

STATE OF NORTH CAROLINA  
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN RE: APPEAL OF ERIKA R. BALES )  
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**ORDER**

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS (“State Board”) for telephonic hearing on June 16, 2020, on the appeal of Erika Bales (“Protestor”), a candidate in the Democratic primary for District Court Judge, District 15B, Seat 3 (the “Contest”), after the Orange County Board of Elections (“Orange Board”) dismissed her election protest.

The State Board heard argument from the Protestor and attorney John Wallace on behalf of Hathaway Pendergrass, the apparent prevailing candidate in the Contest. Having considered argument and written submissions from the parties, relevant statutes, and basing its decision upon the whole record, the State Board unanimously hereby finds, concludes, and orders as follows:

FINDINGS OF UNDISPUTED FACTS

1. Protestor and Pendergrass were among four candidates for the Contest in the March 3, 2020 Democratic primary election.
2. On December 12, 2019, Protestor delivered a Notice of Candidacy to the Orange Board that indicated she was affiliated with the Democratic Party. The form was incomplete, and Director Rachel Raper of the Orange Board contacted Protestor to return to sign a new form. Protestor returned to sign a new form, which indicated she was a registered Democrat, and Director Raper signed the certification, which indicated Protestor was a registered Democrat.
3. Protestor was registered as unaffiliated.
4. Because she was seeking a judicial office, Protestor filed her Notice of Candidacy with the State Board. Prior to filing the Notice, she was informed by a State Board staff member that she was registered as “unaffiliated” or “independent.”
5. According to North Carolina registration records, the accuracy of which no party disputes, Protestor has registered to vote at least four times. In 2007, 2010, and 2015, she registered as unaffiliated. In 2016, she registered as “other” and did not fill in the blank. On February 21, 2020, she voted in the March 3, 2020 primary and signed the one-stop application indicating she was registered as unaffiliated but choosing a Democratic ballot style.
6. The outcome of the Contest is as follows:

<b>Name</b>	<b>Votes</b>	<b>Percent</b>
Hathaway Pendergrass	26,558	50.99%
Erika R. Bales	12,622	24.23%
Lamar F. Proctor, Jr.	8,204	15.75%
Noah Oswald	4,699	9.02%

7. Protestor filed an election protest with the Orange Board on February 27, 2020, pursuant to G.S. § 163-182.9. Among other things, she alleged that voters were given “the false impression that [she] was disqualified from the [primary] election,” and even if she were disqualified from the Democratic primary, that she did not have the opportunity to petition to run as unaffiliated because she was not informed that she was registered as unaffiliated.
8. The Orange Board held a preliminary consideration hearing on March 12, 2020, and unanimously voted to dismiss the protest. The panel issued a written order in support of its decision, concluding that the protest “fails to allege facts sufficient to constitute substantial evidence of the occurrence of an outcome-determinative violation of election law, irregularity, or misconduct.”
9. The Protestor timely filed an appeal with the State Board.
10. The foregoing facts are either contained within Protestor’s election protest or, with respect to voter registration and election results records, have been officially noticed by the State Board and have not been disputed by either party.

#### CONCLUSIONS OF LAW

11. The State Board has jurisdiction over this matter pursuant to G.S. § 163-182.11.
12. Pursuant to G.S. § 163-182.11(b)(2), the State Board’s appellate review was limited to the record from the Orange Board along with supplements to the record provided by Protestor and Pendergrass.
13. Under G.S. § 163-106.1, “[n]o person shall be permitted to file as a candidate in a party primary unless that person has been affiliated with that party for at least 90 days as of the date of that person filing such notice of candidacy. A person registered as ‘unaffiliated’ shall be ineligible to file as a candidate in a party primary election.”
14. Pursuant to G.S. § 163-182.10(d)(2)(c), an election protest should be dismissed if “there is not substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election.” The North Carolina Administrative Code further interprets this statutory requirement to require an election protest to be dismissed if it “fails to include evidence which, if true, substantiates . . . the probable occurrence of an outcome-determinative violation of election law, irregularity, or misconduct.” 08 NCAC 02

.0114(a)(5); *see, e.g.*, Order ¶ 3, *In the Matter of: Consideration of Certain Legal Questions Affecting the Authentication of the 2016 General Election* (Nov. 28, 2016).<sup>1</sup>

15. Protestor failed to allege any basis to conclude that an outcome-determinative violation occurred in the election. Protestor was not the prevailing candidate of the primary election and lost by a significant margin. Protestor alleged that she would have been able to gather sufficient signatures to get on the general election ballot as an unaffiliated candidate if elections officials had alerted her to the fact that she was ineligible for the Democratic primary at the time she filed her notice of candidacy. Protestor's inability to earn a place on the November 2020 general election ballot through the petition process is not properly before the State Board on a protest of the Democratic primary election.
16. Any mistake by the Orange Board in certifying on the Notice of Candidacy that the Protestor was a Democrat—or by the State Board in not notifying her that she had filed in a contest in which she was not eligible—was harmless and an administrative error at most. These actions do not rise to the level of misconduct sufficient to cast doubt on the results of the primary election, and they do not change the fact that Protestor, as an unaffiliated voter, was not eligible to be a candidate in the primary. It is ultimately the candidate's responsibility to know their party affiliation upon filing. By Protestor's own admission, she was informed that she was not registered as a Democrat when she filed her Notice of Candidacy.
17. Protestor alleged, alternatively, in her protest that if she had not been listed on the Democratic primary ballot (because she was ineligible under G.S. § 163-106.1), her votes would have gone to the other three candidates in the race. But because Pendergrass obtained over 50% of the vote with four candidates on the ballot, there is no basis to conclude that the removal of Protestor's name from the ballot would have resulted in another candidate prevailing.
18. In her appeal to the State Board, Protestor for the first time alleges that she won four precincts in Chatham County and was tied in another. There are 18 precincts in Chatham County that voted in this Contest. Unlike the Orange Board, the Chatham County Board of Elections did not publicly acknowledge Protestor's ineligibility for the primary. According to Protestor, this signifies that "there were voters who changed who they voted for based on the proclamation about my candidacy on the 2<sup>nd</sup> day of voting." The additional election results do not "substantiate[] . . . the probable occurrence of an outcome-determinative violation of election law, irregularity, or misconduct." 08 NCAC 02 .0114(a)(5). Protestor lost the vote in Chatham County to Pendergrass by a margin of

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<sup>1</sup> Available at [https://s3.amazonaws.com/dl.ncsbe.gov/State Board Meeting Docs/Orders/Other/2016-In re Consideration of Certain Legal Questions Affecting the Authentication of the 2016 General Election.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Other/2016-In_re_Consideration_of_Certain_Legal_Questions_Affecting_the_Authentication_of_the_2016_General_Election.pdf).

41% to 28.5%. Her additional evidence showing that she was more competitive in some precincts in Chatham County does not substantiate the probability that the public acknowledgement of her ineligibility by the Orange Board was outcome-determinative.

IT IS THEREFORE ORDERED, by unanimous vote of the State Board, that:

The decision of the Orange County Board of Elections is affirmed and the appeal is ordered DISMISSED.

This the 23rd day of June, 2020.



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Damon Circosta, Chair  
STATE BOARD OF ELECTIONS

**§ 163-182.14. Appeal of a final decision to superior court; appeal to the General Assembly or a house thereof.**

(a) Final Decision. – A copy of the final decision of the State Board of Elections on an election protest shall be served on the parties personally or through delivery by U.S. mail or a designated delivery service authorized under 26 U.S.C. § 7502(f)(2) if that delivery provides a record of the date and time of delivery to the address provided by the party. A decision to order a new election is considered a final decision for purposes of seeking review of the decision.

(b) Timing of Right of Appeal. – Except in the case of a general or special election to either house of the General Assembly or to an office established by Article III of the Constitution, an aggrieved party has the right to appeal the final decision to the Superior Court of Wake County within 10 days of the date of service.

After the decision by the State Board of Elections has been served on the parties, the certification of nomination or election or the results of the referendum shall issue pursuant to G.S. 163-182.15 unless an appealing party obtains a stay of the certification from the Superior Court of Wake County within 10 days after the date of service. The court shall not issue a stay of certification unless the petitioner shows the court that the petitioner has appealed the decision of the State Board of Elections, that the petitioner is an aggrieved party, and that the petitioner is likely to prevail in the appeal.

If service is by mail or a designated delivery service, the additional time after service provided in Rule 6(e) of the North Carolina Rules of Civil Procedure shall apply to both the time for appeal and the time to obtain a stay under this subsection.

(c) Contests for General Assembly and Executive Branch Offices. – In the case of a general or special election to either house of the General Assembly or to an office established by Article III of the Constitution, an unsuccessful candidate has the right to appeal the final decision to the General Assembly in accordance with Article 3 of Chapter 120 and G.S. 163-182.13A, as appropriate.

After the decision by the State Board of Elections has been served on the parties, the certification of nomination or election shall issue pursuant to G.S. 163-182.15 unless a contest of the election is initiated pursuant to Article 3 of Chapter 120 or G.S. 163-182.13A, as appropriate.

(d) Attorney's fees shall not be awarded against the State Board of Elections in any election protest brought under this Article. (2001-398, s. 3; 2003-278, s. 8(b); 2005-3, s. 4; 2008-150, s. 4(a); 2009-541, s. 27; 2017-6, s. 3; 2018-146, s. 3.1(a), (b).)