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VIA EMAIL AND U.S. MAIL

**Re: Advisory Letter—Effect of October 16, 2018, Order of Three-Judge Panel in
Cooper v. Berger, No. 18 CVS 3348 (N.C. Sup. Ct.)**

Dear Mr. McKinney:

This advisory letter responds to your recent inquiry about the effect of the October 16, 2018, Order of the three-judge panel in *Cooper v. Berger*, No. 18 CVS 3348 (N.C. Sup. Ct.) on the structure and composition of the North Carolina Bipartisan State Board of Elections and Ethics Enforcement.

On October 16, the three-judge panel in *Cooper v. Berger* held certain sections of Session Law 2017-6 and Session Law 2018-2 to be unconstitutional and therefore void and of no effect. The court permanently enjoined sections 3 to 22 of Session Law 2017-6 and Part VIII of Session Law 2018-2 in their entirety. Through a subsequent order, that order was stayed until December 3, 2018.

This advisory letter concludes that, after the stay of the Order expires, and until the enactment of any revised legislation, N.C. GEN. STAT. § 163-19, as codified before the enactment of Session Law 2016-125, will again govern the composition of the Board and the appointment of its members. As a result, during that time, the Board returns to the form in which it existed prior to the enactment of Session Law 2016-125, *i.e.*, composed of five members appointed by the Governor, and no longer charged with enforcing North Carolina's ethics laws.

This conclusion results from the well-established principle that “an unconstitutional law is void and is as no law.” *State v. Williams*, 146 N.C. 618, 621, 61 S.E. 61, 62 (1908). Under this principle, when a statute that purports to repeal a prior law is itself held unconstitutional, the prior law is once again effective. *See Bd. of Managers James Walker Mem'l Hosp. v. Wilmington*, 237 N.C. 179, 74 S.E.2d 749, (1953) (holding that, after a statute purporting to repeal prior law is held unconstitutional, the repeal in the unconstitutional statute does not have any effect); *Allen v.*

Raleigh, 181 N.C. 453, 457, 107 S.E. 463, 465 (1921) (where a statute, which contained a clause repealing an earlier statute, was itself held unconstitutional, the earlier statute remained in full force and effect).

Here, the Order holds unconstitutional and enjoins Part VIII of Session Law 2018-2, which created a Board that consists of nine individuals, appointed by the Governor from two lists of six individuals provided by the State party chairs of the political parties with the two highest number of registered affiliates and one individual not registered with either political party nominated by the other eight members of the Board. Sess. Law 2018-2, § 8(b). The current members of the Board were appointed by the Governor under this statutory scheme.

As a result of the injunction, under the principles referenced above, the Board's structure and composition initially reverts back to the law in effect before Session Law 2018-2 became law, which was Session Law 2017-6, § 4.(c). However, the Order also enjoins Session Law 2017-6, § 4.(c). As a result, the Board's structure and composition reverts back further to the law in effect before Session Law 2017-6 became law.

Before the enactment of Session Law 2017-6, the laws governing the structure and composition of the Board were enacted as section 2.(c) of Session Law 2016-125. However, this section of Session Law 2016-125 was expressly repealed by section 2 of Session Law 2017-6. Because the Order does not enjoin section 2 of Session Law 2017-6, section 2.(c) of Session Law 2016-125 remains repealed. *See Russell v. Ayer*, 120 N.C. 180, 189, 27 S.E. 133, 135 (1897) (holding that portions of statutes that are not held to be unconstitutional and are unrepealed remain in full force and effect). In addition, section 2.(c) of Session Law 2016-125 was enjoined by a three-judge panel of the Superior Court of Wake County, a ruling that was not overturned on appeal. *See Cooper v. Berger*, No. 16-CVS-15636, 2017 WL 1433245 at *8 ¶ 23, *14 ¶¶ 1, 4a (N.C. Super. Ct. Mar. 17, 2017). Accordingly, the Order requires that the Board's structure and composition revert even further back to the law in effect before Session Law 2016-125 was enacted.

Before the enactment of Session Law 2016-125, the laws governing the structure and composition of the Board were codified under N.C. GEN. STAT. § 163-19, last amended in 2013. Under the 2013 version of section 163-19, the State Board of Elections consisted of five individuals who were appointed by the Governor, from two lists of five individuals nominated by the State party chairs of the two political parties having the highest number of registered affiliates, so long as the Governor did not appoint more than three individuals registered with the same political party. Each Board member was to serve four-year terms, with no member serving more than two consecutive four-year terms. *Id.* The Board was also distinct from the State Ethics Commission and was not empowered with the duties to enforce North Carolina's ethics laws.

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Page 3

Conclusion

For the reasons stated above, it is my opinion that, after the stay of the Order expires, and until the enactment of revised legislation, N.C. GEN. STAT. § 163-19, as codified before the enactment of Session Law 2016-125, will again govern the composition of the Board and the appointment of its members. As a result, the Board must be composed of five members, appointed by the Governor as described above, and will no longer be charged with enforcing North Carolina's ethics laws.

I hope that this adequately responds to your inquiry. This letter is the opinion of the undersigned and is not an official opinion of the Attorney General, as it has not been reviewed and approved in accordance with the procedures for issuing Attorney General opinions. If you should have any further questions about this matter, please feel free to contact me.

Very truly yours,



Alexander McC. Peters
Chief Deputy Attorney General

AMP/hs