



American Legion Baseball
Tar Heel Boys State
High School Oratorical
Veterans' Service

**THE AMERICAN LEGION
DEPARTMENT OF NORTH CAROLINA
2940 Falstaff Rd • P.O. Box 26657
Raleigh, NC 27611-6657
(919) 832-7506**



Scouting
Jr. ROTC
Student Trooper Program
Nursing Scholarships

DATE: April 7, 2020

MEMO TO: All Department of North Carolina Officers, Post officers and
Bluecap Legionnaires

Please find attached, the Legal Opinion from me in respect to the forms for Posts' annual elections during the time frame of this pandemic medical emergency and pursuant to the Governor's Executive Order 121.

I will be reviewing in detail this memorandum with your district and division commanders during our telephonic board meeting of next week.

This opinion has been written in layman terms, therefore, should you have any questions, they should be addressed to your District Commander after Friday, April 17, 2020.

Gaither M. Keener, Jr.
Department Judge Advocate



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Legal Opinion from the Judge Advocate in respect to forms of Post Annual Elections during the time frame of an Emergency pursuant to Executive Order 121 et seq

The COVID-19 pandemic is raging as I write this Order. Everyday more are sick and are dying. Based upon the best medical reports that have been published; North Carolina is still seven to ten weeks for the apex of the illness.

The Governor of our state has issued a new Executive Order on Friday, Executive Order 121, as to a thirty day “Stay at Home” order for all citizens of North Carolina that is not an employee of an Essential Business Rule. It is my opinion our non-profit organization does not meet the requirements of Section 2 subparagraph (9). The new Executive Order 121 is effective Monday March 30 at 4 pm for thirty days. His new Executive Order 121 will require a Stay at Home Order. A copy of Executive Order 121 is attached copies to this Legal Opinion and Order. Said EO 121 requires no mass meeting of more than ten people during the new time frame.

Also, many cities and counties have adopted “Stay Home Orders” and similar orders which limit citizens meeting and require social distancing since we are under a pandemic called “Covid-19”.

Under Executive Order 121 social distancing and no more than ten people may gather during this new time frame, only essential officers may go to the post to handle everyday needed business operations such as payment of bills and operations, payroll, checking the physical facility and the key essential operations of the business.

Therefore, this Legal Opinion as the Department Judge Advocate is pursuant to my Authority under The American Legion, Department of North Carolina Constitution and Bylaws, By-Laws Article 11 entitled Duties of Officers ; Section 5: Department Judge Advocate : “The Department Judge Advocate shall advise the department officers and the department executive committee on all legal matters, including the constitution and interpretation of the department constitution and bylaws, and shall perform such other duties as are usually incident to the office.”

Therefore, below is my Order as to the requirements of our constitution for annual post meetings for the election of Post officers, delegates of the post for the electronic district meeting

for the nomination of a District Vice- Commander, and one Delegate and one Alternate Delegate for the National Convention, and the post election of delegates for the Department Annual convention, which is set for [June 11 through June 14, 2020](#).

This Order is based upon a complete review of our Department's Article of Incorporations , it's Constitution and Bylaws, and the Statutes of North Carolina specifically Chapter 55A North Carolina Nonprofit Corporation Act, the cases and dictum to said Act and along with the other statutes so required by our law.

PREFACE :

The American Legion Department of North Carolina is a constituent part of The American Legion, a Federal corporation organized by Act of Congress. The American Legion department of North Carolina is a Non- Profit Corporation and duly organized as a corporation of North Carolina with its own Articles of Incorporation filed with its Secretary of State of North Carolina pursuant to NCGS 55A. Under the North Carolina Nonprofit Corporation Act, its Board of Directors, the Department Executive Committee "DEC" has all Executive, Legislative, and Judicial powers between department conventions. See Constitution of the department, Article IV, General Organization, Section 4. In addition, the department of North Carolina has, "embraces its jurisdiction extent to the whole of the State of North Carolina".

The American Legion Department North Carolina is organized into posts. The department is divided into divisions, districts and post, so organize and officer as provided.

Article VII: Section 1 states, The DEPARTMENT shall be divided into districts composed of posts of The American Legion as designated By DEPARTMENT executive committee , "DEC" and the department shall be divided into districts composed of posts of The American Legion as designated by the department executive committee.

Article IV: Section 5 states, There shall be one regular annual Department Convention.

Article V: Section 6 states, All elective Post Officers shall be elected annually at a Post meeting held not more than 45 days prior to the Department Convention. The Post Officers so elected shall be installed in their respective offices not more than 30 days after the adjournment of the Department Convention.

Article V: Section 7 states, Each Post in the Department shall have its own Constitution and By-Laws, provided the same is NOT in CONFLICT with the National or Department Constitution and By-Laws.

Article V: Section 8 states, Each Post shall elect and shall be officered by the following officers who shall be elected annually by the Post: Post Commander, Post Vice Commander (as many as the Post may determine), Post Finance Officer, Post Sergeant-At -Arms, Post Historian, and a Post Chaplain.

Article V : Section 9 states, All elective officers of the Post and Delegates and Alternate Delegates to the Department Convention shall be elected annually at a Post meeting and shall be certified to the Department Headquarters not more than 30 days not less than 10 days prior to the next Department Convention.

Article VII: Section 6 states, District Meetings shall be composed of Delegates and Alternate Delegates from each charter Post in the District.

In addition, Article VII provides additional information on the District meeting which has been fully detailed in My Order of March 30, 2020 as to the annual meetings of the 25 districts of this organization.

The National Constitution and By-laws controls over any other Constitutions and By-Laws of this “Federal Charter Organization”. Specifically the Constitution of The American Legion, ARTICLE IX, Section 7, which states, “Each department may prescribe the constitution of its posts. ... “so therefore, the DEC may make any changes to any post constitution and or by- laws as it deems reasonable and necessary, as the by- laws only explain sections of the constitution.

Facts

Since the American Legion, Department of North Carolina, Inc and its Posts are a nonprofit corporation organized under North Carolina nonprofit corporation act; said Act controls our operations and provides us with an understanding how we can continue to operate our organization during this time frame of Executive Orders limiting meetings, except for Essential Operations, and comply with the needs to have our post elections. Since our constitution requires the annual post meetings to be 45 days prior to our annual convention , which has a date of [June 11 through June 14, 2020](#), the first date of any post annual meeting for elections would be [on Monday April 27, 2020](#) (a date that is under the current Executive Order 121 which limits mass meetings of 10 or more people and only for essentials) and the last date we can have a post annual election meeting is [May 31, 2020](#). See Article V Sections 6 and Section 9 of our Department’s Constitution. (Notwithstanding mailing which therefore changes the date to Saturday, May 29,2020)

So the Posts, under the current Executive Order 121, have only between April 27 to May 29 to have their post meetings. That is 33 days to hold traditional annual elections

Of course, the Governor could extend his Executive Order 121 which the Governor of Virginia has this week with a “Stay Home Order” requirements until June 10, 2020. See Virginia Governor’s Executive Order 55 effective April 1, 2020 extending Executive Order 53 and 54.

The North Carolina statutes are very clear.

Post meetings of this department may be by the following means.

Under North Carolina law a nonprofit corporation may allow members or delegates to vote by proxy, written ballot, by written consent, by electronic means, which includes virtual meetings. Our constitution and bylaws do not prohibit any of the actions above. Therefore, the Post Constitution and bylaws shall be the same.

Therefore, planning post annual election meetings and the time frame that each post has to complete said meetings under our Constitution is specific.

The North Carolina Nonprofit Act and our Electronic Record Laws under NCGG 66 et seq. provides that a board meeting of the organization and the annual meeting or regular meeting of its members is not required to be held at a geographic location if the meeting is held by means of the Internet or other electronic communication technology in a manner to which the members have the opportunity to read or hear the proceedings substantially concurrent with the occurrence of the proceedings, vote on matters submitted to the members, pose questions, and make comments et al. Very few Post have that capacity or capability.

So when you think about the different size of posts which will have their annual meeting, it is clear that our Constitution and Bylaws plus the State statutes control.

NCGS 55A -1-41 Notice of meetings.

Subsection (b) of said section states:

Notice May be communicated in person; by electronics means; or by mail or private carrier. If these forms of personal notice are impractical as to one or more persons, notice may be communicated to such persons by publishing the notice in a newspaper, or by radio, television, or other form of public broadcast communication, in the county where the corporation has its principal place of business in the state, or if it has no principal place of business in the state, the county where it has it's registered office.

It is important to note, that any written notice shall be sent by first class postage mail. Then the notice requirement period is 5 days.

I realized that our department constitution does not require a period of time for notice of post meetings, unless the board of directors (the DEC) adopts "Emergency By-Laws" as set forth under 55A-2-07 and the powers outlined to the Board "DEC" under NCGS A-3-03; or the DEC with its authority under the National Constitution and Bylaws.

With that said, Posts every year print out their calendar of post meetings dates and send those dates to their membership, their District Commanders and are required to send those dates for the Department. Some of those Notices are mailed, some are sent out by email, some are sent out by electronic newsletters, and others are posted at the Post location.

So dates for election are always during a regular post meeting. Therefore, most dates have been set for post elections. Also the nomination committee is recommend by the Post commander and approved by the Post PEC, since the selection of officers and board members is the duty of the PEC as the board of directors under NC law, and the Commander is the Chair of the Board of Directors.

Many, post will read the nomination committee's Ballot 3 to 4 meetings prior to the election, so that individuals may be nominated on the floor by members. There is no requirement under the North Carolina constitution and bylaws for this to occur at a post election.

Therefore, if the nomination committee is the PEC, the Board of Directors, then under North Carolina law that nomination ballot is legal under North Carolina law.

If the annual election meeting has not been set by a post PEC, then in that event, the post PEC shall communicate to its members their annual meeting date along with a list of candidates by mail or any other means as indicated by the Notice Requirements under NCGS 55 A -41 (1) printed below. The notice requirements would be ten days since the North Carolina Constitution Requires ten day notice of meetings for boards etc.

It should also be noted; under NCGS 55 A -1-41 that in the case of notice given in the form of an electronic record send by electronic means, the time of the RECEIPT SHALL be determined as provided in NCGS 66-325 which " e" states: An Electronic record is received under subsection (b) per this section even if no individual is aware of its receipt. This is different for a consumer recipient. Since our situation is not a consumer action, the later part of the statute does not apply to a list for member (post) notice. " Plus section (b) of this section states , Unless otherwise agreed between a sender and recipient—— an electronic record is received when: (1) It enters an information processing system that the recipient has designated or use for the purpose of receiving electronic records or information of the type sent; and from which the recipient is able to retrieve the electronica record; and (2) it is a form capable of being processed by that system. Therefore a Post could maybe meet those requirement for an electronic notice to post member if that is their normal communication to their members. Therefore, a Proxy or Ballot may be sent to members by email; and those members where the post may not have their email address, shall be sent by US mail.

Also, under the Notice Proceeds of 55 A -41 (I) we can also, if desired, use this section since, "Written Notice" need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publications regularly sent to members if conspicuously identified as a notice.

Therefore, depending on the way a post communicates with its members, a post can use its electronic newspaper as notice to the post of the meetings of its annual post meeting or by electronic e-mails of the post members as to those members that it normally communicates in that form of communication to its PEC and members.

NCGS 55A-7-04 Action by Written Consent

Under our law for nonprofit corporation, actions required or permitted under the statute can be taken at a meeting of members, including delegates, without a meeting if the action is taken by all members entitled to vote on the action. The action shall be evidence by one or more written consents describing the action taken, sign before or after such action but all members entitled to vote thereon, and delivered to the corporation headquarters for inclusion in the minutes are filed with the corporate records.

For this to occur, a post would need all of its members to execute the ballot.

This remedy of NCGS 55A-7-04 has more issue then is practical for a Post to complete, unless the post is small in membership and you can obtain the written consent from all members. This may work for a post under 20 members who all live in the same area.

NCGS 55A- 7-08 Action by Written Ballot

Under our law, a nonprofit corporation actions required or permitted, may be taken without a meeting if the corporation delivers a written ballot to every member / delegate entitled to vote. Ballots may be provided by electronic means, including electronic email and newsletter. However, if delivered by an Electronic mail, it can only be delivered by such means, if the post sends an email to the member, that the electronic transmissions was authorized by the member and the member agrees to receive and vote his/her ballot by email. NCGS 55A- 7- 08 (a).

In addition, the statute under (b) of 55A-7-08 requires the following: A written ballot shall contain the following:

- (1) set forth each proposed action, and:
- (2) provide an opportunity to vote for or against each proposed action.

And finally, under (c) of 55A-7-08 states;

Approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the same total number of votes were cast.

So that is simple for many posts. Get enough ballots, in the time frame to vote in the election, have a Quorum, and a majority of the ballots will determine who won the election and any other proposal submitted.

Another important matter. Under (d) of this statute: All solicitation for votes by written ballot SHALL indicate the time by which a ballot shall be received (returned) by the corporation in order to be counted. This is important. Plus under the law, you shall maintain a ballot until the next year elections, the ballots need to be locked up in a secure area.

This is a valid option for certain Posts.

Attached to this memo is a sample Ballot.

NCGS 55 A- 7 -24. Proxies

North Carolina law allows proxies for non-profits. There are specific rules, such as, the appointment of a proxy or proxies, the form of the member non-profit proxy, requirement of the execution and delivery to the adjutant (the corporate secretary of our organization) and along with more requirements which are logical and realistic to accomplish for an annual post meeting at this time period.

Therefore, based again upon the facts, we do have a means of nomination by the post commander by appointing the PEC as the nomination committee, have a telephone conference, select a slate of candidates for the post elections, and email (under the same rules for Ballots) either a proxy for all name candidates or a proxy with full Cart Blanche authority's on all matters to a proxy.

This is another way for post. Again the rules are same for notices (written by mail or electronic means) as provided above. And again, all proxies voted shall be maintained secured into the next year election.

Attached to this email are two sample Proxies.

Under the proxy aspect , and under the NC The Nation Constitution specifically ARTICLE IX, Section7, the DEC of the department could adopt changes to each post Constitution and Bylaws as to the time frame of the notice , the dates requirements for the meetings and other remedies.

In addition the post could have an electronic annular meeting with proper notice by means of GOTOMEETING, ZOOM and otherwise Vedio or conference call. But each member during said electronic meeting shall be able to ask questions, here and speak in respect to every matter.

I doubt if many posts will use those technologies. However if a post wishes to use one of the electronic technologies of electronic meeting, the notice requirements are the same as for a regular meeting as provided above and a written Notice of the meeting, the agenda, and a proposed ballot shall be sent to each member prior to the electronic meeting. Again, said notice can be sent electronically; however, it shall meet the rules set forth above.

So there are several options.

Remember, the election of a delegate to a district meeting and the election of a delegate to the DEPARTMENT convention does not have to be made by the members. They are delegates of the post. And the PEC, as the board of directors of said nonprofit corporation, has a full authority to elect the delegates to the district meeting and the department convention under the authority of the North Carolina Nonprofit Act. At many posts the PEC elects the delegates to the district and department convention.

Remember, executive order 121 currently ends April 29. However, as we all know, the current projections of the curve for COVID-19 in North Carolina does not reach its peak until mid May. The governor of Virginia has extended his executive order 53 through June 10. Based upon the details of the information we have today, I would not be surprised the Governor of NC does not expands Executive Order 121 to a period of time in June.

If Executive Order 121 is not expanded to a longer time frame and ends at the end of April, then a post has a time frame for their post meetings in May to elect officers from May 1 to probably May 29th, as their information as to delegates etc. has to be at the department ten days before; and if mailed; then May 29 is the latest postage stamped marked!

What if the Post is unable to have an annual meeting and elect officers?

The North Carolina Department constitution states under Article V, Section 6, The new post officers so elected shall be installed in their respective offices not more than 30 days after the Adjournment of the department convention.

If there is not an election at the post for its officers during this time frame, the current officers stay as the officers of the post until the next annual election. They served for another year.

This is the same rules as to the NC American Legion officers; see By-Law Article X Section 2, “..... and they shall serve until their successors are elected and installed.”

Also, see American Legion National Constitution, Article VI, Section 2, All Officers shall serve until the adjournment of the succeeding national convention following the election and thereafter until their successors are chosen.

Therefore, the American Legion Post of North Carolina shall follow the same procedure. If there are no elections at a post, then the current officers shall serve until the next annual election.

This is my Order , Ruling and Opinion

Gaither M Keener, Jr

Department Judge Advocate.

**Notice of Meeting of
American Legion Post _____**

Members of American Legion Post _____

On behalf of the Board of Directors (PEC) of American Legion Post # _____, it is my pleasure to invite you to vote the ballot accompanying this notice for the election of our officers for the year beginning July 1, 2020 to July 1, 2021.

Because of COVID-19, the Governor's Executive Order 121 does not allow meetings. Therefore the Board solicits you to execute the (here is a choice) Ballot (or you may use Proxy) and return to the Post Adjutant's mailing address (place address here), no later than 1700 hours on _____, _____, 2020.

Your vote is important. We strongly encourage you to vote early. The earliest you can vote is _____, 2020.

This notice is being sent by first class mail and by electronic email.

Name _____

This the _____ day of _____, 2020.

Name _____

Signature _____

(Post Commander or Post Adjutant)

Ballot for Annual Election

American Legion Post _____

Know all members by these presents that as a member of American Legion Post _____, I hereby CAST by ballot for the election of officers as indicated below:

<u>Office</u>	<u>Name</u>	<u>For</u>	<u>Against</u>
Commander	_____	_____	_____
Vice Commander	_____	_____	_____
Post Finance Officer	_____	_____	_____
Post Sgt-at-Arms	_____	_____	_____
Post Historian	_____	_____	_____
Post Chaplain	_____	_____	_____

Optional Below

Delegates to Department Convention

<u>Names</u>	<u>For</u>	<u>Against</u>
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____

This Ballot shall be returned either by first class mail to (_____)
Give address here

Or by electronic mail _____
Give email address here

No later than 1700 hours of _____, _____ 2020 to be included in the official count.
date

Member x _____
Signature

Member ID# _____

Date executed x _____

Proxy Card for Post Annual Election

KNOW ALL Persons by These Present that I, the undersigned member of said American Legion Post, Department of North Carolina, do hereby appoint _____ as proxy. My proxy has full power to act alone for me and in my name as my true agent with full power of substitution to vote and act upon my membership to be held on _____, at ____ pm, at said American Legion post office, said post's current meeting place, or any adjournments thereof, with all the powers I would possess if personally present, as follows:

- 1) Election of Post Commander _____ For _____
(name) Against _____
- 2) Election of Vice Commander _____ For _____
(name) Against _____
- 3) Election of Post Finance Officer _____ For _____
(name) Against _____
- 4) Election of Post Sgt-at-Arms _____ For _____
(name) Against _____
- 5) Election of Post Historian _____ For _____
(name) Against _____
- 6) Election of Post Chaplain _____ For _____
(name) Against _____
- 7) The Election of Delegates and Alternate Delegates to the Department Convention of June 11 through June 14 (or any date to which said convention may be held because of Coronavirus disease of 2020) I hereby give my proxy full power to vote for said nominees for said Delegate or Alternate Delegate as my Proxy so determines.
For _____ Against _____
- 8) I hereby give my Proxy full authority to vote my membership for any other business of said Post.

I do not and cannot attend the Annual meeting of said Post.

Please sign as your name is listed on the membership roll and provide your American Legion membership card number.

(Name Printed) (Membership ID#) (Date)

X _____
(Signature)

Proxy Card for Post Election

KNOW ALL Persons by These Present that I, the undersigned member of said American Legion Post, Department of North Carolina, do hereby appoint _____ as proxy. My proxy has full power to act alone for me and in my name as my true agent with full power of substitution to vote and act upon my membership to be held on _____, at _____pm, at said American Legion post office, said post's current meeting place, or any adjournments thereof, with all the powers I would possess if personally present, as follows:

1. The election of all officers and directors of said American Legion Post # _____ as my Proxy so determines.
2. The Election of Delegates and Alternate Delegates to the Department Convention of June 11 through June 14 (or any date to which said convention may be held because of Coronavirus disease of 2020) I hereby give my proxy full power to vote for said nominees for said Delegate or Alternate Delegate as my Proxy so determines.

I hereby give my Proxy full authority to vote my membership vote for any other business of said Post.

I do not and cannot attend the Annual meeting of said Post.

Please sign as your name is listed on the membership roll and provide your American Legion membership card number.

Date _____

(Name Printed)

Membership ID number

X _____
(Signature)