

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AMERICAN CIVIL LIBERTIES)	Case No: CVCV009311
UNION, and LEAGUE OF UNITED)	
LATIN AMERICAN CITIZENS OF)	
IOWA,)	
)	
Petitioners,)	
)	
v.)	RULING AND ORDER ON
)	PETITIONER'S
IOWA SECRETARY OF STATE)	MOTION FOR TEMPORARY
MATT SCHULTZ,)	INJUNCTIVE RELIEF
Respondent.)	

This matter came before this Court on September 6, 2012, on Petitioners' Motion for Temporary Injunction. The Respondent was represented by Deputy Attorney General, Jeffrey Thompson. The Petitioners were represented by attorney, Joseph Glazebrook. The Court, having considered written and oral arguments of the parties, enters the following ruling and order.

I. BACKGROUND FACTS.

The underlying issue in this case centers around the validity of the Secretary of State's July 20, 2012, adoption of two new administrative rules pursuant to the emergency rulemaking power as set out in Iowa Code Sections 47.1, 17A.4(3) and 17A.5(b) (2011). The two new administrative rules amended Chapter 21, "Election Forms and Instructions" and Chapter 28 "Voter Registration File (I-Voters) Management".

The first new rule, the Voter Complaint Rule, is codified at Iowa Administrative Code rule 721—21.100 and allows any person "to file a complaint concerning an alleged violation of any provision of Iowa Code chapters 39 through 53 [relating to elections]." Such complaints must be made on a form provided by the Secretary and signed by the complainant. *Id.* the

Secretary is then required to forward the complaints to the appropriate governmental agency for investigation. *Id.*

The second new rule, the Noncitizen Registered Voter Identification Rule, is codified at Iowa Administrative Code rule 721—28.5. This rule establishes a process by which the Secretary may verify the citizenship of individuals registered to vote in Iowa. In order to perform a verification under the Citizenship Verification Rule, the Secretary must (a) compare Iowa voter registration records against a list of foreign nationals residing in Iowa, (b) confirm whether any given voter's registration information is "an exact match" to an individual listed in the index of foreign nationals living in Iowa, (c) determine whether any individuals with "an exact match" have recently been naturalized, (d) provide notice to unnaturalized individuals of the possibility of removal from the voter rolls due to an apparent lack of citizenship, (e) provide an opportunity for the individuals to respond within fourteen days, and finally (f) remove unresponding individuals from the voter rolls. Iowa Admin. Code § 721—28.5. If a citizen is removed from the voter rolls, he or she may request an evidentiary hearing before the Iowa Voter Registration Commission pursuant to Iowa Admin. Code. § 821—1.5 to 1.6, and/or re-register to vote at the polls on Election Day pursuant to Iowa Code § 48A.7A.

On August 8, 2012, the American Civil Liberties Union and League of United Latin American Citizens of Iowa (hereinafter Petitioners) filed a Petition for Judicial Review of Agency Action under Iowa Code Section 17A. The Petitioners seek a declaratory judgment that the two new rules are invalid and they seek an order enjoining the Secretary of State from using and/or implementing either of the new rules. The Petitioners seek this relief on the grounds that: (1) the adoption of the rules pursuant to the emergency rulemaking powers was invalid (2) the Secretary of State exceeded his statutory authority in adopting the new rules; and (3) the rules are

vague and pose a substantial risk of erroneously depriving qualified voters in Iowa of their fundamental right to vote.

Respondent filed a Resistance to Petitioners' Motion for Temporary Injunction on August 16, 2012. He contends the Petitioners have not met the four grounds required for a temporary injunction under Iowa Code section 17A.19 (2011).

The Respondent also argued in his brief in resistance to the Motion that this Court did not have jurisdiction in this matter because Petitioners did not exhaust their administrative remedies by first seeking a stay or temporary injunction with the Secretary of State as required under section 17A.19(5)(a), (b). However, the record shows Petitioners did "formally" request a stay pursuant to section 17A.19(5) from the Secretary via e-mail on August 17, 2012. The Secretary denied this request for a stay on August 21, 2012. (P. Ex. 54-55). At the September 6, 2012 hearing the Respondent conceded this was a sufficient request and denial of the stay to satisfy the exhaustion requirements, and thus waived his argument on this issue on the record. Accordingly, the Court need not address this argument as it has been waived.

II. STANDARDS FOR TEMPORARY INJUNCTION.

"A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Lewis Inv., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005) (citing *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985)). "The issuance or refusal of a temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case." *Id.* (Citation omitted). A district court's ruling on a motion for stay under section 17A.19(5) is reviewed for an abuse of discretion. *Snap-On Tools Corp. v. Schadendorf*, 757 N.W.2d 339, 342 (Iowa 2008). The burden is on the movant to establish a temporary injunction is appropriate.

O.N. Equity Sales Co. v. Pals, 509 F. Supp. 2d 761, 767 (N.D. Iowa 2007). However, it is also “often said the pleader will be accorded the advantage of every reasonable intendment, even to implications, regardless of technical objections or informalities.” *Bd. of Ed. of Kimballton Indep. Sch. Dist. v. Bd. of Ed. of Audubon County*, 260 Iowa 840, 151 N.W.2d 465, 467 (1967). In considering a request for temporary injunction, the Court should “consider the circumstances confronting the parties and balance the harm that a temporary injunction may prevent against the harm that may result from its issuance.” *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001) (citation omitted).

At the outset the Court would like to emphasize it is only addressing the Petitioners’ Motion for a *Temporary* Injunction here. It is not in any way addressing their further request for a permanent injunction or the merits of the case, which will both be addressed at some point in the future. The grant or denial of a temporary injunction is not a decision on the merits of the request for a permanent injunction, is not an adjudication on the substantive claims, and does not deprive either party of a trial on the merits. *See Bd. of Ed. of Kimballton Indep. Sch. Dist. v. Bd. of Ed. of Audubon County*, 260 Iowa 840, 844-45, 151 N.W.2d 465, 468 (1967) (finding “action in granting an application for a temporary injunction, or in denying its dissolution on motion, does not deprive the parties of the right to a trial on the merits . . . , nor is it an adjudication for or against” the claims). Even though temporary relief may be properly granted or denied, the opposite conclusion may be had on the permanent injunction after the parties have had an opportunity to present their entire proof and arguments thereon, “because a decision on the merits of a request for a permanent injunction will in many cases be based on different facts and arguments than a decision on a request for a temporary injunction.” *Iowa State Dep’t of Health v. Hertko*, 282 N.W.2d 744, 753 (Iowa 1979) (citation omitted).

III. CONCLUSIONS OF LAW.

To determine whether a stay or other temporary remedies should be entered pursuant to section 17A.19(5)(c), the Court must consider and balance the following factors:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Iowa Code § 17A.19(5)(c). As set forth above, it is Petitioners' burden to present evidence establishing the prerequisites for the temporary injunction. *Snap-On Tools*, 757 N.W.2d at 342.

A. Likelihood of Success on the Merits

The Petitioners contend they could win on the merits of any of the three grounds they allege: (1) the Secretary's use of emergency rulemaking powers was improper; (2) the Secretary lacked statutory authority to promulgate the rules; and (3) the rules themselves are too vague and lack safeguards to ensure against the erroneous deprivation of the fundamental right to vote. To succeed in their claim for a temporary injunction, the Petitioners are only required to show the *likelihood* of success on the merits of their claim, not actual success. *Max 100 L.C.*, 621 N.W.2d at 181. Likelihood of success on the merits of any of the grounds alleged is sufficient to prevail on this first statutory prerequisite.

Petitioners first contend the Secretary's use of the emergency rulemaking power provided for in Iowa Code section 17A.4(3) was improper. Section 17A.4(3) provides, "When an agency for good cause finds that notice and public participation would be unnecessary, impracticable, or contrary to the public interest, the provisions of subsection 1 [dealing with notice requirements] shall be inapplicable."

Notice and public participation in the rulemaking process are only “unnecessary” where the change is routine or ministerial, such as changing a phone number or address. Arthur E. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law. The Rule Making Process*, 60 Iowa L. Rev. 731, 862 (1979). Within the context of administrative procedure, “impracticable” means that notice and participation would limit the agency’s ability to function. *Id.* To find that notice is “contrary to public interest”, Respondent would have to show the benefits of implementing the rule through the emergency procedures would outweigh the considerable value of notice and public participation in the adoption process. Bonfield, *Iowa Administrative Procedure Act*, 60 Iowa L. Rev. at 862.

The Secretary was required to incorporate into the rule a “finding and a brief statement of the reasons for the finding” of why these emergency procedures are justified. Iowa Code § 17A.4(3). The Secretary found that “notice and public participation” in this matter was “contrary to the public interest because a formal procedure is needed prior to the November 6, 2012 Presidential Election to ensure all complaints received by the Secretary of State are treated uniformly, investigated properly and if necessary, forwarded to the appropriate officials for prosecution.”

Respondent argues “good cause” existed here for such rules because notice and public comment were impracticable due to the limited amount of time between the promulgation of the rules and the November election. He contends it was impractical for him to initiate rulemaking until he received approval from the U.S. Department of Homeland Security to use the federal database maintained by the U.S. Citizenship and Immigration Service to verify the citizenship status of current and future Iowa voters. The Secretary argues that because he did not receive

approval for access to this database until July 17, 2012, he could not have initiated rulemaking until then, and at that point it was too late for such rules to become effective through the normal rulemaking procedures before the November elections.

The Court finds the Secretary's argument to be less than persuasive. The new rules do not require or reference the use of the federal database that was purportedly the reason the Secretary had to wait until so close to the election to propose these rules. Thus, it is unclear why the Secretary waited until he got approval to use the list to begin the rulemaking procedures. The Court also notes it appears from the record the Secretary *still* does not have access to the federal database. The record shows the Secretary was aware of the alleged discrepancy between the Iowa Department of Transportation (DOT) list and the voter registration list, showing the alleged voter fraud, in March 2012 when the DOT provided him with the list of the "3000 foreign nationals . . . registered to vote in Iowa." Thus, the Court sees no reason why he did not initiate the rulemaking procedures at that point, if not sooner, with over six months before the November elections. The only emergency claimed by the Respondent is the short amount of time between July 17 and November 6, 2012. However, this timeline was completely self-imposed. The date of the November 2012 general election is common knowledge. The Secretary was in office for eighteen months during which time he could have initiated the normal rulemaking procedures. At a minimum he had over six month to do so after he learned of the alleged voter discrepancies on the lists in March 2012.

The Respondent also stated in the emergency rules that the normal thirty-five day delay before rules become effective under section 17A.5(2) should be waived because the rules

confer a benefit upon the voting public by ensuring there is a legitimate procedure in place for investigating and resolving complaints involving but not limited to the following subject matters: election administration, voter registration, absentee voting, fraudulent voting, and electioneering.

He further argues in his brief that it confers a benefit to the public by providing a “transparent, uniform system for investigating and removing ineligible voters from the registration records.” However, it appears to the Court the Voting Law Complaint Rule may in fact gives less protection to potentially qualified voters because it removes the requirement that an individual sign an oath under penalty of criminal prosecution for bringing a false allegation of ineligibility against a qualified voter. *See* Iowa Code § 48A.14(1).

Finally, Respondent contends the Voter Law Complaint Rule “merely implements” the procedure laid out for challenging a voter’s registration in Iowa Code section 48A.14. However, as set forth above, the change appears to remove some of the protections against frivolous challenges created by the legislature in that statute. Thus, the new rule does more than merely implement the procedure for such voter challenges as previously set forth by the legislature.

For all the reasons set forth above, the Court concludes the Petitioners have set forth sufficient facts and arguments to show a likelihood of success on the merits of the first of Petitioner’s claims. It is not necessary that Petitioners show a likelihood of success on each of their claims for purposes of determining whether to grant a stay through the issuance of a temporary injunction therefore the Court will proceed to the next issue.

B. Petitioners Will Suffer Irreparable Injury if Temporary Injunction is Not Granted.

In arguing the Petitioners will not suffer irreparable injury if the temporary injunction is not granted, Respondent first contends the Petitioners have no standing. This Court has previously determined in its Ruling on Respondent’s Motion to Dismiss, filed September 11, 2012, that the Petitioners do in fact have standing to bring this action. Thus, this claim by the Respondent is without merit for all the same reasons set forth in the Court’s prior ruling.

Respondent further argues even if Petitioners have standing, none of their members' right to vote has been compromised by these rules. However, the statute does not require the Court to find an injury has already occurred to grant a temporary injunction, but instead must consider the "extent to which the applicant *will* suffer irreparable injury." Iowa Code § 17A.19(5)(c) (emphasis added). The Court finds the Petitioners have shown a sufficient potential that they and their members will suffer irreparable harm if the Secretary proceeds to send notices to qualified Iowa voters in an effort to remove them from the voting lists. Affidavits provided by the Petitioner show the DOT list contains inaccuracies by showing the affiants were not U.S. citizens when they obtained their drivers' license, but subsequently became a citizen and then registered to vote. Although the Respondent is correct the rules allow the recipients of such notices to challenge this finding or provide proper documentation to refute the allegations at the polling place, such actions would likely have a chilling effect on qualified voters right to vote.

In addition, as shown from the affidavits provided by the Petitioners, some members of the Petitioners' organizations have been harmed by the chilling effect the rules are having. One affidavit states Iowa residents who are qualified to vote feel deterred from registering to vote for fear of erroneous identification, and if that occurs they will have to endure the time, financial costs, and possible reputational harm from a wrongful criminal investigation into their legal status.

Accordingly, the Court concludes the Petitioners have shown there is a sufficient likelihood they will suffer irreparable harm if a temporary injunction is not issued at this point in the litigation.

C. Other Parties Will Not Be Harmed by Granting Temporary Injunction.

Respondent contends both these rules confer a benefit on the public by providing voters with a clear, uniform procedure for identifying, investigating, and removing ineligible voters from registration records. He argues that staying enforcement of these rules will remove transparency from the process and compromise voters' faith in the voter registration system, as well as undermine their confidence in the Secretary's ability to conduct free and fair elections.

As determined above, the Voting Law Complaint Rule appears to provide less protection against false or improper claims challenging a voter's registration because it eliminates the requirement of a sworn affidavit and the penalty of criminal prosecution for making false allegations. The process provided for by the legislature in section 48A.14(1) already provides an adequate procedure for those seeking to challenge a voter's qualification and thus no such challenger would be harmed by this temporary injunction. With regard to the Voter Purge Rule, the Court believes it places a fairly heavy burden on any allegedly ineligible voter who receives notice under this rule to show they are in fact a qualified voter. Such a burden has the potential to fall more heavily on any newly admitted citizens who may not fully understand how to prove their citizenship, and/or on lower income individuals who may not have the time or resources required to refute such claims. Petitioners have already identified inaccuracies on the DOT list of individuals who obtained a driver's license while not a citizen and subsequently became citizens and registered to vote. Further, if they simply do not have the time or resources to challenge the notice, or fail to get the notice within fourteen days, they will be subject to removal from the voter registration lists despite being qualified voters. In the alternative they may be forced to show additional proof of citizenship at the polling place; an activity which could easily be seen as having a chilling effect on Iowa residents who are qualified electors.

For all of these reasons the Court concludes other parties are not likely to be harmed by the grant of the temporary injunction.

D. Public Interest.

Respondents argue the public interest relied on by the Secretary is sufficient to justify his emergency rulemaking actions. The public interests alleged are the “transparency arguments” discussed above, and providing additional due process for voters suspected of registering illegally. Respondent summarily states granting a temporary injunction would inject “uncertainty, confusion, and mistrust into the election.” To the contrary, the Court believes the opposite has been shown by the affidavits offered by the Petitioners. The affiants show the rules have in fact created confusion and mistrust in the voter registration process. They have created fear that new citizens will lose their right to vote and/or be charged with a felony, and caused some qualified voters to feel deterred from even registering to vote. Accordingly, the Court concludes the public interest relied on by the Secretary is not sufficient to justify his use of the emergency rulemaking procedures, and thereby the circumvention of the valuable notice and public comment, especially when the fundamental right of qualified citizens to vote is involved.

IV. CONCLUSION AND DISPOSTION.

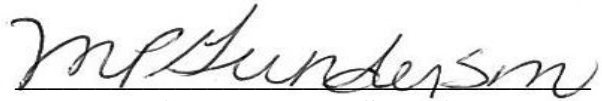
After considering and balancing all of the factors provided for in Iowa Code section 17A.19(5)(c) as discussed herein, the Court concludes the harm that granting the temporary injunction may prevent outweighs the harm that may result from denying it. These new rules clearly are much more than ministerial. Until now, the Secretary of State has been ensuring the eligibility of voters and responding to challenges of voter eligibility without these rules. *See e.g.* Iowa Code § 48A.14(1); Iowa Admin. r. 821; 721-28.3. Thus, it does not appear the regular rulemaking procedures would have limited the functioning of the Secretary’s office in any

significant way, and the normal rulemaking procedure is not impracticable. Respondent has not made a sufficiently compelling argument that the benefits of implementing the rule through the emergency procedures would outweigh the considerable value of notice and public participation in the adoption process at this point in the litigation.

The Court reiterates this is not a determination on the merits of either the Petitioners' request for permanent injunction or on the substantive merits of their claims. Both of these issues will be addressed by the Court at a later date. The granting of the temporary injunction will simply maintain the status quo of the parties and the protections of qualified voters as they currently exist until final judgment on the merits of Petitioners' claims can be determined.

IT IS THE ORDER OF THE COURT that Petitioners' Motion for Temporary Injunction is **GRANTED** and the Implementation of Iowa Administrative Code Rules 721-21.100 and 721-28.5 is **STAYED**.

IT IS SO ORDERED this 13th day of September, 2012.


Mary Pat Gunderson, DISTRICT JUDGE
Fifth Judicial District of Iowa

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