

VIRGINIA ACTS OF ASSEMBLY -- 2004 RECONVENED SESSION

CHAPTER 1010

An Act to amend and reenact §§ 24.2-602, 24.2-629, 24.2-632, 24.2-633, 24.2-634, 24.2-638, 24.2-639, 24.2-642, 24.2-649, 24.2-659, 24.2-1009, and 24.2-1010 of the Code of Virginia and to repeal § 24.2-660 of the Code of Virginia, relating to voting equipment and technology and related election law offenses; penalties.

[S 313]

Approved April 21, 2004

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-602, 24.2-629, 24.2-632, 24.2-633, 24.2-634, 24.2-638, 24.2-639, 24.2-642, 24.2-649, 24.2-659, 24.2-1009, and 24.2-1010 of the Code of Virginia are amended and reenacted, as follows:

§ 24.2-602. Exemption for ballots and election materials from certain purchasing and procurement requirements.

The provisions of Article 3, Division of Purchases and Supply, (§ 2.2-1109 et seq.) of Chapter 11 of Title 2.2 and of Articles 1 (§ 2.2-4300 et seq.), 2 (§ 2.2-4303 et seq.), 3 (§ 2.2-4343 et seq.), and 5 (§ 2.2-4357 et seq.) of Chapter 43, Virginia Public Procurement Act, of Title 2.2 shall not apply to contracts for equipment, *software*, services, the printing of ballots or statements of results, or other materials essential to the conduct of the election. The provisions of Articles 4 (§ 2.2-4347 et seq.) and 6 (§ 2.2-4367 et seq.) of Chapter 43, Virginia Public Procurement Act, of Title 2.2 shall apply to such contracts.

§ 24.2-629. Authorized use of electronic systems and ballots.

A. Any person, firm, or corporation hereinafter referred to as the "vendor," manufacturing, owning, or offering for sale any electronic voting or counting system and ballots designed to be used with such equipment may apply to the State Board, in the manner prescribed by the Board, to have examined a production model of such equipment and the ballots used with it. The Board may require the vendor to pay a reasonable application fee when he files his request for testing or certification of new or upgraded voting equipment. Receipts from such fees shall be credited to the Board for reimbursement of testing and certification expenses. In addition to any other materials which may be required, a current statement of the financial status of the vendor, including any assets and liabilities, shall be filed with the Board; if the vendor is not the manufacturer of the equipment for which application is made, such a statement shall also be filed for the manufacturer. These statements shall be exempt from the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). The Board shall also require, at a site of its choosing, a demonstration of such system and ballots and may require that a production model of the system and a supply of ballots be provided to the Board for testing purposes.

B. The provisions of this title pertaining to mechanical voting devices and ballots shall be deemed applicable to such equipment and ballots provided that (i) the counting equipment used with punchcard or mark sense ballots shall not be required to prevent a voter from voting for a greater number of candidates than he is lawfully entitled to; (ii) the provisions of this title pertaining to ballot squares shall not be applicable to punchcard or mark sense ballots; and (iii) any system approved pursuant to this title shall segregate ballots containing write-in votes from all others. Every electronic voting system shall ensure voting in absolute secrecy, and systems requiring the voter to vote a ballot ~~which~~ *that* is inserted in an electronic counting device shall provide for secrecy of the ballot and a method to conceal the voted ballot. Systems requiring the voter to vote a ballot that is inserted in an electronic counting device shall report, if possible, the number of ballots on which a voter voted for a lesser number of candidates for an office than the number he was lawfully entitled to vote and the number of ballots on which a voter voted for a greater number of candidates than the number he was lawfully entitled to vote. Electronic voting devices shall be programmable, if possible, to allow such undervoted and overvoted ballots to be separated when necessary.

C. After its examination of the equipment, ballots, and other materials submitted by the vendors, the Board shall prepare and file in its office a report of its finding as to (i) the apparent capability of such equipment to accurately count, register, and report votes; (ii) whether the system can be conveniently used without undue confusion to the voter; (iii) its accessibility to voters with disabilities; (iv) whether the system can be safely used without undue potential for fraud; (v) the ease of its operation and transportation by voting equipment custodians and officers of election; (vi) the financial stability of the vendor and manufacturer; (vii) whether the system meets the requirements of this title; ~~and~~ (viii) *whether the system meets federal requirements*; and (ix) whether, in the opinion of the Board, the potential for approval of such system is such as to justify further examination and testing.

D. If the Board determines that there is such potential and prior to its final determination as to approval or disapproval of such system, the Board shall obtain a report by an independent electronics or

engineering consultant as to (i) whether the system accurately counts, registers, and reports votes; (ii) whether it is capable of storing and retaining existing votes in a permanent memory in the event of power failure during and after the election; (iii) the number of separate memory capabilities for the storage of recorded votes; (iv) its mechanical and electronic perfections and imperfections; (v) the audit trail provided by the system; (vi) the anticipated frequency of repair; (vii) the ease of repair; (viii) the anticipated life of the equipment; (ix) its potential for fraudulent use; (x) its accessibility to voters with disabilities; (xi) the ease of its programming, transportation, and operation by voting equipment custodians and officers of election; and (xii) any other matters deemed necessary by the Board. Failure by an applicant to cooperate with the consultant by furnishing information and production equipment and ballots requested shall be deemed a withdrawal of the application, but nothing in this section shall require the disclosure of trade secrets by the applicant. If such trade secrets are essential to the proper analysis of the system and are provided for that reason, the consultant shall subscribe to an oath subject to the penalty for perjury that he will neither disclose nor make use of such information except as necessary for the system analysis. The report of the consultant shall be filed in the office of the Board.

E. If the Board determines that there is potential for approval of the system and prior to its final determination, the Board shall also require that the system be tested in an actual election in one or more counties or cities. Its use at such election shall be as valid for all purposes as if it had been legally approved by the Board and adopted by the counties or cities.

F. If, following testing, the Board approves any electronic system and its ballots for use, the Board shall so notify the electoral boards of each county and city. Systems so approved may be adopted for use at elections as herein provided. No form of electronic system and ballots not so approved shall be adopted by any county or city. Any electronic system and ballots approved for use by the Board shall be deemed to meet the requirements of this title *and any applicable federal laws*, and their use in any election shall be valid.

§ 24.2-632. Voting equipment custodians.

A. For the purpose of ~~placing ballots in the frames of the voting equipment, putting programming and preparing~~ voting and counting equipment ~~in order, including the programming of any electronic activation devices or data storage media used to program or operate the equipment, and setting~~ maintaining, testing, ~~adjusting~~ calibrating, and delivering it, the electoral board shall employ one or more persons, to be known as custodians of voting equipment. The custodians shall be fully competent, thoroughly instructed, and sworn to perform their duties honestly and faithfully, and for such purpose shall be appointed and instructed at least ~~thirty~~ 30 days before each election. *With the approval of the State Board, the electoral board may contract with the voting equipment vendor or another contractor for the purpose of programming, preparing and maintaining the voting equipment. The voting equipment custodians shall instruct and supervise the vendor or contractor technicians and oversee the programming, testing, calibrating and delivering of the equipment. The vendor or contractor technicians shall be sworn to perform their duties honestly and faithfully and be informed of and subject to the misdemeanor and felony penalties provided in §§ 24.2-1009 and 24.2-1010.*

The final testing of the equipment prior to each election shall be done in the presence of an electoral board member or a representative of the electoral board. The electoral board may authorize a representative to be present at the final testing only if it is impracticable for a board member to attend, and such representative shall in no case be the custodian *or a vendor or contractor technician who was responsible for programming the ballot software, electronic activation devices, or electronic data storage media.*

B. Notwithstanding the provisions of subsection A, the local electoral board may assign a board member or registrar to serve as a custodian without pay for such service. The board member or registrar serving as custodian shall be fully competent, thoroughly instructed, and sworn to perform his duties honestly and faithfully, and for such purpose shall be appointed and instructed at least ~~thirty~~ 30 days before each election. Whenever the presence of an electoral board member and custodian is required by the provisions of this title, the same person shall not serve in both capacities. ~~The provisions of this subsection shall be applicable only in a county or city which uses mark sense ballots in combination with electronic counting equipment for the conduct of elections.~~

§ 24.2-633. Notice of final testing of equipment; sealing equipment.

Before ~~preparing the final testing of~~ voting or counting equipment for any election, the electoral board shall mail written notice (i) to the chairman of the local committee of each political party or, (ii) in a primary election, to the chairman of the local committee of the political party holding the primary, or (iii) in a city or town council election in which no candidate is a party nominee and which is held when no other election having party nominees is being conducted, to the candidates.

The notice shall state the time and place where the equipment will be ~~prepared~~ tested and state that the political party or candidate receiving the notice may have one representative present while the equipment is ~~prepared~~ tested.

At the time stated in the notice, the representatives, if present, shall be afforded an opportunity to see that the equipment is in proper condition for use at the election. When a device has been so examined by the representatives, it shall be sealed with a numbered ~~metal~~ seal in their presence, or, if the device

cannot be sealed with a ~~metal~~ *numbered* seal, it shall be locked with a key. The representatives shall certify as to the numbers of the devices; if mechanical voting devices are used, that all counters are set at zero (000); the number registered on the protective counter; and the number on the seal. When no party or candidate representative is present, the custodian shall seal the device as prescribed in this section in the presence of a member of the electoral board or its representative.

§ 24.2-634. Locking and securing after preparation.

When voting or counting equipment has been properly prepared for an election, it shall be locked against voting and sealed, or, if the device cannot be sealed with a ~~metal~~ *numbered* seal, it shall be locked with a key. The equipment keys *and any electronic activation devices* shall be retained in the custody of the electoral board and delivered to the officers of election as provided in § 24.2-639. After the voting equipment has been delivered to the polling places, the electoral board shall provide ample protection against tampering with or damage to the equipment.

§ 24.2-638. Voting equipment to be in plain view; officers and others not permitted to see actual voting; unlocking counter compartment of equipment, etc.

During the election, the exterior of the voting and counting equipment and every part of the polling place shall be in plain view of the officers of election. The equipment shall be placed at least four feet from any table where an officer of election is working or seated. The officers of election shall not themselves be, or permit any other person to be, in any position or near any position that will permit them to observe how a voter votes or has voted.

One of the officers shall inspect the face of the voting device after each voter has cast his vote and verify that the ballots on the face of the device are in their proper places and that the device has not been damaged. During an election the door or other covering of the counter compartment of the voting or counting device shall not be unlocked or open or the counters exposed except for good and sufficient reasons, a statement of which shall be made and signed by the officers of election and attached to the statement of results. No person shall be permitted in or about the polling place except the voting equipment custodian, *vendor or contractor technicians*, and other persons authorized by this title.

§ 24.2-639. Duties of officers of election.

The officers of election of each precinct at which voting or counting equipment is used shall meet at the polling place by 5:15 a.m. on the day of the election and arrange the equipment, furniture, and other materials for the conduct of the election. The officers of election shall verify that all required equipment, ballots, and other materials have been delivered to them for the election. The officers shall post at least two instruction cards for mechanical or direct electronic voting devices conspicuously within the polling place.

The keys to the equipment *and any electronic activation devices that are required for the operation of electronic voting equipment* shall be delivered, prior to the opening of the polls, to the officer of election designated by the electoral board in a sealed envelope on which has been written or printed the ~~number of each device, the number of the seal, if any, and the number registered on the protective counter, if one name of the precinct for which it is intended.~~ The envelope containing the keys *and any electronic activation devices* shall not be opened until all of the officers of election for the precinct are present at the polling place and have examined the envelope to see that it has not been opened. The equipment shall remain locked against voting until the polls are formally opened and shall not be operated except by voters in voting.

Before opening the polls, each officer shall examine the equipment and see that no vote has been cast and that the counters register zero. The officers shall conduct their examination in the presence of the following party and candidate representatives: one authorized representative of each political party or independent candidate in a general or special election, or one authorized representative of each candidate in a primary election, if such representatives are available. Each authorized representative shall be a qualified voter of the county or city within which the polling place is located. Each representative, who is not himself a candidate or party chairman, shall present to the officers of election a written statement designating him to be a representative of the party or candidate and signed by the county or city chairman of his political party, the independent candidate, or the primary candidate, as appropriate. Such statement, bearing the chairman's or candidate's original signature, may be photocopied and such photocopy shall be as valid as if the copy had been signed.

If any counter, *other than a protective or private counter, on mechanical voting equipment* is found not to register zero, the officers shall make a written statement identifying the counter, together with the number registered on it, and shall sign and post the statement on the wall of the polling room, where it shall remain during the day of election. The officers shall enter a similar statement on the statement of results. In determining the results, they shall subtract such number from the final total registered on that counter. *If any counter, other than a protective or private counter, on a mark sense or direct recording electronic voting device is found not to register zero, the officers of election shall immediately notify the electoral board which shall, if possible, substitute a device in good working order, that has been prepared and tested pursuant to § 24.2-634. No mark sense or direct recording electronic device shall be used if any counter, other than a protective or private counter, is found not to register zero.*

§ 24.2-642. Inoperative equipment.

A. When any voting or counting device becomes inoperative in whole or in part while the polls are open, the officers of election shall immediately notify the electoral board. If possible, the electoral board shall *dispatch a qualified technician to the polling place to repair the inoperative device. All repairs shall be made in the presence of two officers of election representing the two political parties or, in the case of a primary election for only one party, two officers representing that party.* If the device cannot be repaired on site, the electoral board shall, if possible, substitute a device in good order for the inoperative device, and at the close of the polls the record of both devices shall be taken, and the votes shown on their counters shall be added together in ascertaining the results of the election.

No voting or counting device that has become inoperative and contains votes may be removed from the polling place while the polls are open and votes are being ascertained. If the officers of election are unable to ascertain the results from the inoperative device after the polls close in order to add its results to the results from the other devices in that precinct, the officers of election shall lock and seal the device without removing the memory card, cartridge or data storage medium and deliver the device to either the clerk of court or registrar's office as provided for in § 24.2-659. On the day following the election, the electoral board shall meet and ascertain the results from the inoperative device in accordance with the procedures prescribed by the device's manufacturer and add the results to the results for the precinct to which the device was assigned.

Nothing in this subsection shall prohibit the removal of an inoperative device from a precinct prior to the opening of the polls or votes being cast on that device. Any device so removed shall be placed in the custody of an authorized custodian, technician or electoral board representative. If the inoperative device can be repaired, it shall be retested and resealed pursuant to § 24.2-634 and may be returned to the precinct by an authorized custodian, technician or electoral board representative. The officers of election shall then open the device pursuant to § 24.2-639.

B. In any precinct that uses a ballot that can be marked without the use of the counting device, if the counting device becomes inoperative and there is no other available counting device, the uncounted ballots shall be placed in a ballot container or compartment which is used exclusively for uncounted ballots. If an operative counting device is available in the polling place after the polls have closed, such uncounted ballots shall be removed from the container and fed into the counting device, one at a time, by an officer of election in the presence of all persons who may be lawfully present at that time but before the votes are determined pursuant to § 24.2-657. If such device is not available, the ballots may be counted manually or as directed by the electoral board.

C. If (i) the inoperative device cannot be repaired in time to continue using it at the election, (ii) a substitute device is needed to conduct the election but is not available for use, (iii) the supply of official paper ballots, or other official ballots that can be cast without use of the inoperative device, is not adequate, and (iv) the local electoral board approves, an officer of election may have copies of the official paper ballot reprinted or reproduced by photographic, electronic, or mechanical processes for use at the election. The voted ballot copies may be received by the officers of election and placed in the ballot container and counted with the votes registered on the voting or counting devices; and the result shall be declared the same as though no device has been inoperative. The voted ballot copies shall be deemed official ballots for the purpose of § 24.2-665 and preserved and returned with the statement of results and with a certificate setting forth how and why the same were voted. The officer of election who had the ballot copies made shall provide a written statement of the number of copies made, signed by him and subject to felony penalties for making false statements pursuant to § 24.2-1016, to be preserved with the unused ballot copies.

§ 24.2-649. Assistance for certain voters.

A. Any voter age 65 or older or physically disabled may request and then shall be handed a paper ballot or a *mark sense ballot* by an officer of election outside the polling place but within 150 feet of the entrance to the polling place. The voter shall mark the *paper* ballot in the officer's presence but in a secret manner and fold and return the ballot to the officer. The officer shall immediately return to the polling place and deposit the ballot in the ballot container in accordance with § 24.2-646. *The voter shall mark the mark sense ballot in the officer's presence but in a secret manner and cover and return the ballot to the officer who shall immediately return to the polling place and deposit the ballot in the ballot counter in accordance with the instructions of the State Board.*

Any county or city that has acquired an electronic voting device that is so constructed as to be easily portable may use the voting device in lieu of a paper or mark sense ballot for the voter requiring assistance pursuant to this subsection. However, the electronic voting device may be used in lieu of a paper ballot only so long as: (i) the voting device remains in the plain view of two officers of election representing two political parties or, in a primary election, two officers of election representing the party conducting the primary, provided that if the use of two officers for this purpose would result in too few officers remaining in the polling place to meet legal requirements, the equipment shall remain in plain view of one officer who shall be either the chief officer or the assistant chief officer; and (ii) the voter casts his ballot in a secret manner unless the voter requests assistance pursuant to this section. After the voter has completed voting his ballot, the officer or officers shall immediately return the voting device to its assigned location inside the polling place. The machine number, the time that the machine

was removed and the time that it was returned, the number on the machine's public counter before the machine was removed and the number on the same counter when it was returned, and the name or names of the officer or officers who accompanied the machine shall be recorded on the statement of results.

B. Any qualified voter, who requires assistance to vote by reason of physical disability or inability to read or write, may, if he so requests, be assisted in voting. If he is blind, he may designate an officer of election or any other person to assist him. If he is unable to read and write or disabled for any cause other than blindness, he may designate an officer of election or some other person to assist him other than the voter's employer or agent of that employer, or officer or agent of the voter's union.

The officer of election or other person so designated shall not enter the booth with the voter unless (i) the voter signs a request stating that he requires assistance by reason of physical disability or inability to read or write and (ii) the officer of election or other person signs a statement that he is not the voter's employer or an agent of that employer, or an officer or agent of the voter's union, and that he will act in accordance with the requirements of this section. The request and statement shall be on a single form furnished by the State Board. If the voter is unable to sign the request, his own mark acknowledged by him before an officer of election shall be sufficient signature. If the voter being assisted is blind, neither the request nor the statement shall be required to be signed and an officer of election shall advise the voter and person assisting the voter of the requirements of this section and record the name of the voter and the name and address of the person assisting him.

The officer of election or other person so designated shall assist the qualified voter in the preparation of his ballot in accordance with his instructions and without soliciting his vote or in any manner attempting to influence his vote and shall not in any manner divulge or indicate, by signs or otherwise, how the voter voted on any office or question.

A person who willfully violates this subsection shall be guilty of a Class 1 misdemeanor. In addition, the provisions of § 24.2-1016 and its felony penalties for false statements shall be applicable to any request or statement signed pursuant to this section.

In any precinct in which an electronic voting device is available that provides an audio ballot, the officers of election shall notify a voter requiring assistance pursuant to this subsection that such equipment is available for him to use to vote in privacy without assistance and the officers of election shall instruct the voter on the use of the voting equipment. Nothing in this subsection shall be construed to require a voter to use the equipment unassisted.

§ 24.2-659. Locking voting and counting devices after election and delivering keys to clerk; printed returns as evidence.

A. If the voting or counting device is secured by the use of equipment keys, after the officers of election lock and seal each voting and counting device, the equipment keys shall be enclosed in an envelope which shall be sealed and have endorsed thereon a certificate of an officer of election stating the election precinct, the number of each device, the number on the seal, and the number of the protective counter, if one, on the device. The sealed envelope shall be delivered by one of the officers of the election to the clerk of the circuit court where the election was held. The custodians of the voting equipment shall enclose and seal in an envelope, properly endorsed, all other keys to all voting equipment in their jurisdictions and deliver the envelope to the clerk of the circuit court by noon on the day following the election. *If the voting or counting devices are secured by the use of equipment keys or electronic activation devices that are not specific to a particular device, after the officers of election lock and seal each voting and counting device, the equipment keys and electronic activation devices shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the election precinct. The sealed envelope shall be delivered by one of the officers of election to the clerk of the circuit court where the election was held.*

If the voting or counting device is secured by removal of the memory card, cartridge, or other data storage medium used in that election, the officers shall remove the memory card, cartridge, or other data storage medium and proceed to lock and seal each voting and counting device. The memory card, cartridge, or other data storage medium shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the election precinct, the number of each device, the number on the seal, and the number of the protective counter, if one, on the device. The sealed envelope shall be delivered by one of the officers of the election to the clerk of the circuit court where the election was held ~~or to the electoral board as specified in § 24.2-660~~. The equipment keys used at the polls shall be sealed in a different envelope and delivered to the clerk who shall release them to the electoral board upon request or at the expiration of the time specified by this section.

If the voting or counting device provides for the creation of a separate master electronic back-up on a memory card, cartridge or other data storage medium that combines the data for all of the voting devices in a given precinct, that data storage medium shall be enclosed in an envelope that shall be sealed and have endorsed thereon a certificate of an officer of election stating the name of the precinct. The sealed envelope shall be delivered by one of the officers of election to the clerk of the circuit court where the election was held. The memory cards or data storage medium for the individual devices may remain sealed in its individual device until the expiration of the time specified by this section. The

equipment keys and the electronic activation devices used at the polls shall be sealed together in a separate envelope and delivered to the clerk who shall release them to the electoral board upon request or at the expiration of the time specified by this section.

The voting and counting devices shall remain locked and sealed for the period of 15 days after the results of the election have been ascertained and, if any contest or recount is pending thereafter, until it has been concluded. The devices shall be opened and all data examined only (i) on the order of a court of competent jurisdiction or (ii) on the request of an authorized representative of the State Board or the electoral board at the direction of the State Board in order to ensure the accuracy of the returns.

When recounts occur in precincts using mechanical or direct electronic voting devices with printed return sheets, the printed return sheets delivered to the clerk may be used as the official evidence of the results.

When the required time has expired, the clerk of the circuit court shall return all voting equipment keys to the electoral board.

B. The local electoral board may direct that the officers of election and custodians, in lieu of conveying the sealed equipment keys to the clerk of the circuit court as provided in subsection A of this section, shall convey them to the principal office of the general registrar on the night of the election. The general registrar shall secure and retain the sealed equipment keys in his office and shall convey them to the clerk of the court by noon of the day following the election.

§ 24.2-1009. Stealing or tampering with ballot containers, voting or registration equipment, software, records or documents.

Any person who (i) steals or willfully, fraudulently, ~~and~~ or wrongfully tampers with any part of any ballot container, voting or registration equipment, records, or documents, which are used in any way within the registration or election process, (ii) *steals or willfully, fraudulently, or wrongfully tampers with the software used to prepare and operate voting equipment or the software or hardware used to collect and disseminate election returns*, (iii) *steals or willfully, fraudulently, or wrongfully tampers with an electronic activation device or electronic data storage medium of the type used to prepare, operate or back-up electronic voting equipment*, (iv) *willfully, fraudulently, or wrongfully intercepts, alters or disrupts the electronic transmission of election returns or the posting of returns on the Internet*, (~~ii~~ v) fraudulently makes any entry, deletion, or alteration to any item listed in (i), or (~~iii~~ vi) aids, abets, or permits any other person to violate the provisions of ~~elause (i) or (ii) clauses (i) through (v)~~, shall be guilty of a Class 5 felony.

§ 24.2-1010. Unauthorized possession or duplication of voting equipment key or electronic activation device.

Any unauthorized person found in possession of any voting equipment key *or electronic activation device of the type used to prepare or operate voting equipment* or any unauthorized person who *duplicates a voting equipment key or electronic activation device* shall be guilty of a Class 1 misdemeanor.

2. That § 24.2-660 of the Code of Virginia is repealed.