectors for each challenge.

Pursuant to the authority vested in the State of Wisconsin Elections Board by ss.5.05(1)(f), 5.93, and 227.(11)(2)(a), Stats., the Elections Board hereby creates Rule ElBd 9.01, 9.02, 9.03, 9.04, 9.05, and 9.06 interpreting ss.6.02, 6,03, 6.92, 6.93, 6.935, 6.94, and 6.95, Stats., as follows:

SECTION 1. ElBd 9.01, 9.02, 9.03, 9.04, 9.05, and 9.06 are created to read:

ELBD 9.01 INSPECTOR MAKING CHALLENGE

Any inspector may challenge for cause any person offering to vote whom the inspector knows or suspects is not a qualified elector. For purposes of challenge, cause is defined as one of the following: non-citizenship; age (the challenged elector is not at least 18 years of age); non-residency; felony conviction; adjudication of incompetence; a bet or wager on the election; or a previous vote in the same election. If a person is challenged as unqualified by an inspector:

(1) One of the inspectors shall administer the following oath or affirmation of veracity to the person: "You do solemnly swear (or affirm) that you will fully and truthfully answer all questions put to you regarding your place of residence and qualifications as an elector of this election."

(2) The inspector shall then ask only those of the following questions which are appropriate to test the person's qualifications based on the cause for the challenge:

(a) Are you a United States Citizen?

(b) Are you at least 18 years of age?

(c) For at least the 10 days before this election, have you resided in, or been a resident of, the ward or election district from which you seek to vote?

(d) Are you currently disqualified from voting for any of the following reasons:

1. A felony conviction for which you are still serving probation or are on parole or extended supervision
2. A judge's ruling that you are incapable of voting.
3. Having made a bet or wager on this election.
4. Having voted previously in this election.

(3) If the challenge is withdrawn, the challenge procedure is halted, but a written record of the procedural steps taken, up to the withdrawal, is preserved. (See s.9.05 of this chapter)

(4) If the challenge is not withdrawn after the person offering to vote has answered the questions, one of the inspectors, before issuing the ballot, shall administer to the challenged elector the following oath or affirmation of eligibility: "You do solemnly swear (or affirm) that: you are 18 years of age; you are a citizen of the United States; you are now and for 10 days have been a resident of this ward except under s. 6.02 (2); you have not voted at this election; you have not made any bet or wager or become directly or indirectly interested in any bet or wager depending upon the result of this election; you are not on any other ground disqualified to vote at this election."

(5) If the person challenged refuses to take the oath or affirmation of eligibility, the inspectors shall not issue a ballot to the person challenged.

(6) If the person challenged refuses to answer fully any relevant questions put to him or her by the inspector under this chapter, or the answers to the questions given by the person indicate that the person does not meet the voting qualification requirements, the inspectors shall not issue a ballot to the person challenged.

(7) If the person challenged answers fully all relevant questions put to the elector by the inspector under this chapter, takes the oath or affirmation of eligibility, fulfills the registration requirements, where applicable, and the answers to the questions given by the person indicate that the person meets the voting qualification requirements, the challenged elector shall be issued a ballot and the voting procedure under s.9.03 of this chapter shall be followed.

ELBD 9.02 ELECTOR MAKING CHALLENGE IN PERSON

Any elector may challenge for cause any person offering to vote whom the elector knows or suspects is not a qualified elector. Any elector who abuses the right to challenge under s.6.925, Stats., may be subject to sanctions available to inspectors under s.7.41(3), Stats. For purposes of challenge, cause is defined as one of the following: non-citizenship; age (the challenged elector is not at least 18 years of age); non-residency; felony conviction; adjudication of incompetence; a bet or wager on the election; or a previous vote in the same election. If a person is challenged as unqualified by an elector:

(1) One of the inspectors shall administer the following oath or affirmation of veracity to the challenging elector: "You do solemnly swear (or affirm) that you will fully and truthfully answer all questions put to you regarding the challenged person's place of residence and qualifications as an elector of this election."

(2) The inspector shall ask the challenger if he or she is an elector and then ask only those of the following questions which are appropriate to determine the qualifications of the challenged elector:

a. Why do you believe that the challenged elector is not a United States Citizen?

b. Why do you believe that the challenged elector is not at least 18 years of age?

c. Why do you believe that the challenged elector has not, for at least the 10 days before this election, resided in, or been a resident of, the ward or election district from which he or she seeks to vote?

d. For which of the following reasons, and why, do you believe the challenged elector is currently disqualified from voting:

1. A felony conviction for which the challenged elector is still serving probation or is on parole

2. A judge's ruling that he or she is incapable of voting.

3. Having made a bet or wager on this election.

4. Having voted previously in this election.

(3) One of the inspectors shall then administer the oath or affirmation of veracity to the challenged elector under this chapter and ask the challenged elector only the questions under s.9.01(2) of this chapter which are appropriate to test the elector's qualifications based on the cause for the challenge.

following the process in subs. (1) to (3),

(4) One of the inspectors shall ~~then~~ ask the challenging elector if he or she withdraws the challenge. If the challenge is withdrawn, the challenge procedure is halted, but a written record of the procedure up to the withdrawal is preserved. (See s.9.05 of this chapter)

(5) If the challenge is not withdrawn after the person offering to vote has answered the questions, one of the inspectors, before issuing the ballot, shall administer to the challenged elector the following oath or affirmation of eligibility: "You do solemnly swear (or affirm) that: you are 18 years of age; you are a citizen of the United States; you are now and for 10 days have been a resident of this ward except under s. 6.02 (2); you have not voted at this election; you have not made any bet or wager or become directly or indirectly interested in any bet or wager depending upon the result of this election; you are not on any other ground disqualified to vote at this election."

(6) If the person challenged refuses to take the oath or affirmation of eligibility, the inspectors shall not issue a ballot to the person challenged.

(7) If the person challenged refuses to answer fully any relevant questions put to him or her by the inspector under this chapter, or the answers to the questions given by the person indicate that the person does not meet the voting qualification requirements, the inspectors shall not issue a ballot to the person challenged.

(8) If the person challenged answers fully all relevant questions put to the elector by the inspector under this chapter, takes the oath or affirmation of eligibility, fulfills the registration requirements, where applicable, and the answers to the questions given by the person indicate that the person meets the voting qualification requirements, the challenged elector shall be issued a ballot and the voting procedure under s.9.03 of this chapter shall be followed.

ELBD 9.03 VOTING PROCEDURE FOR CHALLENGED ELECTORS

Whenever the inspectors under ss. 6.92 to 6.94, Stats., determine to receive the vote of a person who has been challenged under this chapter, they shall give the elector a ballot. Before giving the elector the ballot, the inspectors shall write on the back of the ballot the serial number of the challenged person corresponding to the number kept at the election on the registration or poll list, or other list maintained under s. 6.79, Stats. If lever or direct record voting machines are used in the municipality where the person is voting, the person's vote may be received only upon an absentee ballot furnished by the municipal clerk which shall have the corresponding serial number from the registration or poll list or other list maintained under s. 6.79, Stats., written on the back of the ballot before the ballot is deposited. The inspectors shall indicate on the voter list the reason for the challenge. The challenged ballots shall be counted under ss. 5.85 or 7.51(2)(c), Stats.

ELBD 9.04 CHALLENGING THE ABSENT ELECTOR

The vote of any absent elector may be challenged for cause and the inspectors shall have all the power and authority given them to hear and determine the legality of the ballot the same as if the ballot had been voted in person. One of the inspectors shall administer the following oath or affirmation of veracity to the elector challenging the absentee elector's ballot: "You do solemnly swear (or affirm) that you will fully and truthfully answer all questions put to you regarding the challenged person's place of residence and

qualifications as an elector of this election"; and shall ask the challenger if he or she is an elector and then shall ask only those questions provided in s.9.01(2) of this chapter which are appropriate to test the qualifications of the challenged elector.

ELBD 9.05 RECORDING THE CHALLENGE

The inspectors shall make a written record of all challenges at the polling place, whether or not a ballot is issued to the challenged elector. The written record shall contain the name and address of the challenger; the name, address and serial number of the challenged elector; the cause for the challenge; the questions asked of the elector and the elector's responses to those questions. The written record shall also contain the questions asked of the challenger; the challenger's responses to those questions and whether or not the challenge was withdrawn. The record shall note whether or not the challenged elector took the oath or affirmation of eligibility.

ELBD 9.06 REVIEW BY A BOARD OF CANVASSERS

The municipal board of canvassers may decide any challenge when making its canvass under s. 7.53, Stats. If the returns are reported under s. 7.60, Stats., a challenge may be reviewed by the county board of canvassers. If the returns are reported under s. 7.70, Stats., a challenge may be reviewed by the chairperson of the board or the chairperson's designee. The decision of any board of canvassers or of the chairperson or chairperson's designee may be appealed under s. 9.01, Stats. The standard for disqualification specified in s. 6.325, Stats., shall be used to determine the validity of challenged ballots.

INITIAL REGULATORY FLEXIBILITY ANALYSIS:

The creation of this rule does not affect business.

FISCAL ESTIMATE:

The creation of this rule has no fiscal effect.

CONTACT PERSON:

George A. Dunst
Legal Counsel, State Elections Board
132 E. Wilson St., P. O. Box 2973
Madison, WI 53701-2973; Phone 266-0136

The creation of this rule will take effect on the first day of the month following its publication in the Wisconsin Administrative Register pursuant to s.227.22(2), Stats.

Dated May 24, 2002

Kevin J. Kennedy

KEVIN J. KENNEDY
Executive Director
State Elections Board