

VIRGINIA ACTS OF ASSEMBLY -- 2003 SESSION

CHAPTER 268

An Act to amend and reenact §§ 24.2-801, 24.2-802, 24.2-805, and 24.2-814 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 24.2-801.1, relating to recounts and contests following elections; presidential elections.

[H 2635]

Approved March 16, 2003

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-801, 24.2-802, 24.2-805, and 24.2-814 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 24.2-801.1 as follows:

§ 24.2-801. Petition for recount; recount court.

The petition for a recount *of an election, other than an election for presidential electors*, shall be filed within ~~ten~~ 10 days from the day the State Board or the electoral board certifies the result of the election under § 24.2-679 or § 24.2-671, but not thereafter. The petition shall be filed in the Circuit Court of the City of Richmond in the case of any statewide office and in the circuit court of the county or city in which the candidate being challenged resides in the case of any other office. The petition shall be filed in the Circuit Court of the City of Richmond in the case of any statewide referendum and in the circuit court of any county or city comprising a part of the election district in the case of any other referendum.

The petition shall set forth the results certified by the Board or electoral board and shall request the court to have the ballots in the election recounted or, in the case of mechanical or direct electronic voting devices, the vote redetermined.

In an election for office, a copy of the petition shall be served on the candidate apparently nominated or elected as provided under § 8.01-296 and within ~~ten~~ 10 days after the Board or electoral board has certified the results of such election. In a referendum, a copy of the petition shall be so served on the governing body or chief executive officer of the jurisdiction in which the election was held.

The chief judge of the circuit court in which a petition is filed shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a court appointed and sitting under §§ 24.2-805 and 24.2-806.

§ 24.2-801.1. *Petition for recount of election for presidential electors; recount court.*

The petition for a recount of an election for presidential electors shall be filed no later than 5:00 p.m. on the second calendar day after the day the State Board certifies the result of the election under § 24.2-679, but not thereafter. Presidential candidates who anticipate the possibility of asking for a recount are encouraged to so notify the State Board by letter as soon as possible after election day. The petition shall be filed in the Circuit Court of the City of Richmond. If any presidential candidate is eligible to seek a recount of the results of the election for presidential electors under § 24.2-800 the State Board shall, within 24 hours of the certification of the results, notify the Circuit Court of the City of Richmond and the Supreme Court of Virginia (i) that a recount is possible, (ii) which presidential candidate is eligible to seek a recount, and (iii) of the date the results were certified. The Circuit Court of the City of Richmond shall make arrangements to receive any such filing if the office would normally be closed the entire day, or prior to 5:00 p.m., on the second calendar day after the day the State Board certified the result of the election.

The petition shall set forth the results certified by the Board and shall request the court to have the ballots in the election recounted or, in the case of mechanical or direct electronic voting devices, the vote redetermined.

A copy of the petition shall be served on the presidential candidate whose electors were apparently elected as provided under § 8.01-296 and within five calendar days after the Board has certified the results of such election.

As soon as a petition is filed, the chief judge of the Circuit Court shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a court appointed and sitting under § 24.2-805.

Any recount of an election for presidential electors shall be held promptly and completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of the electors.

§ 24.2-802. Procedure for recount.

A. The State Board of Elections shall promulgate standards for (i) the proper handling and security

of voting and counting devices, ballots, and other materials required for a recount, (ii) accurate determination of votes based upon objective evidence and taking into account the counting device and form of ballots approved for use in the Commonwealth, and (iii) any other matters that will promote a timely and accurate resolution of the recount. The chief judge of the circuit court or the full recount court may, consistent with State Board of Elections standards, resolve disputes over the application of the standards and direct all other appropriate measures to ensure the proper conduct of the recount.

The recount procedures to be followed throughout the election district shall be as uniform as practicable, taking into account the types of ballots and voting devices in use in the election district.

B. Within seven *calendar* days of the filing of the petition for a recount of any election other than an election for presidential electors, or within five calendar days of the filing of a petition for a recount of an election for presidential electors, 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, provided that individual ballots cast in the election shall not be examined at the preliminary hearing. 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 or § 24.2-801.1, 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.

The determination of the votes in a recount shall be based on votes cast in the election and shall not take into account (a *i*) any absentee ballots or conditional ballots sought to be cast but ruled invalid and not cast in the election, (b *ii*) ballots cast only for administrative or test purposes and voided by the officers of election, or (c *iii*) ballots spoiled by a voter and replaced with a new ballot.

The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be used pursuant to § 24.2-803 in contesting the results of an election.

C. 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.

D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used and any or all ballots cast at the election, or may assume supervision thereof through the recount coordinators and officials.

The redetermination of the vote in a recount shall be conducted as follows:

1. For paper ballots, the recount officials shall hand count the ballots using the standards promulgated by the State Board pursuant to subsection A.

2. For mechanical lever machines without printouts, the recount officials shall open the machines and read the counters.

3. For mechanical lever machines with printouts and direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.

4. For optical scan tabulators, the recount officials shall first examine the printout to redetermine the vote. Only if the printout is not clear, or on the request of the court, the recount officials shall rerun all the ballots through a tabulator programmed to count only the votes for the office or issue in question in the recount and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set aside and any ballots not accepted by the tabulator shall be hand counted using the standards promulgated by the State Board pursuant to subsection A.

5. For punchcard tabulators, the recount officials shall first examine the printout to redetermine the vote. Only if the printout is not clear, or on the request of the court, the recount officials shall rerun all the ballots through a tabulator programmed to count only the votes for the office or issue in question in the recount and to set aside all ballots containing write-in votes and, if possible, overvotes and undervotes. The ballots that are set aside and any ballots not accepted by the tabulator shall be hand counted using the standards promulgated by the State Board pursuant to subsection A and the standards set forth in this subdivision. The following standards shall apply in determining whether a ballot has been properly voted and should be counted. A chad is the small piece of a punch card ballot that, when removed by the voter in the voting process, leaves a hole that is recognizable by a ballot tabulator. A ballot on which the chad indicating the selection of a candidate or position on an issue is broken or separated from the card at two or more corners shall be deemed a vote and counted; a chad on which only one corner is broken or separated from the card shall not be considered a vote. No other depression, dimple, or other mark on the ballot shall be counted as a vote. On any ballot on which two or more corners of the chad indicating the selection of a candidate or position have been broken or separated from the card and the voter has also cast a vote for another candidate for the same office or position on the same issue, the partially punched chad also shall be deemed a vote and, if the voter has cast more votes than the number for which he was lawfully entitled to vote, the ballot shall be deemed an overvote and shall not be counted with respect to that office or issue.

There shall be only one redetermination of the vote in each precinct.

At the conclusion of the recount of each precinct, the recount officials shall write down 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 statement of results if the ballots cannot be found, for each of the two candidates or for and against the question. They shall submit the ballots or the statement of results used, as to the validity of which questions exist, to the court. The written statement of any one recount official challenging a ballot shall be sufficient to require its submission to the court. If, on all mechanical or direct electronic voting devices, the number of persons voting in the election, or the number of votes cast for the office or on the question, totals more than the number of names on the pollbooks of persons voting on the devices, the figures recorded by the devices shall be accepted as correct.

At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and votes. After determining all matters pertaining to the recount and redetermination of the vote as raised by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for each party to the recount and declare the person who received the higher number of votes to be nominated or elected, as appropriate, or (b) the votes for and against the question and declare the outcome of the referendum.

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

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

G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety with the court in the amount of ~~ten dollars~~ \$10 per precinct in the area subject to recount. If the

petitioner wins the recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.

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

I. For the purposes of this section:

"Overvote" means a ballot on which a voter casts a vote for a greater number of candidates or positions than the number for which he was lawfully entitled to vote and no vote shall be counted with respect to that office or issue.

"Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or positions than the number for which he was lawfully entitled to vote.

§ 24.2-805. Contest of elections of electors for President and Vice President or primaries for United States Senate or statewide office.

In an election of electors for the President and Vice President of the United States, or a primary for the United States Senate or any statewide office, the proceeding to contest shall be in the Circuit Court of the City of Richmond before a special court composed of the chief judge of such circuit court and two circuit court judges of circuits not contiguous to the City of Richmond appointed by the Chief Justice of the Supreme Court of Virginia, or, in the event of his inability to act, then by the next senior justice, who shall at the time of appointment set the date for trial.

If the chief judge of the Circuit Court of the City of Richmond is absent, unable to sit in the proceeding, or recuses himself, the clerk of the court shall at once certify that fact to the Chief Justice. Then the Chief Justice or the associate justice acting in his stead shall appoint a third judge, who shall be, if possible, a judge of the Circuit Court of the City of Richmond or an adjoining circuit.

Notwithstanding any provision of this chapter to the contrary: (i) notice of the intent to contest an election of electors for the President and Vice President of the United States shall be filed no later than 5:00 p.m. on the second calendar day after the day the State Board certifies the result of the election under § 24.2-679, but not thereafter; (ii) a copy of the complaint shall be served by the contestant as provided under § 8.01-296 on each contestee and within five calendar days after the Board has certified the results of such election, otherwise the complaint shall not be valid; (iii) the contestee's answer shall be filed within five calendar days after the complaint is served on him; (iv) the contest shall not wait upon the results of any recount; and (v) the proceedings shall be held promptly and completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of the electors.

§ 24.2-814. Contest following recount.

A candidate in a primary or an election to office, who was originally declared a winner and subsequently loses as the result of a recount, may file either (i) notice of his intent to contest the result in accordance with § 24.2-803 or § 24.2-804 or (ii) a written complaint pursuant to § 24.2-805 or § 24.2-806. Such notice or complaint shall be filed within ~~ten~~ 10 days following the date of the entry of the order of the recount court pursuant to subsection D of § 24.2-802.

In the case of a contest pursuant to § 24.2-803 or § 24.2-804, the times for filing 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.

This section shall not be applicable to a contest of an election for the President and Vice President of the United States.