



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Secretary Of State TITLE-SERIES: 153-27

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: 153-27 Procedures for Handling Ballots and Counting Write-In Votes in Counties Using Optical Scan Ballots

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: 3-1A-6

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The Secretary of State has the authority to amend legislative rules under W. Va. Code 3-1A-6. In this instance, the existing Rule was updated to remove antiquated language, correct typos, and update the Rule in accordance with subsequent law passage and W. Va. Supreme Court decisions.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/28/2017

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/28/2017

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

N/a

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This Rule governs the process of counting write-in votes in counties that utilize optical scan ballot systems.

§2.1. Removed word punch, which refers to outdated voting systems.

§2.3. Removed language referencing outdated punch card voting systems. Current voting systems automatically electronically separate flagged write-in ballots.

§2.4. Removed language referring to filing fees to be paid by write-in candidates because W. Va. Code § 3-6-4a no longer requires filing fee be paid by such candidates. See also Phillips v. Hechler, 120 F.Supp.2d 587 (W. Va. 2000) (holding that W. Va. Code requirements for write-in filing fees is unconstitutional).

§2.8.1. Removed word punch, which refers to outdated voting systems; also added and to correct typo in subsequent subsection.

§2.8.2. Removed word and to correct typo.

§2.10. Removed words punch card, which refer to outdated voting systems, and added ballot to clarify what must be duplicated or hand counted in the event of an electronic malfunction; also removed word for to correct typo.

§3.2. Corrected typo referring to Section 2.3., which should read Section 2.8. Also re-worded provision for clarity and referenced W. Va. Code § 3-6-5, which provides extensive instructions for processing write-in votes.

§3.4. Removed language referring to outdated voting systems.

§4.3.3. Corrected typo referring to Section 2.3., which should read Section 2.8.

§4.3.3.c.A. Removed language referring to straight ticket vote, which is prohibited by W. Va. Code § 3-6-2(g).

§4.3.3.c.B. Removed language referring to straight ticket vote, which is prohibited by W. Va. Code § 3-6-2(g).

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

N/a

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

None.

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

None.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2017 Increase/Decrease (use "-")	2018 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE

SERIES 27
PROCEDURES FOR HANDLING BALLOTS AND COUNTING WRITE-IN
VOTES IN COUNTIES USING OPTICAL SCAN BALLOTS

§153-27-1. General.

1.1. Scope. -- This rule provides guidelines for the counting of write-in votes in counties that use the optical scan ballot systems.

1.2. Authority. -- W Va. Code §§3-1A-6, 3-4A-27, 3-6-4a, and 3-6-5.

1.3. Filing Date. -- ~~May 7, 2007.~~

1.4. Effective Date. -- ~~May 7, 2007.~~

1.5 This rule shall terminate and have no further force of effect upon the expiration of 10 years from its effective date.

§153-27-2. Definitions.

2.1. "Attempted write-in vote" means any ~~punch or~~ mark in a write-in voting position on a ballot or any writing, stamping or attaching by sticker of a name in the position provided for write-in votes to be entered for the voting system.

2.2. "Central counting center" means the room in the county courthouse where the ballot boxes are opened and the ballots processed and tabulated on election night.

2.3. "Inspection team" or "ballot box team" means two persons, one from each major political party, appointed and deputized according to §3-4A-27 by the clerk of the county commission for the purpose of opening ballot boxes, and verifying the statement of ballots used, ~~and for punch card voting systems, separating ballots with attempted write-in votes from ballots without attempted write-in votes, and for ballots without attempted write-in votes, separating the ballot cards from the grey secrecy envelopes.~~

2.4. "Official write-in candidate" means one who has filed a write-in candidate's certificate of announcement, ~~paid the filing fee,~~ and has been certified according to the provisions of W. Va. Code §3-6-4a.

2.5. "Overvote" means a combination of votes for an office which results in the voter casting more votes for that office than there are persons to be elected. For example, a person who marks one party nominee and also casts an attempted write-in vote for the same office and only one person is to be elected has "overvoted," whether or not the write-in vote can be counted.

2.6. The "proper location for entering a write-in vote" shall mean:

2.6.1. for optical scan systems, on or near the blank line labeled "WRITE-IN, IF ANY" positioned under the office for which the vote is cast.

2.7. "Resolution team" means two persons, one from each major political party, appointed and deputized according to W. Va. Code §3-4A-27 by the clerk of the county commission of a county using an optical scan voting system, for the purpose of examining ballots isolated by the tabulator because of damages, flaws, unreadable marks, or other defects, and determining whether the ballot must be duplicated or hand counted in order to tabulate the ballot accurately.

2.8. "Valid write-in vote" means a vote cast for an official write-in candidate by permitted means which includes the following elements:

2.8.1. a ~~punch or~~ mark in the voting position specified for write-in votes for the office; and

2.8.2. an entry of the name of the official write-in candidate in the proper location, which shall include the first name, or last name, or both first and last names in such a way that the intention of the voter can be determined; ~~and~~

2.9. "Write-in counting team" or "counting team" for optical scan systems means two persons, one from each major political party, appointed and deputized according to W. Va. §3-4A-27 by the clerk of the county commission for the purpose of examining ballots containing attempted write-in votes, determining which of those votes are valid write-in votes, and determining whether the ballot must be temporarily altered or duplicated in order to tabulate the remaining offices accurately.

2.10. "Write-in counting team" or "counting team" ~~for~~ means two persons, one from each major political party, appointed and deputized according to W. Va. Code §3-4A-27 by the clerk of the county commission for the purpose of examining ballots containing attempted write-in votes, determining which of those votes are valid write-in votes, and determining whether the ~~punch-card~~ ballot must be duplicated or hand counted in order to tabulate the remaining offices accurately.

§153-27-3. Casting and Counting Write-in Votes.

3.1. Valid write-in votes may be cast and counted for the election for any official write-in candidate for election to an office or party position other than Delegate to National Convention, but not for the nomination of any candidate. Write-in votes for any person or name other than an official write-in candidate shall be disregarded.

3.2. An attempted write-in vote shall be counted when the write-in counting team or resolution team finds the vote meets the conditions of a "valid write-in vote" as defined in Section ~~2.3~~ 2.8 of this rule, as well as the provisions of W. Va. Code § 3-6-5, and does not create an overvote for the office.

3.3. Acceptable means of making a write-in vote include printing or writing with pen or pencil, imprinting with an inked rubber stamp, and attaching a sticker or gummed label.

~~3.4. In punch card voting systems, an attempted write-in vote found on a grey secrecy envelope which does not contain a punch card ballot signed by the poll clerks shall be disregarded.~~

§153-27-4. Procedures for Optical Scan Ballots.

4.1. The clerk of the county commission shall appoint the following teams of persons to process ballots at the central counting center:

4.1.1. As many inspection teams as are needed to efficiently sort the incoming ballots and complete the procedures for all precincts in the county;

4.1.2. As many write-in counting team as are needed to efficiently review the ballots containing attempted write-in votes and to complete the procedures for all precincts in the county.

4.1.3. One or more resolution teams as needed to efficiently complete the procedures and prevent delays in completing the tabulation for all precincts in the county.

4.2. Each inspection team shall handle the ballots of only one precinct at a time, so as not to intermingle the ballots of various precincts. Each team shall remove the ballots from the ballot box, sort the ballots into stacks of ballots with write-in votes and ballots without write-in votes, and complete any other procedures required or directed by the clerk of the county commission.

4.3. Each write-in counting team shall proceed as follows:

4.3.1. They shall handle the ballots of only one precinct at a time.

4.3.2. They shall examine the ballots containing attempted write-in votes one by one in order to determine whether the write-in vote shall be counted and whether any temporary alteration or duplication of the ballot is necessary.

4.3.2.a. They shall determine whether any official write-in candidates have filed for offices on the ballot in the precinct under consideration. If there are official candidates, they shall proceed to the next step, 4.3.2b. If not, the ballot shall be reviewed as an invalid write-in. (under step 4.3.3.b or c.)

4.3.2.b. They shall examine the attempted write-in vote to determine whether the name of an office to be filled in that election is given. If not, the attempted vote shall be disregarded, and the ballot placed in the stack to be tabulated. If an office to be filled is named, they shall proceed to the next step, 4.3.2.c.

4.3.2.c. They shall then determine if the vote is entered in the proper place for write-in votes. If the name is entered in the proper location, they shall proceed to the next step, 4.3.3. If not, the ballot shall be reviewed as an invalid write-in, step 4.3.3.b or c.

4.3.3. They shall examine the write-in vote to determine if it is a valid write-in vote, as defined in section ~~2.3~~ 2.8 of this rule.

4.3.3.a. If the counting team finds the entry is a valid write-in vote, they shall then examine the ballot to determine whether the voter has overvoted for the office for which the write-in vote was cast.

~~A~~ 4.3.3.a.1. If there is no overvote, a tally mark shall be entered on the write-in record sheet for the precinct, and the ballot placed in the stack to be tabulated.

~~B~~ 4.3.3.a.2. If there is an overvote, no tally mark shall be entered, and the ballot placed in the stack to be tabulated.

4.3.3.b. If the counting team finds the write-in position was marked but the name entered is not an official write-in candidate, they shall place the ballot placed in the stack to be tabulated.

4.3.3.c. If the counting team finds the write-in position was not marked, they shall then examine the ballot to determine whether the voter's intention for the office is clear.

~~A~~ 4.3.3.c.1. If the attempted write-in would not have caused an overvote had it been a valid vote ~~and the ballot contains no straight ticket vote~~, the voter's intention is clear. The ballot shall be

placed in the stack to be tabulated.

~~B. 4.3.3.c.2.~~ If the attempted write-in would have caused an overvote or would have caused a ~~straight ticket~~ vote to be rejected for that office had the vote been a valid write-in, the voter's intention is not clear. The write-in team shall place a black sticker over the write-in position or duplicate the ballot according to the provisions of W. Va. Code §3-4A-27(d), and mark the write-in position so as to cause the tabulator to reject the overvote ~~or straight ticket vote.~~ ~~[Note: If the straight ticket party has a vacancy on the ballot for the write-in office which meant the write-in would not have caused an overvote, or if the straight ticket party has no nominee for the office, the ballot may be counted by the electronic tabulator without alteration or duplication.]~~ The duplicate ballot shall be placed in the stack to be tabulated, or held in a separate stack until the group to be tabulated is complete.

4.4. A ballot shall be duplicated only if there is a mark which makes correct tabulation impossible, or the ballot is so badly damaged it will not go through the scanner;

4.4.1. All duplicated ballots shall be numbered in red ink corresponding to the original ballot beginning with one (1) and continuing in sequence (for example, if there are five (5) ballots to be duplicated for a precinct, the numbers assigned would begin with one (1) and end with five (5).);

4.4.2. When any ballot is duplicated, the original ballot shall be retained with the duplicate.

4.5. For each precinct, a careful tally of write-in votes and all other votes counted manually under this procedure shall be kept by each deputized person designated to count ballots containing write-in votes;

4.6. Once all the ballots are stacked for the tabulator and all valid write-in votes tallied, the ballots shall be delivered as directed by the clerk to the team in charge of the tabulator.

4.7. One resolution team shall be present at the tabulator to review any ballots isolated by the tabulator.

4.7.1. The resolution team shall begin the review of isolated ballots immediately, and shall complete the review and any necessary temporary alteration or duplication according to the procedures of subsection ~~5.4.~~ 2.8. and W. Va. Code § 3-6-5 in order to reflect the voter's intention and shall return the ballots for tabulation.

4.7.2. The results of the precinct tabulation shall not be posted until the resolution team has completed its work and all ballots from the precinct have been tabulated.

4.8. As soon as practical after the tabulation of the precinct, the tally of all tabulated and write-in votes for announced write-in candidates shall be posted for public inspection.