



December 30, 2018

Mr. William McKinney
General Counsel
Office of the Governor
20301 Main Service Center
Raleigh, North Carolina 27699-0301

RE: LETTER OF DECEMBER 28, 2018

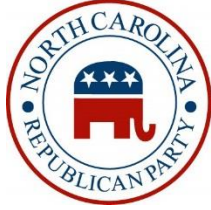
Mr. McKinney,

The North Carolina Republican Party will not be “bullied” into nominating several of its members to an “interim” State Board of Elections which is not authorized by law. With the passage of HB 1029, all authority to supervise elections and investigate “irregularities” were placed under the auspices of the new State Board of Elections. The Governor’s mistaken belief that he has the authority to appoint an interim State Board of Elections appears to be based upon the opinion of Chief Deputy Attorney General Alexander Peters which opined that an “unconstitutional statute is a nullity *ab initio*, confers no rights, imposes no obligations, bestows no power, and justifies no acts performed under it,” *Roberson v. Penland*, 260 N.C. 502, at 505 (1963), including any sections which repealed prior statutes.

While this would appear to be accurate under the cases cited, it fails to take into account one singular and important fact. The General Assembly passed HB 1029 on December 12, 2018, and overrode the Governor’s veto of the same at 3:37 pm on December 27, 2018. Note that the dates and times of the passage and veto override occurred prior to the dissolution of the stay at 12:01 pm December 28, 2018. I would encourage you to re-read Mr. Peter’s opinion, particularly the language under the conclusion section which states:

“For the reasons stated above, it is my opinion that, after the stay of the Order expires, **and until the enactment of revised legislation, N.C.GEN. STAT. § 163-19**, as codified before the enactment of Session Law 2016-125, will again govern the composition of the Board and the appointment of its members.” (*emphasis added*)

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Black's Law Dictionary defines "enactment" as "the act of passing a rule or statute by a legislature." Since new legislation has been enacted, the terms and conditions of HB 1029 control. In fact, the opinion provided by Chief Deputy Attorney General Peters supports this conclusion. Why, therefore, does the Governor insist on pursuing a plan of action that will result in nothing more than further confusion and uncertainty regarding the election system in North Carolina?

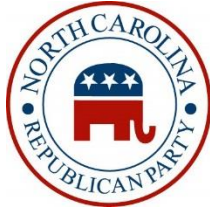
Based upon the language and tone of your letter, it would appear that the Governor intends to appoint members to an "interim" State Board of Elections, including members from the Republican Party, even if Chairman Hayes does not nominate a list of names for consideration by the Governor for appointment. In support of this position, you have cited the Governor's general authority under **N.C.GEN. STAT. § 147-12(a)(3)**. While this statutory provision certainly grants the Governor the authority to fill vacancies in certain circumstances, it does not grant the Governor the authority to appoint Republican board members to an "interim" board without a list of names being submitted by Chairman Hayes. I am sure that you are familiar with the basic tenant of statutory construction which provides that:

"[W]hen a general statute and a special or particular statute are in conflict, the special or particular statute is controlling. The special statute is viewed as an exception to the provisions of the general statute, since it is presumed that the General Assembly did not intend to create a conflict."

Domestic Electric Service, Inc. v. Rocky Mt., 20 N.C. App. 347, at 350-51 (1974)

N.C.GEN. STAT. § 147-12(a)(3) is a general grant of authority to the Governor. This fact is evidenced by the language of the subsection itself, which states that it applies to vacancies "not otherwise provided for in all departments." **N.C.GEN. STAT. § 163-19** is a specific grant of authority that applies to the manner in which initial appointments and vacancies are made to the State Board of Elections. For initial appointments, the Governor only has the authority to appoint members to the State Board of Elections from "a list of nominees submitted to him by the State party chairman of each of the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board of Elections." *Id.* Furthermore, the appointments are to be made from a list of five (5) names submitted by the State Party Chairman. For the filling of vacancies, the Governor only has the authority to fill vacancies on the State Board of Elections "from a list of three nominees submitted to him by the State party chairman of the political party that nominated the vacating member as provided by the preceding paragraph." *Id.*

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Whether the planned appointment to an “interim” State Board of Elections is considered new appointments or the filling of vacancies, **N.C.GEN. STAT. § 163-19** grants Chairman Hayes the sole and exclusive authority to nominate Republican members of the State Board of Elections. Governor Cooper simply has no statutory authority to both nominate and appoint Republican members to the State Board of Elections. Given the uncertainty and substantial litigation surrounding the composition of the previous board, further litigation would serve no legitimate public purpose; however, please be assured of the fact that any attempt by the Governor to usurp the authority granted to Chairman Hayes as Chairman of the North Carolina Republican Party will result in litigation to protect his statutory rights.

At the end of your letter, you expressed a desire “ensure a stable and fair process to resolve the issues surrounding the Ninth Congressional District Election.” Callously accusing Chairman Hayes of impeding and obstructing an ongoing investigation does nothing to further that professed desired outcome. As clearly outlined above, there are serious and genuine issues regarding the propriety and legality of Governor Cooper appointing a so-called “interim” State Board of Elections. Chairman Hayes and the North Carolina Republican Party take their obligations under the law and State Constitution seriously. The reluctance of Chairman Hayes to participate in the creation of an unlawful “interim” State Board of Elections results from a desire to ensure that any future investigation surrounding the Ninth Congressional District election is open, fair and transparent, and not tainted by actions taken by an illegal board. This unlawful suggestion by the Governor only serves to further erode public confidence in our election system.

Should you wish to discuss this matter, please feel free to contact me directly.

Sincerely,

A handwritten signature in black ink that reads "John M. Lewis". The signature is written in a cursive, flowing style.

John M. Lewis
Counsel to the NCGOP

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