

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Adopted Rules of the Office
of the Secretary of State of Minnesota Relating
to Rules Governing Absentee and Mail Balloting,
Minnesota Rules, Chapter 8210

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. § 14.26
AND MINN. R. 1400.2300**

This matter came before Administrative Law Judge Eric L. Lipman upon the application of the Minnesota Secretary of State for a legal review under Minn. Stat. § 14.26.

On April 16, 26 and 30, 2012, the Secretary of State filed documents with the Office of Administrative Hearings relating to the review and approval of the above-entitled rules under Minn. Stat. § 14.26 and Minn. R. 1400.2300.

Based upon a review of the submissions by the Secretary of State, and all of the documents in the rulemaking record,

IT IS HEREBY ORDERED THAT:

1. The Secretary of State has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400.
3. The adopted rules are **APPROVED**.

Dated: April 30, 2012

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Because the adopted rules are presented for a legal review in an unusual factual and legal context, some additional explanation here is warranted. The Secretary of State began this rule proceeding in mid-2011 in advance of the state primary and general election balloting scheduled for the summer and autumn of 2012.

During the 2012 regular session of the Minnesota Legislature, state legislators likewise discussed reforms to the process for military and overseas balloting – a related topic that, potentially, touched upon this rulemaking.

Likewise important, while there were no requests for a hearing on the proposed rules, the Secretary did receive a series of substantive comments and suggestions from local election officials during the comment period. Thus, many key stakeholders – state legislators, the Governor’s office and local election officials – had roles in shaping policy on this subject following the Notice of Intent to Adopt;¹ matters that the Secretary of State worked to integrate and harmonize in this proceeding before the authority for the instant rulemaking expired. Under Minn. Stat. § 14.26, subd. 1, this authority was set to expire at midnight on April 30, 2012.

Given that history, a brief discussion of the four key sets of changes made to the rules following the publication of the dual notice is warranted.

First, the adopted rules make a number of stylistic, grammatical and formatting changes, none of which alter the substance of the proposed rules or fall outside of the scope of rules as originally detailed in the *State Register*.²

Second, the rules which eliminate the “field” for the entry of the date on which certain absentee ballot materials are completed, follows directly from changes to the underlying statute made by the Minnesota Legislature in April of 2012.³ The Order signed on April 30, 2012 adopting these changes is drawn from the Secretary’s rulemaking authority, within the scope of the original notice and crafted to provide relief to the voters benefitted by the statutory changes.

Third, providing for a future effective date for these rules – June 29, 2012 – notwithstanding the fact that Minn. Stat. §§ 14.18 and 14.27 presumptively sets an effective date of five days after publication, also follows from the April 2012 legislative changes.⁴ The Order adopting a future effective date of the rules is in accord with Minn. Stat. § 14.18, subd. 1, within the scope of the original notice and crafted to provide relief to the voters benefitted by the statutory changes.

¹ See, e.g., Journal of the Senate at 6504 (April 25, 2012).

² See, Minn. Stat. § 14.05 (b)(1).

³ See, Journal of the Senate at 6478-80 (April 25, 2012).

⁴ See, Journal of the Senate at 6479 (April 25, 2012) (“This section is effective June 29, 2012”).

Lastly, removing the earlier-proposed grant of authority which permitted election officials to use existing stocks of absentee ballot materials, until those stocks ran out, is likewise appropriate and lawful. While obliging local election officials to use the new materials beginning in June of 2012 is a departure from the earlier proposal, this regulatory change is drawn from the Secretary's rulemaking authority, within the scope of the original notice and crafted to treat all voters in the state equally and uniformly on state election days.⁵

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⁵ See generally, *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003) (As to a recent challenge to procedures for different groups of similarly-situated absentee voters, the Court instructed that “[i]n the total absence of any rational explanation, allowing some absentee voters to revote with replacement ballots but denying that opportunity to the very group for which absentee voting is designed by prohibiting the mailing of replacement absentee ballots is a denial of equal protection that requires remedial action”).