On July 17, Karen Brinson Bell, Executive Director of the State Board of Elections issued an Emergency Order concerning the November election. In this order Bell purports to make several significant changes to the administration of the general election. Not least of these changes is a requirement that each county board of elections open at least one one-stop early voting site per 20,000 registered voters in the county. This means a dramatic increase in the number of sites which the county boards must secure and staff. For example, Wake County is set to have 20 early voting sites, but compliance with Bell’s order would nearly double that number to 38.

Whether or not the mandates listed in the emergency order are all good ideas is debatable. Policy experts, advocacy groups, and health professionals will weigh in on that. One has to ask whether it was appropriate as a policy matter for a single, unelected official to rewrite laws especially for something as important as elections. The more fundamental question as a legal matter is whether the law even allows that.

A. The General Assembly Already Addressed Elections During COVID

The Emergency Order comes after Bell as Executive Director of the State Board of Elections was not able to get the powers she wanted. More importantly, it comes after the General Assembly enacted legislation to address the November general election.

The General Assembly made several changes to election law in order to address concerns about the safety of voters and poll workers. Session Law 2018-1169 appropriated additional funds to the State Board of Elections and county boards of elections for expenses related to COVID. And, it did more than that. The new law temporarily lowered the witness requirement for absentee ballots from two to one witness and made it easier to request absentee by-mail ballots. It also added a provision for a bar code or other unique identifier to allow the county board of
elections and the voter to track a ballot after the voter sends it in. SL 2018-1169 clarified the law concerning multi-partisan assistance teams who help voters in assisted living facilities.

Filed as House Bill 1169 in May, SL 2018-1169 passed with bipartisan support and the Governor signed it into law on June 12. This came after Bell as Executive Director of the State Board of Elections sent two memos to the General Assembly and Governor Cooper addressing COVID related elections issues. The first of these, dated March 26, 2020, asked the General Assembly to make various changes to election laws and, respecting early voting, she only asked the legislation to “consider whether changes to one-stop requirements, such as site and hour requirements, may be needed in light of the uncertainty regarding containment of the Convid-19 pandemic by the early voting period in October 2020.” In a second memo, dated April 22, 2020, Bell asked again for changes to election laws and for additional funding. With regard to one-stop voting, Bell asked for more money for hand sanitizer and equipment and recommended “any changes be made as soon as possible to allow time for county boards of elections to locate and procure appropriate sites, a process that has already begun for the November 3 election.”

What is notable about Bell’s memos is that she outlined several requests in each of them, but neither includes a recommendation like her order that each county board of elections open at least one one-stop early voting site per 20,000 registered voters in the county. In fact, she did not make specific recommendations, other than funding request, for one-stop voting. Yet, just a month later, she ordered a very specific order mandating a huge increase in the number of one-stop sites.

What is also notable about Bell’s memos is the General Assembly’s response. The legislature appropriated additional funds and enacted several of the changes Bell requested. Perhaps the most significant change is the reduction of the witness requirement for absentee by-mail ballots from two witnesses to just one witness. This is a sure indication that requests from Bell and the state Board of Elections were not brushed aside. Rather the legislature considered the requests, evaluating the circumstances, studied the COVID data, and enacted limited changes to election laws.

B. The Emergency Order May not even be Legal.

Bell cites two sources of legal authority for her power to issue the emergency order, a statute which gives the Executive Director emergency powers and an administrative rule detailing when the executive director may use emergency powers. Let’s address each of these in turn.

First, Bell cites G.S. §163-27.1 (“Emergency powers”). At first glance, one might think this statute grants the executive director sweeping powers to wield during the current COVID crisis, but in reality, it does not. That statute provides in relevant part:

(a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following:

   (1) A natural disaster.
(2) Extremely inclement weather.

(3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States.

In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter. The Executive Director shall adopt rules describing the emergency powers and the situations in which the emergency powers will be exercised. (Emphasis added)

The statute only grants the executive director emergency powers in three circumstances: natural disasters, extremely inclement weather, and certain armed conflicts. The last two of these are inapplicable. But, what about the first one, “natural disaster”? As explained in detail below, at least one statewide commission determined that COVID, a public health crisis, was not a natural disaster. Perhaps that is why Bell’s order does not use “natural disaster,” the language from the statute she relies on. Instead she craftily uses “natural causes”—a term that sounds so close to the words of the statute that one would hardly notice the semantic slight-of-hand.

What about the rule Bell cites as authority for her emergency order? That rule defines “natural disaster” for purposes of G.S. § 163A-27.1. According to the rule cited by the Executive Director herself, a natural disaster includes a:

- (A) Hurricane;
- (B) Tornado;
- (C) Storm or snowstorm;
- (D) Flood;
- (E) Tidal wave or tsunami;
- (F) Earthquake or volcanic eruption;
- (G) Landslide or mudslide; or
- (H) Catastrophe arising from natural causes resulted in a disaster declaration by the President of the United States or the Governor.

It seems Bell’s use of “natural causes” is borne of the rule’s inclusion of a “catastrophe arising from natural causes” among the listed examples of a natural disaster. But, does that phrase include a state of disaster arising from a public health crisis? For months, the State Board of Elections did not seem to think so. Election officials even tried to amend the rule to explicitly include “a disease or other public health incident.” That effort failed for various legal reasons, and the history of the effort is a little technical but important to understand.

Last March, elections officials submitted a temporary rule to the Office of Administrative Hearings which published the rule on March 13, 2020 on the OAH website. Following a public hearing and a public comment period, the State Board of Elections adopted the proposed rule on May 4.

The process for a state agency, including the State Board of Elections, to adopt a rule is set out in the Administrative Procedures Act (APA). The APA has specific processes for

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1 The rule cites to G.S. § 163A-750 which was decodified as the current G.S. § 163-27.1.
adopting different types of rules. The procedure for adopting temporary rules is somewhat faster and less rigorous than the procedure for adopting permanent rules. The use of the temporary rule-making process is limited to those circumstances in which adherence to the notice and hearing requirements for permanent rule-making are contrary to the public interest.

In order to use the process for temporary rule-making, one requirement of the APA is that an agency provide a reason for using the procedure for adopting a temporary rule, rather than the more comprehensive process used for permanent rules. To this end, the State Board of Elections submitted a form known as “Temporary Rule-Making Findings of Need” in which the agency lists the reason for taking temporary action to adopt a new rule or amend an existing rule. The Findings of Need form listed “a serious and unforeseen threat to the public health, safety or welfare” as the basis for the State Board of Elections action.

As with virtually all administrative rules in North Carolina, the final step in the process is review by a 10-member body called the Rules Review Commission (RRC). RRC’s review is limited and does not consider the policy behind a proposed rule or its likely efficacy. Instead, the RRC reviews for compliance with the APA’s procedures, statutory authority for an agency to adopt a rule, and ambiguity. If an agency doesn’t comply with the APA when adopting a rule or does not have statutory authority to adopt a rule, the RRC will object to the rule. Likewise, if a rule is unclear or ambiguous, RRC will object. So, what happened to the State Board of Election’s temporary rules in May?

The RRC considered the State Board of Elections’ rule at its telephonic May 21 meeting. An attorney for the State Board of Elections appeared as did members of the public. After considering public input and discussing the procedural and legal issues, the RRC voted unanimously to object to the proposed rules for 3 reasons: failure to comply with the APA; lack of statutory authority; and ambiguity. A letter from RRC’s staff counsel to the State Board of Elections explained the reasons for RRC’s decision:

- The RRC determined that the Rule did not meet the criteria to qualify as a temporary rule because the State Board of Elections “failed to show that adherence to notice and hearing requirements required for permanent rulemaking were contrary to the public interest for [the rule], such that immediate adoption would be required.”
- The RRC objected to the rule based on lack of statutory authority, specifically because the RRC “found that the agency does not have the authority to expand the definition of ‘natural disaster’ as proposed in the rule.
- The RRC found part of the rule contained “unclear language” and so objected for “ambiguity.
- The RRC found the State Board of Elections “failed to provide notice to the public” about a change in the rule which the agency made.

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2 The author of this memo, Jeanette Doran, is a member of the RRC.
The State Board of Elections could have submitted new or supplemental materials about the need for the temporary rule. It did not. Instead, the Executive Director issued an emergency order on July 17. As explained above, the authority for Bell’s emergency order rests in a reading of the statutory language which at least one statewide commission rejected and on an administrative rule that was so arguably inapplicable that the State Board of Elections attempted to amend it and failed.

C. Conclusion

When Bell and the State Board of Elections didn’t get what it wanted through the legislative process Bell issued an emergency order, one which ignores that the Board’s executive director didn’t get the administrative rule she sought back in May. Now, Bell has sidestepped the legislative process, effectively ignoring the General Assembly’s authority to make laws governing elections.

The directives of the Emergency Order may have merits, maybe they don’t. That’s not the point of this memo. The question here is whether that order is legally valid. If government agencies and officials roll out order after order based on sketchy legal authority, it is the responsibility of the public and other officials to call them on their overreach. If the people allow unquestioned power grabs now, they cannot expect a return to the rule of law later.

About the Author

Jeanette Doran has served as President and General Counsel of the North Carolina Institute for Constitutional Law since returning to the Institute to reorganize and restart the organization in July 2019.

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3509 Haworth Drive, Suite 304
Raleigh, NC 27609
984.242.4145
www.ncicl.org