STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN THE MATTER OF: CONSIDERATION OF)	
CERTAIN LEGAL QUESTIONS AFFECTING)	
THE AUTHENTICATION OF THE 2016)	**ORDER**
GENERAL ELECTION)	

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS (State Board) during a public meeting held November 30, 2016, upon the appeal of Thomas Stark (Protestor) from an order of the Durham County Board of Elections (Durham Board) dismissing a protest of election filed November 11. The State Board conducted a hearing under G.S. § 163-182.11(b)(3) to determine whether there was substantial evidence that a violation of election law or other irregularities or misconduct occurred and was sufficiently serious to cast doubt on the apparent result of the election.

The State Board received briefing and heard oral argument from the Appellant, appearing *pro se*, and the North Carolina Democratic Party and Cooper for North Carolina Committee, represented by Kevin Hamilton, appearing *pro hac vice*. The State Board heard sworn testimony from Interim Director of Elections Kate Cosner, Chair William Brian, Secretary Dawn Baxton, and Member Margaret Griffin of the Durham Board; from Ben Swartz of Election Systems & Software (ES&S); and from Business Systems Analyst Brian Neesby of the State Board. After hearing from the parties and witnesses and having considered the record in this matter, the State Board hereby orders the following:

FINDINGS OF FACT

1. The Durham Board uploaded certain unofficial election data to the State Board's online election results website near midnight on November 8, 2016, including all results tabulated for Precinct 29 and five one-stop early voting sites located at the Durham Board Office, North Regional Library, South Regional Library, East Regional Library, and Eno River Unitarian Universalist Fellowship (collectively, Affected Sites); and

2. Prior to the upload of results from Affected Sites, the State Board's online election returns website indicated that roughly 99% of the state's precincts had already reported. At that time, Governor Patrick L. McCrory lead Attorney General Roy A. Cooper in the gubernatorial contest. After the upload of results from Affected Sites, Attorney General Cooper led Governor McCrory; and

3. Election results across North Carolina are aggregated using the Unity Voting System software (Unity) developed and maintained by ES&S. Election officials may input results into Unity electronically through compatible digital media storage cards or manually through the supervised efforts of staff; and

4. Six total electronic tabulation machines were used to read ballots cast at Affected Sites, one tabulator per site. The tabulators used were ES&S Model 100 Precinct Ballot Counters (M100), which store tabulation data on Personal Computer Memory Card International Association Cards (PC Cards) and print tabulated results on a paper tape after the polls have closed; and

5. On November 8, election officials at the Durham Board attempted to load election results from Affected Sites into Unity using six PC Cards, one card per site. Unity displayed a card-read error for each PC Card. Analysis of the error for the PC Card from Precinct 29 indicates that no data read from the card into Unity. Analysis for each of the other Affected Sites indicates that machine tabulation data was read into Unity, but that Unity was unable to aggregate that data with information from the other precincts and early voting sites. This was due to a two-byte memory limitation within the software that prevented the PC Card from being processed and added to county-wide totals where a single contest on that card contained more than 65,535 votes; and

6. Durham Board staff, supervised by members of the Durham Board, and a member of the State Board staff, manually entered results into Unity for Affected Sites by referencing the paper tapes printed by each tabulator. These manual entries did not precisely match the results fed into Unity for the following contests: Superintendent of Public Instruction (June Atkinson versus Mark Johnson), Court of Appeals (Linda Stephens versus Phil Berger, Jr.), Board of Commissioners (James Hill, unopposed), District Court Judge (Shamieka LaCher Rhinehart versus William A. Marsh III), and the Museum Bond; and

7. Due to the highly specialized knowledge necessary to analyze the tabulation errors encountered on November 8, there exists a perception that irregularities in Durham County might have affected the outcome of the gubernatorial contest; and

CONCLUSIONS OF LAW

1. The State Board exercises administrative and quasi-judicial authority in its supervision of elections across North Carolina. G.S. § 163-22; and

2. The State Board may act to resolve protests where there is substantial evidence that an irregularity cast doubt on the apparent outcome of an election contest, including, at its discretion, to order a recount. *See, e.g.*, Article 15A of Chapter 163 of the General Statutes; and

3. The particular circumstances at issue in this matter counsel in favor of a recount ordered in the discretion of the State Board.

It is, therefore, **ORDERED**:

1. Interim Director of Elections Kate Cosner shall prepare an administrative plan for the machine tabulation for a recount of the Affected Sites; and

2. Such plan shall be submitted in writing to Executive Director Kimberly Westbrook Strach for approval no later than noon Friday, December 2, 2016; and

3. Executive Director Strach may modify such plan as necessary and exercise appropriate supervision to ensure the swift recount of the ballot from the Affected Sites with all due haste; and

4. The Durham Board shall take all steps necessary to expedite and ensure timely compliance with this Order holding any emergency meeting necessary to amend canvass to reflect the recount, but in no event shall the Durham Board provide the State Board with its amended canvass and recount results later than 7 p.m. on Monday, December 5, 2016.

This the first day of December, 2016.

A. Grant Whitney, Jr., Chair
State Board of Elections