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## **Coates' Canons Blog: Challenging the Results in Elections to Council of State Offices and the General Assembly: How is it Done?**

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[For a fuller discussion, with statutory citations, click]

North Carolina's election laws provide two different ways for losing candidates to challenge an election—one way for most elections and one way for top state offices.

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. This is the way protests work for county offices, city offices, school boards, and judicial offices.

But for two sets of offices the courts do not make the final decision. For those offices—Council of State seats (including governor, Lt. governor, attorney general and six other executive branch offices) 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.

How do the two kinds of challenges fit together?

### **Protests for most offices**

For those city, county, school, and judicial offices, a trailing candidate may initiate a “protest” with the county board of elections. She must file the protest, at the very latest, by the end of the second day after the canvass. 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. Or it may rule in favor of the winning candidate. In either case, the ruled-against candidate may appeal to the superior court.

### **Contests for the top offices**

By contrast, 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. And it provides that each house of the General Assembly “shall be the judge of the qualifications and elections of its own members.”

For those top offices, an unsuccessful candidate may initiate a “contest” in the General Assembly by filing a written “notice of intent to petition for a contest.” This notice 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 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:

An unsuccessful candidate in a Council of State or legislative race may file a protest leading to a State Board decision, just

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as city, county, school, and judicial candidates can. But for the top offices, an appeal from that decision is to the General Assembly, not to the courts.

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

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.

Any judicial proceeding involving the candidates abates upon the initiation of a contest.

### **Questions regarding the relationship between the procedures**

The statutes raise several questions.

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

Must an unsuccessful legislative or Council of State candidate use the regular protest procedures, or may she pursue a contest in the General alone? That is, may she have the matter determined by the General Assembly with no involvement at all by the county or state elections boards?

Answer to the first question

It appears that the unsuccessful candidate may pursue a contest in the General Assembly without filing a protest under the regular elections boards protest procedures. There is no explicit requirement that she involve the boards of elections.

Perhaps it was the legislative expectation that the unsuccessful candidate would first pursue a protest all the way through a final decision by the State Board. After all, the statutes do touch on the subject. They provide 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 a protest, all the way through a final decision by the State Board. But must she?

The statutes imply that she need not. They permit the filing of the notice in the General Assembly as soon as canvass day. At that early date there could not yet be a final decision of the State Board. If the candidate need not wait for a final decision of the State Board, it would seem that she need not pursue a protest to the State Board 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 statutes lay out in some detail the process that the General Assembly is to follow in considering an election contest. They appear, however, to empower the General Assembly to override the process by adopting different rules. They say that the process is to be followed "[e]xcept as otherwise provided by rules" adopted by the General Assembly. That would seem to mean that the General Assembly could adopt rules saying that contests could be initiated in the General Assembly only after a protest has been pursued to a final decision of the State Board.

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

Suppose a legislative or Council of State candidate pursues a protest to a final decision of the State Board. 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 in the General Assembly?

Answer to the second question

It appears that she can. The statutes permit the filing of the notice of intent within 10 days *after* a certificate of election has been issued.

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

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Suppose a legislative or Council of State candidate pursues a protest under the elections boards protest procedures. While that process is proceeding, may the candidate file a notice of intent 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.

Fourth question: Can an new election order be contested in the General Assembly?

Suppose a trailing legislative or Council of State candidate files a protest that goes to the State Board. Suppose then that the State Board orders a new election. Could the candidate who appeared initially to be the winner 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: The statutes say, “A decision [by the State Board] to order a new election is considered a final decision for purpose of seeking review of the decision.”

For legislative seats, the answer appears to be yes. A notice of intent may be filed in the General Assembly, may be filed by an “unsuccessful candidate.” That term is defined as a candidate for a legislative seat “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 an election board protest is filed 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?

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. The voter then may appeal to the State Board. But may the voter then appeal to the superior court?

The statutes say that an “aggrieved person” has the right to appeal the final decision of the State Board to the superior court. 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 does not apply in the case of legislative and Council of State elections. For those elections, the statute provides that “an unsuccessful candidate has the right to appeal the final decision to the General Assembly.” It gives a protesting voter no route of appeal.

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.

**Desirability of statutory amendment**

The intent behind the statutes may have been to require that the contestant for legislative seats or Council of State offices pursue a protest to a final decision of the State Board. That intent would be reasonable. County boards of elections 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.

## Links

- [www.sog.unc.edu/resources/microsites/knapp-library/elections-and-politics](http://www.sog.unc.edu/resources/microsites/knapp-library/elections-and-politics)