

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN THE MATTER OF
THE NOVEMBER 6, 2012
BUNCOMBE COUNTY DISTRICT 2
COMMISSIONER ELECTION

ORDER

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS on December 13, 2012, upon the appeal of candidate Christina Kelley G. Merrill of the December 3, 2012 Protest Order of the Buncombe County Board of Elections ("BCBE"). Present at the hearing were Gene Johnson, attorney for candidate Christina Kelley G. Merrill, who was also present; Robert Deutsch, attorney for candidate Ellen Frost, who was also present; Lucy Smith, Secretary of the BCBE, Trena Parker, Director of the BCBE, and Jennifer Sparks, Election Information Specialist of the BCBE.

Upon review of the Protest Order, the protest appeal, information in the file and copies of information provided to the BCBE at its hearing, specifically including a detailed chart of the BCBE's handling of the ballots at issue, the State Board rules as follows:

UNDISPUTED FACTS

1. Christina Kelley G. Merrill is a candidate for Buncombe County Commission District 2 and timely filed an election protest on November 20, 2012 concerning the Buncombe County Commission District 2 race. The protest alleged an irregularity involving voters in District 2 who are students at Warren Wilson College ("College").

2. The Buncombe County Commission District 2 was an election with four candidates for two seats. This contest was the subject of a machine recount, a partial hand-to-eye recount, and a full hand-to-eye recount under the provisions of GS 163-182.7 and GS 163-182.7A.

The final count for these seats was:

Mike Fryar	20,007
Ellen Frost	19,918
Christiana Kelly G. Merrill	19,900
Carol Weir Peterson	19,880

3. The protest was dismissed by the BCBE at a preliminary hearing held on November 28, 2012, with the order of dismissal signed on December 3, 2012.

4. The College includes portions of precincts 66.1 and 65.1. Precinct 66.1 is in Buncombe County Commission District 1 and Precinct 65.1 is in Buncombe County Commission District 2. The building used as the College mailing facility is located at 701 Warren Wilson Drive, but is not a residential address. It is located in District 1. Warren Wilson Road has been the dividing line between precincts 66.1 and 65.1 for a number of years, but is also now the dividing line of the newly-created County Commission Districts 1 & 2.

5. On October 31, 2012, during the one-stop absentee voting period, BCBE discovered that many student voters had listed their residential address as 701 Warren Wilson Drive, and had not provided the address where they resided on the campus.

6. After consultation with staff of the State Board, the BCBE sent an email to early voting officials instructing them to ask voters with an address of 701 Warren Wilson Road to provide additional address information. The voters were asked to indicate on an attached map which side of Warren Wilson Road they lived on. Those living on the south side of the road were to receive ballot style G007, which included the race for Buncombe County Commission District 1, and those on the north side of the road, which included Buncombe County Commission District were to receive ballot style G003. The voters also were asked to fill out a voter registration form, to list their residential address on a provisional envelope, and to vote provisionally.

7. For the absentee voters who indicated 701 Warren Wilson Road as their residential address, the BCBE staff attempted to contact them to ascertain their correct assignment. Four students indicated that they would return on election day to vote and their absentee ballot was cancelled. Six students instructed the BCBE to count only those races for which the student was eligible. One student informed the BCBE that she had moved out of N. C. and she was removed from the voter registration database. The BCBE was unable to contact five students to determine their correct assignment so their absentee ballot was counted for all races other than for District 1 or 2 County Commission seats. Twenty-seven voters were correctly issued ballots for District 1. Thirty-one voters were mailed new ballots, but the new ballots were not returned so their absentee ballot was partially counted for the races for which they were eligible and not for the District 1 or 2 Buncombe County Commission races. Eighteen voters were issued new ballots; their incorrect ballot was pulled and the newly submitted, correct ballot was counted.

8. Of the 18 voters who returned correct replacement ballots, all but two of the ballots were postmarked on or before election day, November 6, 2012.

9. In accordance with the State Board's Executive Director's Directive 2012-28 and staff instructions, the BCBE made determinations of residency and proper ballot style at its canvass by using the official, notarized housing list for student dorm assignments provided by Joyce Milling, the Interim Director of Residence Life at Warren Wilson College. If the College list indicated that the student lived on the north side of the dividing line, but the voter indicated that they lived on the south side, priority was given to the voter's statement of residence.

10. The BCBE reviewed all the ballots at issue during canvass and determined that all ballots were properly counted in the correct precinct in which the relevant voters were allowed to vote

and for the offices for which they were entitled to vote. The BCBE made this determination after specifically reviewing 44 provisional ballot applications that did not have a dorm name written on them, but did have information added to the envelope by elections officials based on information collected from the voter or the housing list of the College.

CONCLUSIONS OF LAW

1. Two ballots that were postmarked after election day of the 18 correct ballots returned should not have been counted by the BCBE. One other ballot cast by a voter for whom the BCBE did not have an indication of residence also should not have been counted. But these three ballots were insufficient to affect the outcome of the election since the difference between the second and third place candidates was 18 votes.

2. The protest was properly dismissed at the preliminary hearing held by the Buncombe CBE pursuant to N.C. Gen. Stat. § 163-182.10(a) because there is no probable cause to believe any violation of election law, irregularity, or misconduct has occurred with respect to the Buncombe County Commission, District 2 race.

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED, by unanimous vote, that the appeal of Christina Kelley G. Merrill be, and the same is, hereby **DENIED**, and the protest order of the BCBE be, and the same is, hereby affirmed.

This the ____ day of December, 2012.

Larry Leake, Chairman
North Carolina State Board of Elections