

State Board of Elections

Closed Session Board Minutes

September 15, 2020 (3:16 p.m. – 6:02 p.m.)

In attendance via video conference and/or telephone –Katelyn Love, Kelly Tornow, Lindsey Wakely, Candace Marshall and Annette Barefoot – State Board of Elections Legal Staff, Patrick Gannon - Public Information Officer, Swain Wood and Sripriya Narasimhan – NC Department of Justice; Executive Director Bell in addition to all State Board of Elections members. Roll Call: Dr. Anderson, Mr. Carmon, Mr. Black, Mr. Raymond and Chair Circosta - present.

Chair opened closed session with reminder that the attorney client privilege and confidentiality of items discussed here are ours as a group and not individual. Reminder to preserve the confidentiality of closed sessions and all issues discussed.

Chair stated that closed session minutes from August 31, 2020 would be approved with a minor correction of the opening statement to include language regarding attorney client privilege and confidentiality of items discussed. This revised language would apply to all future closed sessions.

Chair expressed his concern with 49 days before the elections and felt with certainty that the Board of Elections was under assault with lawsuits this election. The agency legal staff and NCDOJ staff were managing the case load. He reached out to NCDOJ to discuss potential settlement opportunities with the State Board members.

Swain Wood, General Counsel to the Attorney General and Sripriya Narasimhan, Deputy General Counsel were introduced. Mr. Wood stated that the Attorney General was the lawyer for the State and DOJ attorneys represent our agency. A memo prepared by AG's office on the election litigation was provided to the Board. The goal of the AG's office was to protect the board in election administration. Multiple lawsuits – 20 or more are currently in ongoing litigation. Eight of those cases are identified for discussion today which deal with voting mechanics and the impact of the pandemic on elections.

Mr. Wood provided a brief summary of the case involving the US Postal Service. Goal is to make sure that the postal service does not slow down delivery of absentee ballots. Noted the NCSBE is not a party to that case, but relevant to some of the issues discussed at this meeting. There will be a hearing next week on this case.

Mr. Wood then moved into a discussion of pending NCSBE cases. Noted that some groups are coordinating, and others are not. Noted that most are constitutional challenges under both NC and US constitution. Cases have been very active with depositions and hearings. It is expected that all cases will have a hearing and subsequent ruling between now and Election Day. Some cases will continue after Election Day. Some will go up for appeal and others will not continue further. With court rulings, one or more judges could change what the State Board will do in upcoming elections. There is a high potential for conflicting rulings and changing rules.

Mr. Wood then moved to a discussion of the settlement possibility. Noted that we would need to find some common ground with plaintiffs and that any settlement would be subject to judicial approval. Allows professional staff to be in control of the rules going forward. He explained that he will walk

through the opportunities for compromise and leverage. Will ultimately ask the Board to authorize the Executive Director to settle these cases along the lines discussed in this meeting.

Chair thanked Mr. Wood for the memo detailing the litigation and noted that he agrees with the AG counsel's litigation assessment. There were areas where there was no interest in compromise – early voting, pre-paid postage, accommodations for the visually impaired, and restrictions on systems for requesting and returning absentee ballots. He asked if any other members wanted to open up these topics for discussion. Noted that there was silence from the other members.

Secretary Anderson commented that focus should be on the issues like extension of receipt deadline as more than one case seeks to do that. She said that she does not want to see the agency accomplish these things by emergency orders. Would prefer to do it in the context of a settlement of specific complaints. Noted that more than one of the cases involves existing legal receipt deadline.

Chair asked the AG's office to begin with this topic. Mr. Wood agreed that there were one or more cases where the issue arose of the postal service warning of delays in delivery. The postal service said it takes as much as a week between when a piece of mail is sent out and when received back. He noted, by law, North Carolina only permits three days between postmark deadline and receipt. A ballot mailed on Election Day that arrives on the 4th day is not counted. For overseas voters under federal law ballots are accepted if they are received by the day before canvass. It is recommend to extend to correlate with overseas deadline – a reasonable deadline for settlement, possibly 9 to 10 days after Election Day.

Mr. Raymond says he cannot support extending civilian absentee deadline. It would compromise the integrity of elections. The current deadline is sufficient. Opens the door for any bad actors that would want to play games, to accomplish that. Stated that he really cannot support this. He understands the need for things to go smoothly, however, believes this recommendation compromises the outcome of the election.

Chair asked Ms. Narasimhan to explain in greater detail the proposed settlement position. He noted that he would like a vote for each individual issue he is asking to settle. That the Executive Director would work specifically within the parameters. There was not a formal vote, but Mr. Raymond indicated his support for this approach.

Mr. Carmon stated that he was under the impression that settlements worked together. Wanted to know if it was still beneficial to settle one instead of all. He noted that any proposed settlement still needs a plaintiff to agree to it. He asked Ms. Narasimhan to explain what may work or not work for an issue by issue approach.

Mr. Wood noted that they came up with the recommended list because they believe it's a set of issues that if presented as a package could get sufficient buy-in from the plaintiffs and the courts for a global resolution. The DOJ will work with whatever settlement options the State Board gives, but the more you give us on these issues to work with, the higher likelihood of accomplishing resolution. Not everything is necessary, but it is a package and plaintiffs will approach it that way.

Ms. Narasimhan summarizes the claims regarding the absentee ballot deadline. Noted that plaintiffs would like all ballots to be counted that are received by the UOCAVA deadline. She thinks there are good reasons the postmark issue is important to the state board. She noted that in offering the position,

the plaintiffs will have to compromise on the postmark position (which would remain unchanged). This is in line with the recommendation from the US Postal Service.

Chair agrees with Mr. Raymond as he does not want any funny business after Election Day. But the postal service has issues now that are a challenge for elections. And a ballot cast on Election Day would have to be returned by the voter by the deadline, not a month later. The voter would have to mail it by Election Day or before. The envelope would have to have some indicia that it was put in the delivery stream on or before Election Day.

Mr. Carmon asked for clarification on voting on settlement positions individually. If there is a sweet package, we have a deal, if there is no sweet package, they may proceed to litigation. Chair suggested the State Board be briefed on all, then vote. Mr. Carmon agreed with this approach. So did Mr. Raymond.

Mr. Black said he thought it would serve better if the State Board could discuss and come to a reasonable decision on each instead of a package. Secretary Anderson noted that she can see both sides with one-by-one vs package approach. She asked for starting with the extension of the receipt deadline as helping in other ways. Noted that it's hard to separate. What we do in one area may help or hinder in others.

Chair stated that the focus should be, is the board willing to settle and will settlement provide a stronger litigation position. Chair asked if they could take a straw poll without taking votes regarding the proposed settlement.

Mr. Black stated that everyone should have a chance to vote, no later than the date for postmarking of ballots. He would agree to the extension of the date for receipt of the ballot but not allowing the postmark on ballots to be after the election. Otherwise, he agrees with board members.

Chair asked if Mr. Raymond's earlier reservations stand. Mr. Raymond stated that his reservations stand. A ballot must be postmarked by Election Day. Chair agreed, but noted his concern that without the settlement a judge may feel differently.

General Counsel Love asked for clarification regarding postmark. Noted postmark only means stamp on the envelope. Noted there is benefit in discussing if this is the only method, or if there are others acceptable to the State Board. Chair noted that they need to know that the ballot was voted on November 3rd and not after. Bottom line is we have to know it was voted by then.

Ms. Narasimhan stated that while the USPS should postmark all mail, however, in practice it does not. Mail could arrive on November 8th with no postmark.

General Counsel Love agreed that this is the part there is a question about. Could BallotTrax be used? She noted the use of UPS and FedEx. There is no postmark, but it is possible for tracking information to show if delivered to the carrier by Election Day.

Chair noted he would be loath to settle anything that would allow ballots to be counted that were voted after Election Day.

Secretary Anderson asked if the agency could make the determination to use Ballottrax if no USPS postmark? She asked if necessary, to the settlement, versus allowing the agency to issue this position/guidance.

General Counsel Love stated that it would be better to put it in settlement vs. State Board interpretation to provide legal certainty. Mr. Wood agreed.

Chair suggested moving on to the next topic.

Mr. Carmon asked if the State Board was clear on language for that portion of the settlement (as it relates to postmark).

Chair invited additional thoughts, but noted his inclination to make a motion that offers Executive Director Brinson Bell the authority to settle outstanding claims as it relates to returned ballots. That they must be received by the State Board of Elections by UOCAVA deadline, if there is sufficient indicia of the ballot being out of the voters hands on Election Day or before.

Chair suggested that Ms. Narasimhan move onto the signature verification requirement. Ms. Narasimhan noted it was included as a claim the plaintiffs are raising, but a numbered memo is satisfactory to resolve this.

Chair asked Ms. Narasimhan to move onto the witness requirement.

Ms. Narasimhan stated that the witness requirement is a subject of litigation in practically all of the lawsuits. Challenge is to the entire one witness requirement to absentee voters in this election. And there is a challenge for individuals living alone, because of COVID-19. There is a concern regarding the current cure provision for a witness deficiency. Plaintiffs have filed legal challenges and received court rulings in other states lifting witness requirement. Guidance was provided to the counties with cure provisions which have now been challenged. Currently there is no cure provision in place, as agency legal staff provided guidance to the counties to refrain from contacting voters about deficient ballots until further notice.

There are two hearings this week before Judge Bryan Collins whom litigation counsel advised was likely sympathetic to the Plaintiff's viewpoint on witnesses. Plaintiffs are seeking to lift the entire requirement. AG proposes we do not lift the requirement. General Assembly was asked to change it and it did not. Instead the AG proposes a cure procedure that is more voter friendly. Cure would confirm that voter is who they say they are when they are filling out the absentee ballot. Would need to discuss form. Cure procedure at present isn't a cure, but a redo. Courts in other states have looked for an alternative pathway.

Ms. Narasimhan noted the need to understand the purpose of the cure provision. There may be ways to do this other than a redo. Need for a pathway.

Associate General Counsel Tornow sought clarification as to whether the initial cure memo issued to the counties and discussed with DOJ attorneys was shared with opposing counsel and the federal court in *Democracy NC*.

Ms. Narasimhan stated that the proposed cure was not given to the court as SBE is adjusting the cure procedures. She stated that it was not filed with the court because there were challenges made to it as soon as it was put out. And a new lawsuit was filed, so cure procedure was not presented to the court.

Chair stated that the witness requirement is important to the Board. The Board does not want to lose the one witness requirement. Problems can exist with missing signatures and address information and how to go about curing the problems. There is danger to the process if we do not figure out some cure.

Ms. Narasimhan stated that DOJ managed to uphold the witness requirement in Federal court in *Democracy NC* case and in state court in the *Chambers* case. In South Carolina, the District Court lifted the witness requirement and no appeal has been filed yet. The impact is that South Carolina is in the 4th Circuit.

Secretary Anderson noted that DOJ memo says we do not have a court-approved cure process and no ballots may be rejected at this time. She noted the first absentee meeting starts September 29. What does this mean for those meetings? Will we have one by the time these boards are situated and ready to act, or will there be an opportunity for the county boards to have a pool of ballots and some deficiency and an opportunity to get them cured even if not in place by the 29th?

Executive Director Bell noted that continuing to update the cure memo is a challenge. Noted we have already accepted nearly 52,000 absentee ballots. From an administrative standpoint, if there is an easier way to resolve the witness situation, that will make it easier for the counties to administer.

Secretary Anderson noted that we should think about the difference in having a witnesses' signature but no name or address and not having a witness signature. If we say that the voter can cure no witness signature, we are exempting them from the witness requirement. This is problematic.

Chair stated that the point of the witness signature is to confirm that the voter voted the ballot. Noted that if cure process confirms it's the voter's ballot, confirmation is still occurring.

Executive Director Bell stated that right now the redesign of the envelope helped with readability and clarity, but voters are confused by the witness signature portion of the envelope. Currently there are 18 different questions about deficiencies, and over 1000 incomplete witness certifications. What is being proposed is the voter will attest that no one nefariously completed the ballot envelope. Upon receipt of a ballot with no witness, the affidavit would be sufficient.

General Counsel Love stated she wanted it to be clear to the board that effective Friday, no cure affidavits or new ballots will be sent out. This is because staff had been preparing to make some changes to the cure memo because of an issue with the envelope design. We were alerted that some voters were confused because the voter and witness signatures are highlighted in light yellow but the rest of the box the witness completes, where they print their name and address, was in grey. So some voters did not complete the grey part, only the yellow signatures. The cure memo was being updated so it would allow the voter to cure a missing witness name and address by providing that information by affidavit if they knew it. Counties were told on Friday that the new memo would be out by the end of the day on Friday. However, the board meeting was scheduled so it did not go out.

Secretary Anderson asked if the counties had started the cure process as originally outlined.

General Counsel Love confirmed that the numbered memo was issued after the *Democracy NC* decision on September 4th. Counties followed that memo until Friday. No new action on ballots by CBE and no ballots have been officially disapproved by any county board of elections.

Chair stated that if we don't get it right it does not matter. Cure must be quick.

Mr. Wood commented that a cure was needed very quickly and could happen by the court in a matter of days.

Chair then directed the discussion to in-person voting and stated that he envisions the cure process as akin to in-person voting. We are not getting rid of the witness requirement.

Mr. Wood noted the early data about ballots being rejected is concerning. Disparate impact across demographic and racial groups.

Associate General Counsel Tornow noted that with the advent of BallotTrax, voters are now seeing that there may be an issue with their ballot and they are contacting the county boards. This is an additional administrative concern because presently the county board is not able to tell them whether or not they can cure their ballot so they are confused. Chair pointed out it's better to pause now than to pause later.

A discussion was had regarding CBE checking signature on voter registration record with that as a cure when the signatures are compared. Secretary Anderson asked how does the voter verify that it's actually their ballot during the cure process? Do they sign to that effect? How will the county board confirm the signature?

Chair noted that he did not envision a signature comparison. If the county board staff are not comfortable, don't cure and instead spoil the ballot. Mr. Black restated his opinion that we should not do away with the witness law. It is an important thing to retain. If struck down, then ballots without it and resulting in more lawsuits. Refers to 9th district hearing and need to keep. Okay if the staff member calls the voter (preferred) or emails the voters then okay. Getting away from the witness aspect may result in additional consequences. Be careful in trying to keep hijinks from going on. We want to give the voter a sense of security and have them feel good about the voting process.

Chair stated that we could do nothing regarding these issues or we could reach agreement on settlement options. There is the possibility that the court could impose more sanctions on us. We want to maintain elections security and have the litigation go away.

Mr. Carmon wanted to know what are we offering as a way that the voter may cure a witness deficiency? We agree not to remove witness requirements.

Chair summarized his motion as permitting the voter to cure deficiencies with the witness requirement.

Executive Director Bell agreed in not removing the witness requirement. She restated her support for a cure process whereby the voter attests to their ballot. Cure will allow for the voter to attest, even if no witness info, or if no witness, that it is their ballot.

Mr. Carmon inquired as to how to handle a possible attestation – mailed to voter, emailed to voter, provide to voter in person. Would we send a new ballot?

Executive Director Bell said it would be a form. Received by mail or email or in person.

Mr. Wood stated that from a litigation perspective, the AG is concerned about something fair, administrable and efficient. Serves the primary thrust of the purpose of the rule. Mr. Raymond stated that we must keep the witness requirement. Voter showing up in person as a cure would be great. One thing to consider is that the Plaintiffs as a group would not agree to a requirement that the voter appear in person to cure any deficiency.

Chair stated that all board members agree on retaining witness requirement. With the options of email, in person and mail, worried about adverse rulings in court.

Secretary Anderson commented on the burden on voters. Letting the voter know of a deficiency and a potential to do over, as we get closer to Election Day, a do over would become more problematic for the voter without an extension of the time for allowed receipt of the new ballot. Again, a lack of witness signature places a burden on the voter.

Chair stated that today the burden on the voter is not bad but at the end closer to Election Day it would be worse. Chair asked Secretary Anderson what specifically she is concerned about with respect to the proposed cure process.

Secretary Anderson indicated her concern that cure affidavit or memo could be exploited by the same person who sent the ballot. No more assurance than we did from the get-go. Said she was trying to balance vote with criticism and challenges that we might get as an agency – that we will get criticism.

Chair said he thinks it's unlikely the same nefarious actor could act twice. Secretary Anderson asked if this would protect us from protests and voter challenges.

Ms. Narasimhan responded that a judge would have ordered it, so it protects the State Board from collateral attack.

Chair moved the discussion to the next topic, in person return of absentee ballots. Voters are seeking ways to return their ballot without using the USPS. Per the existing rule from 2018, is there no way to streamline the process. The idea is not to abandon logging of voter ballots as they come into the elections office. The potential problem is with the chain of custody of the log and the impact of how to make the process work best in a COVID-19 environment with the passing of pens back and forth by voter and clerk. Ideally, the voter would enter the CBE office with a ballot. The clerk would get the voter's name and CIV#, ask if the person was the voter, near relative or guardian or other. Then the ballot would be received if voter or near relative or guardian. There is a question of how to handle if the response from the individual is that they are neither voter or near relative or guardian. The individual would be attesting to a crime.

Secretary Anderson stated that we are dealing with the existing law and existing rule. Raised question about how far we should deviate from rule. What happens when a ballot is accepted by an ineligible person dropping it off? What do we do with those logged as dropped off by "other?" Not returned correctly.

General Counsel Love explained the history of the rule. Stated that return by an unauthorized person is a felony, not that the ballot is not counted. An absentee ballot is not invalid if delivered by someone not

authorized. She distinguished this from the absentee request form statute, which says explicitly that a request form returned by an unauthorized person invalidates the request.

Mr. Black proposed the idea of a poster/sign being evident at the CBE office that would notify the person dropping off the ballot that it was a felony to bring the ballot into the office if they were not either the voter or a near relative or guardian of the voter. They would be directed to take the ballot back to the voter. The signs would educate the voters and at the same time caution at the same time against committing a felony.

Chair stated that simplest method is best. The onus should be placed on the CBE clerk to take down the information, name, CIV#, relationship to voter, and then receive the ballot. Signage would be good to educate the voter.

Mr. Wood stated that there is a litigation risk as the rule was not written with consideration of a pandemic. Judges are sympathetic about contact issues and procedures in place. Plaintiffs in cases want a drop box which could in turn result in ballot harvesting.

Chair says he is opposed to unmanned drop boxes.

Secretary Anderson proposed the CBE clerk obtain the name, relationship to voter, and marking the ballot as accepted. The voter will assume that whether dropped in a box or handed to clerk, ballot as being accepted. She noted that marking relationship to voter as "other" but still giving the ballot to the clerk would give the appearance that it's being accepted and counted.

Chair said he originally thought not asking the question of relationship to voter would best prevent contest, but we probably need to ask the question.

General Counsel Love provided an explanation of the law such that the CBE would let the SBE investigations team know if a ballot were returned by an unauthorized person. Specifics of the case would be considered to determine whether it was a priority according to the Investigations Policy; specifically, whether it was intentional, willful and attempted to influence the election.

Chair suggested that the log is something that should be handled by the clerk, not by the voter. CIV number and name are written down by the clerk. Confirm whether person returning ballot is voter, near relative, or "other."

Executive Director Bell clarified that if someone other than the voter or near relative drops off the ballot, the clerk would collect additional information. She provided further history and guidance on this issue from an administrative viewpoint. When a ballot is mailed, there is no way to determine who dropped it in the postal box. In prior elections, absentee voting was at 3 to 4 percent of voters, maybe as high as 5 percent. In today's environment of the pandemic, the number is closer to 30 to 40 percent of absentee voters. We have to consider if the person is trying to be a good neighbor without knowing their action is a felony. Items are turned over to investigations with the fear of others getting their hands on the logs. She believes that it is a best practice to have the CBE clerk collect the information and post notices as described by Mr. Black. Before the rule, no log was required. An example shared was that in past few days in Henderson County over 700 voters have showed up in person to turn in their absentee ballots. The lobbies of some county board offices are only the size of doctors or dentist offices. In these small spaces we're seeing as many people drop off in a day as we might see in a one-

stop site or an Election Day polling place. I issued the emergency order to reduce long lines and reduce long lines, and the current written log requirement counters that.

Discussion between board members and Executive Director on how to handle if an unauthorized person attempts to drop off the ballot. It is agreed that log is important but discussed who within the CBE office should handle. Temporary staff may not be able to handle issues with someone who is not authorized returning a ballot.

Mr. Carmon stated he does not want our county board staff to turn a blind eye to someone breaking the law. Mr. Black felt that the CBE clerk should handle the processing of ballot, review for errors, cure some errors immediately for a walk-in voter. Discussion ensued regarding the clerk being reluctant to take the ballot if it was returned by an unauthorized person. Secretary Anderson commented that a good Samaritan neighbor returning the ballot for a voter should not be punished nor should that ballot be rejected as a result.

General Counsel Love provided guidance that the numbered memo and administrative rule clarify that a ballot that is returned by an unauthorized person is not invalid. The county board of elections would consider who delivered the ballot in conjunction with other evidence in determining whether the ballot envelope was properly executed. General Counsel Love also clarified that statute states that once the county board of elections accepts the ballot, it cannot be returned to the voter, even if the ballot is being returned by an unauthorized person.

Executive Director suggested that the agency could provide more guidance in the updated numbered memo for various scenarios – for example, the same person delivers 20 ballots to the CBE office. This would be a red flag for potential ballot harvesting.

Chair made the motion that the SBE propose to empower the executive director to authorize settlement on any, and all outstanding cases in which the Attorney General's Office proposes settlement that achieves the following:

1. As it pertains to late return of ballots, that ballots will be accepted if they have a postmark or other indicia of receipt of November 3rd (BallotTrax, commercial carrier tracking info, etc.) They need to come back by UOCAVA deadline – close of business on the day before county canvass.
2. Witness and assistant requirement – must remain in effect and in full force and that the voter herself has the opportunity to cure any deficiencies in voter's attestation or witness portions of container-return envelope. The assistant deficiencies may also be cured.
3. No unmanned ballot drop boxes allowed. Maintain log – clerk asks for name of person returning ballot, and verbal acknowledgement of relationship to voter that they are voter or near relative. Then the clerk writes down CIV number on the log. Then if person returning is not near relative or voter, clerk will take down name, address, relationship to voter, and then we will accept receipt of the ballot and keep that info available for any investigation.

Discussion on the motion to delegate authority to Executive Director. Specifically, the date for acceptance of late return ballots.

Mr. Raymond stated November 3rd for civilian voters and UOCAVA voters had 9 days. Chair agreed with November 3rd postmark and allowing 9 days for receipt. Mr. Black expressed his concern about relying

on canvass, which might be changed by a court. He did not want the date automatically extended. He expressed his preference for relying on a date certain. All board members would accept November 3rd postmark and allowing 9 days after for receipt of ballot. Mr. Black expressed his preference for a date certain. Chair noted that the idea is to cure postal deficiencies, so he's okay with a date certain. Executive Director Bell suggested the alternative of 9 calendar days after the election. Both Chair and Mr. Black acknowledged support of this.

Chair noted that delegation of settlement authority to Executive Director is not blanket, but only within parameters of this motion. This information is confidential.

Second of motion by Member Carmon. Roll Call vote: Anderson – aye, Black – aye, Carmon – aye, Raymond – aye, Chair – aye.

Chair, General Counsel Love and Executive Director Bell discussed language for the motion in open session. Announcement will be taken in open session about delegation of authority. Chair stated that the State Board of Elections was in a good place. There are no good options since March 3rd and COVID-19 impact. He asked that the Attorney General's office keep us updated on litigation and settlement efforts.

The Chair made the motion that the State Board return to open session. The motion was seconded by Secretary Anderson. Closed session ended at 6:02 p.m.