

STATE OF NORTH CAROLINA

STATE BOARD OF ELECTIONS

**In re Appeal of CHRISTINA KELLEY
GALLEGOS-MERRILL,
Appellant.**

**From Buncombe County Board of
Elections**

MEMORANDUM OF LAW IN OPPOSITION TO APPEAL

NOW COMES Ellen Frost Campaign (“Frost”), by and through the undersigned counsel, pursuant to N.C. Gen. Stat. § 163-182.11, and opposing the protest (“the Protest”) of Christina Kelley Gallegos-Merrill (“Appellant”) and Appellant’s appeal of the Protest Order entered by the Buncombe County Board of Elections, hereby prays the State Board of Elections to dismiss Appellant’s Appeal. The Buncombe County Board of Elections properly determined at the Preliminary Consideration meeting on the Protest that there was no probable cause to believe that a violation of election law, an irregularity, or misconduct had occurred. The Protest was properly dismissed pursuant to N.C. Gen. Stat. § 163-182.10(a).

PROCEDURAL BACKGROUND

This matter is before the State Board of Elections (“SBE”) on Appellant’s Appeal from the dismissal of the Protest by the Buncombe County Board of Elections’ (“BCBOE”) on November 28, 2012, after Preliminary Consideration pursuant to N.C. Gen. Stat. § 163-182.10(a). On December 3, 2012, the BCBOE entered an Order (“Protest Order”) dismissing the Protest because Appellant had failed to show “probable cause” that a violation of election law, irregularity, or misconduct had occurred in the November, 2012 election for District #2 Buncombe County Commissioner (“Election”). (Protest Order at p. 3.) At the Preliminary Consideration meeting, all parties concerned agreed on what had occurred, but Protester contended that the BCBOE’s actions were “not appropriate”. (See id. at p. 1-3;

Appellant's Appeal.) Protester did not contend that the student voters involved in the Election engaged in misconduct, and agreed that they were entitled to vote.

FACTS

Prior to the Election, Buncombe County commissioners had all been elected at large, and not from specific districts. The Election was the first election in which Buncombe County commissioners were elected according to districts determined by the General Assembly. The shift from at large to district election naturally created some issues related to the BCBOE mandate to determine voters' residences in the respective districts. See N.C. Gen. Stat. § 163-82.4(a)(10). In particular, the boundary between Commission Districts 1 and 2 ran down the center of Warren Wilson Road, which bisects the campus of Warren Wilson College in the Swannanoa area. (Protest Order at ¶¶ 4-5.) Student dormitories are located on both sides of Warren Wilson Road, so some students should vote in District 1 and some in District 2. (Id.)

Historically, Warren Wilson students had all received their voting information at 701 Warren Wilson Road, the address of the building where the campus mailboxes are located ("701"). (See id. at ¶ 6.) This was not an issue in the past because the physical residence of each student was not related to any specific district in at large elections. With the new district elections, the physical residence of each student became relevant to assign voters to the proper district. (See id.)

Prior to the election, the BCBOE became aware that voting information had been sent to 701 rather than the physical addresses of the student voters. (Id. at ¶¶ 3-5.) BCBOE sent an email to early voting officials instructing them to ask voters with an address of 701 to provide additional address information. (Id.) Voters were asked to indicate on an attached map which side of Warren Wilson Road they lived on, in order for the BCBOE to determine their residence

to assign them to the proper commissioner district. (Id.) Those voters were asked to list their residential address on a provisional envelope, and to vote provisionally. (Id.) Provisional votes were obtained from 136 voters through this process. (Id.)

Of the 136 provisional ballots, 75 voters were determined to live in District 2. Of the 75 provisional ballots in District 2, 44 voters (“701 voters”) indicated 701 as their residential address even though no one lives at 701. (Id. at ¶ 7.) In order to determine which of two commission districts the 701 voters lived in, BCBOE asked the student voters for their residence information, and also obtained the official list of students’ residences from the Warren Wilson College Housing Director (“Housing List”). (Id. at ¶ 7; see also the Verified Letter with Housing List (“Verified Letter”), attached hereto as Exhibit A.) The Housing List was compiled from the Warren Wilson College database, and was deemed to be reliable as a business record of the college. (Verified Letter, Ex. A.) It is important for the college to know where each student lives in the dormitories for a number of reasons. (See id.) Warren Wilson experienced a devastating dormitory fire several years ago, and knowing each student’s residence enabled the college to determine that the dormitory residents were all safe. The Verified Letter and Housing List are part of the record on appeal of the Preliminary Consideration meeting.

The students were then given the appropriate ballots for the district where they indicated they lived, and those ballots were then set aside and marked “provisional”. (Protest Order at ¶¶ 6-7.) The Protest does not mention that any student received the improper ballot. (See Appellant’s Appeal.)

Prior to the BCBOE canvass, the SBE issued Memo 2012-28, which instructed the BCBOE to “rely upon all information available to the Board” in determining the residence of student voters. In addition to residency information provided by the voters themselves, the

BCBOE utilized the Housing List. (See SBE Memo 2012-28 at p. 2; Protest Order at ¶ 8.) At canvass, pursuant to SBE's instructions, the BCBOE determined each voter's residency based upon the Housing List, and counted the provisional ballots accordingly. (Protest Order at ¶ 8.)

Appellant does not contend that any of the student ballots were improperly counted. Rather, the Protest contends that it was improper for the BCBOE to utilize the Housing List to determine the residence of student voters. According to Appellant, the Housing List was "unsworn, unreliable information". (See Appellant's Appeal.) However, the Housing List was in fact submitted to the BCBOE in an affidavit from the College housing director, and is part of the record in this Appeal. Appellant does not allege that the housing list was inaccurate, nor does she state why she believes it was "unreliable". (See *id.*) Despite the lack of any actual, or even alleged, defect in the official housing list, Appellant is seeking to have all of the student votes cast in her district invalidated because of the alleged "unreliability" of the housing list. (See *id.*)

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review of the Protest Order is set forth in N.C. Gen. Stat. § 163-182.11(b) (1), which provides that the SBE may decide the appeal "based upon the record from the county board". As there is no dispute as to the facts as found by the BCBOE in the Protest Order, the SBE should only rule on whether the actions of the BCBOE were "a violation of election law or irregular or misconduct".

II. BCBOE PROPERLY FOLLOWED SBE INSTRUCTIONS IN DETERMINING VOTERS' RESIDENCE.

N.C. Gen. Stat. § 163-57(1)(c) provides, "Residence shall be broadly construed to provide all persons with the opportunity to register and to vote, including stating a mailing

address different from residence address.” Consistent with this rule, the county board of election is obligated to “make diligent effort to complete for the registration records any information requested on the [voter registration] form which the applicant does not complete. . . .” N.C. Gen. Stat. § 163-82.4(a)(10).

Because of the situation described above in Facts, in order to determine residence for the purpose of the commission districts, BCBOE supplemented the information given to it by voters with the Housing List. This was consistent both with North Carolina election law and the specific SBE Memorandum 2012-28 which instructed BCBOE to use “all available information”.

There is no question that as residents of Buncombe County all of the student voters had properly registered with BCBOE as authorized by N.C. Gen. Stat. § 163-57(1)(c); however, because 701 is where they receive their mail, the students had all listed their address as 701.

This had historically been the case for all Warren Wilson students. The fact that 701 was not their physical “residence” became relevant only with the creation of county commission districts by the NC General Assembly. (See Protest Order at ¶¶ 4-8.) Prior to the creation of districts, the 701 address information on the student voter registrations was sufficient to determine residency for at-large voting for county commissioners. After the creation of the districts, BCBOE realized that the students had all given 701 as their address, and determined that 701 could not be used for voting in the Election. BCBOE needed to know the physical residence of the students to assign them to the proper commissioner districts. Where students did not give BCBOE their physical residential address, BCBOE used the Housing List to determine their residences. Using the Housing List complied with the SBE Memo 2012-28 directive to use “all available information” to determine the residences. In using the Housing List, BCBOE carried out its duty under N.C.

Gen. Stat. § 163-82.4(a)(10) to make a “diligent effort to complete for the registration record” each student’s residency.

If BCBOE had not used the official Housing List to determine residency, it would not have been able to determine accurately which commission district was appropriate. BCBOE did not violate election law by using the Housing List, as alleged in the Protest. To the contrary, BCBOE’s failure to use all reliable available information to determine residency would have violated both SBE Memo 2012-28 and N.C. Gen. Stat. § 163-82.4(a)(10).

III. APPELLANT DID NOT SHOW “PROBABLE CAUSE”.

When an election protest is filed, N.C. Gen. Stat. § 163 182.10(a)(1) requires the county board of election to hold a “Preliminary Consideration” meeting. At the meeting, the board is obligated to determine whether the Protest “establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred.” Id. If the board determines the Protest demonstrates “probable cause”, the board is required to hold an evidentiary hearing on the Protest. Id. If the Protest does not show “probable cause”, it must be dismissed by the board. Id.

The BCBOE properly concluded that Appellant’s Election Protest did not show probable cause that a “violation of election law or irregularity or misconduct had occurred.” See id. As explained above, the BCBOE’s process of determining student voters’ residency was consistent with North Carolina law in every respect. Probable cause means a “reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing” that a violation of law has occurred. State v. Allen, 282 N.C. 503 (1973). Appellant’s unsupported allegation that the Housing List was “unreliable” does not constitute “probable cause” of an election violation under any definition of “probable cause”.

IV. BCBOE DID NOT VIOLATE ANY OF APPELLANT'S RIGHTS.

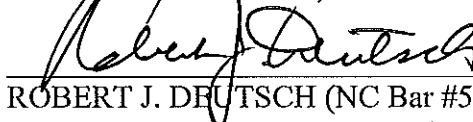
Contrary to Appellant's Appeal, the BCBOE did not violate any of Appellant's rights by dismissing the Election Protest at the Preliminary Determination meeting. Where there is no disagreement on what the BCBOE did to determine residency, it is purely a legal question whether BCBOE's actions violated election law, were irregular, or constituted misconduct. In the absence of a finding of probable cause, Appellant is not entitled to a full evidentiary hearing on the Protest. N.C. Gen. Stat. § 163-182.10(a)(1). All of the theories in the Protest reduce to the contention that BCBOE should not have used the official Housing List to determine the students' residency. Because there is no question that the list was reliable, and that the BCBOE's use of the Housing List was authorized by the SBE and by state law, the Appeal should be dismissed by the SBE.

CONCLUSION

Based upon the foregoing, Frost requests the SBE dismiss Appellant's Appeal because there is no probable cause to believe that a violation of election law or irregularity or misconduct has occurred.

This the 12th day of December, 2012.

ROBERT J. DEUTSCH, P.A.



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CERTIFICATE OF SERVICE

The signature of counsel above certifies that a copy of the foregoing has been served on the State Board of Elections, which will provide notice to the following, on the date and year stated above:

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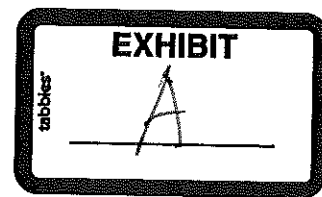
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Buncombe County Board of Elections
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November 26, 2012

To Whom It May Concern:

This letter is to verify that I, Joyce Milling, sent an entire list of current students and staff who live in Residence halls on campus at Warren Wilson College to Trena Parker on November 1, 2012.

I verify that this list remained accurate through election day, November 6, 2012, with the only changes being the following students who had withdrawn and were no longer living on campus by election day:

- Rudwan Bakhsh
- Elora Nadel
- Hannah Fowler
- Melanie Broom

Thank you,

Joyce Milling
Interim Director of Residence Life
Warren Wilson College

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

I, Rowena M. Pomeroy, certify that the JOYCE MILLING, Interim Director of Residence Life, at Warren Wilson College, personally appeared before me and acknowledged that she signed the foregoing document.

This 26th day of November, 2012.

NOTARY PUBLIC

My Commission Expires: October 9, 2014

In the Swannanoa Valley of the Blue Ridge Mountains

PO Box 9000 ASHEVILLE NORTH CAROLINA 28815-9000 828-298 3325

