



NORTH CAROLINA STATE BOARD OF ELECTIONS

Mailing Address:
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Raleigh, NC 27611
(919) 814-0700 or
(866) 522-4723
Fax: (919) 715-0135

December 12, 2022

Via Email and Fedex # 770743910492

Herman E. Lewis
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Via Email (protestor's counsel)

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Re: Appeal from Decision of Columbus County Board of Elections Dismissing Protest

Dear Mr. Lewis and Counsel:

The State Board of Elections received the appeal you filed from the order of the Columbus County Board of Elections dismissing your protest regarding the 2022 general election contest for Columbus County sheriff. The appeal was provided to the State Board members but will not be heard by the State Board. The appeal has been denied pursuant to Rule 08 NCAC 02 .0114(e) of the North Carolina Administrative Code. Attached is a copy of the administrative recommendation to deny the appeal, submitted to the State Board by its Executive Director, citing the applicable grounds in the statutes and administrative rules governing election protests. Pursuant to the Rule, no State Board member objected to the recommendation within two days of its circulation. Also attached is a copy of the rule cited above.

Sincerely,

Paul Cox
General Counsel

Enclosures



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Administrative Denial Recommendation (08 NCAC 02 .0114)

In the Matter of Election Protest of Herman Lewis

I am recommending administrative denial of the above-captioned protest for failure to allege probable cause of an outcome-determinative irregularity, violation of law, or misconduct.

On November 22, 2022, Herman Lewis, a registered voter who was eligible to vote in the election for Columbus County sheriff, filed an election protest with the Columbus County Board of Elections regarding the sheriff contest. In the contest for Columbus County Sheriff, Jody Greene prevailed by 1,589 votes, which amounted to an 8.54% margin in this contest, in which a total of 18,595 votes were cast. The results of the contest appear below:

NAME ON BALLOT	PARTY	BALLOT COUNT	PERCENT
Jody Greene	REP	10,092	54.27%
Jason Soles	DEM	8,503	45.73%

The stated grounds for the protest are that Jody Greene is disqualified from office. Mr. Greene was the elected sheriff who was seeking re-election to office. Judicial proceedings were initiated in Columbus County Superior Court by the county District Attorney filing a petition to remove Mr. Greene from office due to willful misconduct, maladministration, and corruption while in office. A superior court judge entered a preliminary order in which the court found sufficient cause to temporarily suspend Mr. Greene from office pending a full resolution of the proceedings. An amended petition was thereafter filed by the District Attorney, identifying additional examples of conduct to support the grounds for removal stated in the original petition. Mr. Greene thereafter resigned his position on October 24, 2022, prior to a court hearing on the full merits of the District Attorney's amended petition to remove Mr. Greene from office. The District Attorney filed a voluntary dismissal after the resignation. The preliminary order of temporary suspension based on the original petition remains the superior court's only ruling on the matters presented in the petition and amended petition.

The protest largely centers on Mr. Greene's conduct in office that was the focus of the court proceedings and further alleges that Mr. Greene's resignation was an improper and invalid attempt to evade a court order removing him from office. Mr. Lewis contends that the preliminary court order suspending Mr. Greene from office, accompanied by Mr. Greene's

resignation, has the effect of adjudicating Mr. Greene guilty of conduct which disqualifies him from office under the constitutional provision that disqualifies “any person who has been adjudged guilty of corruption or malpractice in any office.” This disqualification provision in the North Carolina Constitution, according to the protest, is to be broadly interpreted to include any ruling in a judicial or quasi-judicial proceeding that rests upon a finding of corruption or malpractice in office. This leads the protester to the conclusion that the County Board can find that an adjudication of guilt has occurred because “there is no factual dispute and disciplinary action has been taken” against Mr. Greene. The protest requests relief in the disqualification of Mr. Greene for office and that the resulting vacancy be filled or a new election held.

The County Board met for preliminary consideration of the protest on November 28, 2022. The board determined that the protest did not establish probable cause to support a finding of a violation of election law, irregularity, or misconduct in the protested contest, or of a defect in the manner by which votes were counted or the results tabulated sufficient to cast doubt on the results of the protested contest. Based on this determination, the protest was dismissed. There is no transcript of the proceeding because this was a preliminary meeting to determine whether the protest documents established probable cause to proceed to an evidentiary hearing.

The written dismissal order was signed and filed at the County Board office on Wednesday, November 30, 2022, and was delivered to Mr. Lewis by email from the director of the County Board on that same date. The County Board timely received Mr. Lewis’s notice of appeal of its written decision on Thursday, December 1, 2022. The appeal documents, which include the notice of appeal, protest, and supporting documents, were subsequently delivered to the State Board office on December 2, 2022.

In the appeal, Mr. Lewis presents multiple issues that are substantive and procedural in nature. Mr. Lewis’s appeal does not seek to include new material; however, the issues presented are also set out in a memorandum attached to the appeal form.

As to the substantive issues presented, Mr. Lewis reiterates the grounds in his protest when he contends that the County Board’s decision to dismiss was in error because Mr. Greene is disqualified from office under these “unique circumstances.”

Article VI, Section 8 of the North Carolina Constitution provides, in relevant part, that the following persons are disqualified for office: “any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office.” N.C. Const. art. VI, § 8. Mr. Greene, however, has not been *adjudged guilty* of corruption or malpractice in office, nor has Mr. Greene been *removed by impeachment* from the office as sheriff of Columbus County through the statutory process for doing so. Therefore, Mr. Greene has not been disqualified as a candidate for office in the 2022 election for the reason proffered by Mr. Lewis.

Mr. Lewis contends that Mr. Greene has effectively been adjudged guilty of corruption or malpractice in office through a statutorily prescribed proceeding. The statute providing for the removal of a sheriff, however, expressly makes removal a *judicial* matter by giving authority to remove a sheriff to only a superior court judge and only after a hearing before the judge on the petition for removal. N.C.G.S. § 128-16 (“Any sheriff or police officer shall be removed from office *by the judge* of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, *and hearing* thereunder[.]” (emphasis added)). Furthermore, although a sheriff can be preliminarily suspended by a judge, this suspension is only considered a “temporary vacancy” under the statute pending a full evidentiary hearing and final determination. N.C.G.S. § 128-19 (“ . . . the judge may suspend the accused from office if in his judgment sufficient cause appear from the petition and affidavit, or affidavits, which may be presented in support of the charges contained therein. In case of suspension, as herein provided, the *temporary vacancy* shall be filled in the manner provided by law for filling of the vacancies in such office.” (emphasis added)). The full hearing is an important part of the judicial process and is more than just a consideration of the petition itself; it is “the trial of the cause” and “take[s] precedence over all other causes upon the court calendar.” N.C.G.S. § 128-20. There cannot be a final adjudication of the issues presented in a removal petition without a full hearing on the matter.

Here, Mr. Greene resigned from office prior to the occurrence of the full evidentiary hearing before a superior court judge that is a prerequisite to entering a final decision on the petition. The preliminary suspension of Mr. Greene is, at most, a temporary suspension based solely on a forecast of evidence included in the petition. A temporary suspension cannot serve as a *de facto final* determination of the issues that would ultimately support removal. Such an interpretation would render the statutory hearing process meaningless. Moreover, the temporary suspension order was entered by the superior court judge prior to the filing of the amended petition, meaning no judicial order imposing discipline—temporary or permanent—based upon the additional allegations in the amended petition has been entered. While Mr. Greene may have faced a strong possibility of removal based on the judge’s preliminary ruling, no final judicial determination has been entered on the issues presented in the removal petition by the only person authorized to do so—a superior court judge. Mr. Greene’s resignation followed by the voluntary dismissal of the proceedings ended the matter, and this chain of events does not mean the preliminary suspension order transformed into a final adjudication of Mr. Greene’s guilt—and the protest cites no law directly applicable in this context that would make it so.

The flaw in Mr. Lewis’s argument on this issue is further emphasized by the protest’s argument that the issues of guilt and removal before the superior court judge—and by consequence his disqualification from office—are not moot. Indeed, mootness of legal matters only becomes an issue when there has *not* been a full and final adjudication of the matter and further proceedings are necessary to achieve a final resolution. In other words, if the disqualification issue is not moot, then it has yet to be adjudged. Mr. Lewis argues two points on mootness. First, he argues that disqualification from office is a remaining issue in the matter. However, a determination of a candidate’s qualifications to seek and hold office is a wholly separate issue that, in this case,

would be a byproduct of a judicial process resulting in the removal of a sheriff under Article 2 of Chapter 128 of the General Statutes. Second, he argues that Mr. Greene’s resignation before a final adjudication is evidence of guilt. But this argument reveals that the protest would require the County Board to now proceed with stepping into the role of the superior court judge by making an adjudication of guilt *itself*, such that Mr. Greene should be removed from office. No statute allows a county board to proceed in this manner. Furthermore, election protests are limited to raising issues involving “the conduct of an election.” N.C.G.S. § 163-182.9(a). As such, before the County Board could determine whether the conduct of the election suffered from an outcome-determinative violation of election law or irregularity or misconduct, the board itself would have to enter an order that Mr. Greene was indeed guilty of corruption or malpractice in office. This is even more so the case when considering that no judicial order has been entered on the matters set forth in the amended petition. County boards of elections are not granted such powers or duties by statute. *See e.g.*, N.C.G.S. § 163-33 (“Powers and duties of county boards of elections”). Likewise, the statutes and rules governing election protests do not give a county board of elections the authority in such a proceeding to “adjudge” a candidate as guilty of corruption or malpractice in office, despite Mr. Lewis’s contentions otherwise.

Accordingly, Mr. Greene has not been disqualified from office, and a board of elections—both county and State—has no authority to disqualify a candidate for office in the manner proposed by Mr. Lewis. The allegations pertaining to this issue fail to establish probable cause to believe that an outcome-determinative violation of election law or irregularity or misconduct has occurred.

As to the procedural issues presented, Mr. Lewis contends the County Board held an unlawful closed session to consider the protest in violation of open meeting laws, entered an order improper in form because it did not address the grounds for disqualification stated in the protest, and was “obligated under North Carolina election law to, at minimum, hold a hearing to assess the allegations concerning Greene’s qualifications.”

Mr. Lewis first contends the County Board impermissibly went into a closed session during the Board meeting, presumably to discuss his protest. Mr. Lewis contends statutory procedures for entering a closed session were not followed, that it was not stated for what purpose the County Board entered a closed session, that discussing the protest during the closed session—the most likely inference of what was discussed—was not a permissible purpose, and that the board did not give an oral summary of the closed session upon returning from the closed session. The purpose of the closed session is unclear based on the appeal documents. On one hand, the agenda shows that the reason given was a “personnel” matter. On the other hand, the memorandum states that the County Board members acknowledged the closed session was “to obtain attorney-client advice regarding the election protests.” Even so, in making these allegations, Mr. Lewis simply posits that the State Board’s review is to ensure lawful procedures are followed and “the appropriate due process rights of a protester are protected” without specifying what due process rights a protester has at the preliminary meeting stage of a protest. Mr. Lewis has not sufficiently explained how alleged violations of open meetings laws affected the preliminary consideration of

his protest, particularly when the protest itself was properly dismissed for failure to establish probable cause and protesters have no statutory right to participate in the preliminary meeting. In other words, even assuming there was a defect in the calling of a closed session, on a *de novo* appellate review of the protest filings, the result would be the same—that the protest was not sufficient to proceed to a hearing.

Mr. Lewis next contends that the order dismissing his protest was defective in form because it did not address the particular grounds for disqualification stated in the protest, and that this defect in form shows the merits of the protest were never actually considered by the board. Findings of fact “on the evidence and on matters officially noticed” and conclusions of law “the county board may state” are only required in a county board’s written decision on a protest after an evidentiary hearing occurs. N.C.G.S. § 163-182.10(d). In particular, a requirement that such findings of fact be included in an order following an evidentiary hearing makes sense, because that is the stage of the proceedings where the board receives competing evidence and testimony from any person with information concerning the subject of the protest. But here, when a county board has only conducted a preliminary meeting to determine probable cause, the board at this stage is solely basing its decision upon the allegations and materials presented in the protest itself—there are no facts to find. Moreover, the operative subdivision of N.C.G.S. § 163-182.10 for the county board’s preliminary decision only requires that an order of dismissal following the preliminary meeting show the board “determine[d] whether the protest substantially complies with G.S. 163-182.9 and whether it establishe[d] probable cause to believe that a violation of election law or irregularity or misconduct has occurred. If the board determines that one or both requirements are not met, the board shall dismiss the protest.” N.C.G.S. § 163-182.10(a). In other words, the plain text of the statute only requires that the order merely memorialize the county board’s ultimate decision on the protest. The County Board’s decision on the protest is plainly stated in the order and, as a result, the order is not invalid for the reason proffered by Mr. Lewis.

Although not fully discussed in the memorandum, Mr. Lewis contends in the appeal form and introduction of the memorandum that the County Board should have proceeded to an evidentiary hearing. When a county board of elections conducts its initial consideration of an election protest, N.C.G.S. § 163-182.10(a) only requires that the county board meet “as soon as possible after the protest is filed” for the county board to review the face of the protest form and materials submitted with the form to make a probable cause determination—no testimony or presentation from a protester or other persons is required. *See* N.C.G.S. § 163-182.10(a)(1) (noting that at the preliminary consideration stage, the county board “meet[s] to determine . . . whether [the protest] establishes probable cause . . .”). If a protest is satisfactory in form and clears this preliminary step, it is *then* that a hearing is required. *Id.* (“If the board determines that both requirements are met, it shall schedule a hearing.”); 08 NCAC 02 .0110(f)(1) (“A county board of elections shall timely hear and decide all protests, *unless the protest is administratively dismissed* pursuant to 08 NCAC 02 .0114[.]” (emphasis added)); *see also* 08 NCAC 02 .0110(c) (“If the county board determines that a hearing is necessary, the board shall set the hearing no later than ten business days from the date of the preliminary consideration[.]”). Here, however, the County Board determined that the protest was not sufficient to proceed to an evidentiary hearing because the

protest did not establish probable cause of an outcome-determinative violation of election law or irregularity or misconduct. The County Board's determination was correct, for the reasons stated above. Accordingly, the County Board was not required to conduct a full evidentiary hearing on this protest.

Pursuant to 08 NCAC 02 .0114(e), the Executive Director of the State Board may review protest filings submitted to the State Board to determine whether to recommend administrative denial. This includes reviewing appeals from dismissals upon preliminary consideration by a county board.

When exercising this authority, pursuant to 08 NCAC 02 .0114(e), the Executive Director follows the same procedures that a county director would follow to recommend administrative dismissal, which are located at 08 NCAC 02 .0114(b). Under those procedures, the Executive Director must provide any recommendation to the State Board for administrative denial within two business days of receiving the filing. If no Board member raises any oral or written objection to the recommendation for administrative denial within two calendar days following the transmission of the recommendation, the Executive Director shall issue a written notice of administrative denial to the individual(s) who has filed the matter.

Having reviewed Mr. Lewis's Protest appeal, I find and conclude the following:

- Mr. Lewis's Protest was properly dismissed by the Columbus County Board for the reasons stated in the County Board's order. The allegations in the protest do not establish probable cause to believe that an outcome-determinative violation of election law or irregularity or misconduct has occurred, nor do the allegations in the protest establish probable cause to find an outcome-determinative defect in the manner in which votes were counted or results tabulated. *See* N.C.G.S. § 163-182.10; 08 NCAC 02 .0114.
- Mr. Lewis's issues presented on appeal have no merit and further warrant administrative denial of the appeal for the reasons herein stated.
 - For the grounds for appeal focused on substantive issues, these grounds only reiterate his theory of disqualification in the protest itself. As discussed above, the allegations in the protest do not establish probable cause to believe that an outcome-determinative violation of election law or irregularity or misconduct has occurred, nor do the allegations in the protest establish probable cause to find an outcome-determinative defect in the manner in which votes were counted or results tabulated. Denial of the appeal is therefore warranted.
 - For the grounds for appeal focused on procedural issues, Mr. Lewis contends that open meetings laws have been violated through certain actions and inactions taken by the County Board in its preliminary consideration and dismissal of his protest, and that the board's order was deficient in its contents. As discussed above, none of the issues raised

would support a reversal of the County Board's dismissal, particularly when the protest itself lacks merit on its face.

For these reasons, as Executive Director, I recommend that the appeal should be DENIED.

If no State Board member raises any oral or written objection to the recommendation within two calendar days (on or before Friday, December 9, 2022), the protest appeal will be denied, and Mr. Lewis will be notified accordingly.

Issued by Karen Brinson Bell, Executive Director, this 7th day of December, 2022.

A handwritten signature in black ink that reads "Karen Brinson Bell". The signature is written in a cursive style with a large initial "K" and "B".

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. 163-182.9 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.

The State Board may consider protests in accordance with G.S. 163-182.12.

(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. 163-182.10. 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. 163-22; 163-182.12;
Eff. October 1, 2018;
Amended Eff. November 1, 2020.*