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HOUSE BILL NO. 1337

Offered January 24, 2000

A BILL to amend and reenact §§ 24.2-802 and 24.2-803 of the Code of Virginia, relating to election recounts and contests.

Patron—Marshall

Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:**1. That §§ 24.2-802 and 24.2-803 of the Code of Virginia are amended and reenacted as follows:**

§ 24.2-802. Procedure for recount.

A. Within seven days of the filing of the petition, the chief judge of the circuit court shall call a preliminary hearing at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to review by the full court. As part of the preliminary hearing, the chief judge may permit the petitioner and his counsel, together with each other party and his counsel and at least two members of the electoral board and the custodians, to examine any mechanical or direct electronic voting device of the type that prints returns when the print-out sheets are not clearly legible. *The petitioner and his counsel and each other party and their counsel under supervision of the electoral board and its agents shall also have access to pollbooks and other materials used in the election for examination purposes. The chief judge during the preliminary hearing shall review all security measures taken for all ballots and voting devices and direct, as he deems necessary, all appropriate measures to ensure proper security to conduct the recount.*

The chief judge, subject to review by the full court, may set the place or places for the recount and may order the delivery of election materials to a central location and the transportation of voting devices to a central location in each county or city under appropriate safeguards.

After the full court is appointed under § 24.2-801, it shall call a hearing at which all motions shall be disposed of and the rules of procedure shall be fixed finally. The court shall call for the advice and cooperation of the State Board or any local electoral board, as appropriate, and such boards shall have the duty and authority to assist the court. *The court shall fix procedures that shall provide for the accurate determination of votes in the election including any evidence of improper voting and inaccurate vote tabulation.*

B. The court shall permit each candidate, or petitioner and governing body or chief executive officer, to select an equal number of the officers of election to be recount officials and to count ballots, ~~or in the case of mechanical or direct electronic voting devices to redetermine the vote.~~ The number shall be fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may permit each party to the recount to submit a list of alternate officials in the number the court directs. There shall be at least one team of recount officials to recount paper ballots and to redetermine the vote cast on mechanical or direct electronic devices of the type that prints returns for the election district at large in which the recount is being held. There shall be at least one team from each locality in the election district to redetermine the vote on other types of mechanical voting devices. There shall be at least one team from each locality using electronic counting devices to insert the ballots into one or more counting devices. The counting devices shall be programmed to count only votes cast for parties to the recount or for or against the question in a referendum recount. Each team shall be composed of one representative of each party.

The court may provide that if, at the time of the recount, any recount official fails to appear, the remaining recount officials present shall appoint substitute recount officials who shall possess the same qualifications as the recount officials for whom they substitute. The court may select pairs of recount coordinators to serve for each county or city in the election district who shall be members of the county or city electoral board and represent different political parties. The court shall have authority to summon such officials and coordinators. On request of a party to the recount, the court shall allow each party to appoint one representative observer for each team of recount officials. The expenses of its representatives shall be borne by each party.

C. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used, any or all ballots cast at the election, and absentee ballots sought to be cast but ruled invalid or may assume supervision thereof through the recount coordinators and officials. At the conclusion of the recount of each precinct, the recount officials shall write down (i) in the case of mechanical or direct electronic voting devices the redetermination of the vote and (ii) the number of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots cast as shown on the

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60 statement of results if the ballots cannot be found, for each of the two candidates or for and against the
61 question. They shall submit the ballots or the statement of results used, as to the validity of which
62 questions exist, to the court. The written statement of any one recount official challenging a ballot shall
63 be sufficient to require its submission to the court. ~~For purposes of redetermining the vote cast by any~~
64 ~~mechanical or direct electronic voting device that prints returns, the printed return sheets shall be~~
65 ~~sufficient evidence of the count.~~ If, on all mechanical or direct electronic voting devices, the number of
66 persons voting in the election, or the number of votes cast for the office or on the question, totals more
67 than the number of names on the pollbooks of persons voting on the devices, the figures recorded by
68 the devices shall be accepted as correct.

69 At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned
70 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and
71 votes. ~~By an appropriate order~~ *After determining all matters pertaining to the proper casting of all votes*
72 *in the election as raised by the parties,* the court shall certify to the State Board and the electoral board
73 or boards (i) the vote for each party to the recount and declare the person who received the higher
74 number of votes to be nominated or elected, as appropriate, or (ii) the votes for and against the question
75 and declare the outcome of the referendum.

76 D. Costs of the recount shall be assessed against the counties and cities comprising the election
77 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
78 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
79 or elected and the candidate petitioning for the recount a difference of not more than one-half of one
80 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
81 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
82 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
83 petitions for a recount, the court may assess costs in an equitable manner between the counties and
84 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date
85 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

86 E. The court shall determine the costs of the recount subject to the following limitations: (i) no per
87 diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of
88 election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the
89 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed
90 only if they serve.

91 F. Any petitioner who may be assessed with costs under subsection D of this section shall post a
92 bond with surety with the court in the amount of ten dollars per precinct in the area subject to recount.
93 If the petitioner wins the recount, the bond shall not be forfeit. If the petitioner loses the recount, the
94 bond shall be forfeit only to the extent of the assessed costs. If the assessed costs exceed the bond, he
95 shall be liable for such excess.

96 G. The recount proceeding shall be final and not subject to appeal.

97 § 24.2-803. Contest of election to General Assembly.

98 A. This section applies to any general or special election of members to the General Assembly.

99 B. A contest of the election of any member to the General Assembly may be initiated by an
100 unsuccessful candidate in the election, referred to hereafter as the contestant.

101 To initiate a contest, the contestant shall give written notice, in the manner provided in subsection D,
102 of his intent to contest the election to the person or persons apparently elected, referred to hereafter as
103 the contestee, and to the Clerk of the House of Delegates if he is contesting a House election or of the
104 Senate if he is contesting a Senate election, ~~within twenty days no later than forty days~~ following the
105 date of the election *or three days after the conclusion of a recount, whichever is later.*

106 The notice shall state the grounds on which the contestant intends to contest the election. The
107 grounds shall include (i) objections to the eligibility of the contestee based on specific allegations, (ii)
108 objections to the conduct or results of the election accompanied by specific allegations which, if proven
109 true, would have a probable impact on the outcome of the election, or (iii) both.

110 The notice shall state that an answer by the contestee must be filed with the clerk of the appropriate
111 house within ten days following service of the notice. The contestant shall sign and verify the notice by
112 his oath or affirmation.

113 C. Within ten days after service of the contestant's notice on the contestee, the contestee shall file
114 with the clerk of the appropriate house a written answer. His answer shall admit or deny the allegations
115 on which the contestant relies, or state that he has no knowledge or information concerning an allegation
116 which shall be deemed denial, and state any other defenses, in law or fact, on which he relies. The
117 contestee shall sign and verify his answer by his oath or affirmation.

118 D. The notice of intent to contest shall be filed by the contestant with the clerk of the appropriate
119 house and copies thereof served by the contestant as provided under § 8.01-296 on each contestee. The
120 answer, petition, and any reply and copies thereof shall be filed with the appropriate clerk, and copies
121 shall be served on the opposing party or his counsel, if any, in the manner prescribed by Rule 1:12 of

the Rules of the Supreme Court of Virginia.

After service of the notice of intent, any party, after reasonable notice to the other party or parties, shall be authorized to take depositions to sustain or invalidate the election. The contestant shall complete the taking of depositions to submit with his petition at any time within ~~thirty~~ *twenty* days following the date of the ~~election~~ *notice of intent to contest the election*, and the contestee shall complete the taking of his depositions within ~~forty-five~~ *thirty-five* days following the date of the ~~election~~ *notice of intent to contest the election*. By written stipulation of the parties, the testimony of any witness may be filed in the form of an affidavit by the witness within the same time limitations prescribed for the taking of depositions.

Subpoenas for witnesses shall be issued by the clerk of the circuit court of the county or city in which the contestee resides on the application of either party. Witnesses shall be entitled to the same allowances and privileges, and be subject to the same penalties, as witnesses summoned to attend the courts.

Every deposition shall be taken before a person authorized by law to administer oaths, who shall certify and seal the deposition in the same manner as in judicial civil proceedings, and file the same with the clerk of the appropriate house.

E. A written petition shall be filed by the contestant with the clerk of the appropriate house (i) within ~~two~~ *ten* days following the ~~second Wednesday in January~~ *filing of the notice of intent to contest the election* if the contested election was held at a November general election and (ii) within ~~twenty~~ *ten* days following the date of the ~~election~~ *filing of the notice of intent to contest the election* or within two days following the commencement of the next session of the General Assembly, whichever is later, if the election was held on a different date. The contestee may file a written reply to the petition within five days following its service on him.

No affidavit may be made a part of, or filed in support of, a petition or reply thereto unless the affidavit has previously been filed with the clerk of the appropriate house, pursuant to the written stipulation of the parties or their counsel, on or before the date established by subsection D for the completion of the taking of depositions by the proponent of the affidavit.

F. If the election was held during a regular session of the General Assembly, the times for filing the notice of intent to contest, the answer, petition, and reply and for taking depositions and affidavits shall be set by the Committee on Privileges and Elections of the appropriate house. The Committee may consider the contestant's and contestee's recommendations for the procedural schedule.

G. The clerk shall refer the notice, answer, petition, reply, depositions, and affidavits to the Committee on Privileges and Elections, which documents shall constitute the record in the contest.

Unless another committee has been designated by the rules of the house to hear contest matters, the Committee on Privileges and Elections shall hear the contest and conduct such investigation as has been directed by resolution of its house. It shall report its findings and recommendations to the house for its action.

H. The house, in its judgment, may find for the contestant and declare him elected, find for the contestee and confirm his election, or declare the election void and order a writ of election as in other cases of vacancy. If the house finds a tie vote has occurred, it shall direct a determination by lot in accordance with § 24.2-674, but no right to a recount shall be permitted. If the house finds, by two-thirds vote of the house that the contestant has prosecuted the election contest in bad faith, the house may order the contestant to pay to the contestee a sum that is not more than the contestee's actual costs of defending against the contest, including, but not limited to, reasonable attorneys' fees, expert witnesses' fees, and such costs as would be taxable in an action at law.