

Chapter 9: Procedure for Recounts and Appeals

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§ 901. Petition for recount.

(1) A petition for recount may be filed by any candidate in an election who believes that there was fraud or error committed in the casting, canvassing, or return of the votes cast at said election. The petition shall be filed with the National Election Director. Such petition shall contain a statement that the petitioner has reason to believe and does believe that the records or copies of records made by the board of election of such district are erroneous, specifying wherein he or she deems such records or copies thereof to be in error, or that votes were cast by persons not entitled to vote therein, and that he or she believes that a recount of the ballots cast in the district will affect the election of one or more candidates voted for at such election.

(2) A petition for a recount must be granted if the difference between the number of votes cast for the winning candidate and the next highest candidate is one-half of one percent or less of the total votes cast for all of the candidates for that particular seat.

Source: PL 2-73 §901; amended by PL 5-70 §16; PL 8-97 §25.

Case annotations: A decision whether to grant or deny a recount is not an everyday decision, but a large question affecting the public interest profoundly and involving fundamental policy considerations. *Olter v. National Election Comm'r*, 3 FSM Intrm. 123, 133 (App. 1987).

The statutory scheme of the National Election Code reflects far greater concern that appropriate recounts be provided than that inappropriate recounts be prevented. If a recount is denied when it should have been granted, a grave risk is presented to constitutional government. *Olter v. National Election Comm'r*, 3 FSM Intrm. 123, 138-39 (App. 1987).

§ 902. Filing time frames.

A petition for a recount must be filed within one week of certification of the results of the election. Any other petition challenging the acceptability of a vote or

votes must be filed prior to certification of the results of the election or within one week of the election, whichever occurs first. The winning candidate shall have one week to respond to the petition. The National Election Director shall then have 10 days to decide whether to approve the petition. If the National Election Director decides not to approve the petition, he shall record the reasons for such decision.

Source: PL 2-73 §902; amended by PL 5-70 §17; PL 8-97 §26.

Case annotations: When an appellant seeks to have an election set aside and done over due to irregularities not correctable by a recount the appeal is timely filed if it is filed within one week of the certification of the results of the election. This is the same filing time frame as for a recount. Aten v. National Election Comm'r (I), 6 FSM Intrm. 38, 39 (App. 1993).

By statute, petitions to the National Election Director challenging the acceptability of a vote or votes must be filed prior to certification of the results of the election or within one week of the election, whichever occurs first. Wiliander v. Mallarme, 7 FSM Intrm. 152, 156 (App. 1995).

Where, because election officials had not processed the absentee ballots until nine and ten days after the election thus making it impossible to file a petition concerning the acceptability of those ballots within the statutory time frame of prior to certification of the results of the election or within one week of the election, whichever occurs first, the petition will still be considered timely if it is filed before certification. Wiliander v. Mallarme, 7 FSM Intrm. 152, 157 (App. 1995).

The time frames established by statute for election petitions to the National Election Director are short. A candidate must be vigilant in asserting his rights to petition. Wiliander v. Mallarme, 7 FSM Intrm. 152, 157 (App. 1995).

Where no action, or words, or silence of the National Election Director prior to the appellant's initial petition misled the appellant into untimely filing his petition after certification it does not give rise to an estoppel. The Director's later failure to raise the issue of untimeliness until his denial of the petition was appealed to the Supreme Court does not give rise to an estoppel. Wiliander v. Mallarme, 7 FSM Intrm. 152, 157-58 (App. 1995).

Deadlines set by statute are generally jurisdictional. If the deadline has not been strictly complied with the adjudicator is without jurisdiction over the matter once the deadline has passed. This applies equally to the National Election Director as a member of an administrative agency (executive branch) hearing an appeal as it does to a court hearing an appeal from an administrative agency. Thus the Director cannot extend statutory time frames set by Congress. When the Director had not rendered his decision within the statutorily-prescribed time limit it must be considered a denial of the petition, and the petitioner could then have filed his appeal in the Supreme Court. Wiliander v. Mallarme, 7 FSM Intrm. 152, 158 (App. 1995).

§ 903. Denial of petition -- Appeal to Supreme Court.

(1) The aggrieved candidate may, within five days after receipt of the decision of the National Election Director, appeal his case to the Appellate Division of the Supreme Court. The Appellate Division of the Supreme Court shall review the appeal to determine if the decision by the National Election Director was:

- (a) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (b) In excess of statutory jurisdiction, authority, or limitations, or a denial of legal rights;
- (c) Without substantial compliance with the procedures required by law; or
- (d) Unwarranted by the facts.

If the decision is in favor of a recount, the National Election Director shall be so notified and shall proceed as provided in sections 904 and 905 of this title.

(2) Appeals may be had in the manner prescribed in section 902 and subsection (1) of this section from any decision of the National Election Director with respect to a challenge affecting the acceptability of a vote or votes. A petition under this section for appeal shall contain the information specified in section 901 of this title for a petition for a recount. A decision of the Appellate Division of the Supreme Court in favor of the petitioner may have the effect of disallowing the challenged votes but shall not halt or delay balloting or counting and tabulating.

Source: PL 2-73 §903; amended by PL 5-70 §18; PL 8-97 §27.

Case annotations: By statute an aggrieved candidate in an election contest can only appeal to the FSM Supreme Court after his petition to the National Election Commissioner has been denied. *Kony v. Mori*, 6 FSM Intrm. 28, 30 (Chk. 1993).

If the possibility of double voting is alleged the burden is on the appellant to show that it occurred. *Aten v. National Election Comm'r (II)*, 6 FSM Intrm. 74, 78 (App. 1993).

Deadlines set by statute are generally jurisdictional. If the deadline has not been strictly complied with the adjudicator is without jurisdiction over the matter once the deadline has passed. This applies equally to the National Election Director as a member of an administrative agency (executive branch) hearing

an appeal as it does to a court hearing an appeal from an administrative agency. Thus the Director cannot extend statutory time frames set by Congress. When the Director had not rendered his decision within the statutorily-prescribed time limit it must be considered a denial of the petition, and the petitioner could then have filed his appeal in the Supreme Court. Wiliander v. Mallarme, 7 FSM Intrm. 152, 158 (App. 1995).

Generally speaking, elections are conducted and carried out and administered by the executive and legislative branches. Courts do not have a primary position in that traditional scheme. The election law states the time at which the court has the right of entertaining an appeal from the final action of the National Election Director. Wiliander v. Siales, 7 FSM Intrm. 77, 79 (Chk. 1995).

Congress's intended that the election appeal process be timely and expeditious. This is especially important in a year in which the newly elected Congress selects the President and Vice President of the nation from among its members. Wiliander v. Mallarme, 7 FSM Intrm. 152, 161 (App. 1995).

§ 904. Approval of petition -- Notice of recount.

If the National Election Director determines that there is a substantial question of fraud or error and that there is a substantial possibility that the outcome of the election would be affected by a recount, he or she shall cause notice of the recount to be given in an appropriate manner.

Source: PL 2-73 §904; amended by PL 5-70 §19; PL 8-97 §28.

Case annotations: To interpret 9 FSMC 904, the FSM Supreme Court should apply a two-prong test. The first prong is whether there is a "substantial question or fraud or error" and the second prong is whether there is "substantial possibility that the outcome would be affected by a recount." Olter v. National Election Comm'r, 3 FSM Intrm. 123, 136-37 (App. 1987).

The statutory scheme of the National Election Code strongly suggests that Congress intended the word "substantial" in 9 FSMC 904 to be applied liberally, so that in the event of doubt, a recount would be available. Olter v. National Election Comm'r, 3 FSM Intrm. 123, 138 (App. 1987).

§ 905. Recount by counting and tabulating committee.

The recount shall be held by the counting and tabulating committee within ten days after the decision of the National Election Director. The counting and tabulating committee shall make certificates of such determination under oath showing the result of the election and what persons were declared elected to fill office, one of which shall be filed with the National Election Director, one with each board of election concerned, and one with the person filing the petition for recount. The person receiving the greatest number of votes shall be deemed to have been elected, but if two or more candidates shall receive an equal number of votes for the office, the tie vote shall be resolved in accordance with section 811 of this title.

Source: PL 2-73 §905; amended by PL 8-97 §29.

§ 906. Irregularities not correctable by recount.

In the event of election irregularities which cannot be corrected by recount, a candidate may petition for an election to be set aside and done over, either in a district as a whole or in the portion thereof where the irregularities took place. The procedures for the filing of such petition, action thereon, and appeal of its denial shall be the same as such procedures for a petition for recount. A petition made pursuant to this section shall not be granted unless the petitioner proves it is more likely than not that the irregularities complained of could have resulted in the election of a candidate who would not have won had the irregularities not occurred.

Source: PL 5-70 §20.

Case annotations: That the results of the election would have been changed but for the alleged irregularities is not the correct formulation of the ground for a revote. *Aten v. National Election Comm'r (II)*, 6 FSM Intrm. 74, 79 (App. 1993).

When the National Election Commissioner's decision concerning election irregularities is appealed to the FSM Supreme Court the Appellate Division must decide whether the National Election Commissioner's decision is proper, and if not, whether the irregularities complained of could have resulted in the election of a candidate who would not have won had the irregularities not occurred. *Aten v. National Election Comm'r (II)*, 6 FSM Intrm. 74, 81 (App. 1993).

Where election irregularities cannot be corrected by a recount the election, in whole or in part, can be set aside and done over only if it is more likely than not that the irregularities complained of could have, not necessarily would have, resulted in the election of a candidate who would not have won had the irregularities not occurred. *Aten v. National Election Comm'r (II)*, 6 FSM Intrm. 74, 82 (App. 1993).