

Bench Memo

Tuesday, September 15, 2020

3 p.m. meeting

This will be a remote meeting using Cisco Webex. For the open session, you should have received an invitation with access for the meeting. You will need to have a microphone on your computer to participate. You can also join using the following link:

[REDACTED]

For the closed session, you should have received a second Cisco Webex invitation. When it is time for the closed session, fully close out of the open session and then log into the closed session. You can also access the meeting using the following link:

[REDACTED]

Meeting number: [REDACTED]

Password: [REDACTED]

Please contact Katelyn ([REDACTED]) if there are any issues.

A copy of the meeting notice and tentative agenda, as well as a link to the documents, is available [here](#).

Statement Regarding Ethics and Conflict of Interest

Authority

G.S. § 138A-15(e)

(e) At the beginning of any meeting of a board, the chair shall remind all members of their duty to avoid conflicts of interest under this

Subchapter. The chair also shall inquire as to whether there is any known conflict of interest with respect to any matters coming before the board at that time.

Counsel Note

Counsel has not been informed of any conflict in advance of this meeting.

Suggested Statement {Chair}

In accordance with the State Government Ethics Act, it is the duty of every Board member to avoid both conflicts of interest and the appearance of a conflict.

Does any Board member have any known conflict of interest or any appearance of a conflict with respect to any matters coming before the Board today? If so, please identify the conflict or appearance of conflict and refrain from any undue participation in the particular matter.

Approval of Prior Meeting Minutes

Materials

[August 31, 2020 Open Session Meeting Minutes \(draft\)](#)

August 31, 2020 Closed Session Meeting Minutes (attached to email)

Authority

G.S. § 143-318.10(e) (relevant portion)

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. ...

Draft Motion

I move that we approve the State Board's open and closed session meeting minutes of August 31, 2020.

Roll Call Vote

Dr. Anderson

Mr. Black

Mr. Carmon

Mr. Raymond

The Chair

Appointment to Vacancies on County Boards of Elections

Materials

Applications are available upon request (Bertie applications attached to email)

Authority

G.S. § 163-30(d) (relevant portion)

Whenever a vacancy occurs in the membership of a county board of elections for any cause the State chair of the political party of the vacating member shall have the right to recommend two registered voters of the affected county for such office, and it shall be the duty of the State Board to fill the vacancy from the names thus recommended.

Summary

We have received nominations from the Democratic Party as follows:

- McDowell County
 1. Michelle Wilson Price ([REDACTED] ; no conflict indicated)
 2. Harriet Allen Rockett (no conflict indicated)
- Nash County
 1. Brenda Johnson Foster (no conflict indicated)
 2. Dr. Cassandra Stroud Conover (no conflict indicated)

We have received nominations from the Republican Party as follows:

- Person County
 1. David Harris Minshall (no conflict indicated)

2. Grace Anne Mattson (no conflict indicated)

Suggested Motion

I move that the State Board appoint [REDACTED] to the [REDACTED] County Board of Elections

Roll Call Vote

Dr. Anderson

Mr. Black

Mr. Carmon

Mr. Raymond

The Chair

Closed Session

Authority

§ 143-318.11. Closed sessions.

(a) Permitted Purposes. - It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

...

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its

minutes as soon as possible within a reasonable time after the settlement is concluded.

...

(c) **Calling a Closed Session.** - A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

Counsel Note

As background for the closed session, there are 8 cases to be discussed in relation to possible settlement:

- Democracy North Carolina v. State Board of Elections
 1. A federal district court judge entered a preliminary injunction that requires a cure process for deficient absentee ballots and that allows one named plaintiff to receive help from a nursing home employee. The judge denied all of plaintiff's other requests
 2. Plaintiffs and the State Board have asked the judge to reconsider denial of the injunction to allow nursing home employees to assist voters due to the visitation restrictions subsequently issued by DHHS.
 3. This was the only lawsuit where plaintiffs sought to allow contactless drop boxes for in person return of absentee ballots. The judge denied this request.
- Chambers v. North Carolina
 1. A three-judge panel of the Wake County Superior Court unanimously denied the preliminary injunction motion, thereby declining to enjoin the witness requirement.
- Taliaferro v. State Board of Elections
 1. This case is pending in federal district court in the Eastern District of North Carolina. It challenges the failure to

provide a way for blind voters to vote absentee by mail independently, without depending on another person for assistance. In its brief, the State Board largely did not dispute plaintiffs' claim that the agency has failed to comply with the ADA and Rehabilitation Act requirements, due to applicable caselaw in the 4th Circuit. However, we do not believe it would not be administratively feasible to implement an accessible option safely for the November election due cyber security issues with online voting, changes to SEIMS, and implementing a new software program.

Marc Elias cases:

- North Carolina Alliance for Retired Americans v. State Board of Elections
 1. Raises challenges to the single witness requirement for single-person or single-adult households, the postage requirement, signature matching procedures, and the prohibitions on who can assist with and deliver an absentee request form.
 2. **A hearing on the preliminary injunction (PI) hearing is scheduled at 9:30 a.m. on September 18 before a single judge.**
- Stringer v. State Board of Elections
 1. The complaint raises various constitutional challenges to absentee voting requirements.
 2. There is a hearing scheduled on September 18 but it is not expected to include the PI motion on this case, because there is no dispute the case should go to a three-judge panel.
- North Carolina Democratic Party v. State Board of Elections
 1. This case was filed in 2019 and challenges various early voting restrictions. Awaiting appointment of a three-judge panel.
- Advance North Carolina v. State Board of Elections
 1. Challenges restrictions made by Session Law 2019-239 on who can make an absentee ballot request.
- Democratic Senatorial Campaign Committee v. State Board

1. This case was filed last week and challenges the requirement in Numbered Memo 2020-19 that a voter be issued a new ballot if the witness did not provide their name, address, or signature. The memo was issued to implement the injunction in the Democracy NC case.

The Department of Justice has recommended several areas for settlement in litigation against the State Board. In addition to their memo, board members may wish to consider the following information:

Absentee Ballot Return Deadline

- State law requires that ballots be postmarked after Election Day. This requirement is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, we are aware that the USPS does not postmark all ballots. Ballottrax now provides county boards and voters with status updates to track ballots in the mail stream. If a ballot was not postmarked, this information could be researched in Ballottrax to determine if there was affirmative information indicating that the ballot was mailed by Election Day.
- The Post Office continues to state that ballots may take up to a week to be delivered, but state law only allows ballots to be accepted that are received three days after the election.
- If the Executive Director's emergency powers are used to extend the receipt deadline for ballots, an emergency order requires consideration of the factors in the rule, which must be calculated to offset the nature and scope of the disruption, and consultation with the board. It also requires that there be a disruption to the election normal schedule for an election to trigger any use of emergency powers. [08 NCAC 01 .0106](#). At this time, the executive director would need to consider whether there enough information to determine the nature and scope of a potential disruption with mail service and to determine how long the deadline needed to be extended for. More specific information may be available closer to the mail deadline for absentee ballots. For more discussion on the emergency powers authority, see the section "In Person Return of Absentee Ballots" below. If this change were made as part of a

settlement agreement that was approved by the court, it would help protect the action from legal attack.

In Person Return of Absentee Ballots

- Voters may return their absentee ballots in person to either the county board of elections office or a one-stop site. They may not return them to an Election Day polling place.
- There has been a vast increase in the number of voters who are returning their absentee ballots in person. Approximately half of absentee ballots returned in the first week of voting were returned in person. Using a written log adds several minutes to the time that a voter must spend returning their ballot in person. Some county boards are providing drop off locations outside but for others this is not feasible.
- It is a Class I felony for any person other than the voter or their near relative or legal guardian take possession of a ballot for delivery to a voter or for return to a county board of elections. [G.S. § 163-226.3\(a\)\(5\)](#).
- In 2018, the State Board adopted a rule that requires logging of absentee ballots that are returned in person to the county board of elections office. [08 NCAC 18 .0102](#). The rule requires that the person delivering the ballot provide the following information in writing: (1) Name of voter; (2) Name of person delivering ballot; (3) Relationship to voter; (4) Phone number (if available) and current address of person delivering ballot; (5) Date and time of delivery of ballot; and (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative. According to the rule and State Board guidance, failure to comply with the logging requirement, or delivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot.
 - The rule was adopted in part because of the illegal absentee ballot activity that took place in Bladen County in 2016. Previously, policy required that county boards log absentee ballots that were received in person, but not every county complied with this and the logs varied somewhat in what

was required. The logs that Bladen County used in 2018 were important to the CD9 investigation.

- Keeping a detailed log may allow a county board to determine if there are patterns with absentee ballots being returned in person. It also creates a record of who dropped off the ballot in case there is a need to contact that person and the voter cannot be reached or does not know the contact information for that person. Relaxing or eliminating the written log could lead the public or candidates to question whether large numbers of ballots were returned illegally and could result in the filing of post-election litigation and election protests, ultimately calling into question the results of the election. Further, the written log is one of the security measures the State Board has cited to for why absentee voting is secure.
- By its language, the rule requiring a written log does not apply to one-stop sites, likely because voters rarely used this option in prior elections. The rule was previously interpreted as requiring that all absentee ballots be logged when they were returned in person, regardless of the location of return. It could be confusing to voters and county board staff and difficult to justify requiring logging at a one-stop site but not at a county board office, especially if the county board office is also a one-stop site.
- Absent a settlement agreement or court order, requiring only verbal confirmation at a county board office would require an emergency order because it is too late to change the rule before the election due to the extended amount of time that rulemaking takes. Any time the executive director exercises her emergency powers due to a pandemic-related issue, there is a risk of legal challenges, because the Rules Review Commission disapproved the temporary rule that would have clarified that it included a disease epidemic. Some groups, including the NCGOP, have laid out legal arguments that the RRC's disapproval means that the emergency powers cannot be used for a disruption related to the pandemic. While counsel believe that the permanent rule's language is sufficient, the usage of emergency powers must be weighed against possible litigation risk, or risk that the

legislature might act to repeal or further limit the statutory authorization for the executive director's emergency powers.

- There is one lawsuit, Democracy NC, that sought to allow contactless drop boxes for voters to return their absentee ballots. However, the judge denied this request. Therefore, it is unclear how or why the State Board would settle a claim about drop boxes when the judge already denied the claim, and this is not at issue in any other active lawsuit discussed in this memo. In the absence of a court order, the executive director would need to exercise emergency powers to lift the written log requirement at county board offices.

Witness Requirement

- Following the federal court order in *Democracy NC*, Numbered Memo 2020-19 was issued on August 21. It states that a missing voter signature or a voter signature in the wrong place on the absentee return envelope can be corrected by the voter signing a cure affidavit. The memo further provides that missing witness information (name, address, signature) cannot be cured and if a ballot is missing this information the county board will spoil the ballot and issue the voter a new ballot.
- Once absentee ballots started being returned, county boards provided feedback that some voters were confused by the highlighting on the witness section. The section the witness is to complete is grey, but the witness signature box is light yellow, so some witnesses only signed but did not provide their name and address. In response, State Board staff began considering whether witness name and address could be provided by the voter in a cure affidavit, if the voter knows that information. The law requires that this information be provided but does not prohibit the voter from providing it. However, for ballots missing the witness signature, voters would still be reissued a new ballot, since the voter cannot sign and attest for the witness. State Board staff also considered allowing the voter to cure the missing witness signature by affidavit by having the witness and voter sign the affidavit; however, this places additional burden on the voter because the same witness who observed the voter marking their ballot may no longer be available or the voter may no longer

have access to that person. Issuing the voter a new ballot in the case of a missing witness signature would give the voter the opportunity to have a different person witness the reissued ballot.

- Last Friday, staff sent county boards of elections an email instructing them not to send voters any cure affidavits or to spoil any ballots and reissue a new ballot. County boards were told that the Numbered Memo 2020-19 was being updated and would be reissued with updated cure letters by the end of the day. Because of the board meeting scheduled for Tuesday, the numbered memo update could not be finalized and therefore county boards are not currently following up with voters whose ballots have missing information.
- Numbered Memo 2020-19 states that a county board shall not use signature verification to compare the voter's signature on the absentee envelope with the signature on file for the voter. It explains: "Verification of the voter's identity is completed through the witness requirement."
- If the witness requirement is allowed to be cured by the voter submitting an affidavit, consider whether the voter would be allowed to submit the affidavit simultaneously with the ballot. And if so, consider how to know that the voter is the person who voted the absentee ballot or who filled out the cure affidavit. We are aware, for example, that the NC Democratic Party has created an online tool to allow a voter to complete and submit the cure affidavit using an online link.

Other Considerations

Because of the pandemic, the absentee process is under much more scrutiny this year than it has been previously. Political parties, advocacy groups, candidates, and the public are closely monitoring how these processes are carried out and how county boards ensure that all voters can safely cast their votes in a fair and accurate election. And the pandemic has led to a number of lawsuits, which have caused uncertainty for voters and from an election administration standpoint.

When considering a settlement agreement, the board may wish to consider what the court might order to determine whether settlement is

more advantageous. Consider what specifically a court might order, when it might be ordered, and whether settling now is more favorable, in light of all factors. Settlement would provide certainty sooner than waiting for a court order and would give the State Board more control over what changes were made. The board may also want to consider if the settlement terms are acceptable and whether it is preferable to decide now or to await the courts. Additionally, the board may wish to consider the effect of settlement of several of these issues simultaneously; for example, if there any compounding effects to the absentee process if a voter is allowed to cure a missing witness signature and the log requirement is also relaxed. Also, the legislature is a party to a number of the cases discussed in this memo and that they may oppose settlement. The courts have approved settlement without the legislature's consent in past cases against other state entities, so this may not be a barrier.

Finally, one other matter to note is the constitutional and statutory provisions that give the General Assembly—not the courts—the authority to determine the outcome of a contested election for Council of State offices. See Article VI, § 5 of the NC Constitution. Pursuant to G.S. § 163-182.13A, “contest” means “a challenge to the apparent election for any elective office established by Article III of the Constitution [Council of State offices] or to request the decision of an undecided election to any elective office established by Article III of the Constitution...” A decision of the General Assembly in determining the contest of the election is not reviewable by state courts. Legal questions about how to count out-of-precinct provisional ballots led to the General Assembly to decide the outcome of the Superintendent of Public Instruction after the 2004 election. See this [article](#) by Bob Joyce for additional description of the dispute. When the governor's race was close in 2016, it was thought that the General Assembly might take jurisdiction over it, but that did not happen.

Suggested Motion

I move that the State Board go into closed session pursuant to G.S. § 143-318.11(a)(3) to receive legal advice from its attorneys in the following cases:

- *North Carolina Democratic Party v. State Board of Elections*
- *Advance North Carolina v. State Board of Elections*
- *Chambers v. North Carolina*
- *Stringer v. State Board of Elections*
- *North Carolina Alliance for Retired Americans v. State Board of Elections*
- *Democracy North Carolina v. State Board of Elections*
- *Taliaferro v. State Board of Elections*
- *Democratic Senatorial Campaign Committee v. State Board*

Roll Call Vote

Dr. Anderson

Mr. Black

Mr. Carmon

Mr. Raymond

The Chair

Delegation of Settlement Authority to the Executive Director

Authority

§ 163-26. Executive Director of State Board of Elections.

There is hereby created the position of Executive Director of the State Board, who shall perform all duties imposed by statute and such duties as may be assigned by the State Board.

Suggested Motion

I move that the State Board delegate settlement authority to its Executive Director for the following cases: [List cases]

Roll Call Vote

Dr. Anderson

Mr. Black

Mr. Carmon

Mr. Raymond

The Chair

Adjournment

Suggested Motion

I move that the State Board adjourn.

Roll Call

Dr. Anderson

Mr. Black

Mr. Carmon

Mr. Raymond

The Chair