

Seven Steps for Effectively Handling Contested Elections

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Although an electric cooperative's Board of Directors faces many difficult decisions, one of the most difficult and contentious issues that can arise is a contested election for a position on the Board. The election process for a Board seat is typically a collegial process. Years can pass before a contested election arises, and in many cooperatives little thought is given to the proper way to handle a contested election until the Board finds itself in the middle of such a situation.

At that point, the situation may seem daunting, but there are relatively simple steps that a cooperative can take to minimize the impact of contested elections on the cooperative's Board, management and staff, as well as steps that can be taken if a contested election arises and the cooperative has not yet established policies and procedures for such a situation.

I. Challenges Presented by Contested Elections

When a contested election does arise, if the Board has not previously developed and implemented election policies and procedures, the Board will find that it is the only body that can address and resolve the difficult and often politically charged issues associated with such an election, such as the qualification of candidates, the use of proxies, permissible campaign methods and materials and the handling of improperly marked ballots. Board members may find themselves in the uncomfortable situation of making decisions that directly affect the election chances of fellow Board members and friends in the community. If the proper policies and procedures are not in place, a contested election can easily turn into a contentious election.

On the surface, having a contested election might not seem to pose any particular problems. Why do contested elections pose so many challenges?

- Incumbent Directors facing election challenges already have a working relationship with the other Board members and may also have personal and business relationships with Board members.
- The challenger typically comes from the same community as the Board members and may also have professional and personal relationships with Board members and employees of the cooperative.
- The challenge may make a campaign issue out of the performance of the current Board and the cooperative’s management.
- The incumbent and the challenger will likely communicate with the cooperative’s members, and such members may then raise questions and concerns with management, staff and Board members.
- Each candidate may raise questions and concerns about the other candidate’s campaign materials and communications with members and ask the Board to “referee” the dispute.
- The incumbent being challenged may feel that he or she is entitled to use cooperative resources and staff in assisting the campaign.
- The cooperative’s staff, general counsel and Board members will be required to work with whoever wins the election.

Any of these factors can cause a contested election to turn into a contentious election. If not handled correctly, the issues that arise with a contentious election can disrupt the operation of the Board, negatively impact the performance of management and staff, and damage the cooperative’s relationship with its members. Also, if mistakes are made in the election process and an election challenge is brought, the lack of proper policies and procedures could result in litigation that consumes the cooperative’s resources and staff time and threatens the Board’s ability to effectively govern the cooperative. If an election challenge lingers and multiple positions are subject to challenge, the legitimacy of actions taken by the Board could even be called into question.

II. Seven Steps for a Smoother Election Process

The cooperative’s goal should be to handle each contested election fairly, impartially and uniformly so as to minimize the possibility of challenges and objections to the election process and results. The cooperative can work toward this goal by taking some or all of the steps outlined below. For any of these steps to be effective, however, the cooperative must take the time to develop appropriate processes and procedures before, rather than after, a contested

election arises. As discussed below, once an election is contested, putting new rules in place might cause issues rather than prevent them.

Consider Forming a Credentials and Elections Committee. A credentials and election committee is made up of members of the cooperative who are not officers or directors of the cooperative or candidates for the Board positions to be filled. The committee can be made responsible for ruling on election questions, such as the validity of proxies or the qualifications of candidates, thus removing the Board and general counsel from the line of fire. The committee can also be made responsible for ruling on candidates' protests or objections to the election process or results.

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If such a committee is used, the cooperative's bylaws should set forth specific guidelines for the appointment and qualifications of committee members and establish the scope of the committee's responsibilities. Although a process can be put in place to maintain such a committee, many

cooperatives' bylaws provide for the selection of the committee members by the Board a certain number of days before an election. Also, when considering using such a committee, applicable state law should be reviewed to determine whether there are specific requirements for the establishment and authority of such committees.

Define General Counsel's Role in Elections. The cooperative's general counsel advises the Board of Directors as a whole and will be placed in a very uncomfortable position if required to take positions relative to the election process. The general counsel's role is to assist the Board in insuring a fair and objective election. When the general counsel is asked for advice by an incumbent Director facing a challenger, the general counsel is placed in the middle of the election process and thus directly in the line of fire. When a contested election arises, this situation can be avoided by having separate special counsel provide advice to the Board, or, if a credentials and elections committee is in place, to the committee.

Special counsel could work with the Board or the committee to ensure an objective and fair election process. Using special counsel allows the cooperative's general counsel to remain separate from the election process and places him or her in a position to work effectively with the Board no matter who wins the election. In addition, while typically the cooperative's general

counsel conducts elections, in contested elections special counsel could conduct elections and allow the general counsel to step out of the election process.

The Board might consider using an independent parliamentarian for the meeting. It can be difficult for the person conducting the election (whether the Chairman or the general counsel) to also rule on what might be contentious parliamentary questions. The independent parliamentarian could be special counsel or a trained parliamentarian.

Design and Implement Election Rules. The Board should approve carefully considered and clearly defined election rules so that such rules will be available when a contested election arises. The cooperative's general counsel and special counsel can help identify the questions most likely to arise during the election process and can make sure that the election rules address these questions and are in compliance with applicable state law. For example, one such question might be how proxies work and what persons have the authority to vote for entities such as churches and non-profit organizations. The rules can also provide how protests and objections by candidates will be handled. Having clear answers in advance for the most common questions not only provides for a smoother election process, but ensures an appearance of objectivity and greatly decreases the risk of making inconsistent rulings.

Make Rules Known to Candidates and Members. Once the cooperative has developed specific written guidelines for elections, it must ensure that when a contested election arises, the candidates and the members are made aware of the rules that will apply. This will both minimize the possibility of confusion and strengthen the chances of a smooth election. When a contested election arises, some cooperatives use their member newsletters and bulletins to provide notice of the annual meeting and applicable election rules and to announce the members participating on the credentials and elections committee. Some cooperatives also provide separate guidelines to the candidates concerning use of campaign literature. A practice that has proven helpful when contested elections arise is to send all of the candidates a packet of information that includes the cooperative's bylaws and any election guidelines and rules.

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Train Staff on Election Rules and Procedures. The staff members assisting with the election process should be well trained on the election rules and procedures to ensure consistency and achieve a smooth process. It would be helpful to have the special counsel to the Board or credentials and elections committee meet with the staff to answer any questions the staff may have about the rules. Special counsel should also be available at all times on the day of the election in the event that questions arise during the election. Proper training and support by counsel helps ensure a fair election process and demonstrates to candidates and the members that the cooperative is using a fair and objective process. Having a trained staff handle the mechanics of the election also makes it less likely that an error will occur that could lead to a contested election.

Use an Independent Auditor. To avoid disputes, an independent auditor should count the votes. This could be the credentials and elections committee or a separate body, such as representatives from a local election board or

CPA firm. If a CPA firm is selected, it would be best if it were not the firm used by the cooperative. Some cooperatives have placed the responsibility for selecting the independent auditor on the credentials and election committee.

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Avoid Quick Fixes. If the cooperative decides to implement policies and procedures only upon an election becoming contested, doing so may create problems rather than solve them. The candidate challenging the incumbent may charge that the Board is changing the rules in the midst of the election to favor the incumbent. In addition, hastily formulated rules are more likely to be vague and ambiguous, and rulings of the Board may be required if the rules are tested, thus placing the Board directly in the line of fire. The best time to develop and implement election rules is when no contested elections are on the horizon. However, if the Board feels that action is necessary or that rules should be put in place, it would be prudent to obtain advice from the cooperative's general counsel or special counsel to avoid taking actions that could lead to or bolster an election challenge.

III. Conclusion

Implementing these changes can achieve several objectives. Having rules in place and making candidates and members aware of them can minimize protests and objections and lessen the strain on the Board, management and staff.

Training staff and having counsel to assist with the elections helps eliminate errors and inconsistencies that could lead to election protests. Also, if the losing candidate protests the election and files suit, the fact that objective policies and procedures were in place decreases the chances that the election will be set aside. Planning in advance for contested elections will allow the cooperative's Board and management to focus on the task of running the cooperative, rather than an election.



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