

## **Summary of Comments Received for Chapter 535: Rules Governing the Administration of Elections Determined by Ranked-choice Voting**

The following people submitted comments related to the content of the rule:

1. March 31, 2018, Christopher Johnson of Somerville, Maine
2. April 4, 2018, Jeff Smith of Swanville, Maine
3. April 4, 2018, Hilary Ware of Norway, Maine
4. April 5, 2018, Andrew Freese of Brewer, Maine
5. April 5, 2018, George Gilbert, representing the Ranked-choice Voting Resource Center
6. April 6, 2018, Ann Luther, representing the League of Women Voters of Maine
7. April 6, 2018, Representative Ralph Chapman, District 133, Brooksville, Maine
8. April 6, 2018, Robert Richie, representing FairVote

The following is a summary of the comments (by rule section) submitted by the people listed above (designated by number), along with the Secretary of State's responses to each comment.

### **Summary of Rule:**

#### **Comment:**

#6 recommended changing the last sentence of the summary to read "...to achieve a winning candidate..." instead of "...to achieve a majority winner..." because the statute specifies the RCV counting rounds continue until only two candidates remain.

#### **Response:**

We agree that Title 21-A section 723-A, subsection 2, paragraph A, specifies that the rounds of ranked-choice counting continue until there are only 2 candidates remaining. We have changed the summary accordingly.

### **Section 1. Applicability of Ranked-choice Voting:**

#### **Comment:**

#7 suggested we consider the case of one qualified candidate and two declared write-in candidates, and change the wording to state that ranked-choice voting applies to an office where "...there is any combination of three or more qualified candidates and declared write-in candidates..."

#### **Response:**

Title 21-A section 601, subsection 2, paragraph J, states the following: "A voter may include no more than one write-in candidate among that voter's ranked choices for each office." Therefore, we think the rule as currently worded is correct (i.e., that an office will be determined by the ranked-choice voting process when there are at least three listed candidates or a combination of two listed candidates and one write-in candidate), and we have not made the commenter's suggested change.

## **Section 2. Definitions:**

### **Comment:**

#6 recommended that the statutory definitions in Title 21-A section 723-A be incorporated into the rules for completeness, consistency and ease of understanding. She also commented that a new definition should be added for “winning candidate”, to be defined as “that candidate who is the continuing candidate after all other candidates have been defeated”.

### **Response:**

We do not think it is necessary to repeat all the statutory definitions in the rule. Having definitions in two places makes it more likely that definitions will get out of sync when the statute is updated, but the rule is not, and vice versa. We also do not think the proposed definition for “winning candidate” adds clarity. Instead, we have amended section 4 of the rule to state that the ranked-choice count continues until there are only two candidates remaining, and the candidate with the most votes (of the 2 remaining candidates in the final round) is the winning candidate.

### **Comment:**

#1 suggested that a definition for “First Choice Vote” should be added, to mean “the candidate chosen in the highest rank for which a choice is indicated, if not invalidated due to an overvote on that ranking”. He states this is necessary to make these rules consistent with Title 21-A section 696, which allows a vote to be counted if it is possible to determine the voter’s intent. He further suggests changing the rule that provides that the ballot is invalidated when two consecutive rankings are skipped and instead count the highest ranking for any continuing candidate regardless of the number of skipped rankings.

### **Response:**

We do not agree that a definition is necessary for “First Choice Vote”. We also do not agree that we should change the rule to ignore all skipped rankings. The ranked-choice voting law in Title 21-A section 723-A, subsection 1, paragraph D, specifically states that a ballot is exhausted when it contains 2 or more sequential skipped rankings before its highest continuing ranking. We believe the rule has to remain in agreement with the ranked-choice voting law on this point. Accordingly, we have not changed the vote counting procedures for how to handle 2 sequential skipped rankings, in section 4, subsection 2, paragraph C, subparagraph (2) of the rule or any other section of the rule that would conflict with the current wording.

## **Section 3. Ballot Design:**

### **Comment:**

#3 commented generally that “...voters need to know they do not need to rank their choices unless they choose to. Your use of the word ‘opportunity’ may cover that scenario.”

### **Response:**

We think that section 3, subsection 2 as currently drafted is clear that the voters may rank as many candidates as they wish and that they do not have to rank all candidates.

**Comment:**

#6 recommends putting numbers in the ovals in the ranking columns, not just showing them as column headings.

**Response:**

The current ballot creation software used with Maine’s existing tabulation system does not allow numbers or any other text to be printed within the voting ovals, so the rule has not been changed to require it.

**Section 4. Vote Counting Procedures:**

**Subsection 2(A) – General procedures -**

**Comment:**

#4 and #7 do not think ballots should be transferred to or counted by the Secretary of State at a central location because they believe it creates an additional time delay in determining the election outcome and increases the risk of tampering.

**Response:**

In order to determine a result for ranked-choice voting, all election results and cast vote records have to be aggregated into a single database before the RCV software utility can be run on the full set of results. This cannot be done on a town-by-town basis. The only way to conduct decentralized processing by RCV after the first choice votes are counted would be if all municipalities had electronic voting machines (not the paper ballot tabulating machines that we currently use in only 265 of the 500 voting jurisdictions), that were connected to the State database over a Wide Area Network (WAN). We do not have that capability currently and would not consider using a WAN to have municipalities upload results, due to cybersecurity concerns.

We believe the rule, as drafted, provides sufficient safeguards to prevent tampering with the ballots or results, and that ballot retrieval and central counting will be done as quickly as possible given the large number of jurisdictions spread over a significant geographical area. Maine does not have election night reporting of official election results now – instead, towns have 3 business days to report their results. Having the RCV count extend into the early part of the week following the election is reasonable, and is the quickest possible result for completing an RCV count for a statewide office.

**Comment:**

#1 thinks subsection 2(A) should be rewritten and that the current wording “transferred and added to the totals” is unnecessary and misleading.

**Response:**

We have corrected this section to remove the reference to no candidate receiving a majority and change the word “transferred” to the phrase “is then counted”. We don’t think any other changes are needed to this section.

**Comment:**

#5 and #6 both point out that Title 21-A, section 723-A(2)(B) requires that RCV rounds continue until only two candidates remain, and that this requires a change in the rules to state that if there are more than 2 continuing candidates at the end of each round, then the last place candidate is defeated and the vote for the next-highest ranked candidate is counted in the next round.

#6 further states that the statute references “defeating” candidates, while the rule references “eliminating” candidates. The commenter recommends using the statutory term where appropriate.

**Response:**

We agree with both of these comments and have amended the rules accordingly.

**Subsection 2(B) – Threshold for majority –****Comment:**

#1 recommends rewording this section to remove the mention of “undervotes” from determination of the majority of votes cast. This is consistent with his comment regarding section 2, that skipped rankings should be disregarded.

**Response:**

For the same reason as we gave in response to #1’s comment on section 2, we did not make this change. The rule must remain consistent with the statute on how to handle skipped rankings (i.e., undervotes), which is to ignore a single skipped ranking, but to consider the ballot exhausted when there are 2 or more consecutive skipped rankings.

**Comment:**

#6 suggests eliminating this paragraph as the definition is defective, and substituting the definition of “winning candidate” that she recommended in her comment for section 2.

**Response:**

We agree that this paragraph can be eliminated, after making the changes to subsection 2(A) regarding continuing the RCV count until only 2 candidates remain. We do not think we need a definition for “winning candidate”.

**Subsection 2(C) – Handling of certain ballot rankings -****Comment:**

#1 expands upon his comment from section 2, that skipped rankings should be ignored, so that the rule is consistent with Title 21-A section 696, subsection 4 (for determining voter intent), and recommends that sub-paragraph (2) should be re-written and sub-paragraph (3) should be eliminated. He also comments that sub-paragraph (4) should be re-written.

**Response:**

For the same reason as we gave in response to #1’s comments on section 2 and section 4(2)(B), we did not make the suggested changes.

**Comment:**

#2 comments that an unintended consequence may occur when a voter skips or duplicates a vote for a 1<sup>st</sup> choice candidate: i.e., that if the voter skips the 1<sup>st</sup> choice, the second choice is elevated to 1<sup>st</sup> choice, whereas if the voter marks a duplicate for 1<sup>st</sup> choice the ballot is exhausted. He believes that any voter who legibly marks a ballot for any choice should have that choice counted.

**Response:**

We do not agree there is a problem here. The law and the rule allow for a single skipped ranking. A duplicate ranking for the same candidate does not exhaust the ballot unless that candidate is defeated and then only if there are no rankings for a continuing candidate on that ballot.

**Comment:**

#6 suggests that the tabulators be programmed to recognize the ballot conditions described in this section and return the ballot to the voter to be corrected before the ballot is cast. She further suggests that the term “eliminated candidate” should be replaced with “defeated candidate” as she did in an earlier comment. Finally, both #1 and #6 suggest that sub-paragraph (1) should be re-written to clarify when a ballot is invalidated due to an overvoted ranking.

**Response:**

We do not agree with the suggestion regarding the programming of the tabulators to message the voter in the event of an undervote. The tabulators already are programmed to give a message to the voter when there is an “overvote” in a plurality race, and it will do the same when there is an “overvote” in any ranking in an RCV race. The tabulators currently are not programmed to give a message to the voter when there is an “undervote” (i.e., there is no oval marked) in a plurality race. Instead, the voter will get a message only when the ballot appears to be totally blank (i.e., there are no markings detected on that ballot). Voters may leave one or more races blank – we believe that is the voter’s choice. Likewise, we believe it should be the voter’s choice whether or not to mark more than one choice in an RCV race. Moreover, we believe that notifying voters of an undervote in one or more races (rather than just when the ballot is totally blank) will result in almost all voters receiving an undervote message and will result in unnecessary delays in voters casting their ballots into the tabulator. Accordingly, we did not add this requirement to the rule, nor will we program the tabulators to return ballots for undervotes, except when the ballots are totally blank.

We agree with the suggestion to replace the term “eliminated candidate” with “defeated candidate” to be consistent with the statute, and have amended the rule accordingly.

With regard to the suggested re-write of the overvote section, we do think the wording suggested by #6 is clearer and we have amended the rule accordingly.

**Comment:**

#7 recommends that the section be clarified as to whether the skipped vote on the 1<sup>st</sup> ranking is counted by local officials for the 2<sup>nd</sup> choice on election night, or whether it is only counted with the redistributed votes after the 1<sup>st</sup> round. He also suggests adding a general concept that would apply to rules regarding RCV recounts – that intermediate ties or close outcomes do not trigger any tie-breaking or recount processes unless the final election outcome would be affected.

**Response:**

The RCV rules are not part of the ballot counting processes on the tabulators. In other words, the tabulator counting processes only consider what is marked in the 1<sup>st</sup> choice column, and would count the skipped ranking on the 1<sup>st</sup> choice as an undervote or blank vote for that race, just as it does now for plurality races. Therefore, the municipalities will only count and report the 1<sup>st</sup> choice votes on election night. It is only during the centralized RCV count that the rules come into play. The RCV counting utility will eliminate the lowest-ranked candidate based on election night results and count the 2<sup>nd</sup> choices on those ballots in the initial round of the RCV count, and it will also count the 2<sup>nd</sup> choices for the continuing candidates on those ballots for which the 1<sup>st</sup> choice was skipped (i.e., not marked).

**Section 5. Preparation for Ranked-choice counting:**

**Subsection 2 – Retrieval of election materials –**

**Comment:**

#5 suggested that the Department of Public Safety should retrieve the ballots as well as the memory sticks from the tabulator towns to avoid having to return to retrieve the ballots in the event of a recount. He also suggested the State should consider creating hash codes for the files on the memory devices, to enable verification that the integrity of the data has been preserved.

**Response:**

We do not intend to retrieve the ballots from the tabulator municipalities for the RCV count; only the USB memory sticks. Although this may seem like a time-saver in the event of a recount, it would involve retrieving and securing a lot more material, and would be unnecessary if no recount is requested. Moreover, we have amended the rules to provide that the RCV materials will be retrieved by private courier, leaving to the State Police the task of retrieving election materials only in the event a recount is requested.

We also do not intend to implement a hashing protocol for the memory devices for this election. This would require us to acquire third-party software and ensure all tabulator towns are trained and able to implement the processes, which is not feasible in this shortened implementation timeframe. Instead, we will rely on physical chain-of-custody protocols to protect the integrity of the devices and the data contained thereon.

**Comment:**

#6 commented that this section should be reworded to state that the Secretary of State will notify the Department of Public Safety before Election Day that retrieval will commence statewide on the Wednesday after the election. She also suggested that the tabulator towns should retain a duplicate memory stick containing the results to be kept with the ballots.

**Response:**

With regard to beginning retrieval automatically on Wednesday, as we indicated in our response to the previous comment, we now intend to utilize a private courier service to retrieve the ballots and memory devices on the Thursday and Friday immediately following election day.

Beginning the retrieval on Wednesday is not feasible for several reasons, including the fact that the larger hand-count towns are counting until very late in the morning of the day after the election and may not be in the office on Wednesday as a result. We also think it is prudent to provide a general alert to the towns on Wednesday to remind them that retrieval will begin on the schedule that we disseminated prior to the election. The courier will need to stage some employees in the more remote locations on Wednesday night to ensure retrieval can begin early on Thursday and to provide that delivery to Augusta will occur on the same day as pickup from the towns (either Thursday or Friday).

With regard to duplicate memory devices, the state is not going to employ duplicate memory devices for this election due to the costs involved. The USB memory devices used by the DS-200 tabulators are commercial grade devices that are set up and tested to accept election results and nothing else. The devices cost \$110 each, so to deploy these for the primary election would cost more than \$40,000. Although we do think this is a prudent practice, it is not appropriate given the level of funding and shortened implementation timeframe. If a municipality's memory device is compromised, the State will simply retrieve the actual ballots and scan them at the RCV counting facility to obtain the results and cast vote records for that municipality.

**Subsection 4 – Notice of Public Proceeding –****Comment:**

#5, #6 and #8 all commented about the starting time for the RCV count and the desire to have this occur as soon as possible after the election. #5 expressed a lack of understanding about the difference between the uploading of results and the running of the RCV utility and suggested this needs to be clarified. #5 and #8 commented that partial results are preferred over waiting until all results are available. #6 commented that the RCV count should be scheduled before all the results are in and should begin no later than the Monday following the election.

**Response:**

Conducting the RCV counting process is a multiple-step process. First, the ballots and memory devices need to be retrieved from all of the voting jurisdictions (about 500) and delivered to the RCV counting facility. We expect that the courier will retrieve the materials from nearly all of the jurisdictions and deliver them to Augusta on the Thursday and Friday after election day. If there are some municipalities (such as island communities) that are not able to be retrieved on Thursday or Friday, then those municipalities' materials will be retrieved by the Monday after the election.

Once a majority of the municipalities' materials are received and logged in at the central counting facility, we will begin the second step of the process, which is to upload the memory devices from the tabulator municipalities into the election results reporting program and scan the ballots from the hand-count towns and upload those results into the election results reporting program. We believe that a significant number of municipalities' materials will be available on the Friday following election day so that we can begin this second step. We also expect to have sufficient staff on hand to conduct these two processes at the same time (i.e., have some staff scanning the hand-counted ballots and uploading the results while other staff are uploading the results from the tabulator municipalities' USB devices into the election results reporting program). However, no individual municipality's ballots will be scanned or USB memory devices uploaded unless the State has received the municipality's official Return of Votes Cast. This will provide a check and balance in the system. We expect that this second step of aggregating all the results and cast vote records into a single database will be done by the afternoon of the Monday following election day.

The final step is to run the RCV counting utility against the full set of the election results and cast vote records of all 500 municipalities. The utility takes mere minutes to run and produce the results from all rounds of counting. This final step will not be done until all municipalities' results are included in the election results reporting program. We believe that incremental or preliminary RCV results will be misleading and thus they will not be run until there is a full data set. We believe the rule as currently drafted accurately states this, and have not made any changes to the rule.

#### **Section 6. Process for Ranked-choice counting:**

##### **Comment:**

#5 commented that the RCV Resource Center has developed an RCV counting utility that we could use for free, and they would be happy to provide this to the State, either as the primary counting utility or to be used as verification to the utility that the State procures.

Also, he recommends that the state make public the cast vote records so that any interested party could verify the accuracy of the State's tabulation.

Finally, #6 reiterates his confusion between the beginning of the scanning and uploading process (after a majority of the election materials have been retrieved) and the running of the RCV utility (after all results have been uploaded into the election results reporting program).

##### **Response:**

With regard to the RCV counting utility, the State already has engaged its voting system vendor, Election Systems & Software (ES&S) to write the RCV counting utility, which we will test prior to the election. Obtaining the utility from the RCV Resource Center would require a separate set of testing and verification of the utility's accuracy. While we appreciate the offer of the free software, at this time we do not believe we have the time or resources to verify two separate systems of RCV counting. Additionally, this has no effect on the text of the rules.



With regard to making the cast vote records public, while we agree that this would provide transparency, it is not something we will consider doing until after the RCV count has been completed and the results announced.

The final comment has been addressed in the response to #6's comments in section 4 of the rules.

**Comment:**

#6 recommends that the quality control reports provided for in section 6, subsection 3(D) of the rule be made public at the end of each day during the RCV count and should be posted on the Secretary of State's web site.

#6 also comments that the RCV counting utility should be run as soon as approximately half of the ballots for any contest have been uploaded and verified in the election results reporting program, but no later than Monday after election day. She further suggests that preliminary reports should be generated daily based on partial returns, and that the RCV counting utility should be run one last time after all results have been uploaded and verified. #7 similarly comments that running the RCV counting utility should not wait until all the results are uploaded into the election results reporting program, to allow for timely identification of apparent winners.

#6 also recommends that the rule should state that the aggregated cast vote record by contest will be posted as an accessible digital file on the Secretary of State's website at the same time that final results are posted on the website.

**Response:**

At the RCV counting facility, which will be on the East campus of the State Office complex and removed from the facilities of the Secretary of State, we intend to use a self-contained, single-purpose, hard-wired network of computers and a server that will have the election results reporting program installed on it. Although the software will generate the quality control reports that are referenced in the rule, the system will have no wireless capability and will not be connected to the internet. Therefore, we intend to generate printed reports as hard-copy documentation. It may not be possible to get electronic versions posted on the Secretary of State's website at the end of each day of counting, as that will require reports to be saved to a USB device and physically transported to the offices of the Secretary of State to be posted by the Webmaster. As time and staffing allows, we will post status reports of the number of jurisdictions whose materials have been received at the central facility, and indicate whether the ballots have been scanned or the results uploaded from the USB devices. We also will post the reports of the cast vote records on the Secretary of State's website as soon as possible after reporting the final results. However, because this is a new process and the feasibility of taking all these steps is uncertain, we do not believe it is prudent to include such requirements in the rule.

With regard to the recommendations that the RCV counting utility should be run against partial results and periodically updated, we do not agree with this. If only a certain part of the state has results uploaded into the system, the lowest-ranked candidate will likely be different than it will be for the state as a whole, thus producing incorrect results and heightening voters' concerns about the final outcome. We believe our focus should be on obtaining and uploading the first

choice results expeditiously (on the Friday and Monday after the election). If we are only missing a couple of small jurisdictions' ballots or election night official results, then we may do an unofficial run of the RCV counting utility against the results database at the end of Monday, and do a final official report when all jurisdictions are accounted for. We have added language to this section of the rule authorizing this approach.

**Comment:**

#7 generally commented again against centralized ballot collection (similar to the comment on section 2), and states that alternative methods could have been put into place since the initiative became law but that now it is too late to do so for June. He further comments that in the past, ballots were tabulated at the local level, with summary information transmitted to the Secretary of State's office by phone, fax or email in order to provide apparent winner information, often on election night or the following day. He further states this could be done for RCV elections by having municipalities report sums of the cast vote record permutations. He states this could be done by deploying existing tabulators to all municipalities or deploying generic commercial optical scanning equipment and using simple commercial optical recognition software to determine the permutations. Either the municipalities would transmit the ballot images to the state, or use software to transmit the summary information to the state.

**Response:**

As we stated in response to the comments regarding section 4(2)(A) of the rules about transferring ballots to the central counting facility, we cannot aggregate results and cast vote records into a central database any other way, without spending significantly higher amounts of money to deploy tabulators to all municipalities and to have results transferred to the central state database over the internet, which introduces serious cyber security concerns.

The commenter is also incorrect about past reporting of election results – the Secretary of State does not have any official results coming in by phone, fax or email on election night or the day after. Most official results come in by the 3<sup>rd</sup> business day after the election although some towns report even later than that deadline. The media outlets do reach out to towns to obtain unofficial results on election night, but the Secretary of State has no official reporting of the results until the tabulation is reported to the Governor on the 20<sup>th</sup> day after the election.

We believe that by providing for an efficient and secure retrieval and transport process for the election materials (i.e., ballots or USB memory devices) to the RCV counting facility, as well as an efficient method of processing these materials and uploading them into the election results reporting program, we should be able to have final, official results within 4 or 5 business days after the election.