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HOUSE BILL NO. 1175

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Privileges and Elections
on February 10, 2006)

(Patrons Prior to Substitute—Delegates Rapp and Saxman [HB 549])

A BILL to amend and reenact §§ 24.2-659, 24.2-669, 24.2-671, and 24.2-802 of the Code of Virginia, relating to elections; certification of results; recounts.

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-659, 24.2-669, 24.2-671, and 24.2-802 of the Code of Virginia are amended and reenacted as follows:

§ 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 election to the clerk of the circuit court where the election was held. 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. *In the event that devices are examined under clause (ii) of this paragraph, each political party and each independent candidate on the ballot, or each primary candidate, shall be entitled to have a representative present during such examination. The representatives and observers lawfully present shall be prohibited from interfering with the officers of election in any way. The State Board or local electoral board shall provide such parties and candidates reasonable advance notice of the examination.*

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.

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

62 B. The local electoral board may direct that the officers of election and custodians, in lieu of
63 conveying the sealed equipment keys to the clerk of the circuit court as provided in subsection A of this
64 section, shall convey them to the principal office of the general registrar on the night of the election.
65 The general registrar shall secure and retain the sealed equipment keys and any other electronic locking
66 or activation devices in his office and shall convey them to the clerk of the court by noon of the day
67 following the ascertainment of the results of the election by the electoral board.

68 § 24.2-669. Clerk to keep ballots; inspection; destruction.

69 The clerk to whom the counted and uncounted ballots are delivered shall, without breaking the seal,
70 deposit them in a secure place in his office, where they shall be kept for the time required by this
71 section. He shall not allow the ballots to be inspected except (i) by an authorized representative of the
72 State Board or by the electoral board at the direction of the State Board to ensure the accuracy of the
73 returns or the purity of the election, (ii) by the officers of election, and then only at the direction of the
74 electoral board in accordance with § 24.2-672 when the provisions of § 24.2-662 have not been
75 followed, or (iii) on the order of a court before which there is pending a proceeding for a contest or
76 recount under Chapter 8 (§ 24.2-800 et seq.) of this title or before whom there is then pending a
77 proceeding in which the ballots are necessary for use in evidence. *In the event that ballots are inspected*
78 *under clause (i) or (ii) of this paragraph, each political party and each independent candidate on the*
79 *ballot, or each primary candidate, shall be entitled to have a representative present during such*
80 *inspection. The representatives and observers lawfully present shall be prohibited from interfering with*
81 *the officers of election in any way. The State Board or local electoral board shall provide such parties*
82 *and candidates reasonable advance notice of the inspection.*

83 After the counted ballots for a federal election have remained in the clerk's office for two years, if
84 no election contest or other proceeding is pending in which such ballots may be needed as evidence, the
85 clerk shall destroy such ballots. After the counted ballots for any other election have remained in the
86 clerk's office for one year, if no election contest or other proceeding is pending in which such ballots
87 may be needed as evidence, the clerk shall destroy such ballots. After the unused ballots have remained
88 in the clerk's office and the time has expired for initiating a recount, contest, or other proceeding in
89 which such ballots may be needed as evidence and no such contest or proceeding is pending, the clerk
90 may then destroy the unused ballots other than punchcard ballots, which shall be returned to the
91 electoral board.

92 § 24.2-671. Electoral board to meet and ascertain results; conclusiveness of results.

93 Each electoral board shall meet at the clerk's or general registrar's office of the county or city for
94 which they are appointed at or before 5:00 p.m. on the day after any election. The board may adjourn to
95 another room of sufficient size in a public building to ascertain the results, and may adjourn from day to
96 day as needed, not to exceed seven calendar days from the date of the election. Written directions to the
97 location of any room other than the clerk's or general registrar's office where the board will meet shall
98 be posted at the doors of the clerk's and general registrar's offices prior to the beginning of the meeting.

99 The board shall open the returns delivered by the officers.

100 If the electoral board has exercised the option provided by § 24.2-668 for delivery of the election
101 materials to the office of the general registrar on the night of the election, the electoral board shall meet
102 at the office of the general registrar at or before 5:00 p.m. on the day after any election.

103 The board shall ascertain from the returns the total votes in the county or city, or town in a town
104 election, for each candidate and for and against each question and complete the abstract of votes cast at
105 such election, as provided for in § 24.2-675. For any office in which no person was elected by write-in
106 votes, and for which the total number of write-in votes for that office is less than (i) five percent of the
107 total number of votes cast for that office and (ii) the total number of votes cast for the candidate
108 receiving the most votes, the electoral board shall ascertain the total votes for each write-in candidate for
109 the office within one week following the election. For offices for which the electoral board issues the
110 certificate of election, the result so ascertained, signed and attested, shall be conclusive and shall not
111 thereafter be subject to challenge except as specifically provided in Chapter 8 (§ 24.2-800 et seq.) of this
112 title.

113 Once the result is so ascertained, the secretary of the electoral board shall deliver one copy of each
114 statement of results to the general registrar to be available for inspection when his office is open for
115 business. The secretary shall then return all pollbooks, any printed inspection and return sheets, and one
116 copy of each statement of results to the clerk.

117 *Beginning with the general election in November 2007, a report of any changes made by the local*
118 *electoral board to the unofficial results ascertained by the officers of election or any subsequent change*
119 *to the official abstract of votes made by the local electoral board shall be forwarded to the State Board*
120 *of Elections and the explanation of such change shall be posted on the State Board website.*

121 *Each political party and each independent candidate on the ballot, or each primary candidate, shall*

be entitled to have representatives present when the local electoral board meets to ascertain the results of the election. Each such party and candidate shall be entitled to have at least as many representatives present as there are teams of officials working to ascertain the results, and the room in which the local electoral board meets shall be of sufficient size and configuration to allow the representatives reasonable access and proximity to view the ballots as the teams of officials work to ascertain the results. The representatives and observers lawfully present shall be prohibited from interfering with the officials in any way.

§ 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 (i) any absentee ballots or provisional ballots sought to be cast but ruled invalid and not cast in the election, (ii) ballots cast only for administrative or test purposes and voided by the officers of election, or (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

183 qualifications as the recount officials for whom they substitute. The court may select pairs of recount
184 coordinators to serve for each county or city in the election district who shall be members of the county
185 or city electoral board and represent different political parties. The court shall have authority to summon
186 such officials and coordinators. *On the request of a any party to the recount, the court shall allow each*
187 *that party to appoint one representative observer for each team of recount officials. The representative*
188 *observers shall have an unobstructed view of the work of the recount officials.* The expenses of its
189 representatives shall be borne by each party.

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

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

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

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

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

202 4. For optical scan tabulators, the recount officials shall first examine the printout to redetermine the
203 vote. Only if the printout is not clear, or on the request of the court *for good cause shown*, the recount
204 officials shall rerun all the ballots through a tabulator programmed to count only the votes for the office
205 or issue in question in the recount and to set aside all ballots containing write-in votes, overvotes, and
206 undervotes. The ballots that are set aside, ~~and~~ any ballots not accepted by the tabulator, *and any ballots*
207 *for which a tabulator could not be programmed to meet the programming requirements of this*
208 *subdivision*, shall be hand counted using the standards promulgated by the State Board pursuant to
209 subsection A.

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

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

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

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

the recount to the results as previously certified by it pursuant to § 24.2-679.

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 \$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.