



NORTH CAROLINA

STATE BOARD OF ELECTIONS

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Numbered Memo 2019-07

TO: County Boards of Elections
FROM: Karen Brinson Bell, Executive Director
RE: Guidance Regarding What Constitutes a Vote
DATE: November 1, 2019

Pursuant to Section 301 (a)(6) of the Help America Vote Act of 2002, codified as 42 U.S.C. § 15481(a)(6), and N.C.G.S. § 163-182.1(b), this guidance is being provided to county boards of elections to ensure uniformity in the tabulation of election results and the conduct of hand-to-eye counts, hand-to-eye recounts, and other audits. It updates and supersedes prior guidance on this subject from 2006. This memo also provides guidance on when a vote should be counted in circumstances in which a voting system is unable to determine the voter's intent with respect to a marked ballot.

State law sets out clear standards for what constitutes a vote. The purpose of this memo is to explain those standards and provide examples of their application to particular circumstances.

Voting Systems

The State Board of Elections may certify voting systems only if they meet statutory requirements, including generating either a paper ballot or a paper record by which voters may verify their votes before casting them and which provides a backup means of counting the vote that the voter casts. Voting systems are required to generate a paper record of each individual vote cast. The paper ballot must be maintained in a secure fashion *and serves as the backup record for purposes of any hand-to-eye count, hand-to-eye recount, or other audit*. Electronic systems that employ optical scan technology to count paper ballots are deemed to satisfy the requirement.¹

¹ G.S. § 163-165.7(a): ... The State Board may certify voting systems only if they meet the requirements set forth in this section and only if they generate a paper ballot which provides a backup means of counting the vote that the voter casts. Those voting systems may include optical scan and direct record electronic (DRE) voting systems that produce a paper ballot. Among other requirements as set by the State Board of Elections, the certification requirements shall require at least all of the following elements:

- ...
- (4) With respect to electronic voting systems, that the voting system generate a paper ballot of each individual vote cast, which paper ballot shall be maintained in a secure fashion and shall serve as a backup record for purposes of any hand-

Regardless of whether the ballot is a standard paper ballot in which all candidates for a ballot item are printed on the ballot, or whether the ballot is a printout of only the selections the voter made, the voter must have the opportunity to verify his or her intent by confirming that the choices the voter selected are correctly marked on the ballot. The voter is not verifying that the barcodes or coordinates printed on the ballot for tabulation purposes are the voter's choices; rather, the voter is verifying that the ovals or rectangles are accurately filled in on standard paper ballots or, in the case of a barcode ballot, the voter is verifying that the names printed on the ballot accurately reflect the voter's selections. Any hand-to-eye count or other circumstance where a person is hand counting a ballot would use the selection that was verified by the voter, not the coordinates or barcodes.

Ballot marking instructions are provided for each ballot. G.S. § 163-165.5(a)(6). Hand-marked ballots should be marked according to the instructions provided for the ballot using a pen or marking device provided at the polling place to fill in the oval or rectangle next to the candidate for whom the voter wishes to vote. When a voter's choice cannot be tabulated by the voting equipment, the principles and rules for counting official ballots as contained in G.S. §§ 163-182.1 and 182.2 and 08 NCAC 6B. 0105 shall apply. Ballot marking device (BMD) voting systems do not allow irregularly marked ballots. The voter should follow instructions on the voting equipment to ensure the vote is cast and that the voter has received confirmation thereof.

Voter Intent

Voter intent is the governing standard in the event questions arise about how to adjudicate the contents of a ballot. Questions about voter intent can arise when a voter hand marks a ballot and the voting system is unable to determine which choices the voter has made. This could occur if a voter uses an improper marking instrument, marks the ballot in an inappropriate manner, places marks in the wrong location on the ballot, or otherwise acts in a manner that causes the voter's ballot to be unreadable by the voting system for which the ballot was designed. Questions about voter intent can also arise during a hand-to-eye count.

Official ballots shall be counted according to the principles and rules contained in G.S. § 163-182.1(a):

- “(1) Only official ballots shall be counted;
- (2) No official ballot shall be rejected because of technical errors in marking it, unless it is impossible to clearly determine the voter's choice;
- (3) If it is impossible to clearly determine a voter's choice in a ballot item, the official ballot shall not be counted for that ballot item, but shall be counted in all other ballot items in which the voter's choice can be clearly determined;
- (4) If an official ballot is marked in a ballot item with more choices than there are offices to be filled or propositions that may prevail, the official ballot shall not be counted for that ballot item, but shall be counted in all other ballot items in

to-eye count, hand-to-eye recount, or other audit. Electronic systems that employ optical scan technology to count paper ballots shall be deemed to satisfy this requirement.

which there is no overvote and the voter's choice can be clearly determined;

- (5) If an official ballot is rejected by a scanner or other counting machine, but human counters can clearly determine the voter's choice, the official ballot shall be counted by hand and eye; and
- (6) Write-in votes shall not be counted in party primaries or in referenda, but shall be counted in general elections if all of the following are true:
 - a. The write-in vote is written by the voter or by a person authorized to assist the voter pursuant to G.S. 163-166.8;
 - b. The write-in vote is not cast for a candidate who has failed to qualify under G.S. 163-123 as a write-in candidate; and
 - c. The voter's choice can be clearly determined.”

Examples

The following non-exhaustive guidance provides examples of how to apply the standards in G.S. § 163-182.1(a) to real-world scenarios:

- For the purpose of conducting sample hand-to-eye audits under G.S. § 163-182.1(b)(1), hand-to-eye recounts under §§ G.S. 163-182.7 and G.S. 163-182.7A, and hand-to-eye counts for any other reason, the printed names must always be used in counting the votes, rather than coordinates or barcodes. This is because the printed name is what the voter used to verify his or her intent.
- If a write-in candidate's name is misspelled or incomplete, a vote for the candidate should be counted if the board of elections can determine which candidate the voter intended to vote for. Pursuant to G.S. § 163-182.1(a)(3), a ballot should not be rejected due to technical errors unless it is impossible to determine a voter's intent.
- If a voter votes for a candidate by filling in the oval or rectangle or selecting the name on a BMD and also writes in a candidate's name, the vote shall be counted one time for that candidate. G.S. § 163-182.1(4) does not apply in this circumstance because it is possible to determine what the voter intended. Similarly, if a voter writes in the same name more than once in a multi-seat contest, a vote shall be counted one time for that candidate. In all such instances where the voter attempts to use write-ins to vote for the same individual more than once, no more than one vote shall be counted for the candidate and the rest shall simply be reported as miscellaneous.
- If the voter writes in a name but does not fill in the accompanying oval or rectangle, in a hand-to-eye count the vote shall be counted for that candidate if it can be determined who the voter intended to vote for.
- If a voter votes for more than one candidate in a vote-for-one contest, the votes in that contest shall not be counted. This includes if one of the votes is a write-in and the accompanied oval or rectangle is not filled in. However, if a voter crosses out the

candidate for whom they overvoted, such that the county board of elections can determine the voter's intent, then that vote shall be counted.

Sample Audit Count

County boards should immediately report any unexplained discrepancies discovered during a sample audit count or any other hand-to-eye count to the State Board. In the event of a material discrepancy between the electronic or mechanical count and a hand-to-eye count, the hand-to-eye count shall control, and the canvass documents should reflect this, except where paper ballots or records have been lost or destroyed or where there is another reasonable basis to conclude that the hand-to-eye count is not the true count. G.S. § 163-182.2(b)(2).

In a sample audit count, if the discrepancy between the hand-to-eye count and the mechanical or electronic count is significant, a complete hand-to-eye count shall be conducted. The sample count need not be done on election night. G.S. § 163-182.2(b)(2). "Significant" has been interpreted to mean a difference that cannot be explained. It may be appropriate to conduct a second hand-to-eye count of the same ballots if the county board has an indication that human error may account for the difference between the electronic or mechanical count and the first hand-to-eye count.