



NORTH CAROLINA

State Board of Elections & Ethics Enforcement

Election Protest Procedures Guide

An election may be called into question through a formal complaint called an “election protest” based on irregularities or misconduct. 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 substantiated by *substantial evidence* can correct results, cause a recount or even a new election.¹

An election protest begins when a candidate or registered voter eligible to participate in the protested contest files the 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. If it does, the protest advances to a protest hearing where the board will assess evidence in the form of witness testimony, affidavits, and any other evidence presented. The board will determine whether there is substantial evidence that voting irregularities occurred *and* that the irregularities were outcome-determinative of the election. A 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.

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.²

Where and what to file in an election protest

A protest must be filed in writing on the [Election Protest Form](#), available on the Office of Administrative Hearings website, and must be signed by the protestor.³ The protest must be filed with the county board of elections. It is best practice to stamp-in protest filings. If the Protest Form is not used, the county board must review the materials for substantial compliance with the form requirement during the preliminary consideration stage (below).

¹ G.S. §§ 163-182.10(d)(2)(c) and 163-182.13.

² G.S. § 163-182.9.

³ G.S. § 163-182.9(b)–(c); 8 NCAC 2.0111.

Please Note: The protest form is currently undergoing revisions and may be updated at the completion of the rulemaking process.

When to file an election protest

Election protests must be filed within the following time frames⁴:

Protest Issue	Deadline
Counting votes or tabulating results	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 vote counting or tabulation (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"> • Ballots already printed; or • Voter registration deadline has already passed; or • Any of the protest proceedings will occur within 30 days of election <p>*NOTE: The protest should not be stayed in the defending party so consents</p>

Untimely Protest

A county board may not hear an untimely protest. Untimely protests shall be referred to the State Board of Elections and Ethics Enforcement.⁵ The State Board has broad authority to consider election protests on its own, including those that were not filed on time.⁶

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.

⁴ G.S. § 163-182.9(b)(4).

⁵ 8 NCAC 2.0110(b).

⁶ G.S. § 163-182.12.

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 find a court reporter.

ELECTION PROTEST PROCEDURES AND EVIDENTIARY STANDARDS

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

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 will review the filed protest to consider whether it establishes **probable cause** that irregularities or misconduct have occurred.⁷ The county board should analyze all the facts alleged (called reviewing “the totality of the circumstances”). It is best practice for the county board to consider only allegations presented on the protest form and any attachments. It is not required that the county board provide individualized notice to the protestor or affected candidates regarding the preliminary consideration meeting.

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.”⁸ Rather, it is a relatively low bar that simply indicates the possibility of a protest’s truthfulness.

If the county board determines that the protest does not meet this standard, it should dismiss the protest. If it dismisses the protest, the county board must memorialize its decision in writing and provide the decision to the protestor and the State Board.

At an initial hearing, 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

⁷ G.S. § 163-182.10(a)(1).

⁸ *Adams v. City of Raleigh*, 782 S.E.2d 108, 113–14 (N.C. Ct. App. 2016) (citations omitted).

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.⁹ If the county board determines that the protest does not meet these procedural requirements, it should dismiss the protest. A party may appeal a county board's dismissal to the State Board.¹⁰

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

Protest Hearing

A protest hearing must be noticed at least three business days prior to the hearing.¹¹ 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 should 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.¹² Notice should 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.¹³ If required to resolve the protest, 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 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.¹⁴

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

⁹ G.S. § 163-182.9.

¹⁰ G.S. § 163-182.11–12; *see also* 8 NCAC 2.0112.

¹¹ G.S. § 163-182.10(b).

¹² 8 NCAC 2.0110(d).

¹³ Order, Authentication of the 2016 Gen. Election, N.C. Bd. of Elections (Nov. 28, 2016).

¹⁴ 8 NCAC 2.0110.

order a transcription of the recording and have it delivered to the State Board, at the county board's expense, within 7 business days of the notice of appeal. ¹⁵

To sustain an election protest, the county board must find **substantial evidence** of an irregularity or misconduct that impacted the election's result.

*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.*¹⁶

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.¹⁷ 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.¹⁸

The board's chair or any two members may subpoena witnesses or any documents.¹⁹ The county board has the power to subpoena appropriate witnesses within its "respective jurisdiction[]." ²⁰

¹⁵ 8 NCAC 2.0110(d)(3).

¹⁶ *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 470–71 (1974)

¹⁷ The following oath as provided 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?"

¹⁸ G.S. § 163-182.10(c)(2).

¹⁹ G.S. § 163-182.10(c)(1). A blank subpoena form may generally be obtained from the local clerk of court.

²⁰ G.S. § 163-33.

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 the individuals' votes could have impacted the election's outcome.²¹

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."²² Again, the protest's success depends on whether the affected ballots or irregularities could have changed the election's outcome.

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 within its authority.²³ 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, such as in a multi-county or statewide contest, the county board shall send its decision to the State Board.²⁴ 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. 5 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.²⁵ The written decision shall include findings of fact and conclusions of law as specified in G.S. § 163-182.10.

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

²¹ Order, In re Authentication of the 2016 Gen. Election, N.C. Bd. of Elections (Nov. 28, 2016) ([link](#)).

²² N.C. Gen. Stat. § 163-182.10(d)(2)(c).

²³ G.S. § 163-182.10(d)(2)(e).

²⁴ G.S. § 163-182.10(d)(2)(d).

²⁵ 8 NCAC 2.0110(d)(2).

person with a significant interest adversely affected and who participated in the hearing may file an appeal. Appeal is to the State Board.²⁶

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. 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.²⁷ The appeal form is available [here](#) on the Office of Administrative Hearing's website. Any relevant evidence must be attached to the form.

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 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.²⁸

What to expect from a State Board appeal

The State Board has broad discretion in its appellate role. It may decide the appeal on the existing record or it may request the county board or an interested party to supplement or add to the evidence.²⁹ Alternatively, the State Board may conduct its own protest hearing and decide the protest based on that proceeding.³⁰ Finally, it may remand back to the county board with an order.³¹

Appealing the State Board's decision

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 house of the General Assembly may not be appealed to the Superior Court.³² Contested elections for Council of State or General Assembly may be appealed to the General Assembly.³³

²⁶ G.S. § 163-182.119(a).

²⁷ G.S. § 163-182.11(a).

²⁸ G.S. § 163-182.11(a).

²⁹ G.S. § 163-182.11(b)(1)–(3).

³⁰ G.S. § 163-182.11(b)(4).

³¹ G.S. § 163-182.11(b)(5).

³² G.S. § 163-182.14(b).

³³ G.S. § 163-182.14(c).