



NORTH CAROLINA

STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255,
Raleigh, NC 27611

Phone:
(919) 814-0700 or
(866) 522-4723

Fax:
(919) 715-0135

VIA USPS # 70201290000168799212

Kim Coley
P.O. Box 37187
Raleigh, NC 27627

November 30, 2020

Re: Appeal from Decision of Wake County Board of Elections Dismissing Protest Filed by Kim Coley

Dear Ms. Coley:

The State Board of Elections (State Board) received the election protest appeal you filed. The matter was provided to State Board members but will not be heard by the State Board. The matter has been administratively dismissed pursuant to rule 08 NCAC 02 .0114(e). Attached is a copy of the Executive Director's recommendation to administratively dismiss the matter citing the applicable basis in 08 NCAC 02 .0114(a). Also attached is a copy of the rule and a copy of the general statute regarding appeal of a final decision by the State Board.

Sincerely,

Kelly Tornow
Associate General Counsel

Enclosures



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Administrative Dismissal Recommendation (08 NCAC 02 .0114)

In the Matter of Protest of Coley

Kim Coley (“Petitioner”) filed an election protest with the Wake County Board of Elections (“Wake Board”) on November 12, 2020. Petitioner was the second-place candidate out of three candidates in the general election contest for North Carolina House District 36 (“Contest”). Petitioner lost the contest by a margin of 5,988 votes according to official election results. Petitioner alleged that there was a violation of election law, irregularity, or misconduct sufficient to cast doubt on the apparent results of the election and seeks to correct the vote count and for an audit to be performed. The allegation was that the vote count does not accurately reflect all ballots cast or does not properly reflect the intent of all voters eligible to vote in the contest because “the numbers don’t add up and percentages are irregular and inconsistent.” Petitioner provided the voter participation percentages for the 2016, 2018, and 2020 elections for House District 36 as evidence of the alleged irregularities.

At its meeting on November 13, 2020, the Wake Board voted unanimously to dismiss the protest at the preliminary consideration stage and filed its written decision in the Wake Board office on November 19, 2020, in the form of an order by the Chair. The Wake Board concluded as a matter of law that Petitioner did not establish probable cause to believe that there was a violation of election law, irregularity, or misconduct sufficient to cast doubt on the apparent results of the election. The order made the following relevant conclusions of law:

1. Protestor offered no factual evidence or allegation that the Wake Board failed to adhere to directives, rules, or orders promulgated by the State Board of Elections.
2. Protestor did not offer any factual evidence to support her allegation that there was an irregularity in the vote count for the Contest and “the facts, even if stated as true, do not give rise to grounds for relief that the Board could grant.”

Petitioner filed a notice of appeal with the Wake Board on November 19, 2020 and filed an appeal with the State Board by mail deposit on the same day. The appeal was received by the State Board on November 20, 2020.

Petitioner makes additional allegations in the protest appeal as follows:

1. Polls predicted a close margin in the Contest and “no one anticipated” an absentee ballot vote margin of 6,000 votes. Additionally, Wake County’s voter turnout was 79.85% but the turnout in House District 36 was 84%, which Protestor believes indicates an irregularity. Petitioner contends that voter turnout in the Contest would have been more aligned with countywide voter turnout if absentee ballots were not included in the calculation.

2. Petitioner was not given an opportunity to speak at the preliminary consideration held by the Wake Board on November 13, 2020.
3. Petitioner also cites disagreement with the courts' injunction of the voter ID law and the consent judgment approved in the *NC Alliance v. State Board* case.

Pursuant to 08 NCAC 02 .0114(e), when a matter purporting to arise as an election protest or protest appeal is filed with the State Board, the executive director shall review the allegations and evidence presented in or attached to the filing. If the executive director finds that the filing must be dismissed as frivolous pursuant to one or more of the bases in Paragraph (a) of the Rule, she shall transmit her administrative dismissal recommendation, citing applicable defects and the requirements of this Rule, to the State Board.

The executive director's administrative recommendation shall be transmitted in writing to State Board members no later than two business days after the matter was filed. If, after two calendar days following the transmission required under 08 NCAC 02 .0114, no State Board member has raised any oral or written objection to the executive director's recommendation for administrative dismissal, the executive director shall issue a written notice of administrative dismissal to the individual who has filed the matter.

Paragraph (a) of 08 NCAC 02 .0114 permits administrative dismissal on the following bases:

1. The matter fails to contest the manner in which votes were counted or results tabulated, or fails to allege a violation of election law or irregularity or misconduct sufficient to cast doubt on the results of the election;
2. The individual submitting the matter was neither a registered voter eligible to participate in the protested contest within the county nor a candidate for nomination or election in the protested contest;
3. The matter was not filed in accordance with G.S. 163-182.9 or was not filed on the form prescribed in 08 NCAC 02 .0111;
4. The protest is duplicative or was made for the purpose of delay;
5. The protest filing, taking into account the totality of the circumstances, fails to include evidence which, if true, substantiates the probable occurrence of an outcome-determinative defect in the manner in which votes were counted or results tabulated, or the probable occurrence of an outcome-determinative violation of election law, irregularity, or misconduct; or
6. The matter, including the initial filing and all subsequent oral or written submissions, fails to allege facts sufficient to constitute substantial evidence of the occurrence of an outcome-determinative violation of election law, irregularity, or misconduct.

Having reviewed Petitioner's appeal, the Executive Director hereby finds:

1. Petitioner's protest appeal should be dismissed per 08 NCAC 02 .0114(a)(1) because the appeal fails to allege a violation of election law or irregularity or misconduct sufficient to cast doubt on the results of the election. There is no allegation

that the Wake Board failed to adhere to any guidance, rule, or election law. Petitioner merely disagrees with the courts' actions on voter ID and with the consent judgement in the *NC Alliance v. State Board* case, but there is no allegation that the Wake Board did not comply with these court decisions. The appeal should also be dismissed on the basis of 08 NCAC 02 .0114(a)(1) because the law does not require county boards to hear from the Petitioner during the preliminary consideration. During the preliminary consideration, the Wake Board was required to determine whether (1) the protest substantially complied with G.S. 163-182.9 and (2) whether it established probable cause to believe that a violation of election law or irregularity or misconduct has occurred.¹ The State Board's Election Protest Procedures Guide states, "Because the county board is considering whether the complaint on its face establishes probable cause, it is not required that these individuals be allowed to speak at the preliminary consideration stage."²

2. Petitioner's protest appeal should be dismissed per 08 NCAC 02 .0114(a)(5) because, taking into account the totality of the circumstances, the filing fails to include evidence, which, if true, substantiates the probable occurrence of an outcome-determinative violation of election law, irregularity, or misconduct. Petitioner's own filing states that she does not have "tangible proof of errors made on the mail-in or absentee ballots." Petitioner provides no evidence that any alleged violation in her protest appeal would equate to a violation sufficient to change the outcome of the 5,988-vote margin between Petitioner and the prevailing candidate.
3. Petitioner's protest appeal should be dismissed per 08 NCAC 02 .0114(a)(6) because the matter, including the initial filing and all subsequent oral or written submissions, fails to allege facts sufficient to constitute substantial evidence of the occurrence of an outcome-determinative violation of election law, irregularity, or misconduct. Petitioner's contention that polls showed the Contest should have been closer and that the historic turnout of voters in the House district was inconsistent does not indicate that any irregularity occurred.

For these reasons, as the Executive Director, I find that the protest appeal lacks merit and recommend that the State Board take no action on this matter. If no board member raises any oral or written objection to the recommendation on or before Thursday, November 26, 2020, the protest appeal will be administratively dismissed, and Petitioner will be notified accordingly.

Issued by Karen Brinson Bell, Executive Director, this 24th day of November 2020.

¹ G.S. § 163-182.10(a).

² [Election Protest Procedures Guide](#), page 5.

08 NCAC 02 .0114 DISMISSAL OF IMPROPER PROTEST FILINGS

(a) The county board of elections shall dismiss any matter purporting to arise as an election protest under G.S. 163A-1177 on the following bases:

- (1) The matter fails to contest the manner in which votes were counted or results tabulated, or fails to allege a violation of election law or irregularity or misconduct sufficient to cast doubt on the results of the election;
- (2) The individual submitting the matter was neither a registered voter eligible to participate in the protested contest within the county nor a candidate for nomination or election in the protested contest;
- (3) The matter was not filed in accordance with G.S. 163A-1177 or was not filed on the form prescribed in 08 NCAC 02 .0111;
- (4) The protest is duplicative or was made for the purpose of delay;
- (5) The protest filing, taking into account the totality of the circumstances, fails to include evidence which, if true, substantiates the probable occurrence of an outcome-determinative defect in the manner in which votes were counted or results tabulated, or the probable occurrence of an outcome-determinative violation of election law, irregularity, or misconduct; or
- (6) The matter, including the initial filing and all subsequent oral or written submissions, fails to allege facts sufficient to constitute substantial evidence of the occurrence of an outcome-determinative violation of election law, irregularity, or misconduct.

The State Board may consider protests in accordance with G.S. 163A-1180.

(b) If the matter is filed with a county board of elections, the county director of elections shall review the allegations and evidence presented in or attached to the filing. If the director of elections finds that the filing must be dismissed pursuant to Paragraph (a) of this Rule, the director shall transmit his or her administrative recommendation that the matter be dismissed, citing applicable defects and the requirements of this Rule. The director's administrative recommendation shall be transmitted in writing to the county board members and the executive director of the State Board no later than two business days after the matter was filed. The director of elections shall confirm that the county board members have received all filings and the director's administrative recommendation before proceeding to issue a notice of dismissal. Nothing in this Paragraph shall delay the county board of elections in proceeding to consider the protest as required under G.S. 163A-1178. If, after two calendar days following the transmission required under this Paragraph, neither a county board member nor the executive director of the State Board has raised any oral or written objection to the county director's recommendation for administrative dismissal, the county director shall issue a written notice of administrative dismissal to the individual(s) who has filed the matter. The notice shall:

- (1) Be sent by certified mail or commercial courier such that the date of delivery may be verified, unless the recipient has agreed in writing to receive notice by electronic means;
- (2) State that the matter was provided to the county board of elections members, but will not be heard by the county board;
- (3) State that the matter has been dismissed administratively, citing this rule and all applicable bases listed in Paragraph (b) of this Rule; and
- (4) Enclose an appeal form required under Paragraph (d) of this Rule.

If within two calendar days, any county board member or the executive director of the State Board raises any oral or written objection to the recommendation for administrative dismissal by the county director, the county board of elections shall proceed to hear the matter. An objection raised under this Subparagraph shall in no way affect or limit the county board of elections' authority to dismiss the matter under Paragraph (b) of this Rule or any other basis permitted by law.

(c) Individuals subject to an administrative dismissal entered by the director of elections may appeal the decision to the executive director of the State Board. All appeals brought under this Paragraph shall be in writing on a form prescribed under this Paragraph (available at ncsbe.gov) and must be received by the State Board office no later than five business days after receipt of the written notice of administrative dismissal from the county director. The State Board shall be deemed to have received the written appeal when it receives the physical form required under this Paragraph either by U.S. mail, courier service, or hand delivery. All appeals shall be made on a form that includes the following statements:

- (1) I am appealing from an administrative dismissal of a matter that I filed at the [county name] Board of Elections on [date].
- (2) I received an administrative notice of dismissal on [date].
- (3) I have enclosed a copy of my original materials filed with the county board of elections.

- ____ YES ____ NO
(4) I have enclosed a copy of the written notice of administrative dismissal.
____ YES ____ NO
(5) This matter should be heard for the following reasons:

- (6) I request notice of any action on this appeal at the following address:
Mailing Address: _____
Phone Number: _____
Email Address: _____

(d) The executive director of the State Board shall inspect all appeals filed under Paragraph (c) of this Rule. Within two business days after the receipt of an appeal, the executive director shall transmit a copy of the appeal to the State Board members along with a written statement indicating the executive director's administrative determination either to grant or to deny the appeal.

- (1) If the executive director's administrative determination is to grant the appeal, the executive director shall issue written notice to the county board of elections and to the appealing party indicating that the matter is remanded to the county board of elections for a hearing. The executive director's administrative determination under this Subparagraph shall in no way affect the county board of elections' authority to dismiss the matter under Paragraph (a) of this Rule or any other basis permitted by law.
- (2) If the executive director's administrative determination is to deny the appeal, but any State Board member raises any oral or written objection within three calendar days, the executive director shall grant the appeal, issue a written notice, and remand the matter to the county board of elections. If no State Board member raises any oral or written objection within three calendar days, the executive director shall issue a written notice to the appealing party and to the county board of elections stating that the appeal is denied. Dismissal under this Subparagraph shall be considered a final agency action for purposes of seeking judicial review.

(e) If the matter is filed with the State Board, the executive director of the State Board shall proceed in a manner outlined in Paragraph (b) of this Rule, including distribution to the State Board members, the opportunity to interpose an objection, and the issuance of notice, except that there shall be no right of appeal under Paragraph (c) of this Rule and that the executive director may administratively remand the matter for hearing by the county board of elections in the manner prescribed under Subparagraph (d) of this Rule.

*History Note: Authority G.S. 163A-741; 163A-1180;
Eff. October 1, 2018.*

§ 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.

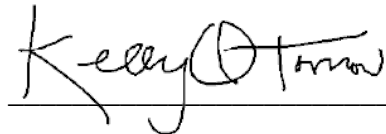
(d) Attorney's fees shall not be awarded against the State Board of Elections in any election protest brought under this Article. (2001-398, s. 3; 2003-278, s. 8(b); 2005-3, s. 4; 2008-150, s. 4(a); 2009-541, s. 27; 2017-6, s. 3; 2018-146, s. 3.1(a), (b).)

Certificate of Service

I, Kelly Tornow, Associate General Counsel for the State Board of Elections, do hereby certify that the foregoing materials were deposited into the care and custody of the U.S. Postal Service using certified mail for delivery to:

Kim Coley
P.O. Box 37187
Raleigh, NC 27627

This the 30th day of November, 2020.

A handwritten signature in black ink that reads "Kelly Tornow". The signature is written in a cursive style with a horizontal line underneath the name.

Kelly Tornow

Associate General Counsel

N.C. State Board of Elections