WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2008

COMMITTEE SUBSTITUTE
FOR
ENROLLED
Senate Bill No. 494

(Senators Kessler, Oliverio, White, Plymale and Jenkins, original sponsors)

[Passed March 5, 2008; in effect from passage.]
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AN ACT to amend and reenact §3-4A-2, §3-4A-10, §3-4A-13, §3-4A-16, §3-4A-17, §3-4A-19, §3-4A-28 and §3-4A-33 of the Code of West Virginia, 1931, as amended, all relating to allowing election officials to use an electronic poll book containing voter registration information to verify that registered voters are eligible to vote in an election; defining terms; providing for storage, protection and maintenance of electronic poll books by county clerk; providing for use of
electronic poll book to verify eligibility of voter; requiring
election official to notify person not shown in electronic poll
book to eligible to vote of the correct precinct; requiring
preelection examination of electronic poll books; and
requiring use of printed poll book if electronic poll book is
not in working order.

Be it enacted by the Legislature of West Virginia:

That §3-4A-2, §3-4A-10, §3-4A-13, §3-4A-16, §3-4A-17,
§3-4A-19, §3-4A-28 and §3-4A-33 of the Code of West
Virginia, 1931, as amended, be amended and reenacted, all to
read as follows:

ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.

§3-4A-2. Definitions.

1 As used in this article, unless otherwise specified:

2 (1) “Automatic tabulating equipment” means all
3 apparatus necessary to electronically count votes
4 recorded on ballots and tabulate the results;

5 (2) “Ballot” means a tabulating card or paper on
6 which votes may be recorded by means of perforating
7 or marking with electronically sensible ink or pencil or
8 a screen upon which votes may be recorded by means of
9 a stylus or by means of touch;

10 (3) “Central counting center” means a facility
11 equipped with suitable and necessary automatic
12 tabulating equipment, selected by the county
13 commission, for the electronic counting of votes
14 recorded on ballots;
(4) "Electronic poll book" means an electronic device containing the same voter registration information maintained by the county clerk in a printed poll book.

(5) "Electronic voting system" is a means of conducting an election whereby votes are recorded on ballots by means of an electronically sensible marking ink, by perforating or are recorded on equipment that registers votes on a computer disk, or by touching a screen with a stylus or by means of touch, and votes are subsequently counted by automatic tabulating equipment at the central counting center;

(6) "Program deck" means the actual punch card deck or decks, or a computer program disk, diskette, tape or other programming media, containing the program for counting and tabulating the votes, including the "application program deck";

(7) "Application program deck" means the punch card deck or equivalent capacity in other program medias as provided, containing specific options used and necessary to modify the program of general application, to conduct and tabulate a specific election according to applicable law;

(8) "Standard validation test deck" means a group of ballots wherein all voting possibilities which can occur in an election are represented; and

(9) "Vote-recording device" means equipment in which ballot labels and ballots are placed to allow a voter to record his or her vote by perforating or equipment with a screen upon which votes may be recorded by means of a stylus or by means of touch.
§3-4A-10. County clerk to be custodian of vote-recording devices, tabulating equipment and electronic poll books; duties.

(a) When an electronic voting system is acquired by any county commission, the vote-recording devices, where applicable, and the tabulating equipment shall be immediately placed in the custody of the county clerk and shall remain in his or her custody at all times except when in use at an election or when in custody of a court or court officers during contest proceedings. The clerk shall see that the vote-recording devices and the tabulating equipment are properly protected and preserved from damage or unnecessary deterioration and shall not permit any unauthorized person to tamper with them. The clerk shall also keep the vote-recording devices and tabulating equipment in repair and of preparing the same for voting.

(b) When a county commission elects to acquire and use electronic poll books in lieu of printed poll books, the clerk of the county commission shall immediately take custody of the electronic poll books, which shall remain in his or her custody at all times except when in use at an election or when in the custody of a court or court officers during contest proceedings. The clerk shall ensure that the electronic poll books are properly protected and preserved from damage or unnecessary deteriorations and the clerk shall not permit any unauthorized person to tamper with the electronic poll books. The clerk shall also keep the electronic poll books in good repair and the clerk shall prepare the electronic poll books for election day.

§3-4A-13. Inspection of ballots, electronic poll books and
vote-recording devices; duties of county commission, ballot commissioners and election commissioners; records relating to ballots and vote-recording devices; receipt of election materials by ballot commissioners.

(a) When the clerk of the county commission has completed the preparation of the ballots and of any electronic poll books and vote-recording devices as provided in sections eleven-a and twelve-a of this article and as provided in section twenty-one, article one of this chapter, and not later than seven days before the day of the election, he or she shall notify the members of the county commission and the ballot commissioners that the ballots and any electronic poll books and devices are ready for use.

(b) The members of the county commission and the ballot commissioners shall convene at the office of the clerk or at such other place at which any vote-recording devices or electronic poll books and the ballots are stored, not later than five days before the day of the election, and shall inspect the devices, electronic poll books and the ballots to determine whether the requirements of this article have been met. Notice of the place and time of the inspection shall be published, no less than three days in advance, as a Class I-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code. The publication area is the county involved.

(c) Any candidate and one representative of each political party on the ballot may be present during the examination. If the devices and electronic poll books and ballots are found to be in proper order, the
members of the county commission and the ballot
commissioners shall endorse their approval in the book
in which the clerk entered the numbers of the devices
opposite the numbers of the precincts.

(d) The vote-recording devices, the electronic poll
books and the ballots shall then be secured in double
lock rooms. The clerk and the president or president
pro tempore of the county commission shall each have
a key. The rooms shall be unlocked only in their
presence and only for the removal of the devices,
electronic poll books and the ballots for transportation
to the polls. Upon removal of the devices, the electronic
poll books and the ballots, the clerk and president or
president pro tempore of the county commission shall
certify in writing signed by them that the devices, the
electronic poll books and packages of ballots were
found to be sealed when removed for transportation to
the polls.

(e) Vote-recording devices used during the early
voting period may be used on election day if retested in
accordance with all the provisions of this section,
including public notice between the close of early
voting and prior to precinct placement for election day.
Vote-recording devices containing a personal electronic
ballot (PEB), a programable memory chip and a printed
paper trail must comply with the applicable
requirements of section twenty-six of this article.

(f) Not later than one day before the election, the
election commissioner of each precinct previously
designated by the ballot commissioners shall attend at
the office of the clerk of the county commission to
receive the necessary election records, books and
supplies required by law. The election commissioners shall receive the per diem mileage rate prescribed by law for this service. The election commissioners shall give the ballot commissioners a sequentially numbered written receipt, on a printed form, provided by the clerk of the county commission, for such records, books and supplies. The receipt shall be prepared in duplicate. One copy of the receipt shall remain with the clerk of the county commission and one copy shall be delivered to the president or president pro tempore of the county commission.

§3-4A-16. Delivery of vote-recording devices and electronic poll books; time, arrangement for voting.

The clerk of the county commission shall deliver or cause to be delivered each vote-recording device, electronic poll book and the package of ballots to the polling place where they are to be employed. The delivery shall be made not less than one hour prior to the opening of the polls and in the presence of the precinct election commissioners. At the time of the delivery the device and electronic poll books are to be sealed to prevent any use prior to the opening of the polls and the ballots are to be packaged and sealed to prevent any tampering with the ballots. Immediately prior to the opening of the polls on election day, the sealed packages of ballots are to be opened, where applicable, and the seal of the vote-recording device and the seal of the electronic poll book is to be broken in the presence of the precinct election commissioners, who shall certify in writing signed by them to the clerk of the county commission that the devices, where applicable, and the ballots have been delivered in their presence, that the devices and packages of ballots were
found to be sealed upon delivery and that the seals have been broken and the devices opened in their presence, as may be appropriate. The election commissioners shall then cause the vote-recording device and booth to be arranged so that the front of the vote-recording device will not be visible, when the vote-recording device is being operated, to any person other than the voter. The poll clerks shall ensure that the vote-recording device is placed in a location that maintains voter privacy through the entire period of voting.

§3-4A-17. Check of vote-recording devices and electronic poll books before use; corrections; reserve vote-recording devices.

(a) In counties utilizing an electronic voting system where votes are to be recorded by means of perforating or by touching a screen with a stylus or by means of touch before permitting the first voter to vote, the election commissioners shall examine the vote-recording devices to ascertain whether the ballot labels are arranged as specified on the facsimile diagram furnished to the precinct. If the ballot labels are arranged incorrectly, the commissioners shall immediately notify the clerk of the county commission of the foregoing facts in writing, indicating the number of the device, and obtain from the clerk a reserve vote-recording device and thereafter proceed to conduct the election.

(b) Any reserve vote-recording device so used is to be prepared for use by the clerk or his or her duly appointed deputy and the reserve vote-recording device is to be prepared, inspected and sealed and delivered to the polling place wherein the seal is to be broken and
the device opened in the presence of the precinct election commissioners who shall certify in writing signed by them to the clerk of the county commission, that the reserve vote-recording device was found to be sealed upon delivery to the polling place, that the seal was broken and the device opened in their presence at the polling place. The vote-recording device found to have been with incorrect ballot labels is to be returned immediately to the custody of the clerk who shall then promptly cause the vote-recording device to be repaired, prepared and resealed in order that it may be used as a reserve vote-recording device if needed.

(c) In counties using electronic poll books, the election commissioners shall examine the electronic poll books to ascertain whether the poll books are in working order before allowing any voters to enter the polling location. If the electronic poll books are not in working order, the election commissioners shall contact the county clerk who shall immediately authorize a printed poll book to serve in place of the electronic poll book for that election. A printed poll book shall accompany the electronic poll book to each precinct.

§3-4A-19. Conducting electronic voting system elections generally; duties of election officers; penalties.

(a) The election officers shall constantly and diligently maintain a watch in order to see that no person votes more than once and to prevent any voter from occupying the voting booth for more than five minutes.

(b) In primary elections, before a voter is permitted to occupy the voting booth, the election commissioner
representing the party to which the voter belongs shall
direct the voter to the vote-recording device or supply
the voter with a ballot, as may be appropriate, which
will allow the voter to vote only for the candidates who
are seeking nomination on the ticket of the party with
which the voter is affiliated or for unaffiliated voters in
accordance with section thirty-one, article two of this
chapter.

(c) The poll clerk shall issue to each voter when he or
she signs the poll book a printed card or ticket
numbered to correspond to the number on the poll book
of the voter and in the case of a primary election,
indicating the party affiliation of the voter, which
numbered card or ticket is to be presented to the
election commissioner in charge of the voting booth.

(d) One hour before the opening of the polls the
precinct election commissioners shall arrive at the
polling place and set up the voting booths in clear view
of the election commissioners. Where applicable, they
shall open the vote-recording devices, place them in the
voting booths, examine them to see that they have the
correct ballots or ballot labels, where applicable by
comparing them with the sample ballots, and determine
whether they are in proper working order. They shall
open and check the ballots, the electronic poll books, if
applicable, supplies, records and forms and post the
sample ballots or ballot labels and instructions to
voters. Upon ascertaining that all ballots, supplies,
electronic poll books, if applicable, records and forms
arrived intact, the election commissioners shall certify
their findings in writing upon forms provided and
collected by the clerk of the county commission over
their signatures to the clerk of the county commission.
Any discrepancies are to be noted and reported immediately to the clerk of the county commission. The election commissioners shall then number in sequential order the ballot stub of each ballot in their possession and report in writing to the clerk of the county commission the number of ballots received. They shall issue the ballots in sequential order to each voter.

(e) Upon entering a precinct which is using an electronic poll book, each voter shall be verified by use of the electronic poll book to be a registered voter. If the voter is not registered according to the electronic poll book within that precinct, the poll clerk is to inform the voter of the proper precinct in which the voter is registered.

(f) Where applicable, each voter shall be instructed how to operate the vote-recording device before he or she enters the voting booth.

(g) Where applicable, any voter who spoils, defaces or mutilates the ballot delivered to him or her, on returning the ballot to the poll clerks, shall receive another in its place. Every person who does not vote any ballot delivered to him or her shall, before leaving the election room, return the ballot to the poll clerks. When a spoiled or defaced ballot is returned, the poll clerks shall make a minute of the fact on the poll books, at the time, write the word “spoiled” across the face of the ballot and place it in an envelope for spoiled ballots.

Immediately on closing the polls, the election commissioners shall ascertain the number of spoiled ballots during the election and the number of ballots remaining not voted. The election commissioners shall
also ascertain from the poll books the number of persons who voted and shall report, in writing signed by them to the clerk of the county commission, any irregularities in the ballot boxes, the number of ballots cast, the number of ballots spoiled during the election and the number of ballots unused. All unused ballots are to be returned at the same time to the clerk of the county commission who shall count them and record the number. All unused ballots shall be stored with the other election materials and destroyed at the expiration of twenty-two months.

(h) Each commissioner who is a member of an election board which fails to account for every ballot delivered to it is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars or confined in jail for not more than one year, or both.

(i) The board of ballot commissioners of each county, or the chair of the board, shall preserve the ballots that are left over in their hands, after supplying the precincts as provided, until the close of the polls on the day of election and shall deliver them to the clerk of the county commission who shall store them with the other election materials and destroy them at the expiration of twenty-two months.

(j) Where ballots are used, the voter, after he or she has marked his or her ballot, shall, before leaving the voting booth, place the ballot inside the envelope or sleeve provided for this purpose, with the stub extending outside the envelope, and return it to an election commissioner who shall remove the stub and deposit the envelope, if applicable, with the ballot
inside in the ballot box. No ballot from which the stub
has been detached may be accepted by the officer in
charge of the ballot box, but the ballot shall be marked
"spoiled" and placed with the spoiled ballots. If an
electronic voting system is used that utilizes a screen on
which votes may be recorded by means of a stylus or by
means of touch and the signal warning that a voter has
attempted to cast his or her ballot has failed to do so
properly has been activated and the voter has departed
the polling place and cannot be recalled by a poll clerk
to complete his or her ballot while the voter remains
physically present in the polling place, then two
election commissioners of different registered party
affiliations, two poll clerks of different registered party
affiliations or an election commissioner and a poll clerk
of different registered party affiliations shall spoil the
ballot.

(k) The precinct election commissioners shall prepare
a report in quadruplicate of the number of voters who
have voted and, where electronic voting systems are
used that utilize a screen on which votes may be
recorded by means of a stylus or by means of touch, the
number of ballots that were spoiled, as indicated by the
poll books, and shall place two copies of this report in
the ballot box or where electronic voting systems are
used that utilize a screen upon which votes may be
recorded by means of a stylus or by means of touch,
shall place two copies of this report and the electronic
ballot devices in a container provided by the clerk of
the county commission, which thereupon is to be sealed
with a paper seal signed by the election commissioners
to ensure that no additional ballots may be deposited or
removed from the ballot box. Two election
commissioners of different registered party affiliations
or two special messengers of different registered party affiliations appointed by the clerk of the county commission, shall forthwith deliver the ballot box or container to the clerk of the county commission at the central counting center and receive a signed numbered receipt therefor. The receipt must carefully set forth in detail any and all irregularities pertaining to the ballot boxes or containers and noted by the precinct election officers.

The receipt is to be prepared in duplicate, a copy of which remains with the clerk of the county commission who shall have any and all irregularities noted. The time of their departure from the polling place is to be noted on the two remaining copies of the report, which are to be immediately mailed to the clerk of the county commission.

(1) The poll books, register of voters, unused ballots, spoiled ballots and other records and supplies are to be delivered to the clerk of the county commission, all in conformity with the provisions of this section.

§3-4A-28. Post-election custody and inspection of vote-recording devices and electronic poll books; canvass and recounts.

(a) The vote-recording devices, electronic poll books, tabulating programs and standard validation test ballots are to remain sealed during the canvass of the returns of the election, except that the equipment may be opened for the canvass and must be resealed immediately thereafter. During the seven-day period after the completion of the canvass, any candidate or the local chair of a political party may be permitted to
examine any of the sealed materials: Provided, That a notice of the time and place of the examination shall be posted at the central counting center before and on the hour of nine o'clock in the morning on the day the examination is to occur and all persons entitled to be present at the central counting center may, at their option, be present. Upon completion of the canvass and after the seven-day period has expired, the vote-recording devices, test results and standard validation test ballots are to be sealed for one year: Provided, however, That the vote-recording devices, electronic poll books, and all tabulating equipment may be released for use in any other lawful election to be held more than ten days after the canvass is completed and any of the electronic voting equipment or electronic poll books discussed in this section may be released for inspection or review by a request of a circuit court or the Supreme Court of Appeals.

(b) In canvassing the returns of the election, the board of canvassers shall examine, as required by subsection (d) of this section, all of the vote-recording devices, electronic poll books, the automatic tabulating equipment used in the election and those voter-verified paper ballots generated by direct recording electronic vote machines, shall determine the number of votes cast for each candidate and for and against each question and, by this examination, shall procure the correct returns and ascertain the true results of the election. Any candidate or his or her party representative may be present at the examination.

(c) If any qualified individual demands a recount of the votes cast at an election, the voter-verified paper ballot shall be used according to the same rules that are
used in the original vote count pursuant to section twenty-seven of this article. For purposes of this subsection, "qualified individual" means a person who is a candidate for office on the ballot or a voter affected by an issue, other than an individual's candidacy, on the ballot.

During the canvass and any requested recount, at least five percent of the precincts are to be chosen at random and the voter-verified paper ballots are to be counted manually. Whenever the vote total obtained from the manual count of the voter-verified paper ballots for all votes cast in a randomly selected precinct:

(1) Differs by more than one percent from the automated vote tabulation equipment; or

(2) Results in a different prevailing candidate or outcome, either passage or defeat, of one or more ballot issues in the randomly selected precincts for any contest or ballot issue, then the discrepancies shall immediately be disclosed to the public and all of the voter-verified paper ballots shall be manually counted. In every case where there is a difference between the vote totals obtained from the automated vote tabulation equipment and the corresponding vote totals obtained from the manual count of the voter-verified paper ballots, the manual count of the voter-verified paper ballots is the vote of record.

§3-4A-33. Tampering with vote-recording devices, electronic poll books, ballot labels, ballot or ballot cards, program decks, standard validation test decks or other automatic tabulating equipment; other
(a) Any person not an election officer or other public official who shall tamper or attempt to tamper with any vote-recording device, electronic poll book, ballot label, ballot or ballot card, program deck, standard validation test deck or automatic tabulating equipment or in any way intentionally impair or attempt to impair their use and any person who shall be guilty of or shall attempt any dishonest practice upon any such devices or equipment, or with or by their use, shall be deemed guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than one year nor more than ten years or fined not less than five thousand dollars, or both.

(b) Any clerk of a county commission, county commissioner, ballot commissioner, election commissioner, or poll clerk, or any custodian, technician or other public official authorized to take part in the holding of an election or in preparing for an election, who, with intent to cause or permit any vote-recording device, electronic poll book, program deck, standard validation test deck or other automatic tabulating equipment to fail to record, test or tabulate correctly all votes cast thereon or tabulated therewith, tampers with or disarranges such device in any way, or any part or appliance thereof, or who causes or consents to the use of such device or equipment for vote recording, testing or tabulating at any election with knowledge of the fact that the same is not in order, or not perfectly set and adjusted so that it will correctly record, test or tabulate all votes cast or who, with the purpose of defrauding or deceiving any voter or of causing it to be doubtful for what ticket or candidate or
candidates or proposition any vote is cast, or of causing it to appear on said device or devices that the votes cast for one ticket, candidate or proposition, were cast for another ticket, candidate or proposition, removes, changes or mutilates any ballot, ballot card or ballot label on said device or any part thereof, or does any other thing intended to interfere with the validity or accuracy of the election, shall be deemed guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than one year nor more than ten years, or fined not less than five thousand dollars or both.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this 1st Day of April, 2008.

Governor