



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

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**Jim Ryan**  
ATTORNEY GENERAL

FILE NO. 96-043

ELECTIONS:  
Discovery Recounts in  
Legislative Elections

The Honorable Carl E. Hawkinson  
Chair, Senate Judiciary Committee  
State House, Room 623  
Springfield, Illinois 62706

Dear Senator Hawkinson:

I have your letter wherein you inquire regarding section 22-9.1 of the Election Code (10 ILCS 5/22-9.1 (West 1994)), which provides in pertinent part:

"Within 5 days after the last day for proclamation of the results of any canvass declaring persons nominated, elected or declared eligible for a runoff election for any office or declaring the adoption or rejection of a question of public policy, the following persons may file a petition for discovery:

(a) any candidate who, in the entire area in which votes may be cast for the office for which he is a candidate, received votes equal in number to at least 95% of the number of votes cast for any successful candidate for the same office; \* \* \*

\* \* \*

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A petition under this Section shall be filed with the election authority for purposes of discovery only. The petition shall ask that ballots, voting machines, or ballot cards--as the case may be--shall be examined, that any automatic tabulating equipment shall be tested, and that ballots, recorded votes, or ballot cards--as the case may be--shall be counted in specified precincts, not exceeding 25% of the total number of precincts within the jurisdiction of the election authority. Where there are fewer than 4 precincts under the jurisdiction of the election authority and within the area in which votes could be cast in the election in connection with which the petition has been filed, discovery shall be permitted in one of such precincts.

\* \* \*

(Emphasis added.)

Specifically, you have asked whether, in situations in which only a part of an election jurisdiction is included within a legislative district, the 25% limitation upon the number of precincts which may be recounted should be calculated based upon: 1) the number of precincts of the election jurisdiction within the district; or 2) the number of all of the precincts within the election jurisdiction. For the reasons hereinafter stated, it is my opinion that a candidate may request recounts in only 25% of the precincts in which voters were eligible to vote for that office.

Initially, it may be helpful to provide an example to illustrate this issue. Assume, for these purposes, that a county contains a total of 960 election precincts. The county is divided between two legislative districts, one of which (District

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A) covers 240 precincts, the other (District B) the remaining 720 precincts. A losing candidate in District A who meets the statutory prerequisites petitions for discovery, claiming that he is entitled to a recount in all 240 precincts in which voters were eligible to vote for that office, since that number equals 25% of the total number of precincts located within the election jurisdiction (the county). Opponents counter that the candidate is entitled to a recount in no more than 60 precincts, since that number equals 25% of the number of precincts in the county in which voters were eligible to cast votes for the legislative candidates.

These were precisely the arguments made in Berquist v. Kusper (1981), 103 Ill. App. 3d 814, which concerned petitions for discovery filed by two unsuccessful candidates for the office of alderman of the city of Countryside, Illinois. The wards in which the petitioners were candidates were comprised of two precincts and three precincts, respectively. Each candidate sought a recount in one precinct. The canvassing board rejected the petitions, apparently on the basis that it was not possible to allow a recount in a ward with fewer than four precincts since to do so would necessarily result in recounting more than 25% of the precincts in which votes were cast. (Cf. Public Act 84-966, effective January 1, 1986, which amended section 22-9.1 to permit recounts in such circumstances.) The petitioners argued in the appellate court that they were entitled to a recount in any

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number of precincts not exceeding 611, or 25% of the total number of precincts (2,444) in suburban Cook County. The court stated therein that:

" \* \* \*

We agree with respondents that petitioners are not entitled to a discovery recount under the statute. We believe that the statute requires a discovery recount of 25% of the precincts within the jurisdiction of the clerk or judge in which votes were cast for a particular office. Petitioners' interpretation of the statute tortures the purpose of inserting such a limitation on the number of precincts in which votes could be recounted. As respondents suggest, petitioners' reading of the statute would mean that the legislature only intended to limit discovery in elections such as county-wide elections. We do not believe that this is what the legislature intended. Rather, we believe that it intended the limitation to apply only to the precincts or election districts involved in the election and not to the county or suburban Cook County as a whole. \* \* \*

\* \* \*

(Emphasis added.) Berquist v. Kusper, 103 Ill. App. 3d at 817.

The reasoning and conclusion of this case is equally applicable to the circumstances you have described. Clearly, it was the intent of the General Assembly in enacting section 22-9.1 to provide for a uniform, limited discovery procedure whereby a candidate can assess the likelihood of prevailing therein prior to initiating an election contest under article 23 of the Election Code (10 ILCS 5/23-1.1a et seq. (West 1994)) or as may otherwise be provided. It is not the purpose of section 22-9.1

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to provide candidates with a full recount of all votes cast within an election jurisdiction. To conclude that the 25% limitation is to be calculated based upon the number of precincts in the entire election jurisdiction in cases in which only a part of those precincts voted in the candidate's race would destroy the uniformity of the procedure and render the limitation meaningless. Therefore, it is my opinion that in the circumstances you have described, an unsuccessful candidate for legislative office who otherwise meets the statutory criteria of section 22-9.1 of the Election Code is eligible thereunder to receive a recount in only a maximum of 25% of the precincts contained within the area of an election jurisdiction (exceeding three precincts) in which voters were eligible to cast votes for that office.

Sincerely,

  
JAMES E. RYAN  
ATTORNEY GENERAL