

**DEPARTMENT OF THE SECRETARY OF STATE
BUREAU OF CORPORATIONS, ELECTIONS AND COMMISSIONS
DIVISION OF ELECTIONS**

Chapter 502: RULES GOVERNING THE CONDUCT AND PROCEDURES FOR ELECTION RECOUNTS, IN ELECTION CONTESTS DETERMINED BY PLURALITY

SUMMARY: This rule sets forth the procedures for the conduct of recounts of state elections by the Secretary of State, including the collection, security and handling of ballots, scheduling the recounts, personnel, instructions, supervision, disputed ballots and final sign-off at the conclusion of the recount, in an election contest determined by plurality.

PART A. GENERAL PROCEDURES

The procedures in this Part are applicable to all recounts of election contests for legislative or single county candidate offices referenced in 21-A M.R.S.A. §737-A(1) other than those that must be determined by ranked-choice voting pursuant to 21-A M.R.S.A. § 1(27-C) and Chapter 535 of the Department's rules. For recounts of election contests for statewide and multicounty offices referenced in 21-A M.R.S.A. §737-A(1-A) and statewide referenda pursuant to 21-A M.R.S.A. §738, the procedures in this Part are applicable except as modified in Part B of these rules.

SECTION 1. DEFINITIONS

1. **“Recount Candidate A”.** “Recount Candidate A” refers to the apparent winner.
2. **“Recount Candidate B”.** “Recount Candidate B” refers to the requesting candidate in a recount involving two candidates, or the candidate who received the second highest number of votes based on the Return of Votes Cast reported by the municipalities, in a recount involving three candidates.
3. **“Recount Candidate C”.** “Recount Candidate C” is the requesting candidate who received the third highest number of votes based on the Return of Votes Cast reported by the municipalities, in a recount involving three candidates.

SECTION 2. PREPARATION FOR THE RECOUNTS

1. **Designating State Recount Personnel**

A. **Recount Supervisor.** The recount will be conducted under the supervision of the Secretary of State, or his or her designee, who is called the Recount Supervisor. The Recount Supervisor will direct and oversee the conduct of the recount according to the laws, rules and procedures governing the conduct of the recount or elections.

B. **Recount Assistants.** The Secretary of State will provide the necessary number of Department staff to act as Recount Assistants. The Recount Supervisor will assign one Recount Assistant to each counting team and will assign Recount Assistants to other tasks as necessary.

2. **Notice of Public Proceeding.** The recount is a public proceeding and members of the press and the general public may attend, although space may be limited. The Secretary of State will provide notice to the public regarding each recount, including information about scheduling.

3. **Collection and Storage of Ballots and Election Materials.** Upon receiving a request for a recount, the State Police will collect the ballots and other election materials as requested by the Secretary of State pursuant to section 2, subsection 4 of these rules. The State Police will deliver these materials to a secure storage area under the control of the State Police or the Secretary of State. The Recount Supervisor and Secretary of State staff will have access to the secure storage area to organize and log the materials prior to the start of the recounts. While the recounts are being conducted, the Recount Supervisor and Recount Assistants will maintain control over the ballots and other recount materials. At the conclusion of the recounts, the Recount Supervisor will return the recount materials to the secure storage area until the materials are returned to the applicable municipalities by the State Police.

4. **Materials Available at the Recount**

A. **Difference of 10 or more votes.** For recounts involving a difference of 10 or more votes between the leading and requesting candidate or candidates, or the Yes and No responses to a referendum, based on the Return of Votes Cast prepared by the municipalities, the State Police will automatically retrieve the following materials, which will be made available for inspection at the recount: the used state ballots, including voted and counted ballots; spoiled, defective and void ballots that were segregated and not counted; and envelopes containing challenge certificates. The State Police will not retrieve unused state ballots, absentee envelopes and applications, incoming voting lists or any local ballots unless a recount of the used state ballots in any municipalities results in a significant discrepancy from the results reported on the Return of Votes Cast prepared by the municipalities that makes retrieval of any or all of these election materials from those municipalities necessary to reach a final tabulation and conclude the recount.

B. **Difference of fewer than 10 votes.** For recounts involving a difference of fewer than 10 votes between the leading and requesting candidate or candidates, or the Yes and No responses to a referendum, based on the Return of Votes Cast prepared by the municipalities, the State Police will retrieve the following materials, which will be made available for inspection at the recount: the materials described in paragraph A, plus the used absentee envelopes and applications, test ballots, unused ballots, absentee voter lists and the incoming voting lists. Local ballots will only be retrieved if they were processed through the same tabulator as the state ballots.

5. **Scheduling Recounts and Counters**

A. **Recount schedule.** The Recount Supervisor will set the schedule for the recounts. Each recount will begin promptly at the assigned time and will resume promptly after the time allotted for lunch and breaks has concluded. While recounts will normally be conducted during regular business hours, a recount may be continued after 5 p.m. with the agreement of the participating candidates, referendum representatives or their counsel. The Recount Supervisor has authority to continue the recount to the next available business day, however, even if the participating candidates or their counsel wish to continue the recount past 5 p.m.

B. **Counters.** Each candidate will provide the number of counters required by the Recount Supervisor. At a minimum, six counters will be required for each candidate participating in the recount unless the Recount Supervisor determines that fewer counters are needed based on the number of ballots cast. If more than six counters are needed, the Recount Supervisor will notify the candidates, referendum representatives or their counsel of the number of counters to be supplied. Candidates and certain other persons, as designated in 21-A M.R.S.A. §737-A, sub-§5, are prohibited from participating in the recounts in any capacity. It is not recommended that the counsel for a candidate act as a counter, although it is not prohibited.

SECTION 3. CONDUCTING THE RECOUNTS

1. **Security of the Recount Area.** There will be a guardrail enclosure set up to separate the recount area from the public viewing area. In addition to the State recount personnel, only the representatives or counsel for the candidates or the Yes or No side of a referendum, and the counters may be within the guardrail enclosure. All persons participating in the recount, including the Recount Supervisor and Recount Assistants, must sign in before the start of the recount, on a form provided by the Secretary of State. Candidates and members of the public must remain outside the guardrail area. Only limited conversation will be permitted in the recount room. Cell phones must be silenced during the recount and may be used within the guardrail area only by the Recount Supervisor or Recount Assistants as needed to conduct the recount. Any person who

causes a disruption of the recount process may be removed from the room, at the discretion of the Recount Supervisor.

2. **Inspection of Materials**

A. **Prior to Counting.** Prior to the beginning of the recount, the representatives or counsel for the candidates or the Yes or No side of a referendum will be allowed within the guardrail enclosure to inspect the tamper-proof containers, locks and seals and sign off on their condition.

B. **During the Recount.** Used (voted) ballots will be inspected and counted during the recount process as provided in subsection 4 below. Once the final count for a municipality has been determined, the voted ballots for that municipality will be resealed in tamper-proof containers, and will not be available for inspection again unless the Recount Supervisor later determines, after consultation with the candidates or their counsel, that re-inspection is necessary to resolve a factual dispute or question about the validity of the recount. If additional materials have been retrieved pursuant to section 2, subsection 4, paragraph B of these rules, they may be inspected as follows:

(1) The containers of unused state ballots may be inspected immediately after that municipality's ballots have been counted, or they may be held for inspection until after all the ballots in the electoral district have been counted.

(2) The incoming voting lists, absentee ballot envelopes and other election materials may be inspected upon request of one or both of the candidates or their counsel, or at the direction of the Recount Supervisor, after all the ballots in the electoral district have been counted and the Final Recount Tabulation has been prepared.

3. **Instructions.** At the start of the recount, the Recount Supervisor or designee will provide instruction to the participants on the laws and rules governing the recount process, ballot markings and the determination of voter intent.

4. **Ballot Handling Process**

A. **Access.** At no time will a candidate or the candidate's counters or representatives, or referendum representatives be permitted access to the ballots, incoming voting lists or other election materials without supervision or observation by the Recount Supervisor or Recount Assistants.

B. **Writing implements.** Only the purple pens or pencils provided by the Secretary of State will be used or allowed in the recount room.

C. **Counting teams.** One counter for each candidate or side of a referendum will be paired to form a counting team. Counters for each candidate or side of a referendum will sit beside one another at a table, facing a Recount Assistant. The counters must remain at the tables during recount sessions, unless excused by the Recount Supervisor or Recount Assistant.

D. **Packaging.** Ballots will be unpacked and carried to the tables by the Recount Supervisor or Recount Assistants. At the completion of the counting session, the Recount Assistants will reseal the used (voted) ballots in the tamper-proof containers from that municipality or in any additional tamper-proof containers supplied by the Secretary of State.

5. **Ballot Sorting and Tallying Process**

A. **Step 1 – Sort ballots by ballot style/party.** On a municipality-by-municipality basis, or on a precinct-by-precinct basis within multi-precinct municipalities, the counting teams will sort out any ballots that do not include the contest involved in the recount (such as ballots from a different party in a primary election or different ballot styles in municipalities or precincts with multiple ballot styles). Ballots that do not include the contest involved will be removed from the counting team’s table and resealed in the tamper-proof containers.

B. **Step 2 -- Sort ballots by candidate or response selected.** On a municipality-by-municipality basis, or on a precinct-by-precinct basis within multi-precinct municipalities, the counting teams will sort the remaining ballots into groups, as follows:

- (1) Ballots with Candidate A or “Yes” selected,
- (2) Ballots with Candidate B or “No” selected,
- (3) Ballots with Candidate C selected (if applicable);
- (4) Ballots with no recount candidate or referendum response selected; and
- (5) Disputed ballots – ballots for which the members of the counting team cannot agree upon which candidate or referendum response was selected by the voter.

C. **Step 3 – Count and record votes.** Each grouping of ballots assembled in Step 2 will be verified by each counting team member and counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the total votes for each grouping with multiple lots of the same grouping being combined on one tally sheet, if applicable.

D. Handling of Absentee Ballot Envelopes Containing Ballots. If, upon examination of absentee voting materials, absentee ballot envelopes appearing to contain ballots that were not removed from the envelope on election night are found, these ballots shall be dealt with in the manner described below:

(1) Clerk's notes indicate ballot is okay to cast and absentee ballot envelope has been slit open, but ballots have not been removed: The ballot shall be removed from the envelope and put into an odd lot to count.

(2) Clerk's notes indicate ballot is okay to cast and absentee ballot envelope has not been slit open: The ballot shall be segregated and not opened until after all other ballots in the electoral district have been counted. At that point, if it can be determined after checking the Incoming Voting List that the voter did not vote at the polls, the envelope shall be opened and the ballot counted and added to the final count.

E. Lot tallies. Upon completion of the recount of each grouping of ballots described above, the Recount Assistant for the counting team will be responsible for completing the Recount Tabulation form for the ballots recounted by that team and obtaining the signatures of each team member on the form. Each lot will be labeled with the alpha code assigned to the counting team and consecutively numbered.

F. Municipal tallies. After all the ballot lots have been counted for a municipality, the Recount Supervisor will provide the tabulation for that municipality to each participating candidate's counsel or representative, or to the representative for the Yes or No side of a referendum on a Recount Tabulation form. Each candidate's counsel or representative, or referendum representative will be asked to sign the completed Recount Tabulation agreeing to the final count for that municipality, including the number of ballots in dispute. Once this is signed by or on behalf of all recount candidates or sides of a referendum, the used ballots will be resealed and neither the candidates nor their counsel nor representatives for either side of a referendum will have access to these ballots again unless a factual dispute or question about the validity of the recount arises later in the recount process which the Recount Supervisor determines could be resolved by re-inspection. If one candidate or side of a referendum is unwilling to agree to the final count for that municipality without first having an opportunity to inspect other election materials after all other ballots in the electoral district have been recounted, pursuant to section 3, subsection 2(B) of this rule, then the Recount Tabulation may remain unsigned at this point in the process.

6. **Disputed ballots**

A. **Notification of dispute.** All disputes must be referred to the Recount Assistant assigned to that counting team, who will alert the Recount Supervisor or another Recount Assistant. All disputed ballots from the town or precinct team shall be placed in one disputed ballot grouping. The number of ballots in a disputed ballot grouping will be noted on a tally sheet form and signed as indicated in this subsection.

B. **Segregated.** The Disputed Ballot form will be attached to any disputed ballots that are not resolved prior to signing the Municipal Tally form and placed in a tamper-proof container clearly labeled "disputed ballots". Disputed ballots that are identified during the sorting and counting process described in section 5 of this rule will be segregated as a single lot for each municipality. Before signing the Municipal Tally form described in section 3 of this rule, the candidates' counsels or representatives may review the disputed ballots jointly and may resolve how they should be sorted and counted. If the disputes are resolved, the votes on those ballots will be added to the municipal totals for the appropriate candidate or referendum response.

C. **Review of disputed ballots.** Prior to signing the final tabulation form Final Recount Tabulation pursuant to section 4 of this rule, the candidates and/or their counsel may review the disputed ballots jointly and may resolve how individual ballots will be counted. Disputed ballots which are resolved before the final tabulation may be repacked and resealed with the other ballots.

D. **Appeals.** If there are enough disputed or challenged ballots to affect the result of the election, the interested candidate may appeal the recount as described in Section 3.1.

RECOMMENDATION:

D. **Appeals.** If there are enough disputed or challenged ballots to affect the result of the election, the interested candidate may appeal the recount as described in Section ~~4.13.1~~.

SECTION 4. RESOLUTION OF THE RECOUNT

1. **Final Recount Tabulation.** After the ballots from all the municipalities included in the recount have been recounted, and after the candidates or their counsel have had an opportunity to inspect other election materials if requested pursuant to section 2, subsection 4 of this rule, the Recount Supervisor shall prepare a Final Recount Tabulation showing the sum of the final counts agreed to in each municipality, including the number of challenged ballots and ballots remaining in dispute. Each candidate's counsel or representative, will then be required to sign the Recount Tabulation for each municipality in the electoral district (if not already signed pursuant to section

3, subsection 5(F) of this rule) and the Final Recount Tabulation. Once the participating candidates, referendum representatives or their counsel have signed the Final Recount Tabulation, that becomes the final count for the election. If the number of challenged or disputed ballots included in the final count for the election is not enough to affect the result of the election, then the result of the election is determined by the Final Recount Tabulation. If the number of challenged or disputed ballots included in the final count for the election is enough to affect the result of the election, and the recount result is appealed pursuant to 21-A M.R.S.A. §737-A, subsection 10, then the result of the election will be determined by the appeal.

2. **Withdrawal from Recount.** If a candidate or side of a referendum wishes to withdraw from the recount at any time, they may do so in writing, subject to the requirements of 21-A M.R.S.A. §737-A, sub-§11 for candidates.

PART B. PROCEDURES FOR STATEWIDE OR MULTICOUNTY RECOUNTS

In addition to the procedures set forth in Part A, the procedures in this Part are applicable to all recounts of election contests for statewide and multicounty offices referenced in 21-A M.R.S.A. §737-A(1-A) that are determined by plurality, and statewide referenda pursuant to 21-A M.R.S.A. §738.

SECTION 1. RECOUNT CONDUCTED IN STAGES

1. **Designated stages for recount.** The Secretary of State will create a list of municipalities to be recounted, presented in descending order of the total votes cast for the office or referendum in each municipality, except that the island municipalities described in paragraph D will be listed in descending order at the end of the list. The total votes cast figures will be based on the Return of Votes Cast reported by the municipalities to the Secretary of State within 3 business days after the election.

RECOMMENDATION:

. . . island municipalities described in ~~subsection 2 paragraph D~~ . . .

A. **Stage I selected by Secretary of State.** The Secretary of State will select the top 5 municipalities in terms of total votes cast for Stage I of the recount, unless the aggregate of the total votes cast for these municipalities is less than 10% of the total votes cast for the office or referendum. In that event, the Secretary of State will select additional municipalities in descending order until the aggregate totals are greater than or equal to 10% of the total votes cast for the office or referendum. The Secretary of State will then notify the State Police of the selected municipalities whose materials will be retrieved and delivered to the recount location.

B. **Stage II selected by the recount participants.** Prior to the end of Stage I of the recount, the candidate or side of the referendum who requested the recount will be asked if they wish to concede the recount or if they wish to continue to the next stage. If the requesting party wishes to continue, each side will be asked to select up to 5 municipalities, other than the island municipalities described in paragraph D, which they would like to recount in Stage II. If the aggregate or the total votes cast in this group of municipalities is less than 10% of the total votes cast for the office or referendum, the Secretary of State may add municipalities to be recounted - either municipalities whose ballots have already been retrieved for another recount, or if none, then the next municipalities in terms of the highest total votes cast, until Stage II aggregate totals are greater than or equal to 10% of the total votes cast for the office or referendum.

RECOMMENDATION:

. . . island municipalities described in ~~subsection 2~~ ~~paragraph D~~ . . .

C. **Additional stages.** Prior to the end of Stage II and each subsequent stage, the requesting party will again be asked if they wish to concede the recount or if they wish to continue to the next stage. If the requesting party wishes to continue, the Secretary of State will select the municipalities to be recounted in the next stage, unless the requestor presents a list of not more than 10 jurisdictions that if recounted in the next stage would lead to a concession if the results do not change significantly in that stage. In selecting the municipalities for Stage III and subsequent rounds, the Secretary of State will select first from among any municipalities whose ballots have already been retrieved for another recount, or if none, then the next municipalities in order of the highest total votes cast, until the aggregate totals for the stage are greater than or equal to 5% of the total votes cast for the office or referendum. The recount will continue in stages until the requesting party concedes the recount.

2. **Island municipalities not recounted unless necessary.** Ballots from island municipalities that are accessible only by boat will not be retrieved for inclusion in the recount, except that if, after all other municipalities have been recounted, the results are close enough that the recount cannot be resolved unless the island results are recounted.

SECTION 3. DEPOSIT FOR RECOUNT

RECOMMENDATION:

SECTION 23. DEPOSIT FOR RECOUNT

1. **Deadline for payment of deposit.** The candidate requesting a recount, or organization representing the apparent losing side of a referendum, must pay the deposit as required by 21-A M.R.S.A. § 737-A, sub-§ 1-A or § 738, sub-§ 2 at the time the written and signed request for the

recount is submitted to the Secretary of State, or within 2 business days of the Secretary of State providing the estimated cost for Stage I of the recount

2. **Multiple requesting candidates for same office recount.** If more than one candidate requests a recount for the same statewide or multicounty office, each candidate must pay a deposit, but the final cost of the recount will be shared among each requesting candidate for each stage in which they remain a participant in the recount.

3. **Form of payment for deposit.** Payment must be in the form of a cashier's check or money order.

STATUTORY AUTHORITY: 21-A M.R.S.A. §§ 737-A, sub-§12, and 738.

EFFECTIVE DATE:

November 2, 2010 – filing 2010-504

EFFECTIVE DATE OF AMENDMENT:
