

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

	)	
IN RE: REQUEST FOR DECLARATORY	)	
RULING ON ABSENTEE BALLOT	)	<u>DECLARATORY RULING</u>
ERRORS	)	
	)	

The State Board of Elections was sent a Request for Declaratory Ruling (“Request”), pursuant to N.C.G.S. § 150B-4(a), from the North Carolina Republican Party, the National Republican Congressional Committee, the Republican National Committee, and Pasquotank County voter Virginia Wasserberg (collectively, the “Petitioners”) on May 20, 2024. The State Board issued a declaratory ruling in response to the Request on August 2, 2024. This declaratory ruling replaces the August 2, 2024, declaratory ruling with respect to the absentee ballot errors at issue in the Request.¹

I. BACKGROUND

N.C.G.S. § 150B-4(a) requires a state agency, upon the request of a person aggrieved, to issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. The declaratory ruling is binding on the agency and the person requesting the ruling, unless set aside by a court.

In the Request, the Petitioners, in relevant part, asked the State Board to issue a declaratory ruling that the following are invalid:

- (1) administrative guidance in Numbered Memo 2021-03 (“Sealed Ballot Envelope Guidance”) regarding whether absentee voters’ ballots must be rejected if sealed in one envelope versus another when returned in the two-envelope absentee ballot return package; and

¹ The August 2, 2024, declaratory ruling issued as to the validity of 08 NCAC 17 .0101(a)(3) remains binding on the agency and Petitioners in accordance with N.C.G.S. § 150B-4.

- (2) administrative guidance in Numbered Memo 2021-03 (“Switched Ballot Guidance”) regarding whether absentee voters’ ballots must be rejected if sent from the same household and the ballots or envelopes identified with those voters were swapped such that one voter attests to voting the ballot that has a tracking number associated with the ballot that was sent to the other voter in the same household, and vice versa.

On June 18, 2024, the State Board agreed to consider the Request to issue a declaratory ruling. On July 29, 2024, the State Board considered the Request, and on August 2, 2024, the State Board issued a declaratory ruling that the relevant guidance in the State Board’s Numbered Memo 2021-03 (“the memo”) were valid and thereby reaffirmed.

On September 3, 2024, Petitioners filed a complaint and petition in Superior Court, Wake County, asking the court to reverse the State Board’s August 2, 2024, declaratory ruling with respect to the guidance in Numbered Memo 2021-03. On October 9, 2024, the State Board removed the action to federal court where it remained pending until a consent judgment and order was entered by the federal court on December 4, 2025.

Under the terms of the consent judgment, the State Board was required to reconsider Petitioners’ Request with respect to the interpretation of the absentee voting statutes contained within Numbered Memo 2021-03 “as if submitted anew.” Furthermore, consistent with N.C.G.S. § 150B-4(a), the consent judgment required that any substantive decision on the declaratory ruling request that differs from the previous declaratory ruling must be prospective only. The State Board reconsidered the Request at a meeting on January 28, 2026, and hereby issues this declaratory ruling on the guidance in the memo involving absentee ballot errors.

II. Validity of the Sealed Ballot Envelope Guidance

A. Background of Guidance

After the photo ID provisions enacted in Session Law 2018-144 became enforceable on April 23, 2023, the Executive Director issued an updated Numbered Memo 2021-03 on

September 25, 2023, to include processes related to photo ID requirements for absentee-by-mail voting. As explained in the memo, a voter previously transmitted their absentee-by-mail ballot to the county board in a single ballot container-return envelope. But the implementation of photo ID required the use of a two-envelope system, where the envelope containing the ballot is transmitted to the county board in an outer envelope that ensures the privacy and confidentiality of the accompanying photo ID documentation (*i.e.*, a photocopy of a photo ID or a photo ID exception form). *See* N.C.G.S. § 163-229(b)(8) (providing there must be “[a]n area to attach additional documentation necessary to comply with the identification requirements”); *see id.* § 163-82.10(a1) (“photocopies of identification for voting . . . are confidential and shall not be considered public records . . .”); *id.* § 163-233(a) (“Any copies of any photographic identification associated with the absentee ballots shall not be a public record.”); *see also id.* § 163-230.1(g)(2) (requiring voters to include confidential identification numbers on their completed photo ID exception form when claiming a certain exception). The photo ID documentation cannot be included in the ballot envelope because the county board must review the photo ID documentation along with the application before opening the ballot envelope to retrieve the ballot. *See* Numbered Memo 2020-25, p. 6 (explaining staff review requirements under 08 NCAC 17 .0109(a) and (b) ²; *see also* N.C.G.S. § 163-230.1(e), (f), and (f1) (collectively indicating that photo ID documentation must be separate from the ballot it accompanies); *id.* § 163-234(3) (providing for removal of ballots from their envelope only after the application has been approved).

² Available at

https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-25_Absentee%20Board%20Meetings.pdf.

There may be instances where the completion of the steps to vote and return an absentee-by-mail ballot are not perfectly followed and further action may therefore be required.

Depending on the nature of the issue, that further action could be that the ballot is spoiled and the absentee ballot package reissued to the voter, or it could be that the county board initiates a process where the voter “cures” the issue.

With respect to issues with the return of an absentee ballot, the memo describes potential issues as either “deficiencies” or “anomalies.” The memo instructs that return *deficiencies* require the ballot to be spoiled and reissued, while instructing that return *anomalies* do not require a spoil and reissue of the ballot. The memo does not instruct that return anomalies require further contact with the voter, further action to document the occurrence of the anomaly, or that the county boards must initiate a process for voters to cure the identified return anomaly.

Specific to Petitioners’ request regarding issues that may result from the two-envelope system discussed above, the memo stated that the following were to be considered anomalies:

- Ballot is inside the executed ballot envelope, which is not sealed or which appears to have been opened and re-sealed, but the ballot envelope is received in a sealed return envelope. Immediately upon opening the return envelope and noticing this situation, staff should re-seal the return envelope with a notation of “sealed in return envelope.” The county board should open the return envelope and address that ballot at its next absentee meeting.
- Ballot is not inside the ballot envelope or has been placed inside the clear sleeve on the ballot envelope used for including the photo ID documentation, but the return envelope is sealed. Immediately upon opening the return envelope and noticing this situation, staff should re-seal the return envelope with a notation of “sealed in return envelope.” The county board should open the return envelope and address that ballot at its next absentee meeting.

Id. at p. 3. The memo stated that the above scenarios were anomalies because “the ballot was received in a sealed envelope and is therefore not deficient.” *Id.* at p. 4 (citing N.C.G.S. §§ 163-230.1(d), 163-231(a)(3)).

The Executive Director issued an updated Numbered Memo 2021-03 on January 19, 2024, to make further refinements to the processes related to photo ID requirements for absentee-by-mail voting.³ The above-quoted text from the version of Numbered Memo 2021-03 issued on September 25, 2023, remained unchanged, but a footnote was added to the section heading that stated return anomalies did not require the ballot to be spoiled because of what is known as the “Materiality Provision” of the federal Civil Rights Act of 1964.⁴

B. Analysis

Petitioners’ Request contends that the Sealed Ballot Envelope Guidance in the memo is contrary to the plain text of certain absentee voting statutes and permits a process that is otherwise not authorized in statute. In short, Petitioners contend that only the ballot envelope in the two-envelope absentee ballot return package can be the “container-return envelope,” relying on statutory provisions in N.C.G.S. §§ 163-229(b), -230.1(d), -231(a), and -231(b), and that a failure to seal the ballot in that envelope should result in the ballot being spoiled and reissued. Petitioners’ Request therefore presents questions of how to interpret the governing statutes and, in turn, how to implement absentee voting procedures.

The North Carolina Supreme Court has explained the basic rules of statutory interpretation as follows:

“Statutory interpretation properly begins with an examination of the plain words of the statute.” *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232 (1992). “If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving

³ The current version of Numbered Memo 2021-03, issued on January 19, 2024, is available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2021/Numbered%20Memo%202021-03_Absentee%20Deficiencies.pdf.

⁴ Numbered Memo 2021-03, fn. 11, pp. 3–4 (issued January 19, 2024) (citing 52 U.S.C. § 10101(a)(2)(B), which states that “No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.”).

the words their plain and definite meaning.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274 (2005). “[H]owever, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.” *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151 (2009). Canons of statutory interpretation are only employed “[i]f the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings[.]” *Abernethy v. Bd. of Comm’rs*, 169 N.C. 631, 636, 86 S.E. 577 (1915).

JVC Enterprises, LLC v. City of Concord, 376 N.C. 782, 785–86, 855 S.E.2d 158, 161 (2021).

The plain text of the statutes that Petitioners cite as referencing container-return envelopes do envision the voter sending back their ballot in only one envelope. But that does not completely resolve the question of whether the guidance in the memo is incorrect. As noted above, the memo only categorizes issues with the return of the absentee ballot as being those that require the ballot to be spoiled and reissued, or those that require acceptance of the ballot. But as the memo goes on to demonstrate with respect to other issues involving the absentee voting procedures, some issues can fall into a third category—those that can be cured by the voter. *See* Numbered Memo 2021-03, pp. 5–8; *see also* N.C.G.S. § 163-230.1(e1) (“Curable deficiencies are deficiencies that can be cured with supplemental documentation or attestation provided by the voter.”).

Under the two-envelope system, it is possible that some voters may mistakenly fail to seal the ballot envelope, or may otherwise place their ballots alongside the ballot envelope in the outer envelope, before sealing the outer envelope. Even though the absentee ballot instructions included with the absentee ballot package guide the voter on the process, these kinds of mistakes very well could occur.

At the same time, it is also possible that a voter could make those same mistakes with respect to the ballot envelope *and* fail to seal the outer envelope before transmitting their ballot back to their county board of elections. The memo is clear that county boards are not to accept

the ballot in such circumstances when that outer envelope is also unsealed or appears to have been opened and re-sealed, because of chain of custody concerns. *See* Numbered Memo 2021-03, p. 3 (“Deficiencies that Require the Ballot to Be Spoiled (Civilian)”).

When a ballot package arrives at the county board of elections and the ballot is not sealed in the ballot envelope, however, it will not be readily apparent to the county board whether the voter’s ballot did indeed remain sealed from view from when it left the voter’s possession to when it arrived at the county board. In other words, those same chain of custody concerns could be present. It could be that the voter did indeed seal their ballot in the outer envelope. Or it could be that someone else had access to the voter’s ballot after the ballot left the voter’s possession and before the outer envelope was later sealed. The guidance in the memo, however, instructs that the county board’s *only* choice is to accept the ballot without any further action. At the very least, the issue should be documented and an attempt to contact the voter should be made so the county board can make an informed decision on how next to proceed.

Therefore, the State Board has determined that the Sealed Ballot Envelope Guidance in Numbered Memo 2021-03 is not correct in that it requires acceptance of an absentee ballot that is not sealed in the ballot envelope without any further action being taken.

III. Validity of the Switched Ballot Guidance

A. Background of Guidance

In the version of Numbered Memo 2021-03 issued September 25, 2023, the section entitled “Deficiencies that require board action” instructed as follows:

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot is in the ballot envelope, more than one ballot is in the ballot envelope, *or two voters’ ballots and ballot envelopes were switched.*

Numbered Memo 2021-03, p. 7 (issued September 25, 2023) (emphasis added). The Numbered Memo at that time did not, however, include guidance as to whether such an issue required the county board to take certain action, such as spoiling and reissuing the ballot.

When Numbered Memo 2021-03 was issued with updates on January 19, 2024, this section was renamed as “Deficiencies that are first discovered at a board meeting” and added the following guidance pertinent to Petitioners’ request:

Two voters’ ballots and ballot envelopes were switched, based on the county board’s review of the CIV numbers (ballot identifying numbers). In this situation, the county board will need to consider the circumstances of the ballots and ballot envelopes together to decide whether to approve the ballots. **If the two voters had their absentee ballots sent to the same address and there are no issues with the applications, then the county board should not spoil the ballots**, because under those circumstances, each voter has properly attested to voting the ballot enclosed with their application. The ballot identifying numbers associated with the enclosed ballots are used for official tracking purposes, and voters in the same household should not have their ballots rejected for failing to ensure these numbers match between their ballots and applications, which is neither a requirement for approval of the ballot under state law nor material to determining a voter’s eligibility to cast the ballot under federal law. The board staff should make a note of the ballot number that now corresponds with the voter in the SEIMS record.

Numbered Memo 2021-03, p. 9 (issued January 19, 2024) (citing the Materiality Provision of the federal Civil Rights Act of 1964).

B. Analysis

Petitioners’ request contends that the Switched Ballot Guidance in the memo runs counter to the plain text of N.C.G.S. § 163-230.1. Petitioners essentially contend that N.C.G.S. § 163-230.1(c) requires a voter to only vote and transmit the ballot that was sent to them, and that a failure to do so must result in that voter’s ballot being spoiled and their absentee ballot package reissued. Petitioners’ Request again presents questions of how to interpret the governing statutes and, in turn, how to implement absentee voting procedures.

The plain language of the provisions of the statute that Petitioners rely on for their position reflect that an absentee voter receives an absentee ballot package containing a ballot⁵ and ballot envelope that have corresponding tracking numbers. These tracking numbers ensure that the county board can confirm that the returned ballot is indeed the ballot that was sent to the voter. The tracking number is also necessary if that ballot later needs to be retrieved, which may occur if the voter's ballot is subject to a successful challenge or is at issue in an election protest. *See* N.C.G.S. § 163-89 (procedures for challenging absentee ballots); *see also* Numbered Memo 2022-05 (“County Board Challenges to Ineligible Absentee and Early Voting Ballots”)⁶; *see also* N.C.G.S. § 163-182.10 (permitting a county board to order that the vote totals be corrected and new results declared if appropriate following a successful protest).

The guidance at issue would appear to give the county boards the ability to decide whether the circumstances would permit the county board to accept a ballot returned by a voter that was not mailed to them. Specifically, the memo instructs that “the county board will need to consider the circumstances of the ballots and ballot envelopes together to decide whether to approve the ballots.” After all, as with the situations addressed in the Sealed Ballot Envelope Guidance, mistakes can happen.

Yet the memo goes on to establish a blanket rule that may actually disregard the circumstances, or otherwise not require a meaningful opportunity for the county board to ascertain the circumstances, before counting the ballot. For instance, the memo appears to require acceptance and counting of the ballot without regard to the ballot style of the ballot in

⁵ Under N.C.G.S. § 163-230.1(c)(1), the voter is to receive a “ballot the applicant is entitled to vote,” which at the very least speaks to the specific ballot style assigned to them that contains the contests the voter is eligible to vote.

⁶ Available at

https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2022/Numbered%20Memo%202022-05_Absentee%20Voter%20Challenges%20by%20County%20Board.pdf.

question. Also, similar to the Sealed Ballot Envelope Guidance discussed above, the memo does not require that an attempt to contact the voters be made so the county board can make an informed decision when considering the circumstances. And there is no clear direction in the memo on how the issue is to be documented aside from noting the new ballot number on the voters' record in SEIMS. At the very least, the issue should be documented and an attempt to contact the voters should be made so the county board can make an informed decision on how next to proceed.

Therefore, the State Board has determined that the Switched Ballot Guidance in Numbered Memo 2021-03 is not correct in that it requires acceptance and the counting of an absentee ballot that was not sent to the voter without any further action first being taken.

IV. CONCLUSION

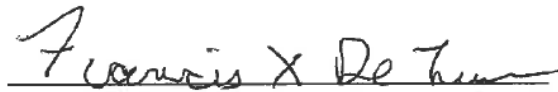
Pursuant to N.C.G.S. § 150B-4, the State Board of Elections DECLARES as follows:

- (1) By a 3–2 vote, the instruction at issue in Numbered Memo 2021-03 pertaining to how county boards must address a ballot that is sealed in the return envelope rather than sealed in the ballot envelope is not correct and must be revised.
- (2) By a 3–2 vote, the guidance at issue in Numbered Memo 2021-03 pertaining to how county boards must address a ballot that has a tracking number corresponding to another voter at the same address is not correct and must be revised.

The State Board, in accordance with the direction in N.C.G.S. § 163-230.1(g), has instructed staff to develop recommended procedures for logging and addressing the issues subject to this declaratory ruling, and has further directed staff to draft proposed administrative rules that would implement those procedures. Although the State Board has declared that certain guidance in Numbered Memo 2021-03 is not correct, those declarations are prospective only in

nature under both the terms of the consent judgment and N.C.G.S. § 150B-4. Furthermore, absentee voting in the March 2026 primary election has already begun and absentee ballots have already been received and approved under the current guidance in Numbered Memo 2021-03. *See* N.C.G.S. § 163-227.10(a) (start of absentee voting period); *see id.* § 163-230.1(f) (required pre-election day meetings of county board of elections). Implementing new absentee voting procedures at this time would therefore result in different treatment of similarly situated absentee voters. Accordingly, the State Board has ordered that the current Sealed Ballot Envelope Guidance and Switched Ballot Guidance in Numbered Memo 2021-03 shall remain in effect until the memo is revised or replaced after the canvass of the March 2026 primary, such that the correct guidance will at that time be applied prospectively.

This 2nd day of February, 2026.

A handwritten signature in black ink, reading "Francis X De Luca", written over a horizontal line.

Francis X. De Luca, Chair
STATE BOARD OF ELECTIONS