

July 31, 2017

Katelyn Love, Deputy General Counsel
Bipartisan State Board of Elections & Ethics Enforcement
441 N. Harrington St.
Raleigh, NC 27603

Dear Ms. Love:

Democracy North Carolina is pleased to offer comment on seven of the 46 administrative rules up for review by the Bipartisan State Board of Elections & Ethics Enforcement (“the Board”). We appreciate the Board’s attention to rulemaking as one of its critical administrative duties, and are excited to engage with the process.

Please find our detailed recommendations below.

08 NCAC 02 .0101 Election Observers

We are glad to see the existing administrative guidance on election observers codified, and recommend the following changes to the new rule:

In (a), add “The list of observers for one stop must designate the names and contact information of the observers”

County Board of Elections staff should be able to easily get in contact with partisan observers in case additional guidance is needed to resolve a dispute between an observer and a precinct official.

In (d), change “may” to “shall,” so that the text reads, “Observers who engage in prohibited conduct after receiving a warning ~~may~~ shall be required by the chief judge to leave the voting enclosure.”

As currently written, this language does not clearly define consequences for partisan observers who engage in prohibited conduct. A partisan observer who has been notified in advance of what constitutes prohibited conduct and fails to abide by a warning from the chief judge should not be given additional chances to misbehave or interfere with the elections process. They have already indicated through their action that they are not willing to abide by the code of conduct or respect the chief judge’s authority. Moreover, their privileged position inside the voting enclosure comes with clear responsibility to obey state law and the rules established by the Board. Only those who are willing to respect the role and its access should be allowed to be partisan observers.

In (d)(2), does “election assistants” mean poll workers or those who are assisting voters?

Assuming it’s the latter, using the word “assistors” would make the meaning clearer.

Add another section and adjust the numbering of existing sections accordingly:

(c) Observer Check-In. Chief judges shall check identification for those who appear at the polls claiming to be appointed observers. Identification is not limited to a photo ID.

This is a “best practice” listed in Numbered Memo 2016-21, which should be included in the administrative code as well. In 2016, there were a lot of partisan and non-partisan observers, inside and outside the polls, and multiple incidents of individuals who were not authorized as inside observers entering the voting enclosure in an attempt to observe the elections process. Including this “best practice” as a requirement for chief judges will help ensure that unauthorized individuals are quickly redirected to their proper location.

08 NCAC 01 .0104 Procedures for Political Committees

Although the Board recommends no change to 08 NCAC 01 .0104, Democracy NC recommends the following addition:

. . . . (d) Whenever a political committee or referendum committee shall fail to file with the State Board of Elections any report required to be filed under the provisions of G.S. 163-278.9 or G.S. 163-278.9A, the Board, by certified mail, shall issue a formal NOTICE OF NONCOMPLIANCE to the political treasurer of said committee and shall order that the report be filed immediately. The Board shall, as a courtesy [or: supplementary notification], make a documented good faith effort to contact a candidate or official associated with the committee regarding the NOTICE OF NONCOMPLIANCE by using an address, phone number, or email in its possession for that person. In the event said committee does not file its report within 20 days of the issuance of the NOTICE OF NONCOMPLIANCE, the Board, by certified mail, shall issue NOTICE OF TERMINATION OF ACTIVE STATUS, which shall render said committee ineligible to receive or make contributions until such time as it has filed the delinquent report and has satisfied any statutory penalty incurred as a result of noncompliance with the provisions of Article 22A of Chapter 163.

There have been a number of cases where a treasurer becomes disassociated with a committee, or fails to communicate noncompliance to a candidate or other officials. In practice, the candidate is the person who receives the negative publicity about the failure, but that person may not even know about the situation until a notice of termination is sent. “A documented good faith effort” could be satisfied by the Board staff including a notation about sending a copy of the notice of noncompliance to the candidate or official in the committee’s correspondence file, with the date and method of communication. Failure to receive the copy would not be grounds for the committee to appeal a notice of termination.

08 NCAC 02 .0110 Actions of County Board as to Election Protests

Section (e) is an addition recommended by the Board to 08 NCAC 02 .0110. In the 2016 general elections, the county canvasses were delayed because of the lack of clarity about how to handle protests like those submitted by agents of the Pat McCrory campaign, which did not influence the outcome of an election. In general, we support the recommended change; however, subsection (2) combines multiple conditions – (a) alternative instructions from the State Board and (b) two types of allegation in the protest. We recommend separating these.

(e) A county board of elections shall timely hear and decide all protests, unless;

(1) the protest is administratively dismissed pursuant to Rule .0114 of this Section; or
(2) the county board of elections receives alternative instructions from the State Board issued under G.S. 163-182.12. If a protest does not concern the manner in which votes were counted or results tabulated, a county board of elections shall not delay canvass in order to hear the protest. A protest that alleges the occurrence of an election law violation regarding an insufficient number of votes to change the outcome of a contest within the jurisdiction of a county board of elections shall not delay canvass by a county board of elections.

Subsection (2) would end after the first sentence, with addition of “; or” and then subsections (3) and (4) would read:

(3) the protest does not concern the manner in which votes were counted or results tabulated; or
(4) the protest alleges the occurrence of an election law violation regarding an insufficient number of votes to change the outcome of a contest within the jurisdiction of a county board of elections.

08 NCAC 02 .0111 Election Protest Form

The Board recommends comprehensive changes to the Election Protest Form. In general, Democracy North Carolina endorses the changes because the existing protest form allowed individuals to delay the canvass with protests that (1) were submitted without protestors being required to attest the information was true to the best of their knowledge; (2) required the presentation of no substantial evidence to back up an allegation; and (3) included information and allegations about which the protestors had no personal knowledge.

As a result of these problems, hundreds of innocent voters were falsely accused of voter fraud in the 2016 election by agents of the Pat McCrory campaign and NC Republican Party (see Democracy North Carolina’s report entitled, “*The Deceit of Voter Fraud*”).

We believe the Board’s comprehensive changes will help prevent this abuse of the protest process from recurring; however, we recommend a number of significant changes.

In prompt 5: Change “apparent results” to “apparent results of the election outcome.” Results is used to mean “election outcome” and “vote count” – a change in vote count may not change the election outcome, hence the need for clarity between the two uses. The statutes imply that the county board may only uphold a protest that affects an election outcome in its jurisdiction, but the statutes also recognize that irregularities occur that may not affect the election outcome. NCGS 163-182.9(b)(2) [“or concerns some other irregularity”] and NCGS 163-182.10(a)(3) [“an irregularity other than the counting or tabulating of votes”].

New Form for Reporting Irregularities Other than Those Affecting the Election Outcome: We also recommend that a notice be provided in Prompt 5 and as part of the opening paragraph on the Election Protest Form that directs a person to request a different form from the director of the county board of elections “to report an incident other than an irregularity affecting the outcome of an election” (quoting the language from the opening sentence of 08 NCAC 02.0111). The State Board should develop such a form and procedures for county boards to process the complaint. Several complaints could even add up to impact the outcome of an election or provide sufficient evidence to cast doubt on the election outcome, even though none by itself reaches that

threshold. For example, three people complaining about illegal absentee ballots at three different senior centers may reveal a pattern of irregularities or illegal behavior that affects the election results.

Re Affected Parties & Service: We recommend that a statement be added at the end of the first paragraph, saying: “*The county board of election shall provide you with reasonable assistance to locate the address and other contact information of candidates, poll workers, registered voters and other Affected Parties.*” Without that, we are concerned that this section imposes a heavy burden on a protestor with limited resources or investigative skills.

08 NCAC 10B .0108 Curbside Voting

The Board recommends no change to the current rule. Based on the feedback received via the Election Protection Hotline and our poll monitors from the last two federal election cycles, Democracy North Carolina recommends the following changes to the policy, aimed at improving the service and access provided to curbside voters and reducing the amount of time it takes to vote curbside.

In any primary or election any qualified voter who is able to travel to the voting place, but because of age, or physical disability and physical barriers encountered at the voting place is unable to enter the voting place or enclosure to vote in person without physical assistance, shall be allowed to vote either in the vehicle conveying such person to the voting place or in the immediate proximity of the voting place under the following ~~restrictions~~ requirements.

(1) The curbside voting area should be clearly marked with proper and easily visible signage informing voters of the possibility of voting curbside and the method for notifying an election official that they are waiting curbside. There shall be a method for the voter to announce their arrival at the curbside to election officials in the precinct, such as a temporary doorbell or buzzer.

~~(1)~~ *(2) The county board of elections shall have printed and numbered a sufficient supply of affidavits to be distributed to each precinct chief judge which shall be in the following form:*

Affidavit of Person Voting Outside Voting Place or Enclosure

State of North Carolina

County of _____

I do solemnly swear (or affirm) that I am a registered voter in _____ precinct. That because of age or physical disability I am unable to enter the voting place to vote in person without physical assistance. That I desire to vote outside the voting place and enclosure. I understand that a false statement as to my condition will be in violation of North Carolina law.

Date _____

Signature of Voter

Address

Signature of precinct election official who administered oath;

~~(2)~~(3) *The chief judge or a judge may designate one of the assistants to attend the voter, or assist the voter himself or herself. In either case, the designated election official shall promptly respond to and acknowledge their awareness of the voter. Upon arrival outside the voting place, the voter shall execute the affidavit after being sworn by a precinct election official. The ballot(s) shall then be delivered to the voter who shall mark the ballot(s) and hand them to the assisting precinct election official. The ballot(s) shall then be delivered to one of the judges of elections who shall deposit the ballot(s) in the proper boxes. The affidavit shall be delivered to a different judge of election. All materials must be timely delivered to the voter;*

~~(3)~~ (4) *The voter and any assisting person shall be entitled to the same assistance and subject to the same restrictions in marking the ballot as is authorized by G.S. 163-166.8 and 08 NCAC 10B.0107.*

(5) *Election observers may position themselves in a way that allows them to hear whether election officials ask curbside voters to state their names and addresses, and to see whether the curbside affidavit is submitted as required under 08 NCAC 10B.0108. The same restrictions on observer behavior provided in G.S. 163-45(c) apply to curbside voting. Under no circumstances may an observer compromise the privacy of the voting process by boarding a bus or vehicle, and no election official may authorize an observer to do so.*

(4)(6) *The affidavit executed by the voter shall be retained by the county board of elections for a period of six months. In those precincts using voting machines, the county board of elections shall furnish paper ballots of each kind for use by persons authorized to vote outside the voting place by this section. In any precinct using direct record electronic voting equipment, the county board of elections, with the approval of the State Board of Elections, may provide for all such paper ballots to be transported upon closing of the polls to the office of the county board of elections for counting. Those ballots may be transported only by the chief judge, judge, or assistant. Upon receipt by the county board of elections, these ballots shall be counted and canvassed in the same manner as one-stop ballots cast under G.S. 163-227.2, except that the count shall commence when the board has received from each precinct either that precinct's ballots or notification that no such ballots were cast. The total for ballots counted by the county board of elections under this subdivision shall be canvassed as if it were a separate precinct.*

Curbside voting is a federally required option for voters with disabilities, but without detailed direction to county Boards of Elections and precinct officials about how to implement it, many voters are unaware of or misunderstand the option, arrive at their polling place or preferred Early Voting site and can't locate the curbside voting location, or spend an hour or more waiting to vote via curbside. In some polling locations in 2016, voters were told that curbside voting wasn't available at that location, or were asked by poll workers to get out of the car and vote inside because curbside voting was understaffed. Prohibitively long waits, discouraging poll workers, and lack of clear signage or prompt attention from poll workers undermine the practical availability of curbside for voters across the state, making the statutory and administrative requirement to provide it meaningless.

08 NCAC 10B .0101 Tasks and Duties of Precinct Officials at Voting Places

The Board recommends no change to this rule. Democracy North Carolina recommends the following changes and development of related administrative guidance.

In (d), add a new subsection (1) and adjust the other subsection numbers accordingly:

(1) Attend an instructional meeting presented by the county board of elections prior to each primary or election. This may be the same as those held for precinct chief judges and precinct judges or a separate meeting.

Through our Election Protection and voter outreach work, Democracy North Carolina frequently hears from voters who are disenfranchised, discouraged, or dismissed by poll workers who misunderstand and misapply election law. Particularly in even-numbered years, many of these poll workers are election assistants, rather than judges, who did not receive the same statutorily mandated training as precinct judges. We believe that providing election assistants with basic training on election laws – including rules on assistance, provisional ballots, out of precinct voting, what to do if they are unable to find a voter’s registration, and tips and tricks for finding a voter’s registration if they are having trouble – will improve the quality of service that voters receive from non-judge poll workers. This is particularly critical given the rapidly-changing landscape of election law in North Carolina over the last two federal election cycles; a trend that we expect to continue.

In (g), add a new subsection (1) and adjust the other subsection numbers accordingly:

(1) Ensure that voters are able to cast their votes in dignity, good order, impartiality, convenience, and privacy as required in G.S. 163-166.7(c) and in accordance with any rules or administrative guidance promulgated under that statute.

Adding this as the first in the list of “General duties of all Precinct Officials” ensures that this critical mandate is not lost in the long laundry list of more technical duties provided in section (g). It also extends the mandate beyond precinct chief judges, who cannot and should not be expected to alone bear the burden of ensuring that a polling place and its voting process operates in an orderly, impartial way that prioritizes the dignity, convenience, and privacy of voters.

Recommendation for Development of “Poll Workers’ Code of Conduct”: In addition to the recommended changes to the rule, Democracy North Carolina would like the Board to consider developing a “Poll Workers’ Code of Conduct,” similar those developed for the 2016 General Election in Numbered Memo 2016-20 and “Tips for Monitoring or Observing the Election at Polling Sites.” While there are provisions for removing a precinct official who is related to another poll worker or candidate or who mishandles ballots and voting systems, the administrative code and statutes are largely silent about how county boards of elections should deal with poll workers who are rude, technologically incompetent, exhibit political bias, provide misleading or incorrect information, or make harassing or discriminatory comments to voters and others at the polling place. Developing such guidance falls squarely within the Board’s authority under 163.66-7(c). The code of conduct could stress the importance of (1) courtesy, respect, and sensitivity toward all voters regardless of age, race, language, gender, and ability; (2) efficiency and convenience; (3) basic knowledge of NC election law and administrative guidance; and, (4) commitment to ensuring that all eligible voters are able to cast ballots. Failure to adhere to this code could be cause for dismissal.

08 NCAC 18 .0101 Absentee Ballot Delivery

This is a new rule proposed by the Board to clarify that any person permitted to assist a disabled voter in completing an absentee ballot may also mail the completed ballot, upon the voter’s

request. While Democracy North Carolina appreciates the Board’s clarification that a person qualified to assist in completing an absentee ballot may also mail the sealed, completed ballot, we recommend the following change to the draft rule.

If, due to a disability, a voter requires assistance mailing his or her return envelope containing an executed absentee ballot, the sealed envelope may be taken directly and without delay to the closest U.S. mail depository or mailbox by a person selected by the voter, so long as the individual is also qualified to assist the voter. ~~Any individual who assists in the manner described in this Rule shall indicate that he or she assisted the voter by marking the space provided for assistors on the return envelope containing the executed absentee ballot.~~

We find it unnecessary and impractical to require the person mailing a voter’s sealed, completed ballot to fill out the assistor section on the container envelope. Existing law already requires any person assisting a voter in marking an absentee ballot to do this. A disabled voter who requires assistance in mailing a completed ballot is also likely to require assistance in completing the ballot; in most cases both kinds of assistance will be provided by the same person, making the draft rule’s requirement duplicative.

In cases where there are two different people assisting – one mailing the sealed ballot envelope, and another assisting the voter with completing the actual ballot – both individuals would have to complete the assistor section on the container envelope. Every container envelope would then require enough space for two assistors to sign and provide their contact information, and some way of distinguishing what kind of assistance was provided by each individual, so that the county Board of Elections knows which of the two assistors to contact in case of any questions about the integrity of the ballot. With spaces for two witnesses, the voter, and an assistor to attest already on the container envelope, adding an additional space for a second assistor to provide contact information and sign will crowd the envelope and make the already complex process even more unwieldy.

Most importantly, any mischief related to absentee ballots is most likely to occur in the completing of the ballot, not the mailing of the sealed container envelope. Rather than create an additional bureaucratic requirement specific to mailing, Democracy North Carolina encourages the Board to focus on education about the existing assistor requirement for voters and groups conducting voter outreach.

Thank you in advance for considering our recommendations in the spirit in which they are offered – with the goal of ensuring that North Carolina’s elections system is accessible, fair, and secure for all voters. Please do not hesitate to contact us with any questions.

Sincerely,

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Associate Research Director

Bob Hall
Executive Director