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08 NCAC 02.0112 APPEAL TO THE STATE BOARD OF ELECTIONS
All appeals of a county board of election protest decision must use the following form:

APPEAL OF ELECTION PROTEST TO STATE BOARD OF ELECTIONS
(Use of this form is required by G. S. 163-182.11 (a))

A copy of this appeal must be given to the county board of elections within 24 hours (weekends and holidays excluded) after the county board files its written decision at its office. The same appeal must be filed with or mailed to the State Board of Elections by the end of the second day following the county board decision if the protest involves a first primary. As to a protest of any other election, this appeal must be filed or deposited in the mail by the end of the fifth day following the county board decision. See 163-182.11 (a). A copy of the original election protest form with attachments must be filed with this appeal. A copy of the county board decision must be filed with this appeal. The county board will provide the record on appeal. As many additional sheets as are necessary to answer the questions below may be attached, but they must be numbered. Please print or type your answers.

1. Full name, mailing address, home and business phone, fax number, and e-mail address of undersigned.

Full Name: Christina Kelley Gallegos-Merrill
Mailing Address: 10 Merrills Road
Fletcher, NC 28732
Home Phone: 828-423-6190
Business Phone: 828-423-6190
Fax Number: 828-628-1575
E-Mail Address: kelleycoproductions@yahoo.com

2. Are you the person who filed the original protest, a candidate or office holder adversely affected by the county decision, or someone else whose interest has been adversely affected by the county decision?

Christina Kelley Gallegos-Merrill filed the original protest. She is a candidate for the office of Buncombe County Board of Commissioners, District 2, and has been adversely affected by the county decision.

3. State the date, place, kind of election, and results of the election protested (if different from the information on the election and its results as set out in the attached original protest form).

The information is set out in the attached original protest form, which is adopted and incorporated herein.

4. State the name, mailing address, home phone, and business phone of all candidates involved in the protested election.

Mike Fryar
2 Lakeview Drive, Fairview, NC 28730
828-628-1060

Ellen Frost
1420 North Fork Road, Black Mountain. NC 28711
828-275-8662

Christina Kelley Gallegos-Merrill
10 Merrills Road, Fletcher, NC 28732
828-423-6190

Carol Peterson
230 Brush Creek Road, Fletcher, NC 28732
828-628-1349

5. State the date of the county board hearing: November 28, 2012.
6. State the legal and factual basis for your appeal.
 - a. The BCBOE failed to properly consider the protest to determine whether probable cause existed;
 - b. The BCBOE reviewed documents (including non-verified written statements) and listened to the statements of employees and others, who were not sworn and not subject to cross examination, in making its determination;
 - c. The BCBOE denied the Protester the right to present testimony of witnesses and other documentary evidence;
 - d. The BCBOE denied the Protester the right to cross examine those employees and others that presented statements;
 - e. The BCOE did not allow those ballots in question to be examined;
 - f. The BCOE failed, despite several requests, to provide the Protester's representatives with relevant documents in a timely fashion prior to the Hearing, thereby prohibiting the Protester and her representatives from being able to review those documents prior to the Hearing;
 - g. The BCBOE exceeded its authority;
 - h. The BCBOE, as a quasi-judicial board, failed to fulfill its duties in a fair and impartial manner;
 - i. The BCBOE denied the Protester her constitutional rights;
 - j. The BCBOE utilized the wrong standard of proof in determining whether probable cause existed;
 - k. The BCBOE dismissed the protest on the grounds of lack of probable cause when, in fact, probable cause existed;
 - l. The BCBOE denied the Protester her right to an evidentiary hearing;
 - m. The BCBOE failed to comply with, and otherwise enforce, relevant provisions of Chapter 163 of the North Carolina General Statutes;
 - n. The Findings of Fact contained in the BCBOE's Order are not substantiated or supported by any evidence;
 - o. The Findings of Fact contained in the BCOE's Order do not support or otherwise substantiate the Conclusion of Law contained therein;
 - p. The Conclusion of Law contained in the BCOE's Order does not support or otherwise substantiate the Order contained therein; and
 - q. Certain Findings of Fact contained in the BCBOE's Order establish the existence of probable cause.

7. Is there any material submitted with this appeal that was not presented to and considered by the county board? If so, please identify and state why it was not presented to the county board. Why do you think the State Board of Elections should consider it?

No such material is submitted with this appeal. The BCBOE refused to accept any materials (evidence) from the Protester or her representative.

8. Normally the State Board will make its decision in an appeal based upon the record from the county board. If you desire the record in this matter to be supplemented, additional evidence to be considered, or a completely new hearing, please state such desire and why it should be allowed on appeal. See 163-182.14 (b).

The Protester desires that the State Board of Elections hold a completely new Preliminary Hearing to determine whether probable cause exists from the written protest. If the State Board considers matters (evidence) outside the written protest, then the Protester desires to supplement the record and that the State Board consider additional evidence. In the alternative, should the State Board refuse to hold a completely new Preliminary Hearing, then the Petitioner requests the State Board to remand the matter to the county board for further proceedings in compliance with an appropriate order of the State Board. The Protester's desire should be allowed due to the legal and factual basis for the appeal set forth in 6, above.

9. What relief do you seek? Why?

The Protester seeks the following relief:

- a. a reversal of the BCBOE's dismissal of the protest;
- b. the protest proceed to an Evidentiary Hearing; and
- c. for the relief requested in the protest.

The Protester seeks the aforementioned relief because there was an initial vote margin of 13 votes and hundreds of votes in question. Additionally, the irregularities complained of in the Protest are sufficient to have affected or cast doubt upon the results of the protested election. Also see the legal and factual basis for the appeal set forth in 6, above.

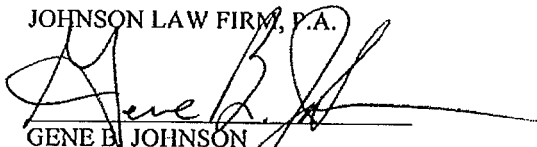
10. Have you read and reviewed G.S. 163-182.11 through 163-182.14 and the current North Carolina State Board of Elections regulations on appeals of election protests?

Yes.

11. Besides a copy of the original protest and the county board decisions, this appeal includes 3 pages of answers and 0 pages of exhibits and documents not included in the original protest.


Christina Kelley Gallegos-Merrill
Signature of Person Appealing

12-4-12
Date Appeal Signed

BY: 
JOHNSON LAW FIRM, P.A.
GENE B. JOHNSON
State Bar No.: 15917
Attorneys for Protester
P.O. Box 1288
Arden, NC 28704
828-650-0859 (Telephone)

Date appeal received by State Board of Elections

(To be entered by the State Board of Elections staff)

Send your appeal to, or if you have questions contact: North Carolina State Board of Elections, P.O. Box 27255, Raleigh, NC 27611-7255, (919) 733-7173.

History Note: Authority G.S. 163-22; 163-182.11
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

BEFORE THE BUNCOMBE COUNTY
BOARD OF ELECTIONS

IN THE MATTER OF
PROTEST FILED BY:

PROTEST ORDER

CHRISTINA KELLEY G. MERRILL

THIS MATTER CAME BEFORE THE BUNCOMBE COUNTY BOARD OF ELECTIONS on November 28, 2012, upon preliminary consideration of an alleged election protest filed by Christina Kelley G. Merrill with the Buncombe County Board of Elections ("BCBOE") alleging errors in voter addresses in determining which ballot type was appropriate for individuals who indicated on provisional ballots that they lived at 701 Warren Wilson Road. Present for this Board were Jones Byrd, Lucy Smith and Robert Van Wagner as well as Election Services staff. Ms. Merrill was present and represented at this meeting by Gene Johnson. The BCBOE opened the meeting on November 28, 2012 at 5:30 p.m.

Based upon the review of information, the Protest and arguments presented to the Board in this matter by interested parties and counsel, the BCBOE hereby makes the following:

FINDINGS OF FACT

1. Christina Kelley G. Merrill is a candidate for Buncombe County Commission District 2 and she has caused documents ("Protest") to be filed with the BCBOE on November 20, 2012 a copy of which is attached hereto and marked Exhibit "A" and the content of which speaks for itself.
2. The Protest was timely filed and appears to substantially comply with GS §163-182.9.
3. The Protest alleges irregularity or misconduct and the possibility of a violation of law concerning several hundred voters who are at Warren Wilson College ("College").
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 College mail facility is located at 701 Warren Wilson Road. The building located at 701 Warren Wilson Drive is not a residential address and is located in District 1.
5. Warren Wilson Road now is the dividing line between Precincts 66.1 and 65.1.

6. BCBOE 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 and those on the north side of the road were to receive ballot style G003. Those voters were asked to fill out a voter registration, to list their residential address on a provisional envelope, and to vote provisionally. Provisional ballots were obtained from 136 individuals through this process.
7. Of the 136 provisional ballots, 75 voters were determined to live in District 2 (ballot style G003) and 61 voters were determined to live in District 1 (ballot style G007). Of the 75 provisional voters determined to live in District 2, 44 voters indicated the 701 Warren Wilson Road as their residential address despite the fact that no one lives at that address.
8. In accordance with State Board of Elections directive and instructions, the BCBOE made determinations of residency and proper ballot style at Canvass by using the official housing list for student dorm assignments provided by Joyce Milling, the Interim Director of Residence Life at Warren Wilson College. During the Canvass meeting there were provisional envelopes having student indications of North or South as to where the students resided, and if the school list indicated that the student lived on the North side, but the student had indicated that they lived on the South side, priority was given to the student's indication. Further, if no indication was given, the determination was made based on the school list. Thereafter, when the BCBOE looked at the ballots, if it was determined that the student was not eligible for certain races, the ballot became a partial ballot and only eligible races were counted.
9. In making a determination of whether the provisional ballots in question were partial provisional ballots, where there was no indication of North or South on the envelope and if the student's name did not appear on the list, it would have been a partial provisional.
10. The Protest alleges that the 44 provisional ballot envelopes did not have the dorm names or an indication of North or South on them, and further alleges that the Board violated state statutes by unilaterally changing the student's addresses.
11. The BCBOE had received State Board Memo 2012-28 instructing the BCBOE to rely upon all available information to use at Canvass. Staff sought the State Board's advice all along the way and fulfilled their policies.
12. At Canvass the BCBOE centered its inquiry on where the individual sleeps at night to determine residency for purposes of ballot style
13. The preliminary consideration applicable to the initial consideration of election protests by a county board of elections as set forth in GS §163-182.10(a) requires a determination of whether the protest "establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred."

14. The Protest alleges that 44 ballots did not have a dorm name and that information was added to the envelope after the fact.

15. The BCBOE takes notice that GS §163-57 gives the BCBOE the authority to determine the residence of a person offering to register or vote and provides the rules applicable thereto.

16. The BCBOE has an indication of residence for these voters of either North or South on the map, or from a list the housing office for all but one student voter.

17. The BCBOE reviewed all the provisional 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.

Based upon the foregoing Findings of Fact, the BCBOE hereby makes the following:

CONCLUSION OF LAW

In this preliminary hearing on the Protest, there appears to be no probable cause to believe a violation of election law, irregularity, or misconduct has occurred.

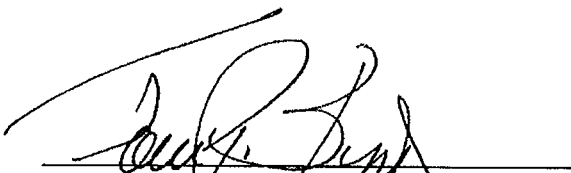
Base upon the foregoing Findings of Fact and Conclusions of Law, the Buncombe County Board of Elections hereby Orders as follows:

ORDER

It is therefore ORDERED, ADJUDGED and DECREED:

The said Protest of Christina Kelley G. Merrill filed with the Buncombe County Board of Elections on November 20, 2012 be, and the same is, hereby dismissed.

This 3rd day of December, 2012.



Jones Byrd, Chair
Buncombe County Board of Elections

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ELECTION PROTEST
(Use of this form is required by G.S. 163-182.9(c))

This form must be filed with the county board of elections within the timeframes set out in G.S. 163-182.9 (b)(4). Please print or type your answers. Feel free to use and attach additional sheets if needed to fully answer the questions below. You may also attach relevant exhibits and documents. Please number the pages of such additional sheets and attachments.

- 1. Full name and mailing address of person(s) filing the protest.

Christina Kelley Gallegos-Merrill
10 Merrill's Rd.
Fletcher, NC 28732

- 2. Home and business phone number, fax number, and e-mail address.

Christina Kelley Gallegos-Merrill
828-423-6190
kelleycoproductions@yahoo.com

- 3. Are you either a candidate or registered voter eligible to vote in the protested election. If a candidate, for what office?

Christina Kelley Gallegos-Merrill is a candidate for the office of Buncombe County Board of Commissioners District 2 and is a registered voter in Buncombe County eligible to vote in the protested election and who did vote in the protested election.

- 4. List the date, location, and exact nature of the election protested. Name all candidates in the election and the number of votes each received. Note the winning candidate(s) elected or nominated.

The election protested is the November 6, 2012, general election for the office of the Buncombe County Board of Commissioners District 2.

Candidates	Votes
Mike Fryar	19,993
Ellen Frost	19,904
Christina Kelley Gallegos-Merrill	19,891
Carol Peterson	19,870

- 5. Does this protest involve an alleged error in vote count or tabulation? If so, please explain in detail. No.

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6. Does this protest involve an irregularity or misconduct not described in number 5 above? If so, please give a detailed description of such misconduct or irregularity and name those who committed such action.

This protest concerns several hundred voters who are purportedly students at Warren Wilson College. Warren Wilson College (hereinafter the "College") is a small college located in Buncombe County, North Carolina.

The College campus includes portions of precincts 66.1 and 65.1 of Buncombe County. Precinct 66.1 is in county commission district 1 and Precinct 65.1 is in county commission district 2. There are dormitories in both precincts.

The College has a mail facility located at 701 Warren Wilson Road which address is in Precinct 66.1 and District 1. Upon information and belief 701 Warren Wilson Road is not a residential address. Warren Wilson Road is the dividing line between Precincts 66.1 and 65.1.

The Buncombe County Board of Elections (hereinafter the "Board") staff determined that there were voters who were registered to vote in Precinct 66.1 who reside in Precinct 65.1.

Upon information and belief many of the voters have previously voted in Precinct 66.1.

Upon information and belief the residency of the individuals attending the College changes frequently.

The Board, by and through its staff, sent out a directive (hereinafter the "Directive") to its early voting officials to inquire of each voter registered at 701 Warren Wilson Road which "side of the road they live on." See Exhibit A attached hereto. The Directive further instructed the early voting officials to have all voters with a 701 Warren Wilson Rd. address of registration vote a provisional ballot and provide the voter with a ballot style reflective of the voter's answer.

136 provisional ballots were obtained as a result of the Directive. 19 of which were Same Day registrants (9 in precinct 65.1 and 10 in precinct 66.1.) The Board obtained a list of students from the College and based upon the addresses (dorms) in the list determined which district and precinct each of the provisional voter resided. Upon information and belief the list provided by the College is unsworn and without any affirmation as to its integrity. Upon information and belief no inquiry was made about the accuracy of the list or how it is maintained or how often updated.

Of the 136 provisional ballot voters 75 were determined to live District 2 ballot style (ballot style G003) and 61 were determined to live in District 1 (ballot style G007.)

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Of the 75 provisional voters determined to reside in Precinct 65.1 (District 2), 44 voters reaffirmed their 701 Warren Wilson Road (District 1) while completing the provisional ballot envelope which solicits the voter's residence including the "dorm."

Pursuant to the Board's determination of voter residency, there should have been 75 style G003 ballots and 61 style G007 ballots; however the Board, upon opening the provisional ballot envelopes at canvas, determined that incorrect ballot styles were presented to the voters in some instances.

Using notations marked in writing on the provisional ballot envelope such as "north" and "south" the Board, during canvas, approved many of the provisional ballots. The Board relied upon these notations in determining whether a voter received the correct ballot style. It is unclear who made the notations on the envelopes.

The Board erred in that it determined that voters intended to register in precincts and districts contrary to the intentions stated by the voters on the provisional ballot envelope.

Some voters failed, after repeated opportunity, to provide their residential address as was their obligation. The Board erred in failing to ascertain the correct address and in counting ballots of voters which are not lawfully registered.

The Board erred by providing provisional ballots to ineligible voters contrary to NCGS 163-166.11 in that the voter must execute "a written affirmation" stating that the individual is a registered voter in the jurisdiction in which the individual seeks to vote and is eligible to vote in that election. At least 44 individuals affirmed that they resided in Precinct 66.1 (District 1) and the Board attempted to provide them with precinct 65.1 style ballots.

The Board erred by removing voters from their registered precinct without authority and in disregard to the NCGS 163-82.1.

The Board erred in using unsworn, unreliable information in attempting to determine the residency of individuals for voting purposes.

7. Please set out all election laws or regulations that you allege were violated in your responses to 5 or 6 above. State how each violation occurred. Please provide the names, addresses, and phone numbers of those who you allege committed such violations.

The election laws violated and the nature of the violations have been specified above. The violations were committed during the course of counting and canvassing of votes by the Buncombe County Board of Elections.

8. Please provide the names, addresses, and phone numbers of any witnesses to any misconduct alleged by you in this protest, and specify what each witness listed saw or knows.

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Mark Delk, of 20 Spring Valley Drive, Arden NC 28704 was a witness to the official acts complained of in this protest. Mr. Delk observed the deliberations and voting of the Buncombe County Board of Elections during the course of the violations complained of herein.

Trena Parker is the Director of the Buncombe County Board of Elections and was responsible for the administration of the election the subject of this protest.

Rachel Rathbone is an employee of the Buncombe County Board of Election and the author of the aforesaid Directive.

9. What action do you desire the county board of elections to take in this matter?

The illegal votes which were counted, tabulated and included in the canvass in violation of state law, as described and complained of herein, should be removed from the official count and canvass of votes. The returns in the election for the office of Buncombe County Commission should be corrected in accordance with law.

10. Do you contend the allegations set out by you are sufficient to have affected or cast doubt upon the results of the protested election? If your answer is yes, please state the factual basis for your opinion.

The question of whether the irregularities complained of herein are sufficient to have affected or cast doubt upon the results of the protested election cannot be determined at this time, based upon existing evidence. However, there is a 13 vote margin and hundreds of votes in question.

11. Have you read and reviewed the North Carolina law pertaining to election protests as set out in G.S. 163-182.9 through G.S. 163-182.14 and current North Carolina State Board of Elections regulations pertaining to election protests?

The Protesters and their legal counsel are familiar with North Carolina law pertaining to election protests and current North Carolina State Board of Elections regulations pertaining to election protests.

12. How many pages of additional answer are attached to this protest? None. How many pages of attachments are attached? One

This the 20th day of November, 2012.


Christina Kelley Gallegos-Merrill

William W. Peaslee
WILLIAM W. PEASLEE ATTORNEY AT LAW PLLC

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North Carolina Bar #17922
102-K Commonwealth Ct.
Cary, NC 27511
Telephone: (919) 481-1992
Facsimile: (919) 481-2919
Attorney for Protester Christina Kelley Gallegos-
Merrill

EP
NOV 20 2012

Date/Time Filed with County Board

Angela K. K... 11/20/12
(to be filled out by the county board)

NOTE: The county board must provide the State Board with a complete copy of a filed protest within one business day after it is filed. In addition, the county board shall provide a copy of the election audit with this copy of the protest.

Please direct any questions to your county board of elections or the North Carolina State Board of Elections, PO Box 27255, Raleigh, NC 27611-7255, (919) 733-7173.

History Note: Authority G.S. 163-22; 163-182.9; Temporary Adoption Eff. April 15, 2002; *Eff. August 1, 2004.*

CERTIFICATE OF SERVICE ATTACHED

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CERTIFICATE OF SERVICE

I certify that the foregoing ELECTION PROTEST was served this day by hand delivery thereof to the offices of the Buncombe County Board of Elections at its offices located at:

35 Woodfin St.
Asheville, NC
Greensboro NC 28801

I further certify that a copy of the foregoing ELECTION PROTEST was served this day by facsimile transmission as follows:

North Carolina State Board of Elections
Attention Mr. Gary Bartlett
Fax number: (919) 715-0135

This the 20th day of November, 2012.



William W. Peaslee
WILLIAM W. PEASLEE ATTORNEY AT LAW PLLC

NOV 20 2012

Rachel Rathbone

From: Rachel Rathbone
Sent: Wednesday, October 31, 2012 10:22 AM
To: BOEAGCC; BOEAVML; BOEBCTC; BOEBMBL; BOEBSML; BOEBTFD; BOEFVBL; BOEJPPD; BOEKENI; BOELCBL; BOELUCH; BOEMHBC; BOENABL; BOESBBL; BOEUHFR; BOEUNCA; BOEWABL; BOEWVTH
Cc: Trena Parker; Jennifer Sparks; John Noce; Barbara Bowers; Kathryn.Horne@buncombecounty.org; Tracy Cannon; Rebekah Barlow; Joyce A. Kanavel
Subject: Urgent! Print out this map!
Attachments: Warren Wilson.pdf

As always, please print the email below and make certain that every worker at your site (both shifts) reads and signs it.

Print out the map attached above!

Hello All! We have identified a particular area at Warren Wilson that requires additional address information from the voters to ensure that they receive the correct ballot style. From this point forward, if you have a voter with an address of 701 Warren Wilson Rd., show them the map attached above and ask them which side of the road they live on. Use the map to determine which ballot style to give them and vote them provisionally. **They must vote a provisional ballot.**

If they live on the SOUTH side of the road, ask them to fill out a voter registration form so that their residential address can be updated. They should receive ballot G007.

If they live on the NORTH side, give them ballot style G003. Ask them to list their residential address on the provisional envelope.

If you recognize that you have already had voters in your precinct who are registered at the 701 Warren Wilson Road address, please know that we have communicated with the State Board of Elections and are in the process of sending out a memorandum to these voters to address the issue.

If you have any questions regarding these instructions please call us.

Thank you!