

## CHAPTER 16.1-16 RECOUNTS AND CONTEST OF ELECTIONS

### **16.1-16-01. Election recounts.**

A recount of any primary, special, or general election for nomination or election to a congressional, state, district, legislative, county, or city office, or for the approval or disapproval of any measure, question, or bond issue submitted to the qualified electors of this state or one of its political subdivisions must be conducted according to guidelines established by the secretary of state and as follows:

1. A recount must be conducted when:
  - a. Any individual failed to be nominated in a primary election by one percent or less of the highest vote cast for a candidate for the office sought.
  - b. Any individual failed to be elected in a general or special election by one-half of one percent or less of the highest vote cast for a candidate for that office.
  - c. A question, measure, or bond issue submitted to the qualified electors has been decided by a margin not exceeding one-fourth of one percent of the total vote cast for and against the question at any election.
2. A demand for a recount may be made by any of the following:
  - a. Any individual who failed to be nominated in a primary election by more than one percent and less than two percent of the highest vote cast for a candidate for the office sought.
  - b. Any individual who failed to be elected in a general or special election by more than one-half of one percent and less than two percent of the highest vote cast for a candidate for that office.
3. A demand for a recount must be made within three days after the canvass of the votes by the county canvassing board in the case of county elections and city elections that are combined with the county and by the state canvassing board in the case of presidential, congressional, state, judicial district, multicounty district, or legislative elections. The demand must be in writing, must recite one of the conditions in subsection 2 as a basis for the recount, must contain a bond in an amount previously established by the auditor or auditors doing the recount sufficient to pay the cost of the recount, and must be filed with:
  - a. The secretary of state when the recount is for a congressional, state, district, or legislative office.
  - b. The county auditor when the recount is for a county office or city office when a city election is combined with the county.
4. Within four days after the canvass of the votes by the state canvassing board in the case of presidential, congressional, state, judicial district, multicounty district, or legislative elections, the secretary of state shall notify all the county auditors to conduct recounts as required by subsection 1 and, when a timely recount demand is received and it is in proper form, as required by subsection 2. The secretary of state shall fix the date or dates of the recounts of legislative contests to be held within seven days after giving notice to the affected auditors that recounts must be conducted. The secretary of state shall fix the date or dates of the recounts of statewide races to be held within fourteen days after giving notice to the auditors that recounts must be conducted. Within four days after the canvass of votes by the county canvassing board or other political subdivision canvassing board, the county auditor or other political subdivision election official shall fix the date for recounts limited to the county, those cities within the county which combined the election with the county, or other political subdivision. The date must be within eight days after the canvass. In all recount proceedings, the county auditor or other election official, as appropriate, shall send notice of the date, place, and time of the recount to all candidates and petitioners involved by certified mail.
5. For recounts conducted by counties of federal, state, district, and county offices, measures, and questions, the county auditor must conduct the recount and may employ up to four qualified electors of the county to assist in the recount. The county

auditor shall review all paper and electronic voting system ballots and associated records, whether the ballots were counted at the precinct or the county canvass, and all absentee ballots cast pursuant to section 16.1-07-09 to determine which ballots were cast and counted according to the law, including that the ballots were properly initialed and that the initials found on the ballots are verified as those of the precinct election board members. The county auditor shall check the precinct count and the count of the county canvassing board. If the county auditor is a candidate involved in the recount, the county auditor is disqualified from acting thereon, and the county recorder shall perform the duties required of the county auditor by this section. For recounts conducted by political subdivisions other than counties of local offices, measures, and questions, the election officer in a political subdivision shall administer a recount in the same manner as is required under this subsection for counties with respect to political subdivision ballot measures, questions, or bond issues.

6. a. The individuals entitled to participate at the recount are:
  - (1) Each candidate involved in the recount, either personally or by a representative.
  - (2) A qualified elector favoring each side of a question if the recount involves a question or proposition submitted to a vote of the electorate.
- b. The individuals allowed to participate may challenge the acceptance or exclusion of any ballot. The individual challenging a ballot must state the reason for the challenge based upon the law, and the county auditor or other political subdivision election official shall count the challenged ballot as the auditor or election official determines proper and then shall set the ballot aside with a notation that it was challenged and how it was counted.
7. At the conclusion of the recount, the county auditor or other election official shall submit all challenged ballots to the recount board for decision. Except for political subdivision recounts other than counties, the recount board must be composed of the state's attorney of the county, the chairman of the board of county commissioners, and the county recorder. Unless otherwise specified by law, for a political subdivision other than a county, the governing body of the political subdivision shall appoint the recount board. An individual may not serve on the recount board if the individual has anything of value bet or wagered on the result of the election, is a candidate for the office being recounted, or is the husband, wife, father, mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law, brother, or sister, whether by birth or marriage, of the whole or the half-blood, of any candidate involved in the recount. If any of the members of the recount board are disqualified or cannot serve for any other reason, the members of the board of county commissioners or other political subdivision governing body who would be qualified to serve on the board shall appoint disinterested qualified electors of the county or other political subdivision to serve as alternates. The recount board shall review all challenged ballots and on majority vote shall decide how those ballots are counted. The recount board is authorized to initial all absentee ballots cast under section 16.1-07-09 that were not considered or counted at the various precincts in the county for the reasons provided in sections 16.1-07-11 and 16.1-07-12 or by the county canvassing boards as provided in section 16.1-15-19. The decision of the recount board is final, subject to the right to contest the election as provided in this chapter. If during the recount a recess is called, the county auditor or other political subdivision election official shall take appropriate steps to safeguard the ballots.
8. The county auditor or other election official shall certify the results of the recount no later than three days after the recount. The recount result is the official result of the election in the county or other political subdivision. The county auditor or other election official shall prepare a corrected abstract of the votes. In a recount limited to the county, city, or other political subdivision, if the corrected abstract shows no change in the outcome of the election, no further action may be taken. If the corrected abstract changes the outcome of the election, the county auditor or other election official shall issue certificates of nomination or election accordingly and shall certify the new result

of a question submitted to the qualified electors. In the case of a city election that is combined with a county election, the county auditor shall certify the new results of the election to the city auditor who is responsible for issuing new certificates of election if applicable.

9. In presidential, congressional, statewide, judicial district, multicounty district, or legislative recounts, the county auditor, no later than three days after the recount, shall send by certified mail a certified copy of the corrected abstract to the secretary of state. The secretary of state immediately shall assemble the state canvassing board, who shall canvass the corrected abstracts and certify the election results. The secretary of state shall issue certificates of election or nomination or record the approval or disapproval of a question submitted to the qualified electors accordingly.
10. The expenses incurred in a recount of a county election must be paid by the county on a warrant by the county auditor. The expenses incurred in a recount of a political subdivision other than a county election must be paid by that political subdivision. The expenses incurred in a recount of a city election must be paid by the city on a warrant by the city auditor. The expenses incurred in a recount of a presidential, congressional, state, judicial district, multicounty district, or legislative election must be paid by the state from the general fund upon approval by the secretary of state of a statement of expenses received from the county auditors. The expenses incurred in a recount demanded under subsection 2 of section 16.1-16-01 must be paid by the secretary of state or county auditor from the bond submitted by the individual requesting the recount.
11. This section also applies to city elections that are not combined with the county except the city auditor, to the extent applicable, shall perform the duties of the county auditor.

#### **16.1-16-02. Who may contest election.**

A defeated candidate or ten qualified electors may contest the nomination or election of any person or the approval or rejection of any question or proposition submitted to a vote of the electorate, pursuant to chapters 16.1-04, 16.1-05, 16.1-06, 16.1-07, 16.1-08.1, 16.1-09, 16.1-10, and 16.1-11. In a county election to change the county seat or to change the boundaries of the county, the complaint must be filed against the board of county commissioners, who shall appear and defend the contest action.

#### **16.1-16-03. Commencement of action - Parties - Status of contestee.**

An action to contest an election must be commenced by service of a summons and verified complaint. The party instituting the action must be known as the contestant, and the party against whom the action is instituted must be known as the contestee. In a contest of an election, the person holding the certificate of election shall take possession and discharge the duties of the office until the contest action is finally decided.

#### **16.1-16-04. Time for commencement of action.**

Any action to contest an election must be commenced and the complaint must be filed in the district court of the contestee's county of residence within five days after final certification of a recount by the appropriate canvassing board or within fourteen days after the final certification by the appropriate canvassing board if no recount is to be conducted. However, if the grounds for the action are the illegal payment of money or other valuable thing subsequent to the filing of any statement of expenses required by this title or if the contestee does not or cannot meet the qualifications to hold the office as required by law, the action may be commenced at any time. The contestee shall serve and file an answer within fourteen days after service of the contest summons and complaint.

#### **16.1-16-05. Grounds for election contest.**

An election contest may be commenced for any of the following causes:

1. If the contestee does not or cannot meet the qualifications to hold the office as required by law.

2. Because of illegal votes or erroneous or fraudulent voting, count, canvass, or recount of votes.

**16.1-16-06. Election contest to be tried as civil action - Precedence on court calendar.**

Election contest actions must be tried as civil actions to the court without a jury. The district court shall set the hearing on the contest action not more than ten days after the filing of the contest answer. Election contests must take precedence over regular court business so elections are determined as soon as practicable. The district court judge shall order a special term of the court if no term is in progress when the election contest complaint is filed.

**16.1-16-07. Contest involving irregularity of ballots - Preservation of ballots.**

Either the contestant or the contestee, within the time provided by this title for the preservation of ballots, may give notice by certified mail to the county recorder of any county where the contestant or the contestee desires the ballots preserved, that an election contest is pending in a designated court. Thereupon, it is the duty of the county recorder to preserve all the paper ballots and electronic voting system ballots and associated records until the contest has been finally determined.

**16.1-16-08. Judgment in election contest action.**

1. The judge in an election contest action shall pronounce judgment on which candidate was elected or nominated and whether any question or proposition was approved or rejected.
2. The appropriate officer shall issue a certificate to the person declared elected or nominated in accordance with the judgment. Any certificate of nomination or election previously issued that is in conflict with the judgment is annulled by the court's judgment.
3. If the court declares that the election resulted in a tie, the election must be determined by law.
4. If the court declares that no one was elected or nominated and sets aside the election, the office must be deemed vacant and any certificate of election or nomination previously issued is annulled. The vacancy must be filled according to law. This subsection does not apply if an incumbent is in office and is entitled to serve until a successor is duly elected and qualified, in which event the incumbent may only be removed by impeachment.
5. In the discretion of the court, court costs may be awarded on the following bases:
  - a. If the contest action is dismissed for insufficient evidence or want of prosecution, or if the court confirms the election results, judgment for costs must be for the contestee and against the contestant.
  - b. If an election is annulled for errors or malfeasance of any election official during any part of the election procedure, the costs must be a charge against the state or political subdivision in which the election was held.
  - c. When an election is annulled on any other ground or when the contestant is declared elected, judgment for costs must be for the contestant and against the contestee.
6. Nothing in this chapter may be construed to authorize a nomination or election to be set aside because of illegal votes unless either of the following is shown, that:
  - a. The contestee had knowledge of or connived in the illegal votes.
  - b. If the number of illegal votes is taken from the contestee, it would reduce the number of the contestee's legal votes below the number of votes cast for some other person for the same nomination or election, after deducting any illegal votes from the other person.

**16.1-16-09. Appeal of election contest judgment.**

An appeal to the supreme court of the judgment in an election contest action may be had by filing a notice of appeal with the clerk of the trial court within ten days of the date of the service

of notice of entry of the judgment. Appeals of election contest actions must be conducted in the manner provided by the North Dakota Rules of Appellate Procedure. Election contest appeals must take precedence over regular court business so election results can be determined as soon as practicable. An appeal may be brought on for hearing before the supreme court at any time upon ten days' notice by either party and must be determined in a summary manner.

**16.1-16-10. Legislative contest of election.**

Legislative election contests must be determined in court as provided in this chapter for other contests. No legislative election may be contested before either house of the legislative assembly.

**16.1-16-11. Answer to legislative statement of contest.**

Repealed by S.L. 1987, ch. 259, § 15.

**16.1-16-12. Depositions - Subpoenas - Time limits.**

Repealed by S.L. 1987, ch. 259, § 15.

**16.1-16-13. Preservation of ballots.**

Repealed by S.L. 1987, ch. 259, § 15.

**16.1-16-14. Testimony and records filed with secretary of state - Secretary of state to deliver to presiding officer.**

Repealed by S.L. 1987, ch. 259, § 15.

**16.1-16-15. Determination of contest - Certificate of election.**

Repealed by S.L. 1987, ch. 259, § 15.

**16.1-16-16. Fees of officers and witnesses.**

Repealed by S.L. 1987, ch. 259, § 15.

**16.1-16-17. Payment for prosecuting or defending legislative election contest prohibited.**

Repealed by S.L. 1987, ch. 259, § 15.