

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**LEAGUE OF UNITED
LATINAMERICAN CITIZENS OF
IOWA and TAYLOR BLAIR,**

Petitioners,

vs.

**IOWA SECRETARY OF STATE
PAUL PATE,**

Respondent.

Case No. CVCV056608

**RULING ON
PETITIONERS' MOTION TO
STAY AGENCY ACTION**

On July 6, 2018, the court held a contested hearing on Petitioner's Motion to Stay Agency Action.¹ On July 16, 2018, Petitioners filed an Amended Petition for Judicial Review as required by the court's July 6 Order severing Count V of CVCV056403 into this separate action. Attorneys Bruce Spiva, Brian Marshall, and Gary Dickey appeared on behalf of Petitioners. Solicitor General Jeffrey Thompson and Assistant Attorneys General Matthew Gannon and Thomas Ogden appeared on behalf of the Respondent. Having reviewed the court file, the filings of the parties and considering the arguments of counsel, the court enters the following ruling.

I. FACTUAL AND PROCEDURAL BACKGROUND

House File 516 (HF 516) was passed in the Iowa Legislature in 2017, and signed into law by Governor Terry Branstad. HF 516 altered Iowa's election procedures. Section 6 of HF 516 is the subject of this litigation. Section 6 amends Iowa Code section 53.2(4), which lists the information an application for an absentee ballot must contain. In addition to the information previously required, such as name, date of birth, address and name or

¹ This judicial review action was originally filed as part of CVCV056403. The court severed the judicial review action, as it cannot be joined with an action at law and equity. The Motion for Temporary Injunction in CVCV056403 is considered a Motion to Stay as to this action.

date of the election, HF 516 adds a requirement for the “registered voter’s voter verification number.” HF 516 § 6(4); Iowa Code § 53.2(4). “Voter verification number” is defined and includes a driver’s license number, nonoperator’s identification card number, or a voter identification number “assigned to the voter by the state commissioner pursuant to section 47.7, subsection 2.” *Id.* For the approximately 123,000 voters without a driver’s license or nonoperator’s identification card, a four-digit PIN number was sent by mail starting in December 2017. Ex. J. The Code provides that if insufficient information is provided on the absentee ballot application, “the commissioner shall, *by the best means available*, obtain the additional necessary information.” Iowa Code § 53.2(4)(b) (emphasis added). This provision pre-dates HF 516.

On August 30, 2017, the Secretary of State issued a Notice of Intended Action (ARC 3282C), proposing, among other things, a new rule 721—21.306(53):

Incomplete absentee ballot applications. If the commissioner receives an absentee ballot request lacking any of the information required by 2017 Iowa Acts, House File 516, section 6(4)(a), the commissioner shall obtain the necessary information by the best means available pursuant to 2017 Iowa Acts, House File 516, section 6(4)(a). “Best means available,” for the purposes of this rule, means contacting the voter directly by mail, e-mail, or telephone or in person. Commissioners may not use the voter registration system to obtain the information.

The rule further provides at 721—21.306(1):

If the voter does not have current access to the voter identification card, the commissioner shall verify the voter’s identity by asking the voter to provide at least two of the following facts about the voter:

- a. Date of birth;
- b. Last four digits of the voter’s social security number (if the number is stored within I-Voters);
- c. Driver’s license or nonoperator’s identification card number (if the number is stored within I-Voters);

- d. Address;
- e. Middle name;
- f. Voter verification number pursuant to Iowa Code section 53.2(4).

The final regulation was filed by the Secretary of State on November 8, 2017 and adopted by the Administrative Rules Review Committee on December 12, 2017 with no change to the proposed regulations, which are now in effect.

Petitioners challenged this rule in count V of CVCV056403. That count was severed and is now CVCV056608. The Amended Petition for Judicial Review seeks relief pursuant to Iowa Code section 17A.19(10)(b) and (n), as well as a stay of the rule during the pendency of judicial review pursuant to section 17A.19(5)(c). Petitioners argue the rule violates the statutory requirement that “the best means available” is to be used to obtain any deficient information in the absentee ballot application by prohibiting use of the voter registration system to obtain the information.

II. STANDARD OF REVIEW

Section 17A.19 of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). With respect to motions to stay the execution of an agency action, “the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.” Iowa Code § 17A.19(5)(a). However, where the agency refuses to do so, “or application to the agency for a stay or other temporary remedies is an inadequate remedy,” the requesting party may petition the district court for a stay. *Id.* § 17A.19(5)(c).

Petitioners' counsel sent a letter to the Secretary of State on June 27, 2018 requesting a stay of the rule in question. The request was denied by letter on July 5, 2018. At the July 6, 2018 hearing, Respondent's counsel acknowledged Petitioners had exhausted their administrative remedies for a stay.

To determine whether a stay should be entered, 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.

It is the applicant's burden to present evidence establishing the prerequisites for the stay.

Snap-On Tools Corp. v. Schadendorf, 757 N.W.2d 339, 342 (Iowa 2008) (internal citations omitted).

“Iowa Code section 17A.19(5) ‘plainly makes the issuance of [a] stay discretionary.’” *Grinnell College v. Osborn*, 751 N.W.2d 396, 398 (Iowa 2008) (quoting *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W.2d 511, 513 (Iowa 1985)).

“If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may . . . issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies.” Iowa Code § 17A.19(5)(d).

III. ANALYSIS

Petitioners are asking the court to temporarily suspend rule 721—21.306(53) pending resolution of this judicial review action. This ruling on the temporary stay does not decide the ultimate merits of Petitioners' claims. In determining whether to grant a stay, the court must consider the four factors set forth above. The strength or weakness of any single factor is not outcome determinative. Rather, the factors, when considered as a whole, must weigh in favor of granting a stay, even if some factors are far weaker than others. *See Grinnell College*, 751 N.W.2d at 402 (recognizing that the “balance of hardships” must favor granting the stay, even if a single factor is not convincing, and that “more of one factor excuses less of another factor”).

A. Petitioners' Likelihood of Success

First, the Court considers “[t]he extent to which the applicant is likely to prevail when the court finally disposes of the matter.” Iowa Code § 17A.19(5)(c)(1). “This factor does not describe the degree of likelihood of prevailing, *but only requires the court to consider and balance the extent or range of the likelihood of success.*” *Grinnell*, 751 N.W.2d at 402 (emphasis added). “A stay can be granted where the likelihood of success is not high but the balance of hardships favors the applicant.” *Id.* (internal quotation marks omitted); *see also Annett Holdings, Inc. v. Pepple*, 823 N.W.2d 418, *2 (Table) (Iowa Ct. App. 2012) (“The applicant need not show that it will eventually prevail in judicial review, but the court will consider the extent or range of the likelihood of success . . . Proof of one factor can excuse another that is lacking and ultimately, the stay can be granted when the balance of hardships weigh in favor of the applicant.”).

Petitioners challenge rule 721—21.306(53) on the grounds it is “in violation of [a] provision of law.” Iowa Code § 17A.19(10)(b). Petitioners argue the rule prohibiting county officials from using the State voter registration system to obtain missing information from an absentee ballot application, including a voter’s identification number, violates the statutory requirement. The statute provides:

If insufficient information has been provided, including the absence of a voter verification number ... the commissioner shall, *by the best means available*, obtain the additional necessary information.

HF 516 section 6(4)(b); Iowa Code § 53.2(4)(b) (emphasis added). In addition to violating the statutory requirement, the Petitioners argue the rule burdens and abridges the right to vote in contravention of Article II, Section 1 of the Iowa Constitution.

Petitioners also challenge rule 721—21.306(53) on the grounds it is “unreasonable, arbitrary, capricious, or an abuse of discretion.” Iowa Code § 17A.19(10)(n). This argument is based on the Petitioners assertion that the requirement that an election commissioner obtain any insufficient information by mail, email, or telephone or in person rather than obtaining information that is readily available to the commissioner merely burdens the state and the voter without any sufficient countervailing public benefit.

It is clear from the case law cited above that the court should not, at this stage, consider whether Petitioners are *actually* likely to succeed on these claims; rather, with respect to Iowa Code Section 17A.19(5)(c)(1), Iowa courts generally only consider whether Petitioners have a viable claim and whether litigation would actually be worthwhile. Surely, Petitioners need not provide evidence that they will definitely succeed, for that would thwart the very purpose of having a subsequent judicial review

proceeding. If that were the standard, the Court essentially would be ruling on the merits of Petitioners' claim, rather than the merits of their request for a stay.

As noted above, in the face of an absentee ballot application lacking a voter verification number or other required information, the law directs the commissioner [county auditor] to obtain the additional necessary information "by the best means available." Iowa Code § 53.2(4)(b). The rule adopted by the Secretary of State specifying county auditors "may not use the voter registration system to obtain the information" is in direct contravention of the statute. If accessing the State voter registration system is "the best means available" to obtain the missing information because it is readily available and is easier, faster, and surer than attempting to make personal contact with the voter, the statute clearly requires the county auditor to use it.

The State argues the Secretary's interpretation of the statute is entitled to the highly deferential standard of Iowa Code section 17A.19(10)(1), which provides for an agency action to be reversed if it is "[b]ased on an irrational, illogical, or wholly unjustifiable interpretation of a provision of law" To be entitled to deference, authority to interpret the statute must be "clearly vested by a provision of law in the discretion of the agency. *Id.* Whether the agency receives deference is a question of law for the court to determine. Iowa Code § 17A.19(11). "[I]t is possible that an agency has the authority to interpret some portions of or certain specialized language in a statute, but does not have the authority to interpret other statutory provisions." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 13–14 (Iowa 2010).

It is unlikely that the Secretary of State's interpretation will be entitled to deference. First, the statutory language of this provision suggests it does not vest

discretion in the Secretary of State. *See Renda*, 784 N.W.2d at 11–12. Rather, the statute vests discretion in county auditors by instructing them to use the “best means available” to supply any information missing from an absentee ballot application. Second, unlike other provisions of HF 516, the provisions relating to identification numbers for the absentee ballot do not expressly delegate rulemaking authority. *Id.* at 12–13. By contrast, Sections 18, 20, 29, 37, and 40 of HF 516 each specifically vest the Secretary of State with rulemaking authority. Third, the phrase “best means available” is not a “substantive term within the special expertise of the agency.” *Renda*, 784 N.W.2d at 14 (collecting cases). Rather, it is general term “that is not uniquely within the subject matter expertise of the agency.” *Id.* Further, the term was in the statute long before the amendments made by HF 516; in fact, it has been in the Code since 1975. *See Iowa Code* § 53.2 (1975) (Unnumbered paragraph 3, “If insufficient information has been provided, the commissioner shall, by the best means available, obtain the additional necessary information.”); *see also* 1973 Iowa Acts 240-41 and 1974 Iowa Acts 325-26. The term is clearly a term that was understood for the last 40 plus years without need for definition or interpretation, and is not uniquely within the subject matter expertise of the agency.

Even if the court determines, on judicial review, to review the Secretary’s interpretation of the statute under the highly deferential “irrational, illogical, or wholly unjustifiable” standard, it is likely Petitioners will be successful in establishing the rule violates the law. There is only need for “statutory interpretation if the terms or meaning of the statute are ambiguous.” *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 889 (Iowa 2017) (quoting *State v. McIver*, 858 N.W.2d 699, 703 (Iowa 2015)). There does not appear to be any such ambiguity here. Prohibiting one means to “obtain the additional

necessary information” to complete an absentee ballot application appears inconsistent with the statutory command to use the “best means available” to do so. Again, especially in light of the fact county auditors were not prohibited from using the voter registration system to obtain the information for that last 42 years.

The court finds this factor weighs heavily in favor of granting the stay.

B. Irreparable harm

Second, the court must consider “[t]he extent to which the applicant will suffer irreparable injury if relief is not granted.” Iowa Code § 17A.19(5)(c)(2). Iowa courts require “an irreparable injury of substantial dimension.” *Salsbury Labs. v. Iowa Dep’t of Env’tl. Quality*, 276 N.W.2d 830, 837 (Iowa 1979). “A restriction on the fundamental right to vote . . . constitutes irreparable injury.” *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Once the right to vote is denied, “there can be no do-over and no redress.” *League of Women’s Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). The irreparable injury alleged is members of Petitioner League of United Latin American Citizens of Iowa (LULAC) may have their absentee ballot applications delayed or rejected due to the regulation. In addition, the regulation burdens LULAC’s program to encourage absentee voting. Declaration of Joe Henry ¶ 9 (“[V]oters I spoke with declined to fill out an absentee ballot application once they were asked to write down an identification number.”).

Absent the rule, county auditors could use the voter registration system to obtain a lacking identification number (as they have done since 1975), and the voter would be issued an absentee ballot. It is not possible to know the exact the number of voters who would not be issued absentee ballots due to the prohibition on allowing county officials to

get missing information from the voter registration system. However, in this State deprivation of the ability to vote for even one eligible voter due to rule 721—21.306(53) cannot be tolerated and is an infringement on the right to vote guaranteed by the Iowa Constitution. Accordingly, the court finds the threat of irreparable harm weighs in favor of granting the stay.

C. Threat of Harm to Respondents if Granted

Third, the court must consider “[t]he extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.” Iowa Code § 17A.19(5)(c)(3). The court finds the threat of harm to the Respondents is minimal or nonexistent. Rule 721—21.306(53) actually imposes a greater burden on the county auditor than the statute. The rule requires the county auditor to affirmatively contact voters rather than relying on the readily available voter registration system data base if they determine it to be the “best means available” to obtain the missing information. There is no indication fraud occurred in elections held prior to the promulgation of the rule when the voter registration system was used to obtain missing information. The court finds this factor weighs in favor of granting a stay.

D. Public Interest

Last, the court must consider “[t]he 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)(4). Rule 721—306(53) creates a barrier to voting an absentee ballot. By prohibiting the county auditor from obtaining missing information independently from the voter registration system, and instead requiring a personal contact with a voter, the likelihood a voter will not be issued an absentee ballot increases. Requiring contact with

a voter by mail, email or telephone is likely to result in voters not being reached by the auditor and thus not being issued a ballot. How many times does the auditor need to try to contact the voter before deciding not to issue an absentee ballot? Identity theft is a legitimate fear in this day and many people will not respond to or decline to provide personal identifying information when requested by telephone or email. *See, e.g.* Federal Trade Commission, *Consumer Information: How to Keep Your Personal Information Secure* (July 2012), <https://www.consumer.ftc.gov/articles/0272-how-keep-your-personal-information-secure> (“Be Alert to Impersonators. . . . Don’t give out personal information on the phone, through the mail or over the Internet unless you’ve initiated the contact or know who you’re dealing with.”). A statute, by its plain language, intended to give the county auditor authority to obtain information to issue absentee ballots is contravened by a rule that restricts use of the actual “best means available” to obtain the information. The public interest is not furthered by this rule but, in fact, is harmed. The balance of hardships favors entry of a stay to prevent abridgment of the right to vote in the upcoming general election. *See Obama for Am.*, 697 F.3d at 437 (“the public interest . . . favors permitting as many qualified voters to vote as possible.”). The court finds this factor weighs in favor of granting a stay.

E. Conclusion

Having considered and balanced the four factors set forth in Iowa Code section 17A.19(5)(c), the court concludes that each of the factors weigh in favor of granting the requested stay. It is likely the Petitioners will prevail on judicial review. The threat of irreparable injury of voters being disenfranchised by application of rule 721—21.306(53) is real, and in a democratic society cannot be allowed. There is no identifiable harm to the

Respondent by entry of a stay. Finally, the public interest does not justify the Secretary of State's actions in promulgating this rule. In fact, staying the rule is in the public interest to encourage and permit as many qualified voters as possible to vote.

IV. ORDER

IT IS THEREFORE ORDERED that the Motion for Stay Pending Judicial Review of Agency Action is **GRANTED**. Iowa Administrative Code rule 721—21.306(53) is hereby **STAYED** and shall remain enjoined pending resolution of the Petition for Judicial Review.



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV056608
Case Title LEAGUE OF UNITED LATIN AMER VS IOWA SECRETARY OF STATE

So Ordered

A handwritten signature in black ink that reads "Karen A. Romano".

Karen A. Romano, District Court Judge,
Fifth Judicial District of Iowa