



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

R.W. "BOBBY" MATHIESON

Petitioner,

v.

At Law No.: C109-6581

RON A. VILLANUEVA

Respondent.

RECOUNT PROCEDURAL ORDER

This matter came before the Court on the Petition for Recount filed on November 24, 2009, on behalf of R.W. "Bobby" Mathieson, Petitioner; on the Response to Petition for Recount filed on behalf of Ron A. Villanueva, Respondent; on the presentation in open court of representatives of the Virginia Board of Elections; and on argument of counsel.

It appearing to the Court that the parties are in agreement on certain issues and that the Court has ruled on other matters as to which the parties disagree and that a Recount Procedural Order should issue fixing procedures for recounting ballots and re-determining the vote, it is ORDERED that:

I. Period Preceding Recount

All voting machine keys, poll books, statements of results, voting machine printed return sheets and printout tapes, ballots and other election materials produced in connection with the election for Virginia House of Delegates from the Twenty-First House District on November 3, 2009 (the "Election"), and previously delivered to the Clerk of the Circuit Court of the City of Virginia Beach (the "Clerk") shall remain in the

safekeeping of the Clerk, who shall assure that such material remains secure and undisturbed in the locations where it presently is situated. The Clerk shall continue to ensure the security of the voting equipment.

To the extent that she has not already done so, the Clerk is hereby ordered to take the following steps: (a) secure all paper ballots and other election materials in sealed boxes (closing and sealing all openings to the boxes); (b) place all boxes in a vault or room not open to the public or to anyone other than the clerk and her staff; (c) cause such vault or room to be securely locked except when access is necessary for the Clerk or her staff; (d) implement all other security measures, if any, taken by the clerk with respect to trial evidence; and (e) certify in writing to this Court (i) the security measures taken by the clerk following the election through the date of this Order and (ii) the security measures taken pursuant to this Order, said certification to be provided to this Court by not later than 4 p.m. on December __, 2009.

Promptly upon request of a representative of either Party, the Virginia Beach General Registrar shall provide such representative with access to and copies of (at the requesting Party's sole expense) the following documents from the materials maintained by the General Registrar in her office: all statements of results (original and corrected), print-out tapes produced by computers or other machines, poll books and abstracts of votes (original and corrected) from the Election. If the General Registrar does not have any of these materials in his office, she shall so advise the Party's representative.

Promptly upon request of a representative of either Party, the Clerk shall provide such representative with access to and copies of (at the requesting Party's

sole expense) the following documents from the materials maintained by the Clerk's office: poll books (whether in paper or electronic format) and abstracts of votes (original and corrected) from the Election. If the Clerk does not have any of these materials in her office, she shall so advise the Party's representative.

II. Date & Time of Recount

The recount of ballots and redetermination of the votes cast in the Election shall take place in the office of, or other facilities provided or arranged by, the Clerk, as set forth in the Preliminary Order of this matter, beginning at 10 a.m. on December _____, 2009, and shall continue thereafter until completed. The recount shall be conducted according to procedures and instructions contained in this Procedural Order. Additionally, to the extent not inconsistent with the provisions of this Procedural Order, the recount shall be conducted in accordance with the State Board of Elections' Instructions for Recount Officials and Instructions for Recount Coordinators, as revised and reformatted through December 12, 2008; the Standards for Recounts of Virginia Elections, revised effective September 8, 2008; and its Ballot Examples for Hand counting Paper or Paper-based Ballots for Virginia Elections or Recounts, as amended and applicable to this recount and redetermination. The results shall be recorded on forms prepared and submitted to the Court by the State Board of Elections, which shall consult with counsel for the parties as part of such preparation and prior to such submission.

III. Court Supervision of Recount

The overall recount and redetermination shall be supervised by the Court, which shall be assisted by the State Board of Elections, by the Virginia Beach

Electoral Board and by the Virginia Beach General Registrar. The Court shall supervise the recount through the Recount Coordinators, who shall be the Chair and Secretary of the Virginia Beach Electoral Board; provided, however, that if both the Chair and the Secretary of the Virginia Beach Electoral Board are of the same party, then the candidate of that party shall designate only one of them to serve, along with the board member representing the party of the other candidate as a Recount Coordinator. In the event that an Electoral Board member is unavailable, the affected party shall be authorized to appoint a Recount Official to act as a Recount Coordinator. The Electoral Board shall ensure that a voting equipment technician is available as may be necessary.

IV. Location of Recount

The recount and redetermination of the vote shall begin at 10:00 a.m. on December _____, 2009. The Recount Officials, Alternates, and Recount Coordinators shall be summoned to appear in the office of the Clerk or at the other facilities provided or arranged for by the Clerk, to receive such instructions and take such oaths as the Court may prescribe. The recount of ballots and redetermination of votes cast in the Election shall take place in the offices of, or other facilities provided or arranged by, the Clerk according to procedures and instructions set forth in this Procedural Order. The offices or other facilities provided or arranged by the Clerk shall be of sufficient size for the purposes of the recount and redetermination and shall allow for direct and proximate observation of the Recount Officials by the Recount Observers.

V. Programming of Tabulators

Pursuant to Va. Code § 24.2-802(D) (3), each optical scan ballot tabulator which may be needed for the Recount shall be programmed to count only the ballots cast in the race for Virginia House of Delegates in the 21st House District (“the House Election”) and to set aside all ballots containing write-in votes, over votes, and under votes in the Delegate Election.

To the extent that a tabulator cannot be programmed in accordance with the foregoing requirements of state law, the Recount Coordinators shall provide notice to the parties and the Court of that fact as well as an explanation of any deviations from said requirements.

VI. Testing Requirements

Final testing of each tabulator shall occur at such time and place as designated previously in Part IV of this Order or at such earlier time as may be set aside by the Virginia Beach Electoral Board, with prior electronic notice to counsel for each party. Each Party is entitled to have designated testing observers present for the final testing.

If it is determined by the Recount Coordinators that blank ballots held under seal by the Clerk are necessary to conduct such testing, then the Clerk shall take the following actions in the presence of the Recount Coordinators and Testing Observers:

- (a) unseal one envelope containing unused optical scan ballots and remove fifteen (15) such ballots;
- (b) provide the fifteen (15) unused ballots to the Recount Coordinators; and

- (c) immediately reseal the envelope and replace it into the box from which it came.

In the presence of the Testing Observers, the Recount Coordinators shall mark each of the fifteen (15) "test ballots" as follows:

- (a) five (5) shall be marked for R.W. "Bobby" Mathieson;
- (b) five (5) shall be marked for Ron A. Villanueva;
- (c) three (3) shall be marked for a write-in candidate named "John Doe";
- (d) two (2) shall be marked for both R.W. "Bobby" Mathieson and Ron A. Villanueva (over vote);
- (e) one (1) shall remain unmarked for any candidate in the House Election (under vote).

In the presence of the Testing Observers, each of the fifteen (15) "test ballots" shall be run through the tabulator programmed in accordance with this Order. After the "test ballots" have been run, the Recount Coordinators shall print the results from the test run.

If the Recount Officials determine that the tabulator has been correctly programmed to count only the votes for the House Election in the recount and to set aside all ballots containing write-in votes, over votes, and under votes, the Recount Coordinators shall take the following actions in the presence of the Testing Observers:

- (a) immediately reset the tabulator counter back to zero and lock the tabulator;

- (b) print the date and the term "TEST BALLOT" across the face of each of the fifteen (15) "test ballots" and sign the ballots; and
- (c) return the fifteen (15) "test ballots" to the Clerk.

If the voting equipment requires the use of ballots for the programming function in addition to the fifteen (15) ballots used for the testing function, the Clerk shall be authorized to provide the Recount Coordinators with the precise number of programming ballots so required, but not more, to the Recount Coordinators. The ballots shall be used solely for the programming function, but shall not be included in the test run of fifteen (15) ballots.

The Clerk shall in the presence of the Recount Coordinators and Testing Observers replace the fifteen (15) "test ballots" (and all programming ballots, if any) into a separate envelope marked "RECOUNT TEST BALLOTS – DO NOT OPEN," seal the envelope, and place it into a sealed box of election materials.

If the tabulator does not accurately count and set aside the fifteen (15) "test ballots," the Recount Coordinators shall require the tabulator to be re-programmed in compliance with this Order, whereupon the Recount Coordinators shall re-run the fifteen (15) "test ballots" again and follow the steps outlined in this Order.

VII. Recount To Be Uninterrupted

The recount shall begin as soon as the Recount Coordinators and Recount Officials have taken their oaths and received their instructions and shall continue without interruption (except one hour for lunch and one hour for dinner, if necessary) until completed.

IX. Recount Officials, Alternate Recount Officials, and Recount Coordinators

The Recount Officials and Alternate Recount Officials for Virginia Beach shall be chosen by the Parties from among the Officers of Election previously appointed by the Virginia Beach Electoral Board pursuant to Va. Code § 24.2-115. The number of Recount Teams and the number of Recount Officials to be appointed for each jurisdiction are set forth on Attachment D of this Procedural Order. Each of the Parties may also name Alternate Recount Officials from among the Officers of Election.

The Recount Coordinators and Recount Officials shall be Officers of the Court acting under its jurisdiction. Nothing contained in this Order and in the procedures to be established for the recount shall be construed, however, to prevent the Parties or their representatives from communicating directly with the Recount Coordinators and Recount Officials, but they are prohibited from interfering with the members of the recount team in any way.

The Preliminary Order required each candidate to submit to the Court the names and addresses of the Recount Coordinators, Recount Officials and Alternate Recount Officials whom he has chosen to serve. Each person so identified was subject to disqualification by the Court for good cause shown. Such persons identified on Attachment E to this Order hereby are appointed as Recount Coordinators, Recount Officials, and Alternate Recount Officials. Hereafter, the Parties may substitute new Officials, Coordinators, or Alternates by agreement or, absent such agreement, upon a showing of good cause and with leave of Court.

To the extent not already completed, the Clerk is authorized and directed to issue the necessary summonses to compel the attendance of the Recount

Coordinators, Recount Officials and Alternate Recount Officials chosen by the Parties to appear at _____ a.m. on the date of the Recount and redetermination, at the office of the Clerk, or at other facilities provided or arranged for by the Clerk, to receive such instructions and take such oaths as the Court may prescribe, and to commence the recount and redetermination of the vote. The summonses shall be on forms prescribed by this Court and shall be issued by the Clerk, who shall mail them directly to the Recount Coordinators, Recount Officials, and Alternate Recount Officials. The Parties are directed to cooperate with the Clerk in completing the summonses, providing address labels, and providing such other assistance as is necessary to expedite the mailing of the summonses.

X. Recount Observers

Each Party is authorized to appoint, and is entitled to have present at the recount and redetermination, one Observer for each team of two Recount Officials. Persons shall qualify as Observers by submitting to the Recount Coordinators a statement, signed by a representative of or counsel for a Party, giving the person's name and authorizing him or her to represent the candidate as an Observer. A photocopy authorization form shall suffice. Not later than 5:00 p.m. on _____, December _____, 2009, the candidates shall exchange with one another and lodge with the Clerk the form of their respective authorization statements that will constitute the credentials of their Recount Observers.

Coordinators, Recount Officials and Alternate Recount Officials chosen by the Parties to appear at _____ a.m. on the date of the Recount and redetermination, at the office of the Clerk, or at other facilities provided or arranged for by the Clerk, to receive such instructions and take such oaths as the Court may prescribe, and to commence the recount and redetermination of the vote. The summonses shall be on forms prescribed by this Court and shall be issued by the Clerk, who shall mail them directly to the Recount Coordinators, Recount Officials, and Alternate Recount Officials. The Parties are directed to cooperate with the Clerk in completing the summonses, providing address labels, and providing such other assistance as is necessary to expedite the mailing of the summonses.

X. Recount Observers

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XI. Ex-Parte Training of Recount Coordinators, Recount Officials and Alternate Recount Officials

All Recount Coordinators, Recount Officials, and Alternate Recount Officials are officers of the Court, and shall be subject to such training as may be provided by Recount Coordinators based on training materials provided by the State Board of Elections. Neither Party nor the representative of either Party shall undertake any in-person, telephonic or electronic training of any Recount Coordinators, Recount Officials or Alternate Recount Officials in their duties. No written communication from a Party or his representative to any Recount Coordinator, Recount Official and/or Alternate Recount Official shall be made *ex parte*, and any such written communication shall be simultaneously served on counsel for the opposing Party and filed with the Clerk (except that communications addressing only time and place of the recount, availability to serve and similar administrative matters are not subject to this requirement). Nothing contained herein shall be construed to prevent any Party or the representative of any Party from encouraging Recount Coordinators, Recount Officials, and Alternate Recount Officials to participate in such training as may be provided by the State Board of Elections. Nothing contained herein shall be construed to prevent the Parties or their representatives from communicating directly with the Recount Coordinators, Recount Officials and Alternate Recount Officials during the recount, but they are prohibited from interfering with the members of the recount team in any way.

XII. Inclement Weather

In the event of snow or other inclement weather, the Sheriff of the City of Virginia Beach is hereby directed to provide transportation, as needed, to the Recount Coordinators, Recount Officials and Alternate Recount Officials to and from their homes and, if necessary to and from the site of the recount, and to and from the locations of voting machines.

XIII. Procedures for Recount and Redetermination

A. Except as described below, the recount and redetermination shall occur in the office of, or other facilities arranged by the Clerk, as set forth in the Preliminary Order of this matter.

B. Immediately prior to the commencement of the Recount, once all Recount Officials, and any necessary Alternates are identified, unneeded Alternates may be dismissed, subject to recall by the Recount Coordinators if necessary. The Clerk then shall administer the following oath to the Recount Coordinators and Recount Officials:

I do solemnly swear (or affirm) that I will perform the duties for this election recount according to law and the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting this election recount, so help me God.

C. The various modes of recounting paper ballots and re-determining the vote shall be as follows:

- (i) Paper Ballots. Paper ballots shall be recounted physically at the offices of, or other facilities arranged by the Clerk, using the standards promulgated by

the State Board of Elections pursuant to Va. Code § 24.2-802(A). The following additional procedures shall apply:

- If the paper ballots counted in the Election cannot be found in a precinct which used paper ballots, the original Statement of Results for the precinct in which said paper ballots cannot be found shall be delivered to the Court.
- If there is a dispute about whether the paper ballots found in a precinct or jurisdiction are the same ballots as were cast in the Election, or if the number of paper ballots appearing to have been cast in a precinct is different from the number of paper ballots cast as shown on the Statement of Results, then the paper ballots thus in dispute, together with the original Statement of Results, the poll books and all other election materials from the precincts in question, shall be delivered to the Court.
- If the Recount Officials cannot agree on whether or how a ballot is to be counted, that ballot shall be treated as challenged and shall be transmitted to the Court in an envelope which shall be sealed and which shall be marked to denote the precinct and the names of the Recount Officials who reviewed the ballot and who disagree on whether or how it should be counted.

Each party reserves all arguments and does not waive any arguments with respect to the extent, if any, to which such election materials may be considered by the Court in resolving such disputes about paper ballots.

- (ii) Direct Recording Electronic Machines. The vote shall be re-determined by an examination of the printed return sheets. If the printout is not clear, or upon the Court's request, the vote shall be re-determined by rerunning the printout from the machine or by examining the counters as appropriate.
- (iii) Optical Scan and Punchcard Tabulators: The Recount Officials shall rerun all the ballots through a tabulator programmed to count only the votes for the House of Delegates for the 21st House District, and to set aside all ballots

containing write-in votes, over votes and under votes. Prior to running the ballots through the tabulator, the Recount Officials shall ensure that logic and accuracy tests have been successfully performed. The ballots that are set aside, any ballots not accepted by the tabulator, and any ballots for which a tabulator could not be programmed to meet the requirements of this Order, shall be hand counted using the standards promulgated by the State Board of Elections pursuant to Va. Code § 24.2-802(A).

D. If the Recount Officials cannot agree on whether or how a ballot is to be counted, the ballot shall be treated as challenged and shall be transmitted to the Court in an envelope which shall be sealed and which shall be marked to denote the precinct and the names of the Recount Officials who reviewed the ballot and who disagree on whether or how it should be counted. The written statement of any one Recount Official challenging a ballot or Statement of Results shall be sufficient to require its submission to the Court.

E. The recount and redetermination of the vote shall consider only votes cast in the election. The recount and redetermination 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. There shall be only one redetermination of the vote, and the eligibility of any voter to have voted shall not be an issue in this proceeding.

F. All optical scan tabulators to be used in the recount shall be tested, prepared, locked, and sealed in accordance with the requirements of the Code of Virginia.

Notice of final testing shall be given by email or fax to the parties to this recount at least 36 hours in advance, in lieu of the notice provided for in Va. Code §24.2-633.

XIV. Computation of Results

Thereafter, the Recount Officials shall write down the number of valid ballots cast in the Election using forms supplied by the State Board of Elections. This number shall be obtained from the ballots cast in the precinct, or from the ballots cast as shown on the Statement of Results if the ballots cannot be found, for each of the Parties to this Recount. They then shall submit their forms, along with the ballots or the Statement of Results used, as to the validity of which questions exist, to the Clerk. The written statement of any one Recount Official challenging a ballot or Statement of Results shall be sufficient to require its submission to the Court. Representatives of each candidate shall be afforded an opportunity to examine the challenged ballots in the presence of an officer of the Court while the Recount Officials are tabulating the results.

The tabulation shall be recorded on forms prepared by the State Board of Elections in consultation with counsel for the candidates and approved by the Court. The State Board of Elections shall engage an outside accounting firm to assist it in the tabulation of the vote. The results of the tabulation, together with the forms on which the votes have been recorded, shall upon completion be delivered to the Court.

XV. Court to Convene

The Court shall be available to convene telephonically on _____, December ____, 2009, for the purpose of entering any orders necessary to direct the conduct of each locality's vote tabulation. The Court shall convene on December

_____, 2009, at _____, for the purpose of determining all matters pertaining to the recount and redetermination of the vote as raise by the Parties, to hear any arguments, if any, and to rule on any challenged ballots and votes. By an appropriate order, the Court will conclude the recount and redetermination by certifying to the State Board of Elections the vote of each of the candidates and declare the person who received the higher number of votes to be elected.

X. Compensation and Mileage Expense

Recount officials shall be paid a per diem payment equal to the per diem payment which they received for service on Election Day, November 3, 2009. They should submit their request for *per diem* payment and mileage on forms supplied by the State Board of Elections. Alternate Recount Officials who do not serve shall submit their request for mileage on forms supplied by the State Board of Elections.

IX. Other

This matter is continued until December _____, 2009, at _____, at which time the Court will be available to convene telephonically and remain in session until the recount is completed. The Secretary of the State Board of Elections is directed to send a copy of this Procedural Order to the Virginia State Electoral Board.

This matter is continued until December _____, 2009 at _____.

IT IS SO ORDERED.

Date: _____

Chief Judge
Circuit Court of the City of Virginia Beach

Judge

Judge

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