

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT

IN THE MATTER OF: APPEAL OF)
CHALLENGE TO CANDIDACY OF)
MARK TIMOTHY CUMMINGS)

ORDER

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT ("State Board") during a hearing held August 16, 2018, upon the Appeal of Willena Cannon ("Challenger-Appellant") from an adverse decision by the Guilford County Board of Elections ("Guilford Board"), which failed to find jurisdiction in a challenge to the eligibility of Mark Cummings ("Candidate-Appellee"), who seeks election to the Superior Court in Guilford County. The State Board heard argument from Challenger-Appellant's counsel, Faith Fox, and from Candidate-Appellee. Having considered the arguments from the parties and relevant statutes, the State Board by a vote of seven members in the affirmative, hereby finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 17, 2018, the State Board received and stamped-in a packet delivered by the U.S. Postal Service containing a written challenge to the qualification of Candidate-Appellee (the "Candidate Challenge").
2. Candidate-Appellee seeks election to the Superior Court in District 18A, a jurisdiction wholly within Guilford County.
3. Staff at the State Board transmitted the Candidate Challenge to the Guilford Board, which held a public hearing to consider the matter on July 26, 2018.
4. The Guilford Board voted 2:2 on motions to establish whether the Candidate Challenge was timely filed.

CONCLUSIONS OF LAW

1. The General Assembly has prescribed processes by which judicial elections are administered in the 2018 election cycle. *See* S.L. 2017-214. Among other requirements,

Candidates seeking the office of Justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, or judge of the district court shall file their notice of candidacy with the State Board of Elections and Ethics Enforcement no earlier than 12:00 noon on June 18, 2018, and no later than 12:00 noon on June 29, 2018.

Id. at Section 4.(a). The enactment altered the regular filing dates, but retained the ordinary requirement that judicial candidates file “with the State Board.” G.S. § 163A-974.

2. Challenges affecting the qualification of candidates are considered under a statutory framework imposing procedural and substantive requirements contained in Part 3 of Article 19 of Chapter 163A of the North Carolina General Statutes.
3. The State Board is the proper forum for receipt of any challenge affecting the qualification of a judicial candidate. G.S. § 163A-1026(a) (“A challenge to a candidate may be filed . . . with the board of elections receiving the notice of the candidacy”).
4. The deadline to challenge a judicial candidate in 2018 was Monday, July 16, 2018, “10 business days after the close of the filing period for notice of candidacy” on June 29, 2018. G.S. § 163A-1026(a), *see also* S.L. 2017-21 § 4.(a).
5. Unlike the statute establishing the initial filing deadline for a challenge (G.S. § 163A-1026(a)), any subsequent appeal is timely if “delivered or deposited in the mail to the State Board” by the deadline. G.S. § 163A-1030(a). The omission of comparable language regarding the initial filing informs our view that a candidate challenge must be *received* by the appropriate board on or before the filing deadline.
6. The Candidate Challenge was not timely filed when the State Board received the submission on July 17, 2018.
7. The State Board possesses general supervisory authority over the administration of elections and over candidate challenges on appeal. G.S. §§ 163A-741(a) and 163A-1030(a). This matter is appropriately before the State Board upon the timely appeal by the Challenger-Appellant.
8. The district for which Candidate-Appellee seeks election is nested wholly within Guilford County, and the Guilford Board was the appropriate panel to consider the Candidate Challenge. G.S. § 163A-1027(1).
9. Jurisdiction is a preliminary determination that must be found in the affirmative before a county board proceeds to decide a challenge on the merits. If jurisdiction is not found, a matter is appropriately dismissed.
10. Failure to find jurisdiction by the affirmative vote of three members of the Guilford Board effectuated a dismissal of the Candidate Challenge as a matter of law, from which appeal may be taken. *See* G.S. §§ 163A-767 (“Except where required by law to act unanimously, a majority vote for action of the board shall require three of the four members”) and 163A-1030(a).
11. Dismissal is appropriate when a Candidate Challenge is not timely filed. *See e.g. Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189 (1983) (failure to timely file is jurisdictional and will result in dismissal).

IT IS THEREFORE ORDERED that:

The Candidate Challenge is DISMISSED.

This the twenty-eighth day of August, 2018.



J. Anthony Penry, Chair
STATE BOARD OF ELECTIONS & ETHICS
ENFORCEMENT

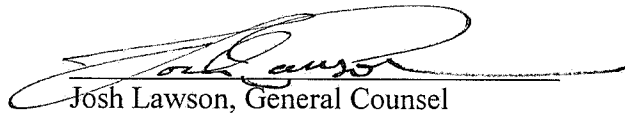
CERTIFICATE OF SERVICE

I, Josh Lawson, general counsel to the North Carolina State Board of Elections & Ethics Enforcement, do hereby certify that I have this day served the foregoing document upon the party to this action by electronic mail:

Faith Fox
for Willena Cannon, Challenger-Appellant
f.fox@faithfoxlaw.com

Judge Mark Timothy Cummings, Candidate-Appellee
mc@markcumminglaw.com

This the twenty-eight day of August, 2018.

A handwritten signature in black ink, appearing to read "Josh Lawson", with a long horizontal flourish extending to the right.

Josh Lawson, General Counsel
N.C. State Board of Elections &
Ethics Enforcement