



NORTH CAROLINA

State Board of Elections

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Executive Director

NUMBERED MEMO 2016-01

TO: County Boards of Elections
FROM: Kim Strach, Executive Director
RE: Reasonable Impediment Challenge Procedures
DATE: February 10, 2016

In June 2015, the General Assembly enacted S.L. 2015-103, § 8(e), which allows certain voters to challenge the factual veracity of an impediment that prevents the voter from obtaining acceptable photo ID. This numbered memo describes the process county boards of elections must follow to consider evidentiary challenges brought against a voter who has completed a Reasonable Impediment Declaration. The below process is highly detailed and is meant as a reference for your county board in the event such a challenge is entered—an event we hope is rare.

How a challenge may be entered

Only registered voters within the county are authorized to bring an evidentiary challenge. The challenger must fully complete an Evidentiary Challenge form and submit it to the county board of elections office no later than 5:00 p.m. on the third business day following the election. For the 2016 March Primary, that deadline is 5:00 p.m. on Friday, March 18. A copy of the Evidentiary Challenge form is attached.

The Evidentiary Challenge form requires that the challenger specifically identify the factual basis of the Reasonable Impediment Declaration. Your county board office must make redacted copies of all Reasonable Impediment Declaration forms available to the public upon request. All Reasonable Impediment Declaration forms should be transported from one-stop voting locations and precinct polling locations to the county board of elections office as soon as practicable. Similarly, elections officials should promptly deliver to the county board of election office all Evidentiary Challenge forms that are dropped off at either one-stop voting locations or precinct polling locations.

Note: County staff must be careful to redact all confidential information contained on the Reasonable Impediment Declaration form, including date of birth, social security number, and the voter's signature.

Basis of an evidentiary challenge

By statute, the scope of an evidentiary challenge is limited to factual evidence that calls into question the veracity of the claimed impediment. The challenger cannot challenge whether the impediment poses a reasonable barrier to obtaining an acceptable photo ID. Consider the following example:

A voter submits a Reasonable Impediment Declaration bearing the following mark:

My reasonable impediment is due to the following reason(s):	
<input type="checkbox"/> Lack of transportation	<input type="checkbox"/> Disability or illness
<input type="checkbox"/> Lack of birth certificate or other documents needed to obtain photo ID	
<input type="checkbox"/> Work schedule	<input type="checkbox"/> Family responsibilities
<input type="checkbox"/> Lost or stolen photo ID	<input checked="" type="checkbox"/> Photo ID applied for but not received
<input type="checkbox"/> Other reasonable impediment _____	
<input type="checkbox"/> State or federal law prohibits me from listing my impediment	

In the above example, an eligible challenger can present facts disputing whether the voter actually applied for and received acceptable photo ID. The basis of a challenge is limited to the factual veracity of the impediment indicated by the voter. Under the statute, a challenger cannot contest whether it is reasonable that a voter “waited until the last minute” to apply for a photo ID. The challenge cannot extend to the reasonableness of the impediment claimed. The statute directs that the “county board shall not find a challenge valid if it provides only evidence regarding the reasonableness of the impediment.” G.S. § 163-182.1B(b)(6).

The pre-printed list on the Reasonable Impediment Declaration is required by law, and the General Assembly has already deemed those reasons legally sufficient. The statute does not allow a county board of elections to second-guess the voter’s priorities or scheduling constraints.

The scope of the evidentiary challenge does not extend to questions involving the reasonableness of claimed impediment. Rather, the challenge must be strictly limited to the presentation of evidence that that the claimed impediment merely denigrates the photo identification requirement, is obviously nonsensical, or is factually false.

What to do when you receive an Evidentiary Challenge form

1. Inspect the Form

If your county board of elections office receives an Evidentiary Challenge form, stamp-in the document and inspect its contents to ensure the form has been completed fully, including a signature and contact information for the challenger. Remember, all forms must be submitted no later than 5:00 p.m. on the third business day following the election.

2. Provide written notice to the voter and the challenger

You must send written notice to both the voter and to the challenger by mail, courier service, or in-person delivery. This notice must at least contain the following:

- Name and address information for the voter and the challenger.
- A statement indicating that an evidentiary challenge has been entered pursuant to G.S. § 163-182.1B, disputing the factual truthfulness of the reasonable impediment claimed by the voter.
- A statement that the county board of elections will hold a hearing at [date, time, and location] during which it will decide whether the challenger has shown by clear and convincing evidence that the claimed impediment merely denigrates the photo identification requirement, is obviously nonsensical, or is factually false.
- A statement that the voter may appear in person or through an authorized representative to present evidence supporting the factual veracity of the impediment.
- Copies of the Reasonable Impediment Declaration form (redacted) and the completed Evidentiary Challenge form.

Your goal should be to provide maximum notice opportunity to the voter. Keep in mind that the voter may encounter particular challenges in arranging to appear at a hearing, challenges similar to the reason they were unable to obtain acceptable photo ID in the first place. Accordingly, you should make every effort to contact the voter via phone, email, and any other available means of contact. This contact is in addition to the written notice you must send by mail, courier service, or in-person delivery.

3. Contact Board Members, your County Attorney, and the State Board of Elections

Members of the county board of elections will ultimately hear the evidentiary challenge, make a determination on the provisional ballot, and issue a written order. It is advisable that county elections staff notify board members that a challenge has been entered. Because the hearing will be a quasi-judicial proceeding, staff should proactively contact their county attorney and request her/his presence at the hearing on the day of canvass. County staff should provide board members and the county attorney with a copy of this Numbered Memo and S.L. 2015-103.

In addition, you are directed to forward any Evidentiary Challenge form you receive to the State Board of Elections via HelpRequest.sboe@ncsbe.gov.

The Hearing

Standard of Review

On canvass day, the county board of elections is required to conduct a hearing on the challenge in an open meeting and render a determination on the provisional ballot. The county board of elections must apply the following standard of review:

Whether, having considered all facts in the light most favorable to the voter, the challenger has shown by clear and convincing evidence that the stated impediment (1) merely denigrates the photo identification requirement, (2) is obviously nonsensical, or (3) is factually false.

The above standard combines statutory requirements set out in G.S. §§ 163-182.1B(b)(1), (5), and (7).

The challenger bears the burden of proof and of persuasion at the hearing. The statute does not require the voter or the voter's authorized representative to prove any facts or to raise a defense, and therefore the fact that a voter fails to appear shall not be counted against the voter during the board's review of the evidence. Please consult with your county attorney prior to the hearing in order to ensure that your county board members are familiar with the standard of review.

Consideration of Materials and Testimony

The county board must consider both the Reasonable Impediment Declaration form and the Evidentiary Challenge form.

All persons giving testimony at the hearing should be sworn.

If the challenger appears, the county board should seek to limit the challenger's presentation of evidence to substantiating facts already alleged in the Evidentiary Challenge form. This requirement prevents the challenger from doing an end-run around the filing deadline, ensures the voter has adequate notice of the scope of the challenge hearing, and is consistent with the statutory requirement that the challenger present "clear and convincing evidence *in writing on a signed form.*" G.S. § 163-182.1B(b)(1). Therefore, even if the challenger offers evidence or makes statements beyond the content of what is contained in the Evidentiary Challenge form, the county board may only consider evidence that in fact substantiates the allegations set forth in the Evidentiary Challenge form.

If the voter or the voter's representative appears, he or she may present evidence or offer testimony for the purposes of countering the challenger's allegations.

Under no circumstance may the board consider the contents of the provisional ballot itself or hear testimony regarding the way in which a voter may have voted.

Order of Proceedings

At the beginning of the hearing, it is best practice for the county board chair or the county attorney to communicate the following:

The county board of elections will now hear evidence and make a determination on the challenged provisional ballot with a Declaration of Reasonable Impediment.

The board will consider all facts in the light most favorable to the voter.

To sustain the challenge the challenger must show by clear and convincing evidence that the impediment claimed by the voter (1) merely denigrates the photo identification requirement, (2) is obviously nonsensical, or (3) is factually false.

The board cannot consider evidence on whether it is reasonable or unreasonable that the claimed impediment prevented the voter from obtaining acceptable photo ID.

The board should ask the parties or their representatives to identify themselves and to approach the board.

If the challenger is present, the board should allow the challenger an opportunity to speak and present evidence first. Again, the board should seek to limit the challenger's presentation of evidence to substantiating facts already alleged in the Evidentiary Challenge form. Keep in mind that the statute sets an intentionally high bar for a challenger.

If the voter is present, the board should allow the voter an opportunity to speak and present evidence second. Remember that all evidence must be construed in the light most favorable to the voter, even if the voter is not present at the hearing. Again, the statute does not allow a county board of elections to second-guess the voter's priorities or scheduling constraints.

Parties should be permitted to cross-examine any testifying witnesses. The board should consult with the county attorney as necessary throughout the hearing.

As with all proceedings, the board should conduct the hearing with a tone of respect for the parties and the process. Keep in mind that a voter who has claimed a reasonable impediment may face material constraints different from those experienced by members of the county board of elections. Every effort should be made to communicate the high value your board places on participation in the elections process.

Deliberation and Order

Once the board has considered the written forms and heard from the parties, it must deliberate in open session. At the conclusion of deliberation, the board must vote on the challenge. It is best practice for the board to select one of the following motions:

[Rejecting the challenge] *After considering all evidence in the light most favorable to the voter, we find that challenger has not shown by clear and convincing evidence that the impediment claimed by the voter (1) merely denigrates the photo identification requirement, (2) is obviously nonsensical, or (3) is factually false.*

[Sustaining the challenge] *After considering all evidence in the light most favorable to the voter, we find that challenger has shown by clear and convincing evidence that the impediment claimed by the voter [choose either merely denigrates the photo identification requirement or is obviously nonsensical or is factually false in that (insert specific finding of how the impediment claimed by the voter is factually false)].*

The county board of elections should proceed to canvass after all hearings are completed and should afterward send a written order to the parties.

Review of a claimed impediment without a hearing

A county board of elections may not question the factual veracity of a claimed impediment without a formal challenge proceeding. A voter must have notice and a meaningful opportunity to be heard on all allegations contesting the truthfulness of the impediment they claim.

All template impediments and equivalent impediments claimed by the voter are valid as a matter of law and cannot be rejected by the county board on the basis that they merely denigrate the photo identification requirement or are nonsensical. Template impediments include: lack of transportation, disability or illness, lack of birth certificate or other documents needed to obtain photo identification, work schedule, family responsibilities, lost or stolen photo identification, photo identification applied for but not received by the voter, and that state or federal law prohibits the voter from listing an impediment.

When a voter has marked “*other reasonable impediment*” and written a description of the impediment on the Reasonable Impediment Declaration form, a county board may consider whether it has grounds to believe the claimed impediment merely denigrates the photo identification requirement or is obviously nonsensical. This determination may be made as part of the Board’s review of provisional ballots during canvass. However, the board may not reject a provisional ballot if there is any possible question of fact.

For example, a voter who writes “baseball player” on the Reasonable Impediment Declaration form could be attempting to more specifically indicate the voter’s profession, which has impeded the voter from obtaining acceptable photo ID. Such a claim would be equivalent to the “work schedule” impediment already deemed valid as a matter of law. Accordingly, a county board could *not* disregard the factual question at issue and consider “baseball player” as merely denigrating the photo identification requirement or as nonsensical, and as a result throw out the ballot.

When considering non-template impediments during canvass, the county board must bear in mind that (1) the voter has declared the impediment under penalty of a Class I felony, (2) the voter could have easily chosen to mark one of the template impediments, and (3) elections officials were able to review alternative identification documents or validate the voter’s social security number and date of birth.

All considerations by the board must be characterized by a commitment to consider all facts in the light most favorable to the voter and to preserve the voter’s due process rights, including meaningful notice and an opportunity to be heard before an unbiased board of elections.



EVIDENTIARY CHALLENGE FORM

NORTH CAROLINA
COUNTY OF [COUNTY]

[] COUNTY BOARD OF ELECTIONS
[ADDRESS]
[CITY/STATE/ZIP]

PHONE: XXX-866-5227 FAX: 919-715-0135
XXXXXXXXXX.boe@ncsbe.gov

FRAUDULENTLY OR FALSELY COMPLETING THIS FORM IS A CLASS I FELONY UNDER CHAPTER 163 OF THE NC GENERAL STATUTES.

TO: [COUNTY] COUNTY BOARD OF ELECTIONS

I am a registered voter in _____ County and I hereby challenge the factual truthfulness of the reasonable impediment claimed by _____ on his/her *Reasonable Impediment Declaration* dated _____.

NOTICE: Any hearing on your challenge before the County Board of Elections will be strictly limited to the facts you allege in your written challenge form. You will not be permitted to allege new facts at the hearing. The County Board of Elections may not find a challenge valid if it provides only evidence regarding the reasonableness of the impediment.

Supply all facts in support of your challenge. Attach all documents you wish for the County Board of Elections to consider. If any fact you allege is outside your personal knowledge, you may attach affidavits from an individual who has personal knowledge of that fact.

COMPLETE THE BELOW SECTION IN THE PRESENCE OF A PUBLIC NOTARY

NORTH CAROLINA

COUNTY OF _____

_____, appearing before the undersigned notary being duly sworn, says that:

- I declare that all facts I have alleged in connection with this challenge are true and accurate to the best of my knowledge.
- I declare my sincerely held belief that the facts I have alleged form a good faith basis to challenge the factual truthfulness of the reasonable impediment claimed by _____ on his/her *Reasonable Impediment Declaration* dated _____.
- I understand that submitting fraudulently or falsely completed declarations is a Class I felony under Chapter 163 of the General Statutes.

Challenger's Name

Challenger's Signature

Address

Telephone No.

Email Address

Sworn to (or affirmed) and subscribed before me this the _____ day of _____, 20____.

(Official Seal)

Official Signature of Notary

_____, Notary Public
Notary's printed or typed name

My commission expires: _____