



Montana Legislative Services Division
Office of Research and Policy Analysis

May 20, 2014

TO: Rep. Bryce Bennett

FROM: Sheri Scurr, Research Analyst
Montana Legislative Services Division

RE: School District levy election - late ballots
Info. Request No. 3808

This memorandum is in response to your May 14 request for information about the Sun River (Simms and Vaughn) school district elections conducted May 6 by the Cascade County election administrator, Ms. Rina Moore. The elections were conducted by mail and some ballots were mailed late. You asked about what statutory deadlines were missed and who is responsible for remedying the situation when mistakes like this are made.

Responsibilities

First, I will review current law with respect to general responsibilities. The language in Title 13 of the Montana Code Annotated (MCA) currently reads that the Secretary of State is "the chief election officer of this state" and is responsible for obtaining and maintaining "uniformity in the application, operation, and interpretation of the election laws".¹

Other statutory language in Title 20 of the MCA reads that the Superintendent of Public Instruction has "general supervision of public schools and districts"² and has the power and duty to "counsel with and advise county superintendents on matters involving the welfare of the schools and, when requested, give a county superintendent a written answer to any question concerning school law".³

Title 20 statutes also state that the county superintendent has "general supervision of the schools of the county within the limitations prescribed" by Title 20.⁴ Also, school district trustees are "the general supervisors for school elections".⁵ The school district clerk is the official responsible for conducting a school election, unless the election is run by the county

¹ Section 13-1-201, MCA.

² Section 20-3-106, MCA.

³ Section 20-3-105(7), MCA.

⁴ Section 20-3-205, MCA.

⁵ Section 20-20-401, MCA.

election administrator instead.⁶ School district trustees may ask the county election administrator to conduct a school election, but must make this request by June 1 in the year prior to the election⁷ and the county election administrator may accept or decline the request.

In the case of the Sun River school district elections, the Cascade County election administrator agreed to conduct any of their school elections.

Mail ballot elections

If an election is conducted by mail ballot, as were the Sun River school district elections, special procedures and time lines apply that are different than for polling place elections. Mail ballot election laws are contained in Title 13, chapter 19, which specifically also apply to school district elections.

An election administrator conducting a mail ballot election must develop a written plan. This plan must be provided to the Secretary of State so that "it is received at least 60 days prior to the date set for the election".⁸ The Secretary of State must review the plan and approve it, disapprove it, or suggest amendments within "5 days of receiving the plan and as soon as possible after receiving any amendments".⁹

The "ballots must be mailed no sooner than the 25th day and no later than the 15th day before election day".¹⁰

School district elections

With respect to school elections, the current law allows school trustees to call an election as late as 40 days prior to the election day and to notify the election administrator as late as 35 days prior to the election.¹¹ The election administrator must certify the ballot by 25 days before the election¹² and, as previously mentioned, if the election is being conducted by mail, the ballots must be printed and mailed between the 25th and 15th day before the election.¹³

⁶ Section 13-1-101(9), MCA.

⁷ Section 20-20-401, MCA.

⁸ Section 13-19-205, MCA.

⁹ Section 13-19-205(4), MCA.

¹⁰ Section 13-19-207, MCA.

¹¹ Section 20-20-201, MCA.

¹² Section 20-20-401, MCA.

¹³ Section 13-19-207, MCA.

School District "F"

The elections involved in the late mailing of ballots to some electors in the Simms high school district levy election and that ultimately led to your information request were:

- a technology levy election for School District 55 (SD 55), which is an elementary school district (the school is located in Simms); and
- a technology levy election for a high school district (SD F) with boundaries that encompass both SD 55 (Simms elementary) and SD 74 (Vaughn elementary).

I interviewed Cascade County election administrator Rita Moore, the Superintendent of SD 55 and the principle of the Simms high school Dave Martzlof, and the Office of Public Instruction school finance and elections officer Janelle Mickelson. I also emailed an information request to the Secretary of State and elections chief Lisa Kimmet.

The problem that led to the late mailing of ballots was that when the Cascade County election administrator was notified of the two technology levy elections, the office did not understand that the Simms high school district had different boundaries than the SD 55 Simms elementary school district and that the high school district (SD F) encompassed both the Simms elementary school district (SD 55) and the Vaughn elementary school district (SD 74). Thus, when a person in the county election administrator's office had a phone conversation with the Cascade County Superintendent of Schools, Betty Kunkel, and was told that Vaughn was not having a levy election, the County election administrator did not prepare ballots for electors residing in SD 74 (Vaughn elementary). The miscommunication or misinterpretation was that the while it was true that the Vaughn elementary school district (SD 74) was not holding a levy election, the electors residing within the boundaries of SD 74 were entitled to vote in the Simms high school levy election because SD 74 is within the boundaries of the Simms high school district (SD F). Furthermore, I found that other written and verbal communications between school district and county election officials seemed to imply that SD 55 was the Simms high school district, when in fact, the Simms high school district is SD F and SD 55 is the elementary district.

Cascade County election officials became aware of the mistake when a Vaughn resident inquired about why the resident had not yet received a ballot for the high school levy election. The county election administrator's office quickly prepared and mailed ballots with only the high school levy question to the electors residing in the SD 74 portion of SD F (Vaughn) on May 1, just 5 days before the day of the election.

New election

Following the levy elections, Cascade County Commissioners requested a legal opinion from the County Attorney's Civil Department about whether the high school levy election should be

invalidated because of the late mailing of ballots to a portion of the high school district electors. In a May 12, 2014, memorandum, the Chief Civil Deputy County Attorney Brian Hopkins summarized case law and the legal standard that all voters must be treated equally. The memorandum concluded: "Under the standard set forth in the Big Spring and Spaeth cases, the differential treatment of voters in SD 74 requires that the vote on the high school levy be voided in order to ensure that all eligible voters have an honest, fair and equal opportunity to vote on the levy". A copy of the memorandum was provided to the school district trustees.

Simms High School District trustees voted on May 13 to not certify the high school levy election results and to redo the election. A new election day was set for July 8, 2014, and the ballots are scheduled to be mailed out by the Cascade County election administrator on June 23. This meets the deadline of no later than 15 days before the election under section 13-19-207, MCA.

Who has the authority to remedy an election mistake?

Although the process is moving forward for a new election on the SD F high school technology levy, current statutes do not really provide for this remedy. Rather, it seems that under current law only a district court has the authority to void the election. The following discussion is quoted from information provided by Legislative staff attorney K. Virginia "Ginger" Aldrich:

You requested information on how the results of an election could be challenged, especially with respect to elections such as the Sun River technology levy where election administration statutes concerning mail ballots did not appear to be complied with. Although school election statutes are found in Title 20, in this case, the election was administered by the county election officer, and in that instance, the county election administrator is required to conduct the election in accordance with the provisions of Title 13, chapters 13 and 15. In addition, the election was held by mail ballot, which falls under Title 13, chapter 19.

Under the statutes in those chapters, my research did not reveal that the duties of individuals involved in the administration, canvassing, and declaration of election results under the facts in the Sun River school election are anything but ministerial duties. See e.g., *State ex. Rel. Pigott v. Board of Canvassers*, 12 Mont. 537, 31 P. 536 (1892) ("The simple duty of the canvassing board is to declare the apparent result of the voting. All other questions are to be tried before the tribunal invested with jurisdiction of cases of contested elections The canvassers . . . are not permitted, by the statutes generally in force in the United States, to 'go behind the returns' for any purpose, but are required to canvass the votes, as ministerial officers, strictly in accordance therewith" (citations omitted)). In other words, election officers do not appear to have

discretion to review the results of any administrative mistakes in this situation; and there does not appear to be an administrative remedy available to review the election procedures under these circumstances. Nevertheless, officials are required to note certain irregularities for the record ("If it appears to the board that the polls were not open in a precinct, the board shall certify this to the election administrator. The election administrator shall enter the certification in the minutes and in the record required by 13-15-404." Section 13-15-402, MCA). Statutes concerning the canvassing and declaration or certification of results compel the requisite authorities to fulfill their duties, and the statutes do not contemplate other administrative remedies or proceedings in the face of administrative irregularities. See e.g. 13-15-405, MCA. Indeed, "[t]he returns "may not be rejected because of failure to show who administered the oath to the election judges, failure to complete all the certificates in a pollbook, or failure of any other act making up the returns that is not essential to determine for whom the votes were cast." Section 13-15-403, MCA. A board does have the authority to petition for a recount of votes cast or to inspect ballots; however, that statute does not contemplate the present situation where ballots may not have been returned due to the shortened time to return ballots. Sections 13-16-201, 13-16-201, 13-16-420 MCA.

In the event of an election irregularity or of noncompliance with a statute, the proper venue would appear to be a district court. See e.g. Mont. Constit. Art. IV, section 7 (contemplating court actions with respect to ballot issues), 13-16-301 (within 5 days after a canvass, an unsuccessful candidate or elector eligible to vote on the issue may apply to the district court for a recount). There, a court has the authority and jurisdiction to order a new election if the "failure to follow the statute would 'change or render doubtful the result of the election'". *Long v. School Dist.*, 149 Mont. 220, 425 P.2d 822 (1967). The district court has jurisdiction in "all special actions and proceedings that are not otherwise provided for." Section 3-5-302, MCA.

Time lines

The following table summarizes the current statutory deadlines applicable in this case and comments about my research into what happened in the Sun River elections. and what changes to the deadlines are being proposed in the SJR 14 general revision bill.

Deadline	Date	Action	Statute	Comments
In the year before the election	June 1, 2013	Trustees may request county election administrator conduct the election	20-20-417	In April 2013, the trustees for High School District F passed a resolution asking the county election administrator to conduct any election they would have.
At least 70 days before the election	Tues., Feb. 25, 2014	County election administrator may decide to hold a mail ballot election. Request for a mail ballot election must be sent from trustees to the election administrator. Exception: Even if no request is received, the election administrator could decide to request a mail ballot election.	13-19-202 13-19-203	I didn't research exactly when or how the mail ballot election decision was made. I did research the mail ballot plan time line. See the next row.
At least 60 days before	Friday, March 7	Last day for the election administrator to send a mail ballot election plan/timetable/sample instructions to the Secretary of State's Office so that it is received by this deadline (i.e. fax, mail, or e-mail to SOS office (not post marked)). The SOS office has 5 days to respond with approval, rejection, or suggested amendments.	13-19-205	The Cascade County election administrator submitted a written plan to the Sec. of State on Jan. 6, 2014, for all of its mail ballot elections. The Sec. of State recommended minor amendments on Jan. 9. The plan was amended and approved by the Sec. of State on the same day, Jan. 9th. This is a general plan. NOTE: The current law deadlines require this plan to be submitted <u>before</u> the deadline for school district trustees to actually call an election, which is no later than 40 days before the election.

Deadline	Date	Action	Statute	Comments
At least 40 days before	By Thurs., March 27, for the election on May 6.	Last day trustees may call an election.	20-20-201	<p>The school district trustee passed the resolution on March 11, 2014, calling for the school technology levy elections. This was 62 days before the day of the election.</p> <p>NOTE: The SJR 14 general revision bill (LCsa02) proposes changing the 40-day deadline to 70 days before the election. The deadline for calling other types of elections is no later than 85 days before the election, which is based on the deadline for candidate filing.</p>
At least 35 days before	Tuesday, April 1	Last day to file resolutions for school election with county election administrator.	20-20-201(2)	<p>This deadline was met. The Cascade County election administrator's office received notification by email on March 21, 2014, of the call for the school district technology levy elections in "SD 55 and F".</p> <p>NOTE: The SJR 14 general revision bill (LCsa02) proposes changing this 35-day deadline to no later than 5 days after the election is called.</p>
No sooner than the 25th and no later than the 15th day before the election.	April 11th through April 21st.	When ballots must be mailed in any mail ballot election.	13-19-207	<p>Ballots were mailed to electors in SD 55 on April 21st, in accordance with the statutory deadline. However, ballots were not mailed to electors in SD 74 until May 1st, which did not meet the statutory deadline.</p> <p>NOTE: The general revision bill would change the deadline for mailing ballots in a mail ballot election under section 13-19-207, MCA, to the same ballot availability deadline as for polling place elections: 20 days before the day of the election.</p>

Conclusion

The late-mailed ballots for the Simms high school district (SD F) technology levy election was the result of a miscommunication and misunderstanding between school and county election officials. Although SD 74 (Vaughn elementary school district) was not holding a levy election, the electors in SD 74 are part of SD F and are eligible to vote in the Simms high school technology levy election.

Although the Simms high school district trustees did not certify the election results for the high school technology levy, a review of current law by legislative staff indicates that the proper authority to review any administrative irregularities under these circumstances and determine a suitable remedy is a district court.