

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**AMERICAN CIVIL LIBERTIES UNION
OF IOWA FOUNDATION, and LEAGUE
OF UNITED LATIN AMERICAN
CITIZENS OF IOWA,**

Petitioners,

vs.

**IOWA SECRETARY OF STATE MATT
SCHULTZ,**

Respondent.

CASE NO. CV009311

**RULING ON MOTION FOR
RECONSIDERATION OF REVIEW ON
THE MERITS**

INTRODUCTION

The Petitioners' Motion for Reconsideration of Review on the Merits came before the Court for oral argument and submission on January 17, 2014. The Petitioners, American Civil Liberties Union of Iowa Foundation and League of United Latin American Citizens of Iowa, were represented by their counsel, Joseph Glazebrook and Rita Bettis. The Respondent, Iowa Secretary of State Matt Schultz, was represented by his counsel, Meghan Gavin. The Respondent submitted a post-hearing brief on February 17, 2014. Petitioners submitted a reply brief on February 27, 2014. After considering the arguments of all parties, the Court now enters the following ruling:

BACKGROUND FACTS AND PROCEDURAL HISTORY

The Court's Ruling on Petitioners' Motion for Review on the Merits on November 12, 2013 detailed this matter's background facts and procedural history. This Ruling incorporates that section by reference.

In the Petitioners' Second Amended Petition for Judicial Review, they argue that Respondent, Iowa Secretary of State Matt Schultz, (1) improperly promulgated emergency rules when no emergency existed, (2) exceeded his statutory authority by promulgating emergency and permanent rules affecting the voter registration list, and (3) violated the right to vote with the emergency and permanent rules. On August 26, 2013, the Petitioners filed a Motion for Review on the Merits for the second of their three claims, that the Respondent lacked statutory authority to promulgate the rules. The Court denied the Motion for Review on the Merits on November 12, 2013. The Court found that while the second claim presented a purely legal question, the Petitioners' other two claims involved factual disputes, and the parties had stated that they did not want to bifurcate the issues.

On December 9, 2013, the Petitioners filed a Motion for Reconsideration of Review on the Merits, arguing that if the Court granted its Motion for Review on the Merits on the second claim, its other claims would be moot and bifurcation would be appropriate.

STANDARD OF REVIEW

The Court may affirm the agency decision or remand to the agency for further proceedings. Iowa Code § 17A.19(10) (2011). The Court “shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced” because the agency action is “[b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law” or is “[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.” Iowa Code § 17A.19(10)(b); (c).

ANALYSIS

The matter before the Court is whether the Respondent exceeded his statutory authority by promulgating emergency and permanent rules affecting the voter registration list. As this issue is a purely legal question, summary judgment is appropriate *See Iowa Med. Soc. v. Iowa Bd. of Nursing*, 831 N.W.2d 826, 839 (Iowa 2013) (citing *City of Sioux City v. GME, Ltd.*, 584 N.W.2d 322, 324–25 (Iowa 1998)).

Rule 721-28.5 creates a procedure to identify and remove foreign nationals from the voter registration list. First, the voter registration list is compared to various state and federal databases of foreign nationals. Following this comparison, if a registered voter is suspected of being a foreign national, the Secretary of State subsequently accesses the Systematic Alien Verification Entitlement (“SAVE”) program administered by the United States Department of Homeland Security to determine if the registered voter is a United States citizen. If the registered voter is confirmed not to be a United States Citizen, the Secretary of State notifies the county auditor who initiates the voter registration challenge process under Iowa Code sections 48A.14-16. Rule 721-28.5 states that it is intended to implement Iowa Code sections 47.7 and 48A.

“To be valid, a rule adopted by an agency must be within the scope of powers delegated to it by statute.” *Haesemeyer v. Mosher*, 308 N.W.2d 35, 37 (Iowa 1981). “[T]he rule must not exceed or limit the scope of the authority granted by the enabling legislation.” *Meredith Outdoor Adver., Inc. v. Iowa Dep't of Transp., Office of Right of Way*, 648 N.W.2d 109, 117 (Iowa 2002). In addition, the rule “cannot be inconsistent with either statutory language or legislative intent.” *Temple v. Vermeer Mfg. Co.*, 285 N.W.2d 157, 159 (Iowa 1979). “An agency rule is presumed valid and the party challenging the rule has the burden to demonstrate that a “rational agency”

could not conclude the rule was within its delegated authority.” *Iowa Med. Soc.*, 831 N.W.2d at 839 (citations omitted); Iowa Code § 17A.19(8)(a).

The right to vote is a fundamental right under the United States Constitution. *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 142, 91 S. Ct. 260, 274, 27 L. Ed. 2d 272 (1970). Therefore, “[l]aws which authorize a challenge to the right to vote should be strictly construed.” 1982 Iowa Op. Att’y Gen. 550 (1982); see also *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 750 A.2d 790, 792 (N.J. Super. App. Div. 2000) (“all challenges to an individual’s right to vote be carefully scrutinized.”).

When Rule 721-28.5 went into effect, Iowa Code section 17A.23(3) provided that “[a]n agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency.” The Iowa Legislature amended this section by adding that “[u]nless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly,” which became effective July 1, 2013. Acts 2013 (85 G.A.) ch. 114, H.F. 586, § 5.

The Petitioners argue that Respondent lacks the statutory authority to promulgate Rule 721-28.5. In support of its argument, the Petitioners state that Iowa Code section 48A.30 provides the exclusive grounds for removing a registered voter from the voter registration list. Iowa Code section 48A.30 provides that:

1. The voter registration of a registered voter shall be canceled if any of the following occurs:
 - a. The registered voter dies. For the purposes of this subsection, the commissioner may accept as evidence of death a notice from the state registrar of vital statistics forwarded by the state registrar of voters, a written statement from a member of the registered voter’s household, an obituary in a newspaper, a written statement from an election official, or a notice from the county recorder of the county where the registered voter died.

- b.* The registered voter registers to vote in another jurisdiction, and the commissioner receives notice of the registration from the registration official in the other jurisdiction.
 - c.* The registered voter requests the cancellation in writing. For the purposes of this subsection, a confirmation by the registered voter that the registered voter is no longer a resident of the county constitutes a request for cancellation.
 - d.* The clerk of the district court, or the United States attorney, or the state registrar sends notice of the registered voter's conviction of a felony as defined in section 701.7, or conviction of an offense classified as a felony under federal law. The clerk of the district court shall send notice of a felony conviction to the state registrar of voters. The registrar shall determine in which county the felon is registered to vote, if any, and shall notify the county commissioner of registration for that county of the felony conviction.
 - e.* The clerk of the district court or the state registrar sends notice that the registered voter has been declared a person who is incompetent to vote under state law.
 - f.* The registered voter's registration record has been inactive pursuant to section 48A.29 for two successive general elections.
2. When a registration is canceled pursuant to subsection 1, paragraph "*d*", "*e*", or "*f*", the commissioner shall send a notice of the cancellation to the registered voter.

The Petitioners assert that the occurrences listed in 48A.30 are the exclusive events for which the Respondent may cancel a registered voter's registration. Therefore they argue that because lack of citizenship is not listed, the Respondent did not have the authority to promulgate a rule that compares the voter registration list with federal databases to find foreign nationals that are possibly registered to vote, and subsequently initiates proceedings to remove them from the registration list.

In addition, the Petitioners cite Iowa Code section 47.7(2)(a), which allows the Secretary of State to coordinate the voter registration list with other state databases, such as the Department of Transportation driver's license records and the judicial records of convicted felons. They argue that since the statute expressly granted the Respondent authority to compare the voter registration list to state databases but was silent on federal databases, the Respondent was not authorized to promulgate a rule to access federal databases to maintain the voter registration list.

Respondent argues that he has the authority to promulgate the Rule 721-28.5 under Iowa Code sections 47.1 and 47.7. The Respondent, as the Iowa Secretary of State, serves as the State Commissioner of Elections, whose duties include “supervis[ing] the activities of the county commissioners of elections” and “prescrib[ing] uniform election practices and procedures.” Iowa Code § 47.1(1). The Respondent also serves as the State Registrar of Voters, and “shall regulate the preparation, preservation, and maintenance of voter records.” *Id.* § 47.7(1). In addition, the Respondent states that Iowa Code section 48A.30 is not the only mechanism provided by statute in which a registered voter may be removed from the voter registration list. He asserts that Iowa Code section 48A.14 provides a separate mechanism, which states that:

1. The registration of a registered voter may be challenged by another registered voter of the same county subject to the conditions and limitations of this section. A challenge shall be a statement in writing to the commissioner alleging one or more of the following reasons the challenged registrant’s registration should not have been accepted or should be canceled:
 - a. The challenged registrant is not a citizen of the United States.
 - b. The challenged registrant is less than seventeen and one-half years of age.
 - c. The challenged registrant is not a resident at the address where the registrant is registered.
 - d. The challenged registrant has falsified information on the registrant’s registration form.
 - e. The challenged registrant has been convicted of a felony, and the registrant’s voting rights have not been restored.
 - f. The challenged registrant has been adjudged by a court of law to be a person who is incompetent to vote and no subsequent proceeding has reversed that finding.

The Respondent argues that because section 48A.14 allows for a challenge to a registered voter’s registration based on an assertion that the registered voter is not a citizen of the United States, he is authorized to promulgate Rule 721-28.5, which creates a procedure to identify and remove foreign nationals from the voter registration list. In addition, the Respondent argues that the rule is not in conflict with and only “sits on top of the process” provided under section 48A.14, as it

merely identifies registered voters suspected to be noncitizens and reports its findings to the county auditor who begins the challenge process under section 48A.14. The Court disagrees.

Since section 48A.14 authorizes a challenge to the right to vote, it should be strictly construed. 1982 Iowa Op. Att'y Gen. 550 (1982); *In re Absentee Ballots Cast*, 750 A.2d at 792; *see also* Iowa Code § 17A.23(3) (“grant of rulemaking authority shall be construed narrowly.”). Based upon this construction, section 48A.14 authorizes a registered voter, in his or her individual capacity, to challenge the registration of another registered voter in the same county based on the six criteria listed in the statute. It does not create a mechanism for the Secretary of State in his official capacity or through his office to challenge a registered voter’s registration. Therefore, the Court finds the Respondent derives no authority from section 48A.14 to promulgate Rule 721-28.5.

The Court also finds that that the Respondent does not have the authority to promulgate Rule 721-28.5 under Iowa Code section 48A.30. That section expressly lists six occurrences that mandate the cancellation of a registered voter’s registration, none of which involve citizenship. It is a rule of statutory interpretation that “when the legislature expressly mentions one thing, it implies the exclusion of other things not specifically mentioned.” *Doe v. Iowa Dep’t of Human Servs.*, 786 N.W.2d 853, 859 (Iowa 2010). Since the section expressly mentions six cancellation occurrences, the omission of a citizenship provision implies that the Respondent is not authorized to promulgate a rule that cancels a registered voter’s registration based upon that criterion. The same analysis applies to Iowa Code section 47.7(2)(a), which expressly grants the Respondent authority to compare the voter registration list to state databases, but does not mention federal databases.¹

¹ The Court notes that although the above analysis is dispositive of this matter, the Petitioners also make the persuasive alternative argument that if the Legislature had granted authority to promulgate Rule 721-28.5, it would

Therefore, the Court finds that the Respondent lacked the statutory authority to promulgate Rule 721-28.5 as it conflicts with Iowa Code section 48A.30, and a rational agency could not conclude the rule was within its delegated authority. Iowa Code § 17A.19(10)(b); *Iowa Med. Soc.*, 831 N.W.2d at 839.

ORDER

IT IS THEREFORE THE ORDER OF THE COURT that the Petitioners' Motion for Review and Judgment on the Merits is GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that Rule 721-28.5 is hereby stricken and held for naught and the Secretary of State for the State of Iowa is enjoined from taking any action pursuant to Rule 721-28.5 as said rule is invalid.

IT IS THE FURTHER ORDER OF THE COURT that the costs of this action are assessed to the Respondent.

be delegated to the Voter Registration Commission ("VRC"), not the Respondent. The VRC is mandated "to make and review policy, adopt rules, and establish procedures to be followed by the [Respondent] in discharging the duties of that office."



State of Iowa Courts

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Case Number CVCV009311
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So Ordered

A handwritten signature in cursive script that reads 'Scott D. Rosenberg'. The signature is written in black ink and is positioned above a horizontal line.

Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa