

COMMITTEE SUBSTITUTE

FOR

H. B. 2438

(BY DELEGATES MILEY, HUNT, BROWN, FRAZIER,
BARKER, MOORE, HAMILTON AND ELLEM)

(Originating in the Committee on the Judiciary)
[January 19, 2011]

A BILL to amend and reenact §3-1-2 of the Code of West Virginia, 1931, as amended; to amend and reenact §3-4-18 and §3-4-19 of said code; and to amend and reenact §3-4A-9 and §3-4A-20 of said code, all relating to independent voters; defining independent voters; and reforming conflicts in voting procedures.

Be it enacted by the Legislature of West Virginia:

That §3-1-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §3-4-18 and §3-4-19 of said code be amended and reenacted; and that §3-4A-9 and §3-4A-20 of said code be amended and reenacted, all to read as follows:

ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.

§3-1-2. Scope of chapter; definitions.

1 Unless restricted by the context, the provisions of this
2 chapter ~~shall~~ apply to every general, primary and special
3 election in which candidates are nominated or elected or in
4 which voters pass upon any public question submitted to
5 them, except that the provisions hereof shall be construed to
6 be operative in municipal elections only in those instances in
7 which they are made expressly so applicable.

8 Unless the context clearly requires a different meaning,
9 as herein used:

10 “Voter” ~~shall mean~~ means any person who possesses the
11 statutory and Constitutional qualifications for voting;

12 “Independent” means a registered voter who declined to
13 state a preference for party affiliation on their voter
14 registration or who listed a party affiliation which is not
15 qualified as a political party as defined in section eight,
16 article one of this chapter.

17 “Election” ~~shall mean~~ means the procedures whereby the
18 voters of this state or any subdivision thereof elect persons to
19 fill public offices, or elect members of a Constitutional
20 convention, or vote on public questions;

21 “Any election” or “all elections” ~~shall include~~ means
22 every general, primary or special election held in this state,
23 or in any of its subdivisions, for the purpose of nominating
24 or electing federal or state officers, or county, city, town or
25 village officers of any subdivision now existing or hereafter
26 created, or for the purpose of electing members of a
27 Constitutional convention, or for voting upon any public
28 question submitted to the people of the state or any of the
29 aforesaid subdivisions;

30 “Office” ~~shall be construed to mean~~ or “public office”
31 ~~which shall include~~ means: (1) Any elective office provided
32 for by the Constitution or laws of the United States or of this
33 state to which a salary or other compensation attaches; ~~and~~ or
34 (2) membership in a Constitutional convention.

35 “Candidate” ~~shall mean~~ means any person to be voted for
36 at an election;

37 “Public question” ~~shall mean~~ means any issue or
38 proposition, now or hereafter required by the governing body
39 of this state or any of its subdivisions to be submitted to the
40 voters of the state or subdivision for decision at elections;

41 The term “minor” as used in article four, section one of
42 the State Constitution and as used in this chapter ~~shall mean~~
43 means a person who has not become eighteen years of age.

ARTICLE 4. VOTING MACHINES.

§3-4-18. Conducting voting machine elections generally; duties of election officials.

1 (1) The election officers shall constantly and diligently
2 maintain a watch in order to see that ~~no~~ a person votes does
3 not vote more than once and to prevent any voter from
4 occupying the voting machine for more than three minutes.

5 (2) In primary elections, before a voter is permitted to use
6 the voting machine, the election officer representing the party
7 ~~to~~ of which the voter belongs, shall adjust the machine so

8 that the voter will be able to vote only for the candidates who
9 are seeking nomination on the ticket of the party with which
10 the voter is affiliated, unless the voter requests an alternative
11 ballot of a political party which has determined such a voter
12 may participate in its primary election voting.

13 ~~(3) If the machine is so constructed as to require~~
14 ~~adjustment after one person has voted before another person~~
15 ~~can vote, the election officers shall so adjust it after each~~
16 ~~person has voted.~~

17 ~~(4) The election officers shall issue to each voter when he~~
18 ~~signs the poll book a card or ticket numbered to correspond~~
19 ~~to the number on the poll book of such voter, and in the case~~
20 ~~of a primary election, indicating the party affiliation of such~~
21 ~~voter, which numbered card or ticket shall be presented to the~~
22 ~~election officer in charge of the machine.~~

§3-4-19. Independent voting in primary elections.

1 ~~If at any primary elections nonpartisan candidates for~~
2 ~~office and public questions are submitted to the voters and on~~
3 ~~which candidates and questions persons registered as~~

4 ~~“independent” are entitled to vote, as provided in section~~
5 ~~eighteen five(b)(3) of article two of this chapter, the Unless~~
6 ~~an independent voter is permitted to participate in the~~
7 ~~primary election of a political party, the following provisions~~
8 ~~apply to independent voters in primary elections that include~~
9 ~~non-partisan candidates or public questions:~~

10 (1) Election officers shall adjust the voting machines, if
11 mechanically possible to do so, so that such “independent”
12 voters may vote only those portions of the voting machine
13 ballot relating to the nonpartisan candidates and the public
14 questions submitted.

15 (2) If the voting machines cannot be so adjusted for the
16 independent voters, then ~~such~~ independent voters, under the
17 close supervision of two commissioners of the election of
18 different political party affiliation, shall be permitted to use
19 the voting machines for voting only those parts of the ballot
20 relating to such nonpartisan candidates and public questions
21 so submitted to the voters.

22 (3) In lieu of using ~~the a voting machines~~ machine, such
23 an independent ~~voters~~ voter may request an official printed
24 ballots ballot. ~~relating to such nonpartisan candidates and~~
25 public questions. ~~Such~~ A ballots ballot, when signed on the
26 back by the poll clerks as in other elections, shall be voted
27 and folded by the independent voter and shall be delivered to
28 one of the election commissioners who shall secure same in
29 a sealed or locked container until canvassed and counted in
30 the same manner as provided for handling and recording
31 absent voter ballots as provided in the section next hereafter.

ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.

§3-4A-9. Minimum requirements of electronic voting systems.

1 An electronic voting system of particular make and
2 design may not be approved by the State Election
3 Commission or be purchased, leased or used by any county
4 commission unless it meets the following requirements:

5 (1) It secures or ensures the voter absolute secrecy in the
6 act of voting or, at the voter's election, provides for open
7 voting;

8 (2) It is constructed to ensure that ~~no person~~, except in
9 instances of open voting as provided in this section, ~~can see~~
10 ~~or know for whom any~~ the contents of a ballot may not be
11 seen or known by anyone other than the voter who has voted
12 or is voting;

13 (3) It permits each voter to vote at any election for all
14 persons and offices for whom and which he or she is lawfully
15 entitled to vote, whether or not the name of any person
16 appears on a ballot or ballot label as a candidate; and it
17 permits each voter to vote for as many persons for an office
18 as he or she is lawfully entitled to vote for; and to vote for or
19 against any question upon which he or she is lawfully entitled
20 to vote. The automatic tabulating equipment used in
21 electronic voting systems is to reject choices recorded on any
22 ballot if the number of choices exceeds the number to which
23 a voter is entitled;

24 (4) It permits each voter to deposit, write in, affix upon
25 a ballot, card, envelope or other medium to be provided for
26 that purpose, ballots containing the names of persons for

27 whom he or she desires to vote whose names do not appear
28 upon the ballots or ballot labels;

29 (5) It permits each voter to change his or her vote for any
30 candidate and upon any question appearing upon the ballots or
31 ballot labels up to the time when his or her ballot is deposited in
32 the ballot box or his or her ballot is cast by electronic means;

33 (6) It contains a program deck consisting of cards that are
34 sequentially numbered or consisting of a computer program
35 disk, diskette, tape or other programming media containing
36 sequentially numbered program instructions and coded or
37 otherwise protected from tampering or substitution of the
38 media or program instructions ~~by~~ of unauthorized persons
39 and capable of tabulating all votes cast in each election;

40 (7) It contains two standard validation test decks
41 approved as to form and testing capabilities by the State
42 Election Commission;

43 (8) It correctly records and counts accurately all votes
44 cast ~~each~~ for the candidate and for and against each question
45 appearing upon the ballots or ballot labels;

46 (9) It permits each voter at any election, other than a
47 primary ~~elections~~ election, ~~by one mark or punch~~ to vote a
48 straight party ticket, as provided in section five, article six
49 of this chapter, by one mark or punch;

50 (10) It permits ~~each~~ a voter in a primary ~~elections~~
51 election to: (A) vote only for the candidates of the party for
52 which ~~he or she~~ the voter is legally permitted to vote; (B)
53 vote for the candidates, if any, for nonpartisan nominations
54 or election; and (C) vote on public questions; and precludes
55 ~~him or her~~ the voter from voting for any candidate seeking
56 nomination by any other political party unless that political
57 party has determined that the voter may participate in its
58 primary election ~~permits him or her to vote for the~~
59 ~~candidates, if any, for nonpartisan nomination or election~~
60 ~~and permits him or her to vote on public questions~~;

61 (11) It, where applicable, is provided with means for
62 sealing or electronically securing the vote recording device
63 to prevent its use and to prevent ~~tampering with ballot~~
64 ~~labels, both before the polls are open or before the operation~~

65 of the vote recording device for an election is begun and
66 immediately after the polls are closed of after the operation
67 of the vote recording device for an election is completed;

68 (12) It has the capacity to contain the names of
69 candidates constituting the tickets of at least nine political
70 parties and accommodates the wording of at least fifteen
71 questions;

72 (13) (A) Direct recording electronic voting machines
73 must generate a paper copy of each voter's ~~votes~~ vote that
74 will be automatically kept within a storage container, that is
75 locked, closely attached to the direct recording electronic
76 voting machine, and inaccessible to all but authorized voting
77 officials, who will handle such storage containers and such
78 paper copies contained therein in accordance with section
79 nineteen of this article.

80 (B) The paper copy of the voter's vote shall be
81 generated at the time the voter is at the voting station using
82 the direct recording electronic voting machine.

83 (C) The voter may examine the paper copy visually or
84 through headphone readout, and may accept or reject the
85 printed copy.

86 (D) The voter may not touch, handle or manipulate the
87 printed copy manually in any way.

88 (E) Once the printed copy of the voter's votes is
89 accepted by the voter as correctly reflecting the voter's
90 intent, but not before, it will automatically be stored for
91 recounts or random checks and the electronic vote will be
92 cast within the computer mechanism of the direct recording
93 electronic voting machine.

94 (F) Direct recording electronic voting machines with a
95 mandatory paper copy shall be approved by the Secretary of
96 State. The Secretary of State may promulgate rules and
97 emergency rules to implement or enforce this subsection
98 pursuant to the provisions of section five, article three,
99 chapter twenty-nine-a of this code.

100 (14) Where vote recording devices are used, they shall:

101 (A) Be durably constructed of material of good quality
102 and in a workmanlike manner and in a form which makes it
103 safely transportable;

104 (B) Be constructed with frames for the placing of ballot
105 labels that the labels upon which are printed the names of
106 candidates and their respective parties, titles of ~~offices~~ office
107 and wording of questions are reasonably protected from
108 mutilation, disfigurement or disarrangement or are
109 constructed to ensure that the screens upon which appear the
110 names of the candidates and their respective parties, titles of
111 offices and wording of questions are reasonably protected
112 ~~any~~ from modification;

113 (C) Bear a number that will identify it or distinguish it
114 from any other machine;

115 (D) Be constructed to ensure that a voter may easily
116 learn the method of operating it and may expeditiously cast
117 his or her vote for all candidates of his or her choice and
118 upon any public question;

119 (E) Be accompanied by a mechanically or electronically
120 operated instruction model which shows the arrangement of
121 ballot labels, party columns or rows, and questions;

122 (F) For electronic voting systems that utilize a screen upon
123 which votes may be recorded by means of a stylus or by means
124 of touch: (i) Be constructed to provide for the direct electronic
125 recording and tabulating of votes cast in a system specifically
126 designed and engineered for the election application;

127 ~~(G) For electronic voting systems that utilize a screen upon~~
128 ~~which votes may be recorded by means of a stylus or by means~~
129 ~~of touch;~~ (ii) Be constructed to prevent any voter from voting
130 for more than the allowable number of candidates for any
131 office, to include an audible or visual signal, or both, warning
132 any voter who attempts to vote for more than the allowable
133 number of candidates for any office or who attempts to cast his
134 or her ballot prior to its completion and are constructed to
135 include a visual or audible confirmation, or both, to the voter
136 upon completion and casting of the ballot;

137 ~~(H) For electronic voting systems that utilize a screen~~
138 ~~upon which votes may be recorded by means of a stylus or~~

139 ~~by means of touch;~~ (iii) Be constructed to present the entire
140 ballot to the voter, in a series of sequential pages, and to
141 ensure that the voter sees all of the ballot options on all
142 pages before completing his or her vote and to allow the
143 voter to review and change all ballot choices prior to
144 completing and casting his or her ballot;

145 ~~(f) For electronic voting systems that utilize a screen upon~~
146 ~~which votes may be recorded by means of a stylus or by means~~
147 ~~of touch;~~ (iv) Be constructed to allow election commissioners
148 to spoil a ballot where a voter fails to properly cast his or her
149 ballot, has departed the polling place and cannot be recalled by
150 a poll clerk to complete his or her ballot;

151 ~~(J) For electronic voting systems that utilize a screen~~
152 ~~upon which votes may be recorded by means of a stylus or~~
153 ~~by means of touch;~~ (v) Be constructed to allow election
154 commissioners, poll clerks, or both, to designate, mark or
155 otherwise record provisional ballots;

156 ~~(K) For electronic voting systems that utilize a screen~~
157 ~~upon which votes may be recorded by means of a stylus or~~

158 ~~by means of touch~~; (vi) Consist of devices which are
159 independent, nonnetworked voting systems in which each
160 vote is recorded and retained within each device's internal
161 nonvolatile electronic memory and contain an internal
162 security, the absence of which prevents substitution of any
163 other device;

164 ~~(L) For electronic voting systems that utilize a screen~~
165 ~~upon which votes may be recorded by means of a stylus or~~
166 ~~by means of touch~~; (vii) Store each vote in no fewer than
167 three separate, independent, nonvolatile electronic memory
168 components and that each device contains comprehensive
169 diagnostics to ensure that failures do not go undetected;

170 ~~(M) For electronic voting systems that utilize a screen~~
171 ~~upon which votes may be recorded by means of a stylus or~~
172 ~~by means of touch~~; (viii) Contain a unique, embedded
173 internal serial number for auditing purposes for each device
174 used to activate, retain and record votes;

175 ~~(N) For electronic voting systems that utilize a screen~~
176 ~~upon which votes may be recorded by means of a stylus or~~

177 ~~by means of touch,~~ (ix) Be constructed to record all
178 preelection, election and post-election activities, including
179 all ballot images and system anomalies, in each device's
180 internal electronic memory and are to be accessible in
181 electronic or printed form;

182 ~~(O) For electronic voting systems that utilize a screen~~
183 ~~upon which votes may be recorded by means of a stylus or~~
184 ~~by means of touch,~~ (x) Be constructed with a battery backup
185 system in each device to, at a minimum, prevent the loss of
186 any votes, as well as all preelection, election and post-
187 election activities, including all ballot images and system
188 anomalies, stored in the device's internal electronic memory
189 and to allow voting to continue for two hours of
190 uninterrupted operation in case of an electrical power
191 failure; and

192 ~~(P) For electronic voting systems that utilize a screen~~
193 ~~upon which votes may be recorded by means of a stylus or~~
194 ~~by means of touch,~~ (xi) Be constructed to prevent the loss of
195 any votes, as well as all preelection, election and post-

196 election activities, including all ballot images and system
197 anomalies, stored in each device's internal electronic
198 memory even in case of an electrical and battery power
199 failure.

§3-4A-20. Independent voting in primary elections.

1 ~~If at any primary elections, nonpartisan candidates for~~
2 ~~office and public questions are submitted to the voters on~~
3 ~~which persons registered as “independent” are entitled to~~
4 ~~vote, as provided in section eighteen article two of this~~
5 ~~chapter, the~~ Unless an independent voter is permitted to
6 participate in the primary election of a political party, the
7 following provisions apply to independent voters in primary
8 elections that include non-partisan candidates or public
9 questions:

10 (1) Election officers shall provide a vote recording
11 device, where applicable, or the appropriate ballot to be
12 marked by an electronically sensible pen or ink, or by means
13 of a stylus or by means of touch, so that independent voters
14 may vote only those portions of the ballot relating to the

15 nonpartisan candidates and the public questions submitted,
16 or shall provide a ballot containing only provisions for
17 voting for those candidates and upon those issues submitted
18 common to the ballots provided to all voters regardless of
19 political party affiliation, or both.

20 (2) In counties utilizing electronic voting systems in
21 which votes are recorded by perforating, if vote recording
22 devices are not available for the independent voters,
23 provisions are to be made for sealing the partisan section or
24 sections of the ballot or ballot labels on a vote recording
25 device using temporary seals, thus permitting the
26 independent voter to vote for the nonpartisan section or
27 sections of the ballot or ballot labels.

28 (3) After ~~the~~ an independent voter has voted, ~~the~~
29 temporary seals may be removed and the device may then
30 be used by partisan voters.