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Revisor R-4193

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Relating to Voter Registration, Petitions, Absentee Ballots, Optical Scan Voting Systems, Recounts, Election Judge Training Program and Ballot Preparation, Minnesota Rules Chapters 8200, 8205, 8210, 8230, 8235, 8240 and 8250.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on Friday, January 3, 2014. The public hearing was held in Room 106 of the State Retirement Systems Building in Saint Paul, Minnesota.

The Office of the Minnesota Secretary of State (the Office or the Secretary) proposes to revise state administrative rules relating to the conduct of elections so as to align these rules with recent statutory changes. Additionally, the Secretary proposes a series of changes to the instructions for absentee and mail balloting with the object of reducing the number of spoiled ballots. Lastly, the Secretary proposes to expand the range of "authorized proofs of residence" – documents that are used to establish a voter's current residence – for the purpose of voter registration.

The Secretary's regulatory purpose is to carry forward recent changes in Minnesota's election law and to reduce barriers to voting by eligible voters.[1]

The Secretary's proposal to expand the range of "authorized proofs of residence" was controversial; particularly because the Secretary noted that the expansion was proposed by him "in light of the reduction of vouching as a form of proof of residence for same-day registration ...."[2]

During the 2013 legislative session, the Minnesota Legislature revised Minnesota's election law so as reduce the number of persons whose residence could be vouched for by another voter. It reduced this number from 15 persons to eight.

To critics of the Secretary's proposals – many of whom supported the 2013 change – an expansion of "authorized proofs of residence" is a direct affront to the Legislature's efforts to improve the security of, and public confidence in, the same-day

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[1] *See, e.g.,* Ex. D at 1, 10, 12, 24, 25 - 27 (Statement of Need and Reasonableness or SONAR).

[2] *Id.* at 1.

registration process.[3] To these critics, the Secretary was attempting to countermand the statutory change and the policy choice made by the Legislature.

The rulemaking hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[4] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are within the agency's statutory authority; that the rules are needed and reasonable; and that any modifications that the agency made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[5]

Approximately 18 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Five members of the public made statements or asked questions during the hearing.[6]

The agency panel at the public hearing included Bert Black, Legal Advisor to the Secretary; Beth Fraser, Deputy Secretary of State; and Gary Poser, Director of the Elections Division.[7]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until Thursday, January 23, 2014 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[8] The hearing record closed on Thursday, January 30, 2014.

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[3] *See, e.g., Comments of Senator Scott Newman; Comments of Representative Kurt Daudt; Comments of Dean Barton; Comments of Dan McGrath; Comments of Marilyn Post; Comments of Joe Salmon.*

[4] *See,* Minn. Stat. §§ 14.131 through 14.20.

[5] Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

[6] HEARING ROSTER, at 1-2; HEARING TRANSCRIPT, at 2 (January 3, 2014).

[7] HEARING TRANSCRIPT, at 2 and 15.

[8] *See,* Minn. Stat. § 14.15, subd. 1.

SUMMARY OF CONCLUSIONS

The Agency has established that, with two exceptions, it has the statutory authority to adopt the proposed rules, that it followed the required rulemaking procedures and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Rulemaking Authority

1. The Secretary cites twenty different provisions of *Minnesota Statutes* in support of his claim that he is authorized to promulgate through rulemaking each of the proposed changes.[9]

2. While many of cited the statutes direct the Secretary to carry out one or another portions of the elections process, included within this listing are specific authorizations to promulgate administrative rules. The Secretary is delegated specific authority to develop rules relating to: administration of the statewide voter registration system;[10] obtaining and maintaining permanent absentee voter status;[11] marking, processing and return of absentee ballots;[12] printing absentee ballot applications, voter lists, ballot and return envelopes, certificates of eligibility and absentee ballot directions;[13] methods and procedures for the reconciliation of voters and ballot cards;[14] circulation, signing, filing and inspection of nominating petitions;[15] training of county auditors, local election officials and election judges;[16] mail balloting – including instructions to voters, procedures for challenge of voters, public observation of the counting of ballots, and procedures for proper handling and safeguarding of ballots;[17]

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[9] Ex. D at 2 - 9 (SONAR).

[10] *See,* Minn. Stat. § 201.022, subd. 2.

[11] *See,* Minn. Stat. § 203B.04, subd. 5 (c).

[12] *See,* Minn. Stat. § 203B.08, subd. 4.

[13] *See,* Minn. Stat. § 203B.09.

[14] *See,* Minn. Stat. § 203B.125.

[15] *See,* Minn. Stat. § 204B.071.

[16] *See,* Minn. Stat. § 204B.25, subd. 2.

[17] *See,* Minn. Stat. § 204B.45, subd. 3.

procedures for election recounts;[18] formatting and preparation of the state primary ballot;[19] preparation and delivery of the state general election ballot;[20] and, standard ballot formats for electronic voting systems.[21]

3. Likewise important, Minn. Stat. § 201.221, subd. 1 incudes a very broad delegation of rulemaking authority. This statute provides that the Secretary may adopt administrative rules "to implement the provisions" of Chapter 201 provided that those rules are "consistent with federal and state election laws."[22] Chapter 201 provides the requirements for registering and signifying one's eligibility to vote and the operation of the statewide voter registration system.[23]

4. Further, Minn. Stat. § 201.061, subd. 3 (a)(2) provides that an individual seeking to establish that he or she is a resident of Minnesota, for purposes of registering to vote, may present "any document approved by the secretary of state as proper identification ...."[24]

5. In this rulemaking, the Secretary proposes to significantly expand the range and number of documents approved by him as proper proofs of Minnesota residency. Among the documents that could be used by a newly-registering voter would be: a learner's permit; an identification card from a secondary educational institution; an account statement for a credit card, bank services or housing payments; or lease agreements or rental agreements. Moreover, for "bills delivered electronically," a "display of the bill on the voter's portable electronic device" would signify the "original" of that item for registration purposes.[25]

6. State Senator Scott Newman, a Senate Conferee on the 2013 Omnibus Election Law Bill, argued that the Secretary's proposed rulemaking was part of an effort to undermine statutory changes made by the Minnesota Legislature. Senator Newman wrote:

> In 2013, the Legislature crafted an omnibus elections bill that garnered strong bipartisan support. A key reform encompassed in the legislation was the reduction in the total number of people for whom a single registered voter could 'vouch' for on Election Day. The reason many members, including me, supported this provision was because

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[18] *See,* Minn. Stat. § 204C.361 (a).

[19] *See,* Minn. Stat. § 204D.08, subd. 1.

[20] *See,* Minn. Stat. § 204D.11, subd. 1.

[21] *See,* Minn. Stat. § 206.84, subd. 2.

[22] Minn. Stat. § 201.221, subd. 1.

[23] *See,* Minn. Stat. §§ 201.01 - 201.275.

[24] Minn. Stat. § 201.061, subd. 3 (a)(2).

[25] Ex. C at 5 - 6 (Minn. R. 8200.5100, subp. 2).

vouching lacks integrity as a proof of residence tool. My goal, in supporting the legislation, was to enhance the integrity of Minnesota's election process.

The Secretary of State is proposing changes to proofs of residence 'in response to changes adopted by the Legislature in 2013.' Rulemaking is designed to authorize agencies to further detail Minnesota Statutes, not authorize the agencies to circumvent the requirements or the intent of law. The Office of the Secretary of State writes that these changes are being proposed 'in light of the reduction in vouching....' The Secretary is proposing rule changes to circumvent election integrity measures passed by the Legislature and signed by the Governor in 2013. As such, the changes proposed to expand eligible proofs of residence are neither needed nor reasonable. The Secretary of State has ample time to recommend these measures for consideration during the 2014 Legislative Session.[26]

State Representative Kurt Daudt sounded similar themes when he commented on the proposed rules. He maintains that the proposed changes should follow from an amendment to the underlying statute and not by revising agency regulations:

During the 2013 legislative session a bill was passed, with strong bipartisan support, which included reducing the total number of people a registered voter is allowed to vouch for on Election Day. This change was strongly supported by many legislators. The legislative intent of this action to improve and enhance the integrity of elections in Minnesota was a primary reason for the strong support.

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The 2014 legislative session begins just over one month from today. There is adequate lime for the Secretary to propose additional legislative changes for legislators to consider. Attempting to change this rule now would only serve to circumvent the legislative process.....

I respectfully ask that your office reject these proposed changes and have the Secretary of State follow the legislative process to properly make this important alteration.[27]

7. Legislators may have assumed that the Secretary would not approve documents that are easily susceptible to alteration, or that he would obtain broad agreement among legislators before adding to the list of "authorized proofs," but these limitations are not part of Minn. Stat. § 201.061 or Minn. Stat. § 201.221.

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[26] *Comments of Senator Scott Newman.*

[27] *Comments of Representative Kurt Daudt.*

8. However, legislators do have a remedy. If they are persuaded that an executive branch official has used a delegation of rulemaking authority in inappropriate ways, there are four options. The Legislature can: repeal administrative rules that it regards as improvident;[28] narrow the reach of rules that have undesirable impacts;[29] reduce the scope of rulemaking authority that it has delegated to the official;[30] and urge the Governor to veto rules that have recently been adopted.[31] Any and all of these methods are at its disposal.

9. With that said, the Administrative Procedure Act does not permit an Administrative Law Judge to withhold approval of a proposed rule on the grounds that a statutory revision is (always, or sometimes) preferable to a rule revision, in cases where both methods are available. This is because the delegation of rulemaking authority runs from the Legislature to the agency and not from the Legislature to the Administrative Law Judge.[32]

10. The Administrative Law Judge concludes that the delegation of authority to the Secretary is broad enough to authorize the use of the listed financial documents, and digital versions of these items, for purposes of establishing a voter's residence.[33]

11. Additionally, following a review of the statutes cited in Finding 2, the Administrative Law Judge concludes that the Secretary has the authority to adopt each of the proposed rules.

II. Procedural Requirements of Chapter 14

A. Publication and Filings

12. On June 24, 2013, the Agency published in the *State Register* a Request for Comments seeking comments on possible amendments to the state's voter

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[28] *See generally,* Minn. Const. Art. III, §§ 1 and 23; Minn. Stat. § 14.05, subd. 1.

[29] *See, e.g.,* Minn. Stat. §§ 14.05, subd.1, 14.127, subd. 3 and 14.128, subd. 2

[30] *See,* Minn. Stat. § 14.05, subd. 1 ("Each agency shall adopt [or] amend ... its rules ... pursuant to authority delegated by law and in full compliance with its duties and obligations").

[31] *See,* Minn. Stat. § 14.05, subd. 6.

[32] *See,* Minn. Stat. § 14.50 ("[I]t shall also be the duty of the judge to make a report on each proposed agency action in which the administrative law judge functioned in an official capacity, stating findings of fact and conclusions and recommendations, taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant procedural requirements of law or rule, and (iii) in rulemaking proceedings, demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts").

[33] *Compare,* Ex. C at 5 - 6 (Minn. R. 8200.5100, subp. 2) *with* Minn. Stat. § 201.061, subd. 3 (a)(2); Minn. Stat. § 201.221, subd. 1.

registration procedures, ballot materials, training programs and "other election-related rule provisions that may arise ...."[34]

13. On November 6, 2013, the Secretary filed documents with the Office of Administrative Hearings seeking review and approval of its Notice of Hearing and its additional notice plan. By way of an Order dated November 12, 2013, the Notice of Hearing and additional notice plan were approved.[35]

14. The Notice of Hearing, published in the November 25, 2013 volume of the *State Register*, set Friday, January 3, 2014 the date of the rulemaking hearing. The Notice of Hearing identified the date and location of the hearing in this matter.[36]

15. On November 21, 2013, the Secretary mailed a copy of the Notice of Hearing to all persons and associations who had registered their names with the Secretary for the purpose of receiving such notice. On November 21, 2013, sent electronic notices to the persons and associations identified in the additional notice plan.[37]

16. On November 21, 2013, the Secretary mailed a copy of the Notice of Hearing and the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over election administration.[38]

17. On November 21, 2013, the Secretary mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.[39]

18. At the hearing on January 3, 2014, the Secretary filed copies of the documents as required by Minn. R. 1400.2220.[40]

B. Additional Notice Requirements

19. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

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[34] Ex. A; 37 *State Register* 1868 (June 24, 2013).

[35] ORDER ON REVIEW OF ADDITIONAL NOTICE PLAN AND HEARING NOTICE, Docket No. 8-3500-30741 (Nov. 12, 2013).

[36] Ex. F; 38 *State Register* 698 (Nov. 25, 2013).

[37] Exs. G and H.

[38] Ex. K.

[39] Ex. E.

[40] Exs. A through J.

20. On November 21, 2013, the Secretary provided the Hearing Notice in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- The Notice of Hearing was posted on the Secretary's website and the Secretary has maintained these materials continuously since they were posted.
- Notice of the rulemaking was sent by first class mail to the notice list the Secretary maintains pursuant to Minn. Stat. § 14.14.
- A copy of the Notice of Hearing and the proposed rules was sent by electronic mail to a wide-ranging set of elected officials, partisan organizations, public advocacy groups, election equipment vendors and election law practitioners, as detailed in its Additional Notice Plan.
- Notice of the rulemaking was circulated through advisories by the Secretary to the news media.[41]

C. Notice Practice

21. The Administrative Law Judge concludes that the Secretary fulfilled his responsibilities, to make the Statement of Need and Reasonableness "available for public review" "at least 30 days before the date set for the hearing ...."[42]

22. The Administrative Law Judge concludes that the Secretary fulfilled his responsibilities to mail the Notice of Hearing "at least 33 days before ... the start of the hearing" to the statutorily designated legislators.[43]

23. The Administrative Law Judge concludes that the Secretary fulfilled his responsibilities, to mail the Hearing Notice "at least 33 days before ... the start of the hearing ...."[44]

D. Impact on Farming Operations

24. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

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[41] Ex. D at 13 – 16 (SONAR).

[42] *See,* Ex. G; Minn. Stat. §§ 14.131, 14.14, subd. 1a.

[43] Ex. K; Minn. Stat. §§ 14.116, 14.14, subd. 1a; Minn. R. 1400.2080, subp. 6.

[44] Exs. G and H; Minn. Stat. § 14.14, subd. 1a; Minn. R. 1400.2080, subp. 6.

25. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Secretary was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

26. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness. Those factors are:

(a) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(c) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(d) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(e) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(f) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(g) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

(h) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.[45]

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[45] Minn. Stat. § 14.131.

1. The Agency's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

27. The Secretary asserts that the proposed rules will benefit both registering voters and election administration officials if Minnesota's current balloting rules are streamlined and clarified. The Secretary maintains:

> Election officials and local governments will benefit from the proposed rules because they clarify and revise current rule provisions governing absentee and mail balloting materials and processing. These proposed changes will make it easier for officials to administer these procedures, and lead to fewer calls from confused voters. The proposed rules also benefit elections officials by clarifying certain procedures that have previously resulted in rejection of absentee ballots. Reducing the number of rejected absentee ballots also reduces the amount of time and resources that an election official has to spend re-sending materials to voters in order to allow voters to correct the errors.[46]

28. As to the costs of the proposed changes, the Secretary notes that "election officials and the local governments for whom they work will bear some costs related to printing new instructions and absentee and mail ballot materials, but these costs should be minimal. To the extent possible the proposed rules provide for the use of excess stock of materials when a change to forms is suggested, in order to ensure the most efficient use of government resources."[47]

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

29. The Secretary does not project that implementation and enforcement of the proposed rules will result in additional costs to the Secretary or any other state agency. This is because "[t]he Secretary of State is already required to conduct training for election officials ... [and the] provisions of the new rules will be incorporated into the current training session."[48]

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[46] Ex. D at 10.

[47] *Id.* at 10 - 11.

[48] *Id.* at 11.

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

30. The Secretary asserts that his determinations as to "less costly methods or less intrusive methods for achieving the purpose of the proposed rule," are "discussed in the rule-by-rule section of the analysis."[49]

31. Notwithstanding a thorough review of the Rule-by-Rule analysis included in the SONAR, the Administrative Law Judge is unable to ascertain that the Secretary made the determination to reject particular lower cost or less intrusive methods or, alternatively, that the Secretary concluded that no such alternatives exist.

32. The closest the SONAR comes to these determinations is the discussion of alternative methods of identifying employees of residential facilities under Minn. R. 8200.5100, subp. 1. As to this rule, the Secretary describes a set of alternatives for establishing that a particular person is a *bona fide* employee of a residential facility:

> Additional and alternative forms of employee identification suggested included such items as uniforms worn by employees or business cards. Because employee identification badges are provided for the express purpose of identifying the individual as an employee of the facility, because employee identification cards can be easily provided by the employee without need to take time from a manager to prepare a letter, and because unlike business cards or uniforms, employee identification badges are generally returned at the end of employment, it is reasonable to consider an employee identification badge proof of employment.[50]

33. It is unfortunate that the required determinations were not more plainly stated in the SONAR. These determinations fulfill important public information functions. The Legislature conditions the exercise of lawmaking power by executive branch officials, in part, on those officials explaining which alternative methods were rejected and why those means are less desirable.[51] If these determinations are not clearly stated, the SONAR's role in building public confidence is depleted.[52]

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[49] *Id.*

[50] *Id.* at 20 - 21.

[51] *See,* Minn. Stat. § 14.131.

[52] *See generally,* Minn. Stat. § 14.001 ("The purposes of the Administrative Procedure Act are: (1) to provide oversight of powers and duties delegated to administrative agencies; (2) to increase public accountability of administrative agencies; (3) to ensure a uniform minimum procedure; (4) to increase public access to governmental information; (5) to increase public participation in the formulation of administrative rules ... and (7) to simplify the process of judicial review of agency action as well as increase its ease and availability").

34. Notwithstanding the lack of a clearly-stated determinations, the Administrative Law Judge concludes that any such omissions were harmless error under Minn. Stat. § 14.26, subd. 3(d). The wide range of the range of alternatives offered by public commentators make clear that the omissions did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

35. The Secretary asserts that the descriptions of the "alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule" are "discussed in the rule-by-rule section of the analysis."[53]

36. As noted above, the required descriptions are not clearly set forth in the SONAR.[54]

37. Notwithstanding the lack of a clearly-stated descriptions, the Administrative Law Judge concludes that any such omissions were harmless error under Minn. Stat. § 14.26, subd. 3(d). The wide range of the range of alternatives offered by public commentators make clear that the omissions did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

(e) The probable costs of complying with the proposed rules.

38. The Secretary estimates that there "will be some limited one-time cost increases to county, city, township and school district election officials due to the need to re-print absentee balloting materials." Yet, the Secretary maintains that reformatting of these materials would have been required in any event if there had been no rulemaking – so as to account for recent changes to the election law. As the Secretary notes "[s]ome proposed changes to the forms are required by the legislative changes adopted in 2013 and not independently imposed by the proposed rules."[55]

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[53] Ex. D at 11.

[54] *See,* Findings 31 – 33, *supra.*

[55] Ex. D at 11.

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

39. The Secretary argues that among the impacts of not adopting the proposed regulations will be rejection of otherwise appropriate absentee ballots, unresolved barriers to the local use of new ballot counting machines and potentially "disparate treatment of voters or ballot materials throughout the state."[56]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

40. As to the assessment of the broader environment of federal regulations, the Secretary states flatly that "[n]othing in the proposed rules is in conflict with federal regulations."[57]

41. In the view of the Administrative Law Judge, the required assessment calls for more than a listing of those instances in which the proposed regulatory requirements are at odds with federal law. This is because, under the Supremacy Clause of the U.S. Constitution, in the event of any such conflict between state and federal law, the contrary state rules would be preempted.[58]

42. Reading Minn. Stat. § 14.131 (7) as the Secretary has here would limit the assessments to those occasions when an agency official proposed rules that are otherwise illegal or a nullity. That reading misapprehends the assessment requirement.

43. The purpose of the assessment is to detail for the public the incremental impact, if any, of adding the proposed rules to the existing body of regulations. The body of current law includes both state and federal regulations.

44. Notwithstanding the lack of a description, the Administrative Law Judge concludes that the Secretary's failure to assess the "differences between the proposed rules and existing federal regulation" on ballot formats and election administration was a harmless error under Minn. Stat. § 14.26, subd. 3(d). The SONAR makes clear that a key purpose of the proposed regulations was to achieve conformity with federal

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[56] Ex. D at 12.

[57] *Id.*

[58] U.S. Const., Art. VI, Clause 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding").

balloting and election administration standards and to facilitate practices that are permitted under federal law.[59]

45. Because of the detail that appears elsewhere in the SONAR, it is clear that the omission of the required assessment did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

46. The SONAR does not include the description required by Minn. Stat. § 14.131 (8).[60]

47. Notwithstanding the lack of the required description, the Administrative Law Judge concludes that the Secretary's failure to assess "the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule" was a harmless error under Minn. Stat. § 14.26, subd. 3(d). As noted above, not only does Minnesota have an existing set of ballot formatting and election administration regulations, but a key objective of the proposed changes is to authorize the use of equipment and technologies that are permitted under federal law.

48. Because of the detail that appears elsewhere in the SONAR, it is clear that the omission of the required assessment did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

2. Performance-Based Regulation

49. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[61]

50. The Secretary states only that "[t]he proposed rules are specifically designed to improve the performance election administration and in person, absentee and mail ballot voting."[62]

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[59] *See,* Ex. D at 18 (conforming state rules to the federal practice under the Federal Voting Accessibility for the Elderly and Handicapped Act); Ex. D at 19 (proposed revisions facilitate the use of federal absentee ballot and change of address forms); Ex. D at 46 (a formatting change that permits the use of federally-approved voting machine equipment).

[60] Ex. D at 12.

[61] Minn. Stat. §§ 14.002 and 14.131.

[62] Ex. D at 13.

51. In the view of the Administrative Law Judge the single sentence, while true, is not the description required by Minn. Stat. § 14.131.

52. Notwithstanding the lack of additional detail, the Administrative Law Judge concludes that the proposed rules meet the objectives of Minn. Stat. § 14.002. The proposed rules are expressed in terms of desired results instead of the specific means for achieving those results. They likewise avoid the incorporation of specifications of particular methods or materials. As noted above, among the proposed changes are revisions that will permit a still-wider range of ballot tabulating equipment and avoid regulatory bias in favor of particular solutions or vendors.[63]

53. For these reasons, the Administrative Law Judge concludes that the Secretary's failure to "describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems" was a harmless error under Minn. Stat. § 14.26, subd. 3(d). The omission did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

54. As required by Minn. Stat. § 14.131, the Commissioner of Minnesota Management and Budget (MMB) evaluated the fiscal impact of the proposed rules on local units of government. In a Memorandum dated October 30, 2013, MMB concluded that "the proposed rule revisions will have minimal fiscal impact on local units of government, and the Secretary of State has adequately considered local government costs."[64]

4. Compliance with Minn. Stat. § 14.131

55. The Administrative Law Judge finds that the Secretary has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

56. However, because of the shortcomings in the analyses under Minn. Stat. § 14.131, paragraphs (3), (4), (7) and (8), and the provision on documenting performance-based systems, the Administrative Law Judge recommends that this report be closely reviewed in advance of the agency's next rulemaking.

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[63] *See,* Ex. D at 42 (eliminating the requirement that write-in ballots be sorted into a separate compartment of the voting equipment); Ex. D at 46 (formatting change permits the use of federally-approved voting machine equipment).

[64] Ex. K.

5. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

57. Minn. Stat. § 14.127, requires the Secretary to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Secretary must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[65]

58. The Secretary determined that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city.[66]

59. The Administrative Law Judge finds that the Secretary has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

6. Adoption or Amendment of Local Ordinances

60. Under Minn. Stat. § 14.128, the Secretary must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Secretary must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[67]

61. The Secretary concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The proposed rules should not require local governments to adopt or amend those more general ordinances and regulations.[68]

62. The Administrative Law Judge finds that the Secretary has made the determination required by Minn. Stat. § 14.128 and approves that determination.

III. Rulemaking Legal Standards

63. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[69]

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[65] Minn. Stat. § 14.127, subds. 1 and 2.

[66] Ex. D at 13.

[67] Minn. Stat. § 14.128, subd. 1.

[68] Ex. D at 17.

[69] *See,* Minn. R. 1400.2100.

64. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[70] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[71] and the agency's interpretation of related statutes.[72]

65. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[73] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[74]

66. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[75] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[76]

67. Because the Secretary proposed further changes to the rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

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[70] *See, Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

[71] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[72] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[73] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[74] *See, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

[75] *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

[76] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

- "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice";

- the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and

- the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

68. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

- whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests";

- whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing"; and

- whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

IV. Rule by Rule Analysis

69. As noted above, the role of the Administrative Law Judge during a legal review of rules is to determine whether the agency has made a reasonable selection among the regulatory options that it has available. The judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. This is because the delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the Administrative Procedure Act begins with this important premise.[77]

70. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise require closer examination.

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[77] *See, Manufactured Housing Institute, supra,* 347 N.W.2d at 244 (The Court instructs that the state courts are to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); *see also,* REPORT OF THE ADMINISTRATIVE LAW JUDGE, IN THE MATTER OF THE PROPOSED RULES OF THE MINNESOTA POLLUTION CONTROL AGENCY GOVERNING PERMITS FOR GREENHOUSE GAS EMISSIONS, Minnesota Rules Chapters 7005, 7007 and 7011, Docket No. 8-2200-22910-1 at 20 (Nov. 9, 2012) (http://mn.gov/oah/images/2200-22910-GreenhouseGas-dismissal.pdf).

71. The Administrative Law Judge finds that the Secretary has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

72. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Minn. R. 8200.5100

73. As noted above, the principal critique to the proposed rules is that the expansion of "authorized proofs of residence" will undermine Minnesota's efforts to prevent fraudulent voter registrations. Because of the claimed impacts, several commentators argued that the proposed changes were neither needed nor reasonable. Thus, the key dispute between proponents of the proposed changes, and those who oppose the revisions, is whether a wider range of approved documents and images will "increase the number of otherwise eligible voters who are able to register on election day"[78] or negate the franchise by permitting those who are not eligible to vote to cast ballots.[79]

74. The Administrative Law Judge finds the case of *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238 (Minn. 1984) instructive. In that case, the Commissioner of Health was tasked with setting, through rulemaking, the maximum level of ambient formaldehyde that would be permitted in new housing units. During the 1980s formaldehyde was used as a bonding agent in building materials, such as plywood and particle board, and those materials were commonly used in manufacturing mobile homes. The Minnesota Supreme Court concluded that a rule setting the level of ambient formaldehyde at 5 parts per million was arbitrary and capricious when there was "no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments."[80]

75. In this proceeding, by contrast, the Secretary has explained how he resolved the conflicts in the rulemaking record, detailed the performance assumptions he used and articulated the policy objectives he was pursuing through the proposed rule. As the Secretary wrote in the SONAR:

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[78] Ex. D at 10 (SONAR); *see also, Comments of Catholic Charities of St. Paul and Minneapolis; Comments of Mary Theresa Downing; Comments of Mary Gover; Comments of Perry Leger; Comments of Beth Passi; Comments of Deborah Price and Comments of Kathy Tomisch; Hearing Testimony of Ana Ashby; Hearing Testimony of Christina Clark; Hearing Testimony of Sheri Knuth; Hearing Testimony of Susan Sheridan Tucker.*

[79] *See generally, Comments of Senator Scott Newman; Comments of Dean Barton; Comments of Dan McGrath; Comments of Marilyn Post; Comments of Joe Salmon.*

[80] *See, Manufactured Housing Institute, supra,* at 246.

In light of the reduction in vouching advanced by the Legislature in 2013, and in response to comments by community groups and elections officials, the Office explored many additional acceptable proofs of residence. In evaluating additional proofs of residence, the Office looked to how frequently that proof of residence was accepted by other states with election day registration, the reliability of the proof of residence, and feedback from elections officials and community organizations. The Office looked to these sources to evaluate the potential advantages of the additional proof of residence, and the potential for the proof of residence to fill in a gap that would otherwise prevent an eligible voter from being able to provide proof of residence and register to vote.

....

In order to determine the scope of additional proofs needed, the Office of Secretary of State consulted with county and municipal elections officials and utilized the information gained from the Secretary of State's voter hotline to determine the additional proofs that would be needed to assist those otherwise eligible voters that have no other proof of residence available – some of whom had previously relied on vouching, which has now been limited. The Secretary of State also considered the interests of election judges to ensure that the number of documents that an election judge would have to review on election day would be limited and not unduly burdensome.

....

Allowing these alternative forms of proof of residence is reasonable and necessary because it will reduce the number of individuals that have to rely on vouching, which is especially reasonable and necessary in light of the reduction of vouching from 15 to eight. These additional proofs further respond to the concerns of commentators that the current list of authorized proofs of residence is insufficient.[81]

76. While it may well be that some of the documents and digital images approved by the Secretary in this rulemaking will be easier to forge or alter than documents listed in the prior rule, the Secretary has chosen a compliance threshold that assists "otherwise eligible voters that have no other proof of residence available."[82] The proposed rule is needed and reasonable as those terms are used in the Administrative Procedure Act.

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[81] Ex. D at 21 - 25 (SONAR).

[82] *Id* at 24 (SONAR).

B. Minn. R. 8200.9940

77. In the proposed rules, the Secretary proposes to clarify the language of the form that precinct election officials use to record details of same-day voter registration and vouching. The Secretary proposes to include the following statement on the instruction form: "Employees of residential facilities may vouch for an unlimited number of voters."[83]

78. To the extent that the proposed text does not accurately state the limitations on the ability of an employee of a residential facility to vouch for other voters, it is defective. Minn. Stat. § 201.061, subd. 3(a)(4) places two substantive limitations upon the ability of residential facility employees to vouch for other voters: The voter that is being vouched for must be a "resident in the facility" and the facility must be within the boundaries of the precinct.[84]

79. Employees of residential facilities are not entitled to vouch for an unlimited number of voters who are not residents of a heath care facility in the precinct.[85]

80. One possible cure to the defect would be for the required form to state that: "Employees of residential facilities may vouch for an unlimited number of facility residents who are registering to vote at the facility's address." Such a revision would be needed and reasonable and would not be a substantial change from the rules as originally proposed.

C. Minn. R. 8205.3200, Subp. 1(C)

81. In the proposed rules, the Secretary proposes to clarify the language of the directives on review of petitions for recognition of major and minor political parties. The Secretary proposes to include following inspection procedure: "The secretary of state shall inspect each petition to determine whether or not **is** has been signed by a number of persons eligible to vote ...."[86]

82. To the extent that the word "is," rather than "it," appears in the sentence, the rule is ambiguous and defective.

83. Revising the rule to include the proper (and intended) word is needed and reasonable and would not be a substantial change from the rules as originally proposed.

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[83] Ex. C at 10; *see also,* Minn. Stat. § 201.061, subd. 3(a)(4) ("The secretary of state shall provide a form for election judges to use in recording the number of individuals for whom a voter signs proof-of-residence oaths on election day").

[84] Minn. Stat. § 201.061, subd. 3(a)(4).

[85] *Compare,* Minn. Stat. § 201.061, subd. 3(a)(4) *with* Minn. Stat. § 201.014, subd. 1 (Eligibility to vote).

[86] Ex. C at 14 (line 6) (emphasis added); *see also,* Minn. Stat. § 201.02, subds. 7(c) and 23(b)(2).

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Except as noted in Finding 78, the Secretary has demonstrated the statutory authority to adopt the proposed rules.

2. The Notice of Hearing complied with Minn. R. 1400.2080, subp. 5.

3. The Secretary gave notice to interested persons in this matter.

4. The Secretary has fulfilled its additional notice requirements.

5. The Secretary has fulfilled the procedural requirements of Minn. Stat. §§ 14.05, subd. 1; 14.14; and 14.50 (i) and (ii).

6. The Secretary has fulfilled the procedural requirements of law or rule.

7. Except as noted in Findings 81 and 82, the Secretary has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

8. The modification to the proposed rules suggested by the Secretary after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

9. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

10. As part of the public comment process, a number of stakeholders urged the Secretary to adopt other revisions to Chapters 8200 and 8205. In each instance, the Agency's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

11. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Secretary from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that, except as noted above, the proposed rules be adopted.

Dated: February 28, 2014

ERIC L. LIPMAN
Administrative Law Judge

Reported: One Transcript, Kirby Kennedy & Associates.

NOTICE

The agency must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the agency makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the agency of actions that will correct the defects, and the agency may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the agency may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the agency makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the agency is not required to wait for the Commission's advice for more than 60 days after the Commission has received the agency's submission.

If the agency elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the agency makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the agency must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the agency, and the agency will notify those persons who requested to be informed of their filing.