

**Local Government Mandate Statement
Kentucky Legislative Research Commission
2021 Regular Session**

Part I: Measure Information

Bill Request #: 104

Bill #: HB 162

Document ID #: 181

Bill Subject/Title: AN ACT relating to elections and making an appropriation therefor.

Sponsor: Representative David Osborne

Unit of Government: City X County X Urban-County
Unified Local
 X Charter County X Consolidated Local X Government

Office(s) Impacted: County Clerk; County Board of Elections

Requirement: X Mandatory Optional

Effect on
Powers & Duties: Modifies Existing X Adds New Eliminates Existing

Part II: Bill Provisions and the Estimated Fiscal Impact Relating to Local Government

HB 162 would require an automatic recount in any regular election or special election for any member of the General Assembly, Congress, or constitutional officer, if the margin of defeat is 0.5% or less. For the Governor and Lieutenant Governor, the recount must be held no later than the Tuesday following the election and be completed within fourteen days, Sundays excluded. For the remaining constitutional offices, the recount must be held no later than the second Tuesday following the election and be completed within fourteen days, Sundays excluded. The State Board of Election would determine if a recount is required. The voting equipment, ballots, boxes, and all papers relating to the election would be maintained by the county board of elections. Machines and boxes must remain locked, with the keys in the county board of elections until the recount.

The county board of elections must conduct the recount, which would be paid by the Commonwealth of Kentucky. Each political party represented on the county board of elections would be permitted to appoint a representative to be present, and each candidate or the candidate's representative may be present, along with board-authorized news media

representatives. The recount must occur after the integrity of the ballots have been confirmed; after votes are counted, the recount must be certified to the Secretary of State by 4 p.m. on the day following the completion of the recount (Sunday excluded).

The addition of the automatic recounts does not change the significant components of the existing laws relating to candidate or party initiated recounts or the appeals process available to the candidate, but the bill adds certain criteria regarding candidate or party-initiated recounts:

- The contestee must file any recount request within 5 days of the contested election.
- A candidate receiving a certificate of election from the county board of elections must file any recount request within 10 days after the election, and the county board of elections must be named a party defendant in the petition.
- A candidate receiving a certificate of election from the State Board of Elections must file any petition requesting a recount no later than the second Tuesday following the election, and the State Board of Elections must be named a defendant in the petition.
- The bond to cover the cost of the recount may be filed by the state political party, political organization, or political group, if any, to which the candidate is affiliated.
- All election-related materials and equipment must be maintained by the county board of elections. The machines and boxes must remain locked and the keys remain with the county board of elections until the recount.
- Each political party represented on the county board of elections may appoint a representative to be present, and each candidate or the candidate's representative may be present along with board-authorized news media representatives.
- After completion of the recount, the county board of elections must forward the result to the Circuit Court at which time the Court will enter a judgement reflecting the recount results and directing the State Board of Elections or the county board of elections to issue a certificate of election.
- Any party may appeal the judgement to the Court of Appeals.

Any slate of candidates for Governor and Lieutenant Governor, or any candidate for Congress, who does not qualify for an automatic recount, may petition Franklin Circuit Court for a recount. For Governor and Lieutenant Governor Candidates, the petition must be filed by the Tuesday following the election and the State Board of Elections must be named a party defendant in the petition. For Congressional candidates, the petition must be filed by the second Tuesday following the election. Likewise, the State Board of Elections must be named a party defendant in the petition. The findings of the court may not be appealed. However, a petition of contest may be filed to the General Assembly who may accept, modify, or disregard the findings of the court in its sole and absolute discretion. Any candidate for Congress aggrieved by the findings or action of the court must proceed under the rules established by the United States Congress or federal law.

Any candidate for the General Assembly may request a recount of the ballots by filing a petition in the Circuit Court of the county where the requesting candidate resides and no later than the second Tuesday following the election and the State Board of Elections must be named a party defendant in the petition. The findings of the court may not be appealed.

However, a petition for contest may be filed to the General Assembly who may accept, modify, or disregard the findings of the court in its sole and absolute discretion.

Any slate of candidates for Governor and Lieutenant Governor may contest a regular or special elections by filing a signed written application and notice of contest with the clerk of the Senate and the clerk of the House. If contesting a regular election, the application must be filed no later the thirty days after the final action of the State Board of Elections or following entry of the findings of the Franklin Circuit Court. In the case of a special election, the notice must be filed no later than 7 days after the final action of the State Board of Elections or following entry of the findings of the Franklin Circuit Court.

Any candidate for the General Assembly may contest any regular or special election by filing a signed written application and notice of contest with the clerk of the house to which the candidate seeks election. If contesting a regular election, the application and notice of contest must be filed no later than 15 days after the final action of the State Board of elections or following entry of the findings of the Circuit Court. If contesting a special election, the application and notice of contest must be filed no later than 3 days following the final action of the State Board of Elections. In both instances, the application and notice must state the grounds of the contest, and no grounds other than those stated in the application and notice must be heard. In the case of a special election contest, the candidates may include a request for a recount. No election contest can be heard unless the contestee has been serviced with a copy of the application and notice of contest. The contestee may make defense without giving counter notice.

The cost of depositions to be used before the board or house of the General Assembly must be paid to the prevailing parties within 30 days of adjudication. If the costs are not timely paid, the prevailing party may seek judgement in a Circuit Court of competent jurisdiction.

When the election of a Governor and Lieutenant Governor is contested, then a board made up of 11 members of and selected by the General Assembly will be responsible for trying the contest, with 7 members constituting a quorum. The board may use the services of any law enforcement agency to transport all records and equipment relating to the contest. All machines and materials must be sealed and transmitted in a tamper-resistant manner with a written chain of custody on a form promulgated by the State Board of Elections. The clerk of the House of Representatives will be custodian of the records.

If a new election is required, the Speaker of the House must issue a writ of election which must designate the day of the elections and be directed to the proper sheriff(s) of the county or counties in which an election is to be held.

When the election of a member of the General Assembly is contested, the presiding officer of the house to which the member belongs will determine the number of board members, but not more than 9, nor less than 5, and a majority will constitute a quorum. The board members must be sworn prior to trying the contested election and must give true judgement unless the board is dissolved prior to rendering judgement. The board must meet within 24 hours of tis selection and appoint its chair, and assign a day for hearing the contest. If a

member willfully fails to attend its sessions, the house to which the member belongs must at its discretion punish that member by fine or imprisonment, or both. The board may send for all related materials and equipment, may issue subpoenas, and may use the services of law enforcement to transport all records relating to the contest. The clerk of the contesting member's house will be custodian for the records. The board may order, without approval of the contester's house, another recount. This recount must be conducted by the county clerk if no recount has been conducted. If a recount has been conducted, the State Board of Elections must determine the number of persons required for the recount, each being a county clerk except the clerk in which the recount is held; and by random draw, select those that will serve.

If the candidates have received an equal number of votes, the outcome must be determined by lot. If the winning candidate is not legally qualified to take office, then a vacancy will exist, and a new election must be ordered. The person with the highest number of legal votes must be adjudged the person elected and entitled to the office. If the board is unable to decide the person entitled to the office, a new election must be ordered by proclamation to take place between 30 days and 6 weeks following the proclamation. If a new election is ordered, or the incumbent is adjudged not to be entitled to the office, the office must be deemed vacant. Board decisions must be made by a majority of the members and that decision must be reported to the house by which it was appointed, for further action.

In the case of administrative and clerical error regarding all primaries, regular elections, or special elections, the court may determine if an automatic recount will suffice.

In all the scenarios above, no certificate of election can be issued while any recount is pending, and any certificate issued before final judgement is null and void.

The fiscal impact of HB 162 on local governments is indeterminable. On its face, HB 162 may not have a fiscal impact on county clerks because the costs of an automatic recount are to be paid by the Commonwealth. (This assumes there is available funding in the General Fund Surplus Account under KRS 48.700 or the Budget Reserve Trust Fund under KRS 48.795.) Assuming that all true costs are reimbursed, there would be no cost to counties for the automatic recount. Costs of the non-automatic recounts authorized in the bill would be paid by the unsuccessful party.

The Kentucky County Clerks' Association would prefer that the recount be conducted by the Circuit Clerk (instead of the board of elections as provided in the bill) if one of the candidates has a grievance against the county clerk or county board of elections.

The Kentucky County Clerks' Association believes that the current voting machines are consistently accurate and an automatic recount is not necessary due to the machines' technology. The association is concerned that having a set percentage as to when an automatic recount would happen might hinder a candidate's ability to request a recount.

The Kentucky County Clerks' Association said that the bill is unclear on who determines the cost of an automatic recount and the disbursement of those funds (county clerk or the

county board of election members). The Minnesota Secretary of State established a cost-reimbursement formula of \$.03 per ballot counted; this rate covered less than one-fifth of the total costs. In Washington state, the Secretary of State surveyed counties for actual costs and requested funds from the state legislature, which funded about 50% of the requested amount.

The Kentucky County Clerks' Association states that it is difficult to determine fiscal impact because some recounts would be determined by the Circuit Court. Also, cost is dependent on the size of the area (one precinct vs. entire county) that would be recounted.

The recount of a 2018 state House race in Daviess County cost approximately \$10,000.

Part III: Differences to Local Government Mandate Statement from Prior Versions

Part II, above, pertains to the introduced version of the bill.

Data Source(s): LRC Staff; Kentucky County Clerks' Association; Daviess County Clerk; The Pew Center on the States, "The Cost of Statewide Recounts: A Case Study of Minnesota and Washington," November 2010

Preparer: Robert Jenkins **Reviewer:** KHC **Date:** 2/3/21