

NORTH CAROLINA
CLEVELAND COUNTY

BEFORE THE CLEVELAND COUNTY
BOARD OF ELECTIONS

IN THE MATTER OF CANDIDATE
BEASLEY'S CHALLENGE OF ELEVEN
(11) UNCOUNTED BALLOTS IN THE
CONTEST FOR SUPREME COURT CHIEF
JUSTICE

ORDER

INTRODUCTION

This matter came before the Cleveland County Board of Elections (the "Board") on December 3, 2020, to consider a protest (the "Protest") filed by Chief Justice Beasley ("Candidate Beasley") in her race for the seat of Chief Justice of the North Carolina Supreme Court, in which she is running against Justice Paul Newby ("Candidate Newby"). The Board previously held a preliminary consideration on November 23, 2020.

Present were all Board members, Director of Elections Clifton Philbeck, Deputy Director of Elections Renee Bost, and Elections Specialist Breanna Jones. Elliot Engstrom of Engstrom Law, PLLC appeared as counsel for the Board, David Teddy of Teddy, Meekins & Talbert, PLLC appeared for Candidate Beasley, and Jonathan Kidd of Caulder & Valentine Law Firm, PLLC, appeared for Candidate Newby.

Candidate Beasley initially challenged what she alleges was an unlawful failure to count eleven (11) ballots in Cleveland County. However, at the outset of this hearing, her counsel voluntarily dismissed the Protest as to eight (8) of the challenges, and the Board accepted this dismissal. The Protest as to the ballots of Briyana Love, Ebonee Hunter, Ericka Dabbs, Floyd Lyles III, Jannah Pemberton, Janie Pope, Laura Michelle Clark, and Tiras Allen is therefore voluntarily dismissed. This leaves only Candidate Beasley's challenge as to the uncounted ballots of Arshane Cook, Lacey Cook, and Monica Barker. The Board finds that it is not able to determine whether

Candidate Beasley's challenge, if successful, would be outcome determinative, because the challenge involves a statewide contest.

For the reasons stated below, the Board concludes, as to all three (3) of the challenged ballots, that the protest shall be dismissed because there is not substantial evidence of a violation of the election law or other irregularity or misconduct. *See* N.C.G.S. § 163-182.10(d)(2)b.

BALLOTS OF ARSHANE COOK AND LACEY COOK

Findings of Fact

The Board first considered the ballots of Arshane Cook and Lacey Cook. The Board found the following facts regarding these ballots:

1. Absentee ballots for Arshane Cook and Lacey Cook were requested from, and sent to, the same address.
2. The two return envelopes were received at the Board's office on October 27, 2020.
3. The two return envelopes were presented to the Board at its absentee meeting on October 27, 2020.
4. At its absentee meeting, the Board saw that Lacey Cook had signed Arshane Cook's return envelope, while Arshane Cook had signed Lacey Cook's return envelope. The two individuals had therefore not signed their own return envelopes.
5. That same day, staff mailed a cure letter to both of the Cooks at the address from which they requested their absentee ballots. The cure letter was never received back.
6. Staff also attempted to call the Cooks twice, but did not reach either of them. Each time staff called, staff left a voicemail.
7. The Board did not count either of the Cooks' ballots.

Discussion and Conclusion of Law

Counsel for Candidate Beasley argued that the clear intent of these two voters was to vote and that they seem to have simply mixed up their ballots. Counsel for Candidate Newby argued that the Board followed the proper legal procedure in not counting the ballots.

N.C.G.S. § 163-231 proscribes the procedure that a voter must follow when voting absentee. Specifically, N.C.G.S. § 163-231(a)(4) requires a voter to “[m]ake the application printed on the container-return envelope according to the provisions of G.S. 163-229(b)” and “make the certificate printed on the container-return envelope according to the provisions of G.S. 163-229(b).” One portion of the application printed on the container-return envelope is “the voter’s signature.” N.C.G.S. § 163-229(b)(2). In the case of Lacey Cook and Arshane Cook, neither envelope contained the respective voters’ signatures.

Further, staff closely followed the procedure outlined in Numbered Memo 2020-19 regarding absentee container-return envelope deficiencies. North Carolina State Board of Election Numbered Memo 2020-19, available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-19_Absentee%20Deficiencies.pdf. Staff “contact[ed] the voter[s] in writing within one business day of identifying the deficiency to inform the voter[s] there [was] an issue with their absentee ballot[s] and enclose[ed] . . . cure certification[s].” *Id.* at 3. Staff also attempted to “contact the voter[s] by phone to inform the voter[s] that the county board ha[d] mailed the voter[s] a cure certification.”

For these reasons, as to the ballots of Lacey Cook and Arshane Cook, the Board concludes that the Protest should be dismissed because there is not substantial evidence of a violation of the election law or other irregularity or misconduct. All Board members support this finding except for Board Member Ali Paksoy.

BALLOT OF MONICA BARKER

Findings of Fact

The Board next considered the ballot of Monica Barker. As to Barker's ballot, the Board made the following findings of fact:

1. Barker's return envelope was received by the Board on November 5, 2020 at 12:13 p.m.
2. The return envelope has only a stamp on it, with no indication of when it was deposited in the mail.
3. Barker's ballot was not logged in the Board's log book as having been accepted in person by the voter.
4. Board staff physically collected ballots from the post office every day leading up to the election, including weekends.
5. The Board was unable to determine how it received Barker's ballot other than that the ballot was somehow received through the mail. The Board cannot determine whether the ballot was picked up at the post office by Board staff or delivered by a postal worker to the Board office.
6. There is no information in Ballotrax to indicate when Barker's ballot was placed in the mail.
7. The Board did not count Barker's ballot.

Discussion and Conclusion of Law

A postmarked absentee ballot must be received "not later than 5:00 pm on the day of the . . . general election." N.C.G.S. § 163-231(b)(1). However, even if a ballot is not received by this time, it must still be counted if it is "postmarked and that postmark is dated on or before the day of the . . . general election . . . and [is] received by the county board of elections not later than three

days after the election by 5:00 p.m.” N.C.G.S. § 163-231(b)(2)b. Numbered Memo 2020-22 states that the State Board of Elections further extended the absentee ballot deadline to November 12, 2020 for ballots that were postmarked on or before election day. North Carolina State Board of Elections Numbered Memo 2020-22, available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-22_Deadline%20for%20Mailed%20Absentee%20Ballots.pdf.

Counsel for Candidate Beasley asked the Board to take judicial notice of the fact that a ballot received by November 5 must have been placed in the mail by November 3, and that Barker’s ballot must have been placed in the mail stream, if not formally postmarked, by November 3. *See generally* N.C. R. Evid. 201(c). Since the ballot must have been placed in the mail stream by November 3, counsel argued, the ballot should have been counted.

Counsel for Candidate Newby argued that the ballot was not postmarked on or before election day and was received after election day, and the Board was therefore correct not to count it. Counsel further argued that attempting to ascertain when a piece of mail was likely placed into the mail stream presented a slippery slope, and that doing so exceeded the Board’s statutory mandate.

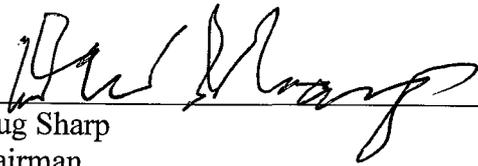
It is not this Board’s role to guess how or when a ballot might have been placed in the mail. Pursuant to both N.C.G.S. § 163-231 and Numbered Memo 2020-22, the Board is not to count ballots that it receives after election day which are not postmarked on or before election day. The Board received Barker’s ballot after election day, and Barker’s ballot is not postmarked on or before election day. The Board therefore properly did not count Barker’s ballot.

For these reasons, as to the ballot of Monica Barker, the Board concludes that the Protest should be dismissed because there is not substantial evidence of a violation of the election law or

other irregularity or misconduct. All Board members support this finding except for Board Chairman Doug Sharp.

IT IS THEREFORE ORDERED, by 4-1 decisions as to each ballot, that Candidate Beasley's Protest as to the ballots of Arshane Cook, Lacey Cook, and Monica Barker are all hereby DISMISSED because there is not substantial evidence of a violation of the election law or other irregularity or misconduct as to any of these ballots. Board Member Ali Paksoy disagreed with the Board's decision as to the ballots of Arshane Cook and Lacey Cook. Board Chairman Doug Sharp disagreed with the Board's decision as to the ballot of Monica Barker.

Entered the 7th day of December, 2020.



Doug Sharp
Chairman
Cleveland County Board of Elections