



## Election Protest Procedures Guide

---

### 1. OVERVIEW

The apparent results of an election may be called into question through a formal complaint called an “election protest” based on irregularities or misconduct that affected the outcome of the election. State law allows voters or candidates to bring an election protest alleging a defect in the way votes were counted or alleging some other violation of election law, irregularity, or misconduct.

An election protest proved by *substantial evidence* can correct results, cause a recount, or can even result a new election, among other things.<sup>1</sup>

An election protest is initiated when a candidate or registered voter eligible to participate in the protested contest files a protest with the county board of elections where the alleged problem occurred. The county board first engages in a preliminary consideration and decides whether the protest demonstrates probable cause and whether it substantially complies with the filing requirements. If it does, the protest advances to a protest hearing where the board will assess evidence in the form of witness testimony, affidavits, documents, and any other evidence presented. The county board will determine whether there is substantial evidence that voting irregularities occurred *and* whether the irregularities were outcome-determinative. An interested party may appeal the county board’s determination to the State Board. A final State Board decision may be appealed to the Superior Court in Wake County.

### 2. FILING

#### **Who may file an election protest**

A registered voter who was eligible to vote in the protested election contest or who was a candidate in that election may file an election protest.<sup>2</sup>

#### **Where and what to file in an election protest**

A protest must be filed in writing on the [Election Protest Form](#), available on the State Board’s website, and must be signed and sworn by the protestor.<sup>3</sup> The protest form is designed to be filed by one individual. The State Board or county board reserves the right to combine multiple similar protests.

---

<sup>1</sup> G.S. § 163-182.10(d)(2)(c); § 163-182.13.

<sup>2</sup> G.S. § 163-182.9(a).

<sup>3</sup> G.S. § 163-182.9(b) and (c); 8 NCAC 02. 0111.

The protest must be filed with the county board of elections in which the alleged issue occurred. The county board should date stamp the protest when it is received.

**When to file an election protest**

Election protests must be filed within the following time frames<sup>4</sup>:

Protest Issue	Deadline
Manner in which votes were counted or results were tabulated	Before the county canvass meeting
Manner in which votes were counted or tabulated and protest states good cause for delay in filing	By 5 p.m. on 2nd business day after the county canvass meeting
Irregularity other than counting of votes or tabulation of results (protest filed on or after Election Day)	By 5 p.m. on 2nd business day after county canvass
Irregularity other than vote counting or tabulation, and protest filed before Election Day <i>Example: Candidate Challenge filed after deadline under G.S. § 163-127.2</i>	Stay (delay proceedings) until after Election Day if: <ul style="list-style-type: none"> <li>• Ballots have already been printed;</li> <li>• Voter registration deadline has already passed; or</li> <li>• Any of the protest proceedings will occur within 30 days of election.</li> </ul> <p>*NOTE: The protest should not be stayed if the defending party consents to proceed</p>

A county board of elections shall not delay canvass in order to hear the protest if the protest:

- Does not concern the manner in which votes were counted or results tabulated; or

<sup>4</sup> G.S. § 163-182.9(b)(4).

- Alleges the occurrence of an election law violation regarding an insufficient number of votes to change the outcome of a contest.<sup>5</sup>

**Untimely Protest**

A county board may not hear an untimely protest. Untimely protests shall be forwarded to the State Board of Elections.<sup>6</sup> The State Board has broad authority to consider election protests on its own, including those that were not filed on time.<sup>7</sup> However, it is not required to consider untimely or improperly filed protests.

**Challenge to a Candidate’s Eligibility**

A challenge to a candidate’s eligibility is as a candidate challenge filed under Article 11B of Chapter 163. If a challenger discovers one or more grounds for challenging a candidate after the deadline in G.S. § 163-127.2(a), the grounds may be the basis for an election protest. If an election protest is filed on the basis of a candidate’s eligibility, the burden of proof is on the protestor, not the candidate.<sup>8</sup>

**Notice to the State Board & the County Attorney**

A county board must provide to the State Board a copy of any filed election protest and attachments within 24 hours after it is filed. Protests should be emailed to [legal@ncsbe.gov](mailto:legal@ncsbe.gov).

It is best practice to notify your county attorney immediately when a protest is filed. Historically, county attorneys have offered guidance and assistance in the proceeding and in drafting orders. The county attorney may also be able to help secure a court reporter for the proceedings.

**3. ADMINISTRATIVE DISMISSAL**

When an election protest is filed with the county board, the director shall review the allegations and evidence. By rule, a county elections director may recommend administrative dismissal of a protest if it meets certain criteria. If the director finds that the filing must be dismissed because it was improperly filed, the director shall transmit their recommendation in writing to the county board members and executive director of the State Board no later than *two business days* after the matter is filed. The recommendation shall cite the applicable defects listed in the administrative rule and below.

<sup>5</sup> 08 NCAC 02. 0110(f).

<sup>6</sup> 08 NCAC 02. 0110(b).

<sup>7</sup> G.S. § 163-182.12.

<sup>8</sup> G.S. § 163-182.10(d)(2). See *Appeal of Ramseur*, 120 N.C. App. 521 (1995) and [In re Protest of Lilly](#), Order, State Board of Elections (Aug. 3, 2020).

If, after *two calendar days*, neither a county board member nor the executive director of the State Board has raised any oral or written objection to the county director's recommendation for administrative dismissal, written notice of the administrative dismissal shall be sent to the protestor (see **Notice of Administrative Dismissal**, below).<sup>9</sup> The county director shall confirm that the county board members have received the filings and the director's administrative recommendation before proceeding to issue a notice of dismissal.

The county board of elections director shall administratively dismiss an election protest if:<sup>10</sup>

- The election protest fails to contest the manner in which the votes were counted or the results tabulated, or if it fails to allege a violation of election law or irregularity or misconduct sufficient to cast doubt on the results of the election.
- The individual making the election protest was neither a registered voter eligible to participate in the protested contest nor a candidate for nomination or election in the protested contest.
- The election protest was not filed in accordance with G.S. § 163-182.9 or was not filed on the form proscribed in 08 NCAC 02 .0111.
- The election protest is duplicative or was made for the purpose of delay.
- The election protest fails to include evidence which, if true, would substantiate the probable occurrence of an outcome-determinative defect in the manner in which voters were counted or results tabulated, or the probable occurrence of an outcome-determinative violation of election law, irregularity, or misconduct.
- The election protest, including all subsequent submissions, fails to allege facts sufficient to constitute substantial evidence of the occurrence of an outcome-determinative violation of election law, irregularity, or misconduct.

The written notice of administrative dismissal shall:

- Be sent by certified mail or commercial carrier such that the date of delivery may be verified, unless the recipient has agreed in writing to receive notice by electronic means;
- State that the matter was provided to the county board of elections members, but will not be heard by the county board;
- State that the matter has been dismissed administratively, citing this rule and all applicable bases for dismissal in 08 NCAC 02 .0114(a); and

The protestor may appeal the county director's administrative dismissal to the Executive Director of the State Board using the form listed in 08 NCAC 02 .0114(d). The appeal must be received by the State Board office by US mail, courier service, or hand delivery no later than five business days after the protestor received written notice of the county director's administrative dismissal.

---

<sup>9</sup> 08 NCAC 02 .0114(b).

<sup>10</sup> 08 NCAC 02 .0114(a).

If an election protest is not administratively dismissed by the county director, the protest will proceed to the preliminary consideration stage.

#### **4. CONSIDERATION BY THE COUNTY BOARD OF ELECTIONS**

An election protest advances in two stages. Each stage has a different evidentiary standard.

##### **a. PRELIMINARY CONSIDERATION**

The county board must notice a meeting and convene as quickly as possible to determine (1) whether the protest has substantially complied with the form requirement, and (2) whether the protest establishes probable cause.

The county board should provide individualized notice to the protestor and affected candidates regarding the preliminary consideration meeting. However, because the county board is considering whether the complaint *on its face* establishes probable cause, it is not required that these individuals be allowed to speak at the preliminary consideration stage.

The county board will review the filed protest to consider whether it establishes **probable cause** of an outcome-determinative irregularity, violation of law, or misconduct:<sup>11</sup>

*Probable cause means a “nontechnical probability that incriminating evidence is involved.” Probable cause does not require a showing that the protest “be correct or more likely true than false.”<sup>12</sup> Rather, it is a relatively low bar that simply indicates the possibility of a protest’s truthfulness.*

The county board should analyze all the facts alleged (called reviewing “the totality of the circumstances”). The county board should consider only allegations presented on the protest form and any attachments. The preliminary consideration is not an opportunity to present new evidence. If the county board determines that the protest does not meet this standard, it should dismiss the protest.

During its preliminary consideration, the county board will also determine whether the protestor substantially complied with the requirements of G.S. § 163-182.9. These requirements include that the protestor is eligible to file a protest, that the protestor filed the protest in writing and included required information on the form, and that the protest was timely filed.<sup>13</sup> If the county board determines that the protest does not meet these procedural requirements, it must dismiss the protest.

---

<sup>11</sup> G.S. § 163-182.10(a)(1). The State Board clarified in a 2016 [order](#), and in 2018 by [rule](#), that a protest will be dismissed if it merely disputes the eligibility of a voter without alleging an outcome-determinative violation of election law, irregularity, or misconduct.

<sup>12</sup> *Adams v. City of Raleigh*, 782 S.E.2d 108, 113–14 (N.C. Ct. App. 2016) (citations omitted).

<sup>13</sup> G.S. § 163-182.9.

If it dismisses the protest, the county board must memorialize its decision in the form of a written order and provide the decision to the protestor and the State Board. The county attorney should assist with drafting an order and should attend the meeting if possible. A party may appeal a county board's dismissal to the State Board.<sup>14</sup>

If the county board finds probable cause, and that the procedural requirements are met, the protest advances to a protest hearing.

## **b. PROTEST HEARING**

A protest hearing must be noticed at least three business days prior to the hearing.<sup>15</sup> The notice must be actual notice (meaning notice is actually received) in a manner up to the county board, but it must quickly follow any oral notices with a written notice. Notice must be provided to the following parties: *the protestor, any candidate likely to be affected, elections officials alleged to have acted improperly, and those persons likely to have a significant interest in the resolution of the protest.*<sup>16</sup> Notice must also be provided to the political parties.

When the protest hearing is held depends on the substance of the election protest, but the hearing may be held no later than 10 business days after the preliminary consideration hearing. If the protest relates to vote tabulation or vote counting, and the alleged number of votes affected could affect the outcome of the election, the protest hearing shall be held at the county canvass.<sup>17</sup>

County canvass on affected ballot items may be delayed for no more than three days, unless a longer delay is approved by the State Board, if the delay is required to resolve the protest. If the protest relates to an election-related irregularity other than results tabulation or vote counting, the protest is not required to be resolved by canvass, and the county board shall set a hearing date within 10 days of the preliminary consideration hearing.<sup>18</sup>

**The protest hearing shall be recorded by a court reporter. The recording must be transcribed if the decision is appealed to the State Board. Upon notice of appeal, the county board shall order a transcription of the recording and have it delivered to the State Board, at the county board's expense, within seven business days of the notice of appeal.**<sup>19</sup>

---

<sup>14</sup> G.S. §§ 163-182.12 to 182.13; *see also* 8 NCAC 2.0112.

<sup>15</sup> G.S. § 163-182.10(b).

<sup>16</sup> 08 NCAC 02. 0110(d).

<sup>17</sup> Order, Authentication of the 2016 Gen. Election, N.C. Bd. of Elections (Nov. 28, 2016).

<sup>18</sup> 08 NCAC 02. 0110.

<sup>19</sup> 08 NCAC 02. 0110(d)(3).

The burden of proof is on the protestor.<sup>20</sup> To sustain an election protest, the county board must find **substantial evidence** of an irregularity or misconduct that impacted the election results:

*Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must do more than create the suspicion of the existence of the fact to be established.... [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.*<sup>21</sup>

At the protest hearing, the county board may receive evidence from any person with information concerning the subject of the protest. Evidence may be in the form of affidavits, witness testimony, or other evidence. Each witness shall be placed under oath before testifying.<sup>22</sup> The protestor shall submit his or her allegations and introduce the evidence. Any other person to whom notice was given may, if present, present evidence. Individuals with relevant information who did not receive notice of the hearing but have “significant interest” in the protest’s resolutions may also submit evidence if that interest is not adequately represented by other participants.<sup>23</sup>

The board’s chair or any two members may subpoena witnesses or any documents.<sup>24</sup> The county board has the power to subpoena appropriate witnesses within its “respective jurisdiction[.]”<sup>25</sup>

The county board shall dismiss the protest if it fails to show “substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election.”<sup>26</sup> **Again, the protest’s success depends on whether the affected ballots or irregularities could have changed the election’s outcome.** Allegations of unqualified voters participating may not be brought as election protests; these must be brought as voter qualification challenges filed within the time period required by law. In an election protest, evidence of unqualified individuals voting may only be used as evidence if those individuals’ votes could have impacted the election’s outcome.<sup>27</sup>

If the county board determines there is substantial evidence that a violation did occur and it was “sufficiently serious to cast doubt on the apparent results of the election,” it may declare new results, order a recount, send the protest and conclusion to the State Board, or any other action

---

<sup>20</sup> *Appeal of Ramseur*, 120 N.C. App. 521 (1995); *Appeal of Harper*, 118 N.C.App. 698 (1995) (“When an unsuccessful candidate seeks to invalidate an election, the burden of proof is on him to show that he would have been successful had the irregularities not occurred.”).

<sup>21</sup> *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 470–71 (1974)

<sup>22</sup> The following oath as outlined in G.S. § 11-11 may be used: “Do you swear (or affirm) that the testimony you shall give to the board shall be the truth, the whole truth, and nothing but the truth; so help you, God?”

<sup>23</sup> G.S. § 163-182.10(c)(2).

<sup>24</sup> G.S. § 163-182.10(c)(1). A blank subpoena form may generally be obtained from the local clerk of court.

<sup>25</sup> G.S. § 163-33.

<sup>26</sup> G.S. § 163-182.10(d)(2)(c).

<sup>27</sup> Order, In re Authentication of the 2016 Gen. Election, N.C. Bd. of Elections (Nov. 28, 2016) ([link](#)).

within its authority.<sup>28</sup> Alternately, if the county board finds there is substantial evidence to believe there was a violation occurred but it cannot conclude the violations were outcome-determinative for multi-county or statewide contests, the county board shall send its decision to the State Board.<sup>29</sup> The State Board will then determine whether the improper ballots were sufficient to change the election's result.

The county board shall orally or in writing notify the person protested and any affected candidate of its decision on the protest no later than 5:00 p.m. the calendar day after hearing. The board shall file a written decision with the board office no later than 5:00 p.m. five business days after the oral decision is given to the protestor. The written decision shall be served by any means of actual delivery upon the protestor and any affected candidate within 24 hours after it is filed at the board office.<sup>30</sup> The written decision shall include findings of fact and conclusions of law as specified in G.S. § 163-182.10(d).

## 5. APPEAL

The decision by the county board of elections on the election protest may be appealed to the State Board.

### **Who may appeal a county board decision**

The individual who filed the election protest, the candidate or elected official adversely affected by the decision, or any other person with a significant interest adversely affected and who participated in the hearing may file an appeal. Appeal is to the State Board.<sup>31</sup>

### **How and when to file in an appeal**

The appeal contains two parts. First, an appealing party must notify the county board in writing of the party's intent to appeal within 24 hours of the board's written decision. The notice of appeal is not required to include a copy of the appeal form itself. Second, the appealing party must timely file an appeal to the State Board. The appeal must be in writing and on the Election Protest Appeal Form.<sup>32</sup> The appeal form is available [here](#) on the Office of Administrative Hearing's website.

The appeal must be delivered to the State Board in person or by mail. It may not be emailed. If the protest decision concerns a first primary, the appeal must be delivered or deposited in the mail by the end of the second calendar day after the day the county board issued its written decision. If the protest decision concerns any

---

<sup>28</sup> G.S. § 163-182.10(d)(2)(e).

<sup>29</sup> G.S. § 163-182.10(d)(2)(d).

<sup>30</sup> 08 NCAC 02. 0110(d)(2).

<sup>31</sup> G.S. § 163-182.11(a).

<sup>32</sup> G.S. § 163-182.11(a).

other election, the appeal must be delivered or deposited in the mail by the fifth calendar day after the county board issued its written decision.<sup>33</sup>

The State Board has broad discretion in its appellate role. It may decide the appeal on the existing record or it may require the county board or an interested party to supplement or add to the evidence.<sup>34</sup> Alternatively, the State Board may conduct its own protest hearing and decide the protest based on that proceeding.<sup>35</sup> Finally, it may remand back to the county board with an order.<sup>36</sup>

Frivolous or improperly filed election protests may be administratively dismissed by the executive director pursuant to 08 NCAC 02 .0114(e). If, after two calendar days of the executive director's administrative dismissal recommendation, no State Board member interposes an objection, the protest appeal will be dismissed.

Most protest decisions of the State Board may be appealed to the Superior Court of Wake County within 10 days of the date of service of the decision. Protest decisions regarding offices of the Council of State and either chamber of the General Assembly may not be appealed to the Superior Court.<sup>37</sup> Contested elections for Council of State or General Assembly may be appealed to the General Assembly.<sup>38</sup>

---

<sup>33</sup> G.S. § 163-182.11(a).

<sup>34</sup> G.S. § 163-182.11(b)(1)-(3).

<sup>35</sup> G.S. § 163-182.11(b)(4).

<sup>36</sup> G.S. § 163-182.11(b)(5).

<sup>37</sup> G.S. § 163-182.14(b).

<sup>38</sup> G.S. § 163-182.14(c).