NORTH CAROLINA

WAKE COUNTY

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GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 09-SP-5626

WAVE COURTY G.S.C.

BY_____

In re: SUBPOENA ISSUED TO ATTORNEY C. RUFFIN POOLE BY THE NORTH CAROLINA BOARD OF ELECTIONS IN A PROCEEDING ENTITLED "INVESTIGATION INTO ALLEGATIONS OF POSSIBLE VIOLATIONS OF ELECTIONS LAWS, INCLUDING BUT NOT LIMITED TO, ILLEGAL CONTRIBUTIONS AND INACCURATE REPORTING IN CAMPAIGN FINANCE REPORTS BY THE MIKE EASLEY COMMITTEE AND THE NORTH CAROLINA DEMOCRATIC PARTY"

ORDER

This matter comes before the Court on the "Petition in the Nature of a Special Proceeding" filed by Petitioner C. Ruffin Poole, seeking to quash a subpoena issued to him by the North Carolina Board of Elections compelling his testimony at a proceeding in Raleigh, North Carolina beginning October 26, 2009.

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A hearing was held on this Petition on Monday, October 26, 2009 in Wake County Superior Court before the undersigned Superior Court Judge. The Petitioner was represented by Joseph E. Zeszotarski, Jr. The North Carolina Board of Elections (hereinafter "NCBOE") was represented by Special Deputy Attorneys General Susan Nichols, Karen Long, and Alexander Peters. After hearing from the parties, consideration of the filed pleadings, and *in camera* review

of an affidavit offered under seal by Petitioner, and it appearing to the Court that the Petition should be allowed and the subpoena at issue quashed, the Court makes the following:

FINDINGS OF FACT

- 1. Petitioner has been served the subpoena attached as Exhibit A to the Petition by the North Carolina Board of Elections, pursuant to N.C.G.S. § 163-278, seeking to require his testimony at the proceeding set out in the subpoena and being held in Raleigh, North Carolina starting October 26, 2009.
- 2. Petitioner has submitted an affidavit, under seal, for review in camera by the Court. The NCBOE did not object to Petitioner's request that the Court hear all matters relating to the Affidavit in camera and in a closed hearing. The Court reviewed Petitioner's Affidavit during a closed hearing with counsel for Petitioner and counsel for the NCBOE present. Because the crosed nearing was held under seal, counsel for NCBOE were permitted to view the contents of the Affidavit to determine their position regarding the matter.
- 3. Given its nature, the subject matter of the affidavit reviewed in camera is material that is properly considered in a closed hearing and under seal.
- 4. The privilege claimed by Petitioner in Paragraphs 4 through 7 of his Affidavit is a valid legal privilege that prevents the NCBOE from compelling his testimony at the hearing it is conducting, as claimed by Petitioner in Paragraph 6(b) of his Petition.
- 5. The factual matters set out in Petitioner's Affidavit are credible and are accepted by the Court as true and accurate.
- 6. Under Rule 45(c)(5) and (c)(3)(2) of the North Carolina Rules of Civil Procedure, the affidavit of Petitioner submitted in camera establishes a "privilege" under the Rule that

warrants the subpoena to Petitioner being quashed, and the subpoena should be quashed under that Rule.

7. No valid basis exists for the NCBOE to require Petitioner to appear at the hearing to which they have subpoenaed Petitioner to appear, in light of the valid privilege possessed by Petitioner as claimed in Paragraph 6(b) of the Petition, and as established by Paragraphs 4 through 7 of Petitioner's Affidavit.

CONCLUSIONS OF LAW

- This matter is properly before the Court. The Court has jurisdiction over the parties and the matter, and venue is proper in this Court.
- 2. The Petition filed by Petitioner in this matter is the appropriate legal means to bring an action to quash the subpoena issued to Petitioner by the NCBOE.
- the Court to consider it *in camera* and in a closed and sealed hearing, with counsel for the parties present, in support of Petitioner's claim of privilege as set out in the Affidavit. The Court finds, in its discretion, that it should consider Petitioner's Affidavit in a closed and sealed hearing with counsel for the parties present, and that given its nature, the Affidavit shall be placed under seal, and that counsel for the parties shall not be permitted to disclose the contents of the Affidavit without further court order.
 - 4. Rule 45 of the North Carolina Rules of Civil Procedure, and the provisions of sections (c)(5) and (c)(3) of that Rule, apply to an action to quash a subpoena issued by the NCBOE, by both application of the Rules of Civil Procedure and through this Court's inherent power.

- 5. Under Rules 45(c)(5) and (c)(3)(b) of the North Carolina Rules of Civil Procedure, which the Court finds applicable to this case, Petitioner is entitled to bring an action to quash the subpoena issued to him by the NCBOE in this Court, if he can establish that the subpoena "requires the disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection."
- 6. Under these Rules and the Court's inherent authority, the petition to quash the subpoena is properly brought in this Court <u>before</u> Petitioner is required to appear to testify pursuant to the subpoena.
- 7. Moreover, under the unique circumstances of this case, Petitioner's action to quash the subpoena issued to him by the NCBOE is properly brought in this Court, rather than brought before the NCBOE, given the basis for the privilege claimed by Petitioner in Paragraph

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 - 8. The privilege claimed by Petitioner in Paragraphs 4 through 7 of his Affidavit is a valid legal privilege that prevents the NCBOE from compelling Petitioner to testify pursuant to its subpoena.
 - 9. The matters set out in Paragraphs 4 through 7 of Petitioner's Affidavit establish a valid legal privilege under Rule 45 of the North Carolina Rules of Civil Procedure that permits this Court to enter an order quashing the subpoena issued to Petitioner by the NCBOE.
 - 10. Under Rule 45(c)(5) and (c)(3)(b) of the North Carolina Rules of Civil Procedure, and the Court's inherent power, the subpoena to Petitioner should be quashed. Because the subpoena is properly quashed, the Court finds that that Petitioner shall not be required to appear at the hearing being held by the NCBOE. Any effort to require Petitioner to actually appear at

the NCBOE proceeding pursuant to the subpoena is futile in light of the valid privilege that is the basis of this Court's order quashing the subpoena.

- 11. Given the matters set out in Petitioner's Affidavit, both the nature of and the basis for the privilege asserted by Petitioner in Paragraphs 4 through 7 of his Affidavit is to be kept under seal in the Petitioner's Affidavit, in the Court's discretion.
- 12. The Court makes no findings regarding the applicability of the attorney-client privilege, and the attorney-client privilege is not a basis of this Order.

Now, therefore, based upon these FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby ORDERED and ADJUDGED that the relief requested in the Petition in the Nature of a Special Proceeding is ALLOWED, and the subpoena issued by the North Carolina Board of Elections to Petitioner C. Ruffin Poole is QUASHED, on the grounds of privilege as set out in Paragraph o(D) of the return and as established by Petitioner's Attridavit; and

It is further ORDERED and ADJUDGED that Petitioner's request that his Affidavit and all matters relating thereto be considered in a closed hearing and under seal is ALLOWED in this Court's discretion; and

It is further ORDERED that both the nature of and the basis for the privilege asserted by Petitioner in Paragraphs 4 through 7 of his Affidavit is to be kept under seal in the Petitioner's Affidavit; and

It is further ORDERED that Petitioner's Affidavit shall be placed in the court file <u>under</u> seal, so that it shall be available for review should any party wish to appeal this order. No person shall disclose the contents of the Affidavit absent order of this Court or an appellate court; and

The State has made a motion to stay this Order. The State's Motion to Stay is hereby DENIED.

This the $\frac{26}{2}$ day of October, 2009.

Honorable Henry V. Barnette, Jr. Superior Court Judge Presiding

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