

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SECRETARY OF STATE

In the Matter of the Adoption of Rules
Governing Voter Registration (generally),
Voter Registration Data, the Statewide
Voter Registration System, Voter
Registration Applications, Verification of
Registrations Received by Election
Officials, Absentee Voting and Mail
Balloting, Minnesota Rules, Chapters
8200 and 8210

ORDER ON REVIEW
OF RULES UNDER Minn. Stat. § 14.388

On July 8, 2004, the Office of the Secretary of State filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. §§ 14.386 and 14.388.

Based upon a review of the written submissions by the agency and the public comments in this matter, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The following rules or parts thereof as set out in the Memorandum, are disapproved: 8200.1100, 8200.1200, 8200.1700, 8200.2900, 8200.3800, 8200.5500, 8200.9310, 8210.0200, 8210.0220 and 8210.0800.
2. All other rules are approved.

Dated this 22nd day of July 2004.

S/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

NOTICE

Minn. Rule pt. 1400.2400, subp. 4a provides that when a rule is disapproved the agency must resubmit the rule to the administrative law judge for review after changing it. The judge then has five working days to review and approve or disapprove the rule. Minn. Rule pt. 1400.2400, subp. 5 provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by a judge. The

request must be made within five working days of receiving the judge's decision. The Chief Judge must then review the agency's filing within 14 days of receiving it.

MEMORANDUM

Applicable Law

The federal Help America Vote Act (HAVA) of 2002, Public Law 107-252, required changes in state election law. Those changes were enacted by the Minnesota Legislature in Chapter 293 of Minn. Laws 2004. Article 1 of the law, dealing with HAVA compliance, provides (at § 1) that a single statewide official voter registration list, administered at the state level, is to be created with the name of every legally registered voter in this state. Each voter is assigned a unique identifier. Section 39 of Chapter 293 provided as follows:

Sec. 39. [RULES.]

Enactment of this article is good cause for the Secretary of State to use the authority of Minn. Stat. § 14.388, to adopt, amend or repeal rules as necessary to comply in a timely manner with the changes in statute contained in this act or to comply with the federal Help America Vote Act of 2002, Public Law 107-252.

The agency states in its Order Adopting Rules that the changes it has adopted in each rule are required in order to implement the federal and state legislation.

Minn. Stat. § 14.388 provides an abbreviated rulemaking procedure where an agency can show good cause for use of that provision. In this case the legislature has specified, in Sec. 39 above, that good cause has been shown. Section 14.388 provides that the agency must satisfy the requirements of Minn. Stat. § 14.386(a)(1)-(4) in order to adopt a rule. Under those provisions the Revisor of Statutes must approve the form of the rule, the agency head must adopt the rule, the Office of Administrative Hearings must approve the rule as to its legality and the rule must be published in the State Register. Specifically excluded from review by OAH is whether or not the agency has shown the rule to be needed and reasonable, a criteria that must be met in a typical chapter 14 rulemaking.

The legality determination by OAH is governed by Minn. Rule pt. 1400.2400, subp. 3, which states that in reviewing a filing the judge must decide whether the rule meets the standards of part 1400.2100, Items A and D to G. Those standards of review provide as follows:

A rule must be disapproved by the judge or chief judge if the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded

under Minnesota Statutes, section 14.15, subdivision 5, or 14.36, subdivision 3, paragraph (d);

. . .

D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;

E. is unconstitutional or illegal;

F. improperly delegates the agency's powers to another agency, person or group;

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law. . . .

Minn. Stat. § 14.388, subd. 2 provides that interested parties have five business days after the date of the Notice of Adoption to submit comments to the Office of Administrative Hearings. That comment period ended on July 15, 2004 at 4:30 p.m. OAH received 410 timely comments concerning this rule. At the direction of the administrative law judge, the agency submitted its response to the comments by 4:30 p.m. on Monday, July 19, 2004.

Use of the Good Cause Exemption

Two commenters^[1] challenged the use of the good cause exemption process to adopt these rules. They argued that the agency has not justified the use of the good cause statute by showing that the rules adopt changes only when no interpretation of law is required. They also argue that the agency has failed to show that the full rulemaking process is "unnecessary, impracticable, or contrary to the public interest."

Normally, to proceed under Minn. Stat. § 14.388, an agency must show that the usual chapter 14 rulemaking process is unnecessary or impractical and must show that the proposed rules fit within one of four very narrow categories set out in the statute. OAH is directed to determine whether adequate justification has been provided for use of the good cause process. In this case, however, the legislature has supplied good cause for use of the process. Section 39 of Chapter 293 states that, "Enactment of this article is good cause for the Secretary of State to use the authority of Minnesota statutes, section 14.388," The commenters point out that the legislature could have specified that the expedited rule process in Minn. Stat. § 14.389 be used. That process allows 30 days for public comment. But the legislative intent is clearly to authorize the process in §§ 14.388 and 14.386 that allows only five working days for comment. The legislature also clearly allowed use of the process without the agency having to show good cause itself under the requirements of the statute.

Notice to the Public

A commenter raised a question concerning whether the agency complied with the notice requirements contained in Minn. Stat. § 14.388, subd. 2. The commenter stated that: “The primary and perhaps only vehicle for notice was the posting of the rules on the website of the Secretary of State. Posting of the rules was learned as the word ‘was spread.’”^[2]

Minn. Stat. § 14.388, subd. 2 requires that an “agency proposing to adopt, amend, or repeal a rule under this section must give electronic notice of its intent in accordance with section 16E.07, subdivision 3,^[3] and notice by United States mail or electronic mail to persons who have registered their names with the agency under section 14.14, subdivision 1a. The notice must be given no later than the date the agency submits the proposed rule to the Office of Administrative Hearings for review of its legality and must include: (1) the proposed rule, amendment or repeal; (2) an explanation of why the rule meets the requirements of the good cause exemption under subdivision 1; and (3) a statement that interested parties have five business days after the date of the notice to submit comments to the Office of Administrative Hearings.”

The Order Adopting Rules states that the agency complied with “[a]ll notice and procedural requirements in Minnesota Statutes, chapter 14, Minnesota Rules, chapter 1400, and other applicable laws . . . to the extent that they apply to exempt rules under the good cause provisions of Minnesota Statutes, section 14.388.” The agency’s cover letter to the Administrative Law Judge dated July 8, 2004, states that “[c]oncurrent with this delivery, the same material enclosed [the proposed rules and the Order Adopting Rules] is being posted on the Web site of the Office of the Secretary of State rulemaking docket page and sent to those persons who have requested notice of rulemaking activities” On this record, the ALJ concludes that the notice requirements for these rules were met. Over 400 comments were received in the five business day comment period.

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Requests for Hearing

OAH received approximately 395 requests for a hearing on these proposed rules from concerned Minnesota residents. The requests were short form letters, and expressed concern that newly registered voters may be adversely affected by the proposed rules and the rapid implementation of HAVA. These individuals requested a hearing because they believe that the proposed rules should be explained to the voting public in an open forum and allow for public input, especially in light of the upcoming presidential election season.

As explained above, the good cause exemption under Minn. Stat. § 14.388 does not provide for a public hearing, and the Administrative Law Judge does not have the authority to order the agency to conduct one. It is the agency’s decision as to whether it will withdraw any of the proposed rule parts and/or proceed instead to adopt them in a standard chapter 14 rulemaking.

Only Necessary Rules

A large number of commenters argued that only the rules that are absolutely necessary for the 2004 election should be adopted through the good cause process so that greater public participation would be possible later.^[4] They also point out that there is very little time before the primary election (September 14, 2004) and express concern about whether extensive changes can be successfully implemented in time.^[5] The commenters also have argued that the agency has no authority to adopt any rules under the good cause process that are not specifically required to implement HAVA or Chapter 293.^[6]

The Secretary of State should review the comments of election officials to determine whether there are some rules that could be deferred beyond the 2004 election to allow greater public participation or more time for implementation. The agency has discretion in this regard. However, the agency is not authorized to adopt rules in this process unless the rules are “necessary to comply in a timely manner” with changes in HAVA or Chapter 293. Additionally, Minn. Rule pt. 1400.2100 D., one of the standards of review for “good cause” rules, requires disapproval of any rule that exceeds or conflicts with the enabling statute. In short, the legislature has granted authority to the agency only to adopt rules in this abbreviated process that are needed to implement the new statutes for the 2004 election. Each rule section must be measured by that legislative requirement.

8200.0300 - Delegation of Duties; 8200.2200 - Buildings for Registration; 8200.2600 - Registrations and Name and Address Changes to Registrations; 8200.5300 - Election Judge Duties

According to the agency, each of these rule parts makes minor changes updating the rule language to mirror the requirements of HAVA and Chapter 293. The predominant change is from “registration card” to “voter registration application.” One comment remarked that these changes are best described as “housekeeping” provisions that are not necessary to comply with the provisions of HAVA or Chapter 293,^[7] and that the agency is engaging in improper use of its statutory authority under Chapter 293, article I, section 39. The commenter suggested that these changes be made under the standard rulemaking provisions in 2005.

HAVA makes repeated references to “applications for voter registration” and Chapter 293 refers to “voter registration applications” throughout. It is logical to make such terminology changes at this time to maintain consistency between HAVA, Chapter 293, and the rules. Variation in terminology would likely cause confusion. The agency has not exceeded its statutory authority in these proposed rule amendments.

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8200.1100 – Printing Specifications

This proposed rule deletes language that specifically allows the agency to approve alternate forms of voter registration applications and adopts new language that simply says that the Secretary of State must approve “other forms deemed appropriate.” The agency states that approval by the Secretary of State is required by

Chapter 293, Art I, § 6 which states that the application must be as provided in statute “and approved by the Secretary of State.”

A large number of commenters, including county and municipal officials, argued that there is no authority in statute for the agency to delete the option of approving alternative application forms.^[8] They suggest that this is a substantive policy change beyond the scope of the “good cause” authority granted by the legislature and outside of what is required by Chapter 293. It was also suggested that agency staff agreed in conference committee that alternative forms meeting the statutory criteria would be approved by the agency. The Secretary of State recently disapproved a design for a voter registration application submitted by Ramsey County on the grounds that it created a fourth application for use in Minnesota that might lead to voter confusion. In reply to the comments the agency stated only that an approval process is needed.

Whatever the merits of having more uniformity in the design of an application form, the deleted language constitutes an important policy change that is not clearly mandated by the legislation. That is, the deletion is not “necessary to comply in a timely manner” with changes in HAVA or Chapter 293. The agency acknowledges in its reply letter that the legislature contemplated that it would make only technical changes through rulemaking, with the policy changes left to the legislature.^[9] In light of the very large number of requests for a hearing on these rules, and since this proposed change is not required for the 2004 election, it is not authorized for adoption by Chapter 293. In order to correct this defect, the agency could leave the rule as it was except for changing “cards” to “applications” or it could modify the new item to state that alternative forms for applications may be approved by the agency.

8200.1200 – Registration Application Format

The agency has amended this rule to reference the statutory criteria for the contents of an application and to specify that the agency must approve the design and contents of an application before it can be used. The new rule subpart also sets up an advisory committee on design. The agency states that the charges are required by Chapter 293, Art. 1, § 6, which provides for agency approval of the application but provides no process.

Election officials made similar comments about these changes as they did for 1800.1100, namely that it restricts alternative formats for the application.^[10] They objected to the language that requires approval before any election official can have an application printed or distributed. Objection was also made to the creation of an advisory committee in the rule as being unnecessary for implementation of Chapter 293.^[11]

The creation of an advisory committee in subp. 1a.B., while it may be a meritorious proposal, is neither authorized by Chapter 293 nor needed to implement it for the 2004 elections. It must therefore be deleted. However, subp. 1a.A and C are consistent with and implement the requirement in Chapter 293, Art. I, § 6 that

specifically grants the agency approval of whether or not the form meets the statutory requirements. This seems to imply that the agency must have final approval of the design and content of the voter registration application before it is used.^[12] This approval is limited by the language of the prior rule that allows alternative forms. Some commenters asked that the Secretary of State be required to state reasons for any disapproval and how it might be remedied. This suggestion could be the subject of future rulemaking or legislation. In order to avoid the implication that the agency has sole authority to specify a single design, the word “the” in the first line of subp. 1a.A. must be changed to “any.”

8200.1700 – Printing and Distributing Voter Registration Applications

This rule as amended again states that the form of the application must be approved by and meet the design specified by the Secretary of State under 8200.1200. One commenter^[13] argued that the agency has no authority to prescribe a specific form and suggests that any form meeting the statutory requirements must be approved. As suggested above, the statutory language grants the agency approval authority but does not authorize it to change the rule allowing alternative forms to be approved. The legislation does not authorize the agency to impose a single design and this authority is not needed to comply with Chapter 293 or HAVA in a timely manner for the 2004 election. To correct this defect the word “specified” in the rule must be changed to “approved.”

8200.2500 Definition of Accepted or Processed

The agency proposes to define “accepted or processed” as it is used, though not defined, in section 303(a)(5)(A)(i) of HAVA. The proposed language is as follows: “‘accepted or processed’ means that the determination has been made that the voter registration application is not deficient and the registration status of the voter is ‘active’ or ‘challenged.’” The agency argues that the amendment is needed to comply with Laws 2004, Chapter 293, article 1, sections 4, 12, and other sections that discuss the issue of “matching” data on registration applications. The agency also asserts that the proposed language will facilitate the application process so that as many people as possible are able to successfully register to vote.

One commenter objected to this definition as insufficient, stating that it causes confusion as to who makes the determination, when and how the determination is made, and when and how notice of the determination is given.^[14] Another pointed out that the term “active” is not defined in the Election Code, and that it should be defined in rule before being adopted under this part.^[15] The objections do not go to the legality of the rule, but the comments may be considered by the agency.

8200.2900 – Deficient Registrations; Notice of Deficient Registrations

These rules set out what constitutes a deficient registration. The agency states that it is defining “deficient” based on the definition in Minn. Stat. § 201.071, subd. 3, as amended in 2004, but restating it positively. Several counties stated that the rule language in the first paragraph confused matters, should be deleted, and that requiring “prior registration” (item E.) went beyond existing state law.^[16] They argued that the statute itself is sufficient, and intentionally minimized deficient registrations, while the proposed rule does the opposite.^[17] The deletion of the phrase “auditor cannot obtain” in favor of “applicant does not provide” in the fourth paragraph was objected to as shifting the burden of supplying unknown information to the applicant, contrary to Chapter 293 and HAVA.^[18] This was described as a significant policy change that was not authorized since it is not needed to implement HAVA or Chapter 293.^[19]

The agency states (without a specific citation) that HAVA requires the applicant to be the source of information in the registration process. However, it points to no authority that requires it to shift the burden from the auditor to the applicant as it has done in the fourth paragraph. This change is significant to counties because it appears to allow them less discretion in determining when an application is deficient. Since it constitutes a policy change that has not been shown to be needed for the upcoming election, it cannot be adopted under the good cause authority granted to the agency and must be deleted.

The agency’s attempted restatement in rule of the requirements in Minn. Stat. § 201.071, subd. 3 conflicts with that statute. The statute states that an application is not deficient if certain items are provided, while the rule (inversely) makes an application deficient if the items are not provided. The rule differs from the meaning of the statute, and, as the counties point out, there is a likelihood of confusion as to which meaning is to be applied. The first paragraph of amended rule 8200.2900 must therefore be deleted. It does not appear to be needed for the upcoming election in light of the statutory language.

8200.3100 – Notice of Incomplete Registration; Completion of Incomplete Registrations

This rule part provides in **item B** that applicants who have incomplete registrations, whether they are first time federal voters who registered by mail or new registrants of any kind whose information is not verified under Chapter 293, article 1, section 12 and Minn. Rule pt. 8200.9300, subp. 2(c), will receive a notice of incomplete registration. The proposed rule sets out the contents of the notice in either situation. It also requires county auditors to compile a list of voters who voted but were not verified by election day. The agency maintains that Chapter 293, Art. 1, §§ 4 and 12 require notices to be provided when an application is incomplete that informs the applicant how to complete the registration process.

Four commenters object to the portion of the rule part requiring county auditors to compile a list of voters who were not verified by election day.^[20] Two commenters suggest that the Statewide Voter Registration System (SVRS) should be able to carry out the list requirement and that putting this burden directly on county officials will result

in a time-consuming manual count of precinct voter rosters.^[21] Similarly, two county election administrators argue that there is nothing in Chapter 293 requiring the county auditors to compile a list of those who voted but were not verified by election day. The counties assert that the intent of HAVA and Chapter 293 is satisfied by presenting a valid ID to an election judge and that no further verification is necessary, and therefore, the list requirement places an additional burden on the county election officials.^[22] A final commenter objected to this rule part because it does not have a timeframe for completion, does not state what language or languages the notices will be sent in, and does not contain the proposed language of the notice.^[23]

The requirements of item B are reasonably within what is required by Chapter 293, Art. I, §§ 4 and 12 and the agency's overall responsibility to maintain a statewide voter registration list. The comments go more to the reasonableness of the proposed rule, a matter that OAH cannot address in this rulemaking. The agency may, nonetheless, make an appropriate modification in this or a future rulemaking proceeding.

8200.3110 - Notice of Late Registration

This new rule part addresses late registration as a separate category from deficient or incomplete registration applications. It applies to registration applications filed during the period when pre-election registration is not permitted by Minn. Stat. § 201.061, subd. 1, and it requires the county auditor to send a notice of late registration to the applicant. The rule part incorporates requirements from prior Minn. Rules parts 8200.2800 and .2900 and facilitates the agency's reorganization efforts.

Two commenters called this new rule part unnecessary in that it is already contained in, and merely duplicates, language in statute.^[24] One commenter questioned this rule part as merely a slight rewrite of Minn. Rules pt. 8200.2800 with the addition of a sentence regarding the notice of late registration being returned if not deliverable. This commenter suggests that this added sentence conflicts with the Secretary of State's election judge training guide regarding classification of voters whose notices are returned as not deliverable.^[25]

The comments to this rule do not allege that it conflicts with the statute, but complain that it is duplicative. The rule incorporates some former rule language that was deemed necessary to a complete set of registration rules. The record does not show any problem with legality.

8200.3700 – Change of Status of Voter Registration Applications

- This rule part amends certain terms to acknowledge that registration applications will be received in electronic format and, therefore, may not necessarily be physically removed from the registration files when a voter's registration status changes. The agency cites to three sections in Chapter 293 that reference the fact that applications may be electronic or may be transmitted or maintained electronically. The rule part also

requires county auditors to notify persons whose status is to be changed to inactive, which the agency considers a public service to those individuals.

Some of the counties take issue with the requirement that they notify individuals of a change to inactive status, since such a change can result for so many different reasons. The counties propose that there will be significant additional costs associated with the required notification, and, above all, that Chapter 293 does not require such notification and the state voter registration system can generate and send notices.^[26] Also, a number of commenters discuss that Minnesota is exempt from the National Voter Registration Act of 1993, which mandates the process by which states remove ineligible voters from their registration lists.^[27] They argue that such changes are not required under HAVA.

The agency maintains that HAVA requires that safeguards be provided to ensure that voters are not removed in error.^[28] The present rule is permissive, that is, it says the county auditor may notify a voter of a removal from the list. The amendments require the counties to notify a voter of a change in status. The agency has demonstrated that the amendments are necessary to implement its responsibility under Chapter 293 and HAVA to maintain accurate voter registration lists. The agency should consider the comment by the counties that this task can be accomplished by the state voter registration system.

8200.3800 – Omitted Registration Voting Procedure

- New language is added to **Subpart 1** that provides that a voter using this procedure cannot complain under Minn. Stat. § 210.04 that the voter's name was not in the statewide registration list. The agency states that use of the procedure in the rule makes a subsequent complaint moot. Commenters, including several counties, objected to this restriction on the filing of a complaint^[29] and argued that there was no authority in Chapter 293 or HAVA to impose this limitation. It was observed that even though a voter is allowed to vote, officials will never learn whether a mistake was made or software problems existed or the removal was malicious, if a complaint cannot be filed.

The language added to the rules is beyond the authority granted to the agency to enact rules needed to implement Chapter 293 and HAVA for the 2004 election. It is also doubtful that the agency can narrow by rule the right to make a complaint that is granted in statute and authorized by HAVA. To correct this defect, the additional language must be deleted. The agency agreed to withdraw its proposed addition to this rule in its July 19, 2004 letter.

8200.5500 – Registrations Received on Election Day

- **Subpart 1** allows election day registration with a driver's license, state I.D. card or a Social Security number "if it is provided by the applicant to the best of the applicant's knowledge, belief, and ability." The agency states that the rule only requires

a good faith effort by the voter since Minnesota law allows election day registration in other ways, such as by another voter vouching that the first voter resides in the precinct. A commenter observed that voters who registered through “vouching” might be required by an election judge to first guess at their driver’s license number before registering.^[30] The commenter acknowledges that the agency must deal with the discrepancy between HAVA and the more liberal Minnesota law on election day registration.

However, the quoted language is so unclear that it does not advise voters or election judges of their duties under the rule. It is unconstitutionally vague in that it does not provide those expected to comply with and enforce the rule with enough guidance to do so.^[31] The agency’s explanation, that “best efforts” are required, is somewhat better. However, it still does not seem to acknowledge that Minnesota law allows registration without a driver’s license, I.D. card, or Social Security number. In order to correct this defect, the quoted language must be deleted. It could be replaced by “or an applicant can register as otherwise provided by Minnesota law.”

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8200.9310 – Treatment of Voter Registration Applications
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In **Subpart 1** of this proposed rule the agency proposes to delete language that requires county authorization before it can add, change or delete registration records. Two commenters^[32] wanted this language retained because county officials are responsible for voter records. They point out that Chapter 293, Art. 1, § 2, subd. 1(8) specifically provides that the statewide registration system must “allow county auditors and the Secretary of State to add or modify information in the system to provide for accurate and up-to-date records.”

The agency argues that Chapter 293 and HAVA put it in charge of the statewide voter registration system. HAVA^[33] requires a single computerized statewide voter registration list maintained and administered at the state level. Chapter 293 adopts this language.^[34] Given the statutory direction, deletion of the language requiring county authorization is authorized. But clearly the Minnesota statute recognizes that county auditors will be involved in ensuring accurate and up-to-date records. Deleting the language in the rule does not prevent counties from modifying information on the list, but does recognize that the Secretary of State has overall responsibility for maintaining the registration list.

Subpart 2 of this rule defines verification of voter registration applications. It requires a match between the data in the application and the Department of Public Safety (DPS) records for name, date of birth and Minnesota driver’s license or state I.D. card (or if the applicant has no license or I.D. card, the last four digits of the Social Security number). If the Secretary of State cannot verify the information with certainty, the county auditor is directed to attempt to obtain needed information from the applicant. If the information is not provided, the application is deemed incomplete. The agency states that HAVA requires comparisons with the DPS database and that Chapter 293 uses the term “verification” but does not define it.

A number of commenters argued that the agency was defining verification more strictly than contemplated by HAVA or Chapter 293, resulting in the possible disenfranchisement of potential voters. Ramsey and Hennepin Counties^[35] pointed out that Chapter 293 only required a compilation of voters for whom the county auditor and the Secretary of State are *unable to conclude* that a match exists. The counties believe that the rule restricts the authority of the county auditor to match data to an applicant, contrary to Chapter 293. One commenter suggested that agency staff stated during the Chapter 293 conference committee that matches would be defined broadly and county auditors would have discretion in determining when a match existed.^[36] The concern is that an applicant may or may not use a middle name or use a variation of a first name that would preclude an exact match,^[37] or that a number might be transposed, or that legibility could be a problem. The commenters argue that a discrepancy between the two sets of data may not be significant enough to prevent the agency or county election official from accurately concluding that they “relate to the same person.”^[38]

Subpart 2 conflicts with the statute and impermissibly narrows the statute.^[39] Chapter 293^[40] only directs the Secretary of State “to compare” the applicant’s data with the DPS database. The agency then provides a report to the county auditor with the names of voters whose data “cannot be verified as provided in this subdivision.” The county auditor then compiles a list of voters for whom it is “unable to conclude” that the application and DPS data match. The legislature did not authorize the exact match of information that the agency proposes. Nor did it limit the authority of the county auditor to the degree proposed in the rule. Subpart 2.A. must either be deleted or modified to recognize that verification can be made without an exact match of all data, where election officials still can conclude that the data relates to the same person.

Some commenters were also concerned that the proposed rule would result in a requirement for a match of addresses in order to verify a registration.^[41] The proposed rule does not list the address as an item to be matched. But apparently the address will be included on agency reports to the county auditors and the rule^[42] requires the auditor to attempt to match the information. One commenter pointed out that Chapter 293 does not require address verification and would disenfranchise voters who had not yet changed their address in the DPS database after moving.^[43] Because the rule does not require verification by comparing addresses, it does not conflict with the statute in that respect. And the rule directs the auditor to conclude that an application is incomplete only when the auditor “cannot verify information for a registration.” This language seems to refer only to the items specifically listed in the rule for comparison, excluding addresses. The commenters’ concern can be addressed through the education of county election officials about the new requirements.

8210.0200 – Absentee Ballot Application

The current absentee ballot application allows the voter to provide two pieces of information on a voluntary basis: telephone number and date of birth. **Subpart 1a** of the proposed rule adds two additional categories of optional information: email address,

and “Minnesota Driver’s license number, identification card number, or last four digits of Social Security number.” All four of these items of information are labeled on the application as “(optional).”

Several commenters raised an objection to adding further items of optional information because of practical considerations regarding the timing of the 2004 elections and the need to print absentee ballot applications prior to the adoption of these rules and their new requirements.^[44] Other commenters objected to encouraging voters to provide additional private data on the forms because the forms may become public after election day pursuant to Minn. Stat. § 203B.04.^[45] They proposed that the application contain a notice that the information supplied would become public.^[46] The agency stated in its Order Adopting Rules that the proposal to add additional optional information was “to aid election administration and adds [the] option of providing [an] e-mail address as an additional means of contact.”

One commenter objected to the proposed addition of other items of optional information because “[n]othing in either Chapter 293 or HAVA requires this information to be included on absentee applications” and “[t]his rule change significantly expands upon the requirements of voters adopted in HAVA and in Chapter 293.”^[47] The agency responded that this “information being requested is so that we can inform applicants of any errors as quickly as possible, and can match the application with the registrant’s records as quickly as possible in absentee situations where time may be tight.”

Neither the agency’s Order Adopting Rules, nor its response to comments, provides any authority for asking for additional optional information on the application in this exempt rulemaking. The agency was given the authority to adopt rules under the good cause exemption “as necessary to comply in a timely manner with the changes in statute contained in [Chapter 293] or to comply with the federal Help America Vote Act of 2002, Public Law 107-252.”^[48]

An exempt rule must be reviewed to determine whether it “exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law.”^[49] There is no evidence in the record that the addition of these items of optional information is necessary to comply with any changes in state or federal law as required by § 39 of Chapter 293. Therefore, the proposed changes are not authorized by the agency’s enabling statute for this rulemaking, and the proposed additional optional information items constitute a defect in the rule. This defect can be corrected by deleting the proposed language.

8210.0220 – Missing Information

This proposed rule part details the process that an auditor or clerk must follow if an application for an absentee ballot cannot be approved because of missing information. The Order Adopting Rules states that the proposed change is needed to comply with “HAVA, which generally permits voters the opportunity to supplement registrations in order to be enfranchised, see HAVA section 303(b) and the conforming

Minnesota legislation, Laws 2004, Chapter 293, Article 1, section 4. By extension, the absentee balloting process is part of that same class of applications.”

Two commenters objected to this proposed part.^[50] One of the commenters objected to the proposed part because it contained “ambiguous language” that was “not necessary.”^[51] The other stated, in response to the information contained in the agency’s Order Adopting Rules, that “[a]bsentee voting is not part of the same class of applications as described in HAVA section 303 (b) and Chapter 293, Article 1, section 4 which pertain to mail in voter registration applications, not absentee voting applications. Nothing in HAVA or Chapter 293 requires this proposed rule be added under the exempt rules process.”^[52]

The agency’s reference to HAVA’s general permission to supplement voter registration applications does not authorize or require a change to the portion of the rules concerning absentee ballots. The state law section to which the agency refers pertains to incomplete voter registration applications submitted by mail. There is no mention of absentee ballots in either of the statutory references provided by the agency to explain the need for this change.

The record does not establish that the proposed changes are necessary in order to comply with any changes in state or federal law. Therefore, the proposed changes are not authorized by the agency’s enabling statute for this rulemaking and constitute a defect in the rules. This defect can be corrected by deleting the proposed rule part.

8210.0800 – Absentee Ballot Return Envelope as Provided by Minnesota Statutes, Sections 203B.16 and 203B.17

Subpart 2 amends item F as follows: “The envelope must be white in color with ~~Pantone 194 U red~~ black ink ~~or darker~~ used for all printing.” The agency states in its Order Adopting Rules that the change in ink color is needed to comply with “HAVA, section 701(a), which requires the timely return of absentee ballots to the polls.” There is nothing in the record to indicate why red ink could interfere with the timely return of ballots to the polls.^[53]

Several commenters objected to this amendment because black ink was not required by HAVA^[54] or Chapter 293.^[55] The agency indicates in its Response to Comments that the “Department of Defense wants the red ink eliminated, pursuant to communications they have had with this office. This is a matter of administration of UOCAVA, and the Department of Defense should be given deference. . .” The standard for whether the agency may propose changes in this rulemaking is not whether the agency has a good reason for proposing changes, but rather whether those changes are “necessary to comply in a timely manner with the changes in statute contained in [Chapter 293] or to comply with the federal Help America Vote Act of 2002, Public Law 107-252.”^[56]

Neither HAVA nor Chapter 293 requires that envelopes be printed with black ink only. Therefore, the proposed changes are not authorized by the agency’s enabling statute for this rulemaking, and the proposed change is a defect. This defect can be corrected by restoring the original rule language.

8210.3000 – Mail Balloting

At step 3 of **subp. 4a**, mail ballot voters who make an error on the ballot and cannot get a new ballot are told to “completely erase any errors and remark your ballot.” One county auditor^[57] commented that the rule is confusing in the context of an electronic voting system that does not require the use of a pencil. Although the rule as proposed does not fail a legality review, the agency should consider if it can be modified to better fit an electronic voting situation.

G.A.B.

^[1] Ex. 373 – DFL Party; Ex. 375 – John Kerry for President.

^[2] Ex. 128, p. 3.

^[3] Minn. Stat. § 16E.07 provides that:

Subd. 3. **Access to data.** The legislature determines that the greatest possible access to certain government information and data is essential to allow citizens to participate fully in a democratic system of government. Certain information and data, including, but not limited to the following, must be provided free of charge or for a nominal cost associated with reproducing the information or data:

....

(2) legislative and rulemaking information, including an electronic version of the State Register, public information newsletters, bill text and summaries, bill status information, rule status information, meeting schedules, and the text of statutes and rules;

....

^[4] E.g., Exs. 1, 199, 308, and 312.

^[5] Ex. 307 – League of Minnesota Cities and Ex. 359 – Association of Minnesota Counties.

^[6] See, e.g., Ex. 373, p. 1.

^[7] Ex. 2, p. 3.

^[8] Ex. 1, p. 4, Ex. 111, p. 2, Ex. 307, Ex. 128, p. 3 – Minnesota Assoc. of County Officials; Ex. 308.

^[9] Some commenters (e.g. Ex. 315. p. 1) believed that the Secretary of State lacks authority to adopt rules relating to the form of the application due to deletion of the statutory language requiring form to be dealt with in rules. But it appears that the reason for the deletion was the listing of the contents of the form in statute, rather than an effort to prevent the agency from making rule amendments relating to form approval.

^[10] E.g. Ex. 199, p. 2; Ex. 307, p. 2 – League of Minnesota Cities; Ex. 1, p. 2.

^[11] Ex. 373, p. 2.

^[12] The statute refers only to form approval and does not mention design as opposed to contents. Legislative clarification of the respective roles of the state and local election officials as to design would be helpful.

^[13] Ex. 373, p. 4 – DFL.

^[14] Ex. 373, p. 4.

^[15] Ex. 315, p. 2.

^[16] Exs. 128, p. 5; 199; 307 and 359.

^[17] Exs. 307, p. 2 and 373, p. 4.

^[18] Exs. 373, p. 4 and 1, p. 2.

^[19] Ex. 111, p. 2 – Metro Inter-County Association.

^[20] Ex. 128, p. 5 – Minnesota Assoc. of County Officers; Ex. 199, p. 2; Ex. 307, p. 2 – League of Minnesota Cities; and Ex. 308, p. 2.

^[21] Ex. 128, p. 5; Ex. 307, p. 2.

^[22] Ex. 199, p. 2; Ex. 308, p. 2.

^[23] Ex. 373, p. 5 – DFL Party.

^[24] Ex. 128, p. 5 – Minnesota Assoc. of County Officials; Ex. 307, p. 2 – League of Minnesota Cities.

^[25] Ex. 315, p. 2 – Rep. Hilty.

^[26] Ex. 199, p. 2; Ex. 308, p. 2.

^[27] Ex. 199, p. 2; Ex. 308, p. 2; Ex. 128, p. 5 – Minnesota Assoc. of County Officials; Ex. 307, pp. 2-3 – League of Minnesota Cities.

^[28] § 303(a)(4)(B).

^[29] Exs. 1, p. 2; 199, p. 3; 307, p. 3; and 128, p. 6.

^[30] Ex. 324, p. 4 – Minnesota AFL-CIO.

^[31] In re N.P., 361 N.W. 2d 386, 394 (Minn. 1985); Thompson v. City of Minneapolis, 300 N.W. 2d 763, 768 (Minn. 1980).

^[32] Exs. 128, p. 6 – Minnesota Assoc. of County Officers; and 315, p. 3 – Representative Hilty.

^[33] § 303(a)(1)(A).

^[34] Chapter 293, Art. I, § 1.

^[35] Exs. 2 and 372.

^[36] Exs. 324, p. 3 – Minnesota AFL-CIO and 131 – Senator Marty.

^[37] Ex. 315, p. 4 – Representative Hilty.

^[38] Ex. 375, p. 4.

^[39] Minn. Rule part 1400.2100 D.; United Hardware Distrib. Co. v. Commissioner, 284 N.W. 2d 820, 822 (Minn. 1979).

^[40] Art. 1, § 12, subd. 1(c).

^[41] Exs. 2, p. 2 and 305, p. 3.

^[42] Subp. 2.C.

^[43] Ex. 315, p. 4 – Representative Hilty.

^[44] Exs. 1; 111; and 359.

^[45] Ex. 199, p. 3.

^[46] See, e.g., Ex. 307, p. 3 – League of Minnesota Cities.

^[47] Ex. 1, pp. 2-3.

^[48] Chapter 293, Art. 1, § 39.

^[49] Minn. Rule part 1400.2100.

^[50] Exs. 128 and 199.

^[51] Ex. 128.

^[52] Ex. 199, p. 3.

^[53] The only evidence related to this issue was supplied by the commenters, who stated that the U.S.

Postal Service informed county auditors that the only place on the envelope where black ink is required is the address on the front of the envelope. Exs. 1, p. 3; 128; 199, p. 3; and 307, p. 3 – League of Minnesota Cities.

^[54] Ex. 128.

^[55] Exs. 1; 111; 199.

^[56] Chapter 293, Art. 1, § 39.

^[57] Ex. 80.