

Challenging the Results in Elections to Council of State Offices and the General Assembly: Relationship of Election Protests and Election Contests

North Carolina’s election laws provide for challenges to the apparent outcome of an election by an unsuccessful candidate.

For the great majority of elective offices, the challenge consists of an election protest that is initiated in the county boards of elections, decided by the State Board of Elections, and appealed to the superior court of Wake County and then to the appellate courts. The courts make the final decision. Let’s call this the “State Board protest procedures.”

For two sets of offices, however, the courts do not make the final decision. For those offices—Council of State seats (including Governor) and seats in the North Carolina Senate and House of Representatives—the final decision in an election challenge rests with the General Assembly, not the courts. Let’s call this the “General Assembly contest procedures.”

This memorandum concerns the relationship between the State Board protest¹ procedures² and the General Assembly contest³ procedures.⁴

State Board protest procedures

Under the State Board protest procedures, a trailing candidate⁵ may initiate a protest with the county board of elections. She must file a protest, at the very latest, by the end of the second day after the canvass.⁶ The county board and, ultimately, the State Board of Elections may consider the protest. The State Board may rule in favor of the trailing candidate, and, if so, it may take any of several actions, including ordering a new election.⁷ Or it may rule in favor of the winning candidate. In either case, the ruled-

¹ “Protest” is the statutory term for a challenge under the State Board protest procedures.

² Found in Article 15A of G.S. Chapter 163.

³ “Contest” is the statutory term for a challenge under the General Assembly contest procedures.

⁴ Found in Article 3 of G.S. Chapter 120.

⁵ G.S. 163-182.9(a) does not limit the filing of protests to trailing candidates. It provides that any registered voter and any candidate in the election may file a protest.

⁶ G.S. 163-182.9(b)(4).

⁷ G.S. 163-182.13. The State Board is empowered to order new elections. County boards of elections do not have that authority.

against candidate⁸ may appeal to the superior court. If there is no appeal, the certificate of election is issued 10 days after service of the State Board’s final decision. If there is an appeal, a certificate is issued anyway unless the superior court issues a stay within that 10-day period.⁹

General Assembly contest procedures

The North Carolina Constitution provides that a contested election for a Council of State office is to be determined by joint ballot of both houses of the General Assembly “in the manner prescribed by law.”¹⁰

In connection with the contested 2004 Superintendent of Public Instruction race, it was discovered that there were in fact no statutory provisions governing such election contests in the General Assembly. As a result, the General Assembly in 2005 enacted G.S. 163-182.13A, amended a number of other provisions of G.S. Chapter 163, and amended Article 3 of G.S. Chapter 120.¹¹ Together, these 2005 enactments implemented the General Assembly contest procedures.

In addition, the North Carolina Constitution provides that each house of the General Assembly “shall be the judge of the qualifications and elections of its own members.”¹² In 2005 there were in place bareboned statutory provisions for handling challenges in legislative elections, but the 2005 enactments revised those provisions, making the new General Assembly contest procedures applicable to challenges involving legislative elections as well as elections for Council of State offices.

Under the General Assembly contest procedures, an unsuccessful candidate in a Council of State or legislative race may initiate a contest by filing a written “notice of intent to petition for a contest.”¹³ This notice of intent may be filed no earlier than the date of the canvass and no later than the latter of (1) 10 days after a certificate of election has been issued or (2) 10 days after the conclusion of the Chapter 163 standard protest procedure, and in no event more than 30 days of the convening of the General Assembly.

The statutes then detail the process that the General Assembly is to follow in making its determination with regard to the election contest.

Relationship between the procedures

Some elements of the relationship between the State Board protest procedures and the General Assembly contest procedures are clear:

⁸ G.S. 163-182.14(b) says the appeal may be taken by “an aggrieved party.” That term is not defined in this statute [though the term “person aggrieved” is defined in the Administrative Procedures Act in G.S. 150B-2(6)], but it surely includes the ruled-against candidate.

⁹ G.S. 163-182.15(a) and (b).

¹⁰ Article VI, Sec. 5.

¹¹ S.L. 2005-3.

¹² Article II, Sec. 20.

¹³ G.S. 120-10.3.

An unsuccessful candidate in a Council of State or legislative race may file a protest under the State Board protest procedures. An appeal from a final decision by the State Board is to the General Assembly, not to the courts, under the General Assembly contest procedures.¹⁴

No certificate of election is to be issued in a Council of State or legislative race if a notice of intent has been filed under the General Assembly contest procedures.¹⁵

Voters as well as candidates can begin the protest procedure leading to a State Board decision, but only candidates may begin a contest in the General Assembly.¹⁶

Any judicial proceeding abates upon the initiation of a contest.¹⁷

Questions regarding the relationship between the procedures

The 2005 enactments raise several questions.

First question: May a trailing candidate go straight to the General Assembly?

Must an unsuccessful legislative or Council of State candidate file a protest under the State Board protest procedures, or may she pursue the General Assembly contest procedures alone? That is, may she simply file a notice of intent under the General Assembly contest procedures and have the matter determined by the General Assembly with no involvement by the county or state elections boards?

Answer to the first question

It appears that the unsuccessful candidate may pursue the General Assembly contest procedures without filing a protest under the State Board protest procedures. There is no explicit requirement that she pursue the State Board protest procedures.

Perhaps it was the legislative expectation that the unsuccessful candidate would first follow the State Board protest procedures all the way through a final decision by the State Board. After all, G.S. 163-182.14(c) provides that the route of appeal from a final decision of the State Board for an unsuccessful candidate in a Council of State or legislative race is to the General Assembly. Clearly, the unsuccessful candidate may pursue the protest under the State Board protest procedures all the way through a final decision by the State Board. But must she?

G.S. 120-10.3 implies that she need not, in that it permits the filing of the notice of intent to contest as soon as canvass day. At that early date there could not yet be a final decision of the State Board under the State Board protest procedures. If the

¹⁴ G.S. 163-182.14.

¹⁵ G.S. 163-182.14.

¹⁶ G.S. 182.9(a), G.S. 163-182.14(b), G.S. 163-182.14(c), and G.S. 120-10.3(a).

¹⁷ G.S. 163-182.13A(j) and G.S. 120-10.11.

candidate need not wait for a final decision of the State Board, it would seem that she need not initiate the State Board protest procedure at all.

Additional consideration. It may be that the General Assembly could, by rule, require that candidates pursue a protest all the way through a decision of the State Board before filing a contest in the General Assembly. The General Assembly contest procedures are set out in Article 3 of G.S. Chapter 120. Those statutory provisions lay out the process by which a contest is started and by which the General Assembly considers it. The very first statutory provision—G.S. 120-10.1—directs that the process be followed. It does, however, appear to empower the General Assembly to override the process by adopting different rules. It says that the process is to be followed “[e]xcept as otherwise provided by rules” adopted by the General Assembly.¹⁸ That would seem to mean that the General Assembly could adopt rules governing contests that would provide that contests could be initiated in the General Assembly only after a protest has been fully pursued under the State Board protest provisions.¹⁹

Second question: What if the State Board issues a certificate of election?

Suppose a legislative or Council of State candidate pursues a protest under the State Board procedures. Suppose the State Board rules against her and, before she appeals to the General Assembly, the State Board issues a certificate of election to her opponent. May she then file a notice of intent under the General Assembly contest procedures?

Answer to the second question

It appears that she can. G.S. 120-10.3 permits the filing of the notice of intent within 10 days *after* a certificate of election has been issued.

¹⁸ The full provision begins, “Except as otherwise provided by rules of the house . . .” The term “house” as used there refers to the Senate or the House of Representatives, as appropriate, when that chamber is considering a contest of an election to that chamber. The Senate considers Senate contests and the House considers House contests. Each house may, the statute provides, adopt its own rules. The phrase “[e]xcept as otherwise provide by rules” also applies to contests of Council of State elections. Under G.S. 163-182.13A(a), “the provisions of Article 3 of Chapter 120 shall apply to contested elections under this section,” meaning Council of State elections. Presumably in the case of Council of State elections, the phrase “[e]xcept as otherwise provide by rules” would refer to rules adopted by both houses, not just one house.

¹⁹ There is an interesting issue regarding timing. It seems likely that most notices of intent initiating a contest in the General Assembly will be filed in December, in order to meet the deadlines set out in the statute—G.S. 120-10.3—and mentioned above at footnote 13. The General Assembly sitting at that time would have been elected two years earlier. But the General Assembly that will in fact rule on the contest is the next one, the one elected at the same election giving rise to the contest. G.S. 120-10.10 clearly so provides. That new General Assembly will take office in January. Given this timing, it appears likely that any rules adopted by the old General Assembly will govern the filing of the notice but any rules adopted by the new General Assembly will govern the determination of the contest.

Third question: Can a protest and a contest go on at the same time?

Suppose a legislative or Council of State candidate pursues a protest under the State Board procedures. While that process is proceeding, may the candidate file a notice of intent for a contest in the General Assembly and pursue that route concurrently?

Answer to the third question

With the caveat set out above as an “additional consideration,” it appears that she could pursue both routes concurrently.²⁰

Fourth question: Can a State Board order for a new election be contested in the General Assembly?

Suppose a trailing legislative or Council of State candidate files a protest with the State Board but does not file a contest in the General Assembly. Suppose then that the State Board orders a new election.²¹ Could the candidate who appeared initially to be the successful candidate now file a notice of intent under the General Assembly contest procedures as an “unsuccessful candidate,” on the grounds that he appeared to be the winner and must now face a new election?

Answer to the fourth question

For Council of State Offices, the answer is certainly yes: “A decision [by the State Board] to order a new election is considered a final decision for purpose of seeking review of the decision.”²²

For legislative seats, the answer appears to be yes. A notice of intent under the General Assembly contest procedures may be filed by an “unsuccessful candidate.”²³ That term is defined as a candidate “who has not been issued a certificate of election.” When a new election is ordered, it appears that each candidate is an “unsuccessful candidate.” Each could file a notice of intent.

Fifth question: What if the protester is a voter rather than a candidate?

Suppose in a legislative or Council of State election a protest is filed under the State Board protest procedures by a voter, rather than by a candidate. Suppose that the State Board rules against the voter in the protest. May the voter appeal the State Board decision to the superior court in Wake County and then possibly to the appellate courts?

²⁰ G.S. 120-10.3(b) provides that, at the latest, a notice of intent under the General Assembly contest procedures must be filed within 30 days of the convening of the General Assembly. Surely if it appears that the State Board will not have finished considering the protest by that time, the protesting candidate may file a notice of intent under the General Assembly contest procedures.

²¹ Under G.S. 163-182.13.

²² G.S. 163-182.14(a).

²³ G.S. 120-10.3(a).

Answer to the fifth question

The answer to this question appears to be no. It is certainly true that a voter may file a protest under the State Board protest procedures.²⁴ The voter then may appeal to the State Board.²⁵ But may the voter then appeal to the superior court?

Under the State Board protest procedures, an “aggrieved person” has the right to appeal the final decision of the State Board to the superior court.²⁶ The protest-filing voter would appear to be such an “aggrieved person,” and in protests regarding all elections other than legislative and Council of State elections, the voter would appear to have the right to appeal to the superior court.

But in the case of legislative and Council of State elections, it appears that the protest-filing voter may not appeal from the final decision of the State Board at all. The statute granting an “aggrieved person” the right to appeal expressly says that it applies “[e]xcept in the case” of legislative and Council of State elections.²⁷ For those elections, the statute provides that “an unsuccessful candidate has the right to appeal the final decision to the General Assembly.”

Reading these provisions together, the appeal from the State Board decision regarding a legislative or Council of State election is available only to an unsuccessful candidate and may be taken only to the General Assembly.

Sixth question: Could the parties agree to settle the matter in court rather than in the General Assembly?

Suppose the protester and the respondent both preferred to litigate the State Board’s final decision by appeal to the courts rather than by a contest in the General Assembly. Could they by agreement take the appeal to the superior court (and ultimately to the appellate courts)?

Answer to the sixth question

No. The statutory provision allowing appeals from a State Board order to the superior court in Wake County says that it applies “[e]xcept in the case of a general or special election to either house of the General Assembly or to [a Council of State] office.”²⁸ It then says that for those offices “an unsuccessful candidate has the right to appeal the final decision to the General Assembly”²⁹ There is no statutory right to appeal

²⁴ G.S. 182.9(a) clearly permits a registered voter of the county who was eligible to vote in the election to file a protest.

²⁵ G.S. 163-182.11(a) provides that an appeal to the State Board may be taken by, among others, “[t]he person who filed the protest.”

²⁶ G.S. 163-182.14(b).

²⁷ G.S. 163-182.14(b).

²⁸ G.S. 163-182.14(b).

²⁹ G.S. 163-182.14©

from a final decision of the State Board to the superior court, even if the parties would like to go that route.

Further, in a 1920 decision, the North Carolina Supreme Court held that the courts are without jurisdiction to hear a challenge to the seating of a member of the House of Representatives. It cited the provision of the Constitution that each house is the judge of the qualifications and elections of its members. It said that that provision has the effect of “withdrawing the inquiry from the consideration of the courts.”³⁰

The same principle would apply with respect to challenges in Council of State office elections.

Desirability of statutory amendment

The intent behind the statutes setting up the General Assembly contest procedures may have been to require that the contestant first pursue a protest under the State Board protest procedures. That intent would be reasonable. County boards of election and the State Board are accustomed to handling election protests. They have procedures in place for dealing with the likely evidentiary issues that arise in a protest. On receiving a contest as an appeal from a final decision of the State Board, the General Assembly would get the benefit of both the evidentiary record developed by the State Board and the board’s reasoning in reaching its determination.

If that is in fact the intent, amendments to the statutes could make that clear.

³⁰ Alexander v. Pharr, 179 N.C. 699 (1920). The action was a quo warranto challenge. The relevant provision in the Constitution as it stood at that time is the same as the provision in the current Constitution of 1971.