

Administrative Rule Review – ARR23-085
Legislative Service Office

AGENCY Secretary of State

DATE SUBMITTED: February 21, 2024

SUBJECT: Chapter 2 - Identification for Voter Registration

NATURE OF RULES: Legislative, Procedural

STATUTORY AUTHORITY: The agency has cited W.S. 22-1-102(a)(xxxix)(A) and 22-2-121 as its authority.

DETERMINATION OF PROCEDURAL COMPLIANCE BASED UPON INFORMATION SUBMITTED BY SECRETARY OF STATE TO LSO: Apparently complete to date.

SUMMARY OF RULES: The Secretary of State has promulgated rules that, beginning on June 1, 2024, will require a person to provide proof of residency when registering to vote in Wyoming. The rules, which are included with rules that require the provision of acceptable identification when voting, specify the following:

- A person who provides a current, valid Wyoming driver's license, Wyoming digital driver's license, or a tribal identification card that contains the person's Wyoming driver's license number or the last four digits of the person's Social Security number at the time of registration will have provided sufficient proof of identity and residency.
- If a person does not have a driver's license or tribal identification card, the person can provide the last four digits of the person's Social Security number and one of several documents (including a passport, a driver's license from another state, a military card, or a school identification card) to establish proof of identity and proof of residency.
- If a person does not have any of those forms of identification, the person can provide their driver's license number or the last four digits of the person's Social Security number plus two additional documents (including a certificate of citizenship or naturalization, a voter registration card from another state, a birth certificate, and others) to establish proof of identity and proof of residency.
- Documents like a utility bill, bank statement, mortgage statement dated within 90 days (instead of the current 45 days) are acceptable for proof of Wyoming residency. Documents like a residential lease and a property tax bill dated within one year of registration are acceptable to establish proof of residency. For this category, a hunting or fishing license, Wyoming vehicle registration, and a social-service agency letter verifying the person is homeless (and if dated within one year of registration) are added as acceptable for proof of residency.
- No person will be allowed to register if the person's presented identification contains any indication that the person is not a citizen of the United States.
- A person cannot provide a military draft record or selective service card to establish evidence of the person's citizenship.

FINDINGS: While portions of the rules appear to be within the scope of statutory authority and legislative intent, other portions of the rules appear to be outside the scope of statutory authority and legislative intent.

Insofar as the rule inserts additional documents or clarifies the description of documents as sufficient to establish proof of identity for voter registration, the rule appears to be within the scope of statutory authority and legislative intent. W.S. 22-1-102(a)(xxxix)(A) specifies that acceptable identification means, among other things, "other proof of identity as specified by rule of the secretary of state as adequate proof of the identity of a voter for purposes of voter registration" (emphases added).

For the portion of rules that purport to establish a requirement for a person to provide proof of residency when registering to vote, the rules do not appear to be within the scope of statutory authority and legislative intent.

There do not appear to be any statutory provisions that expressly and unambiguously authorize the promulgation of rules for proof of residency by the Secretary of State, either when registering to vote or before actually voting. W.S. 22-1-102(a)(xxx) defines "residence" and provides several rules to govern the construction of that term. The definition, however, does not authorize the promulgation of rules concerning residency.

Rather, Wyoming statutes charge the county clerks with the duty of verifying voter registration information and provide for a complete process by which residency qualifications may be established, verified, challenged, and appealed. Under the Election Code, county clerks must investigate the qualifications of any voter registration if a clerk believes that the voter may be unqualified. The Election Code grants discretion for the county clerks to consider "any other residency qualifications either provided by law or deemed reasonable by the clerk to render a judicious determination." W.S. 22-3-105(b)(vi). If a county clerk cannot verify the registration information, either at the polls or after the registration is entered into the voter registration system, a county clerk strikes or denies the voter's registration under W.S. 22-3-105. This action requires notice to a person who is denied registration and provides for the right to appeal to a circuit court or a district court and the timeline for that appeal.

The Secretary of State cites W.S. 22-1-102(a)(xxxix)(A) as support for promulgating these rules. As noted above, that provision of statute concerns "acceptable identification," which is defined as, for purposes of voter registration, "one (1) of the identification documents or other proof of identity as specified by rule of the secretary of state as adequate proof of the identity of a voter" (emphases added). That provision does not describe identification as encompassing residency requirements or a requirement that a voter must prove residency through acceptable identification as that term is defined in the Election Code.

The Secretary of State also cites W.S. 22-2-121 as support for the promulgation of these rules. This section grants the Secretary of State authority to prepare directives, forms, and advice concerning the election laws as well as rulemaking authority in several areas. Most of the rulemaking authority appears to be authorization to promulgate rules to implement and comply with federal law. See W.S. 22-2-121(d) (rules to comply with the Help America Vote Act of 2002); W.S. 22-2-121(e) (rules to comply with the Military and Overseas Voter Empowerment Act of 2009).

W.S. 22-2-121(b) specifically provides that the "secretary of state shall promulgate such rules as are necessary to maintain uniform voting and vote counting procedures and orderly voting" (emphases added). This rulemaking authority does not appear to apply to registration, which is the subject of the rules promulgated here. The plain meaning of "voting" appears to support this interpretation. "Voting," Black's Law Dictionary at 1571 (7th ed. 1999) (defining "voting" as "the casting of votes for the purpose of deciding an issue") (emphasis added); "Voting," American Heritage Dictionary at 1930 (4th ed. 2000) (defining "voting" to mean "to express one's preference for a candidate or for a proposed resolution of an issue").

This portion of the rules also do not appear to be within the intent of the Legislature. While W.S. 22-2-121(b) appears to be a broad grant of authority to promulgate rules for "uniform voting" and "orderly

voting," other provisions of the Election Code suggest that this rulemaking authority does not apply to registration, and there is not express authority for rulemaking for proof of residency.

By requiring proof of residency upon registration, the rules appear to be contrary to, or potentially render moot, the challenge provisions under W.S. 22-15-101 through 22-15-109. That chapter of the Election Code provides that the right to vote "may be challenged at the polls in the manner prescribed by law." W.S. 22-15-101. One of the grounds for challenge is that the person offering to vote is "[n]ot a qualified elector." W.S. 22-15-104(a)(i). Another ground for challenge is that, for in-person voting, the person failed "to present acceptable identification" immediately before voting. W.S. 22-15-104(a)(vi). These provisions also appear to suggest that the question of proof of residency is one that arises when a person is challenged for not being a qualified elector (which may include, for example, that the person is not a bona fide Wyoming resident) at the time of voting, rather than at the time of registration as these rules contemplate. The person must be offered a provisional ballot and allowed to subscribe to an oath required by W.S. 22-15-105(b). The provisional ballot is then counted only after the voter establishes that the voter was previously registered or is eligible to be registered and is a qualified elector. W.S. 22-15-105(d). These provisions suggest that the question of proof of residency arises when a person is challenged for not being a qualified elector (which may include, for example, that the person is not a bona fide Wyoming resident or a United States citizen) at the time of voting, rather than at the time of registration as these rules contemplate.

Similarly, a person who is unable to provide the required proof of identity must be offered a provisional ballot, subject to the person providing "documentation to the county clerk establishing their eligibility to vote." W.S. 22-3-118(a)(ii) and (d).

While it may be argued to be more convenient to require proof of residency at the time of registration and to establish an exhaustive list of documents that prove residency, this appears to be contrary to statute. The Election Code allows individuals equipped with acceptable proof of identification to register to vote by filling out a voter registration oath form and places the duty of verifying the voter's information on the county clerks. It grants discretion to the county clerks to render judicious determinations of voters' qualifications. To the extent the rules shift the burden to the individual to prove the individual's voter qualifications when registering, and limit the methods used by the county clerks to verify voter qualifications, the rules appear to be contrary to statute. Further, it is unclear whether a person lacking the proof of residency specified by the rule would be provided the same notice and opportunity to appeal as is required when a county clerk revokes a voter's registration in accordance with W.S. 22-3-105.

Further, the rules may not be within the scope of legislative intent given the following provisions of the Election Code:

- The Election Code provides that, when registering to vote, the person must furnish, among other things, the person's "current residence address" and "acceptable identification as defined by W.S. 22-1-102(a)(xxxix)." W.S. 22-3-103(a). When the Legislature enacted a law to require the furnishing of acceptable identification, it did not amend the requirement for a person to, when registering to vote, provide something other than the person's "current residence address." 2021 Wyo. Session Laws Ch. 114. The fact that the Legislature amended Wyoming law to require proof of identity but did not effect changes to require proof of residency suggests an intent that proof of residency separate from proof of identity is not required. *Cf. Herrick v. Jackson Hole Airport*, 2019 WY 118, ¶ 29, 452 P.3d 1276, 1284 (Wyo. 2019) ("This Court is not at liberty to add words to a statute that the legislature chose to omit.").
- The remaining provisions of W.S. 22-2-121 that authorize the Secretary of State to promulgate rules to implement federal voter-registration laws may be superfluous if W.S. 22-2-121(b) is construed to be a broad grant of rulemaking authority for matters concerning both registration and voting.

- W.S. 22-1-102(a)(xxvii) defines "registration" as the "entry and verification" of the name and voter registration, as provided in W.S. 22-3-104(f) and 22-3-108. W.S. 22-3-104(f) speaks to "verification of the information," which appears to be a reference to W.S. 22-3-104(d), which requires a person to provide "the information required by W.S. 22-3-103(a)" and sign the required registration oath. W.S. 22-3-103(a) requires the person to provide the person's "current residence address" and, among other things, "acceptable identification." Similarly, W.S. 22-3-108(a) requires the official registry list to include, among other things, "residence by street number and name, if any." There is no express reference to proof of residency in either statute.

LSO also notes that these rules do not appear to be promulgated in response to any legislative change. After the Legislature enacted changes to the Election Code concerning the provision of acceptable identification for purposes of voter registration, see 2021 Wyo. Session Laws, Ch. 114, the Secretary of State promulgated rules to address those changes, see ARR22-024. Those rules were approved by Management Council and the Governor.

Ultimately, there does not appear to be a provision in the Election Code, whether read separately or in conjunction with other provisions of the Code, that authorizes the Secretary of State to establish rules to require proof of residency when registering to vote.

Similarly, the portion of the rule (Section 7) concerning a prohibition on noncitizens voting if they provide identification showing that they are not United States citizens does not appear to be within the scope of statutory authority and legislative intent for the reasons described above. While the change to the rule may tangentially be related to the rules concerning identification, Wyoming law does not appear to authorize the Secretary of State to establish rules to require proof of citizenship when registering to vote.

As a technical note, LSO notes that the structure of the rule may result in confusion over references to the acceptable forms of identification that are listed in the rule. For example, in Section 5(b), the second-to-last sentence of Section 5(b)(intro) specifies that an applicant who does not have a valid driver's license or Social Security number must "provide any one of the following forms of identification." The newly inserted last sentence then refers to the items listed in paragraphs (i) through (vi) as proof of Wyoming residency. With the amended language, the paragraphs no longer refer to or are connected to the reference to "any one of the following forms of identification."

Finally, compliance with federal law has not been determined, as it is assumed that the Attorney General has provided that review.

STAFF RECOMMENDATION: That the Council recommend that the Governor direct the Secretary of State to rescind the rules or amend the rules to address the concerns raised in this rule-review report.

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