

IOWA HOUSE OF REPRESENTATIVES
ELECTION CONTEST COMMITTEE

KAYLA KOETHER,)	
)	
Challenger,)	BRIEF OF INCUMBENT
)	
v.)	
)	
MICHAEL BERGAN,)	
)	
Incumbent.)	
)	

FACTUAL BACKGROUND

On November 6, 2018, the State of Iowa held its General Election. Iowa voters across the state went to the polls to vote for statewide officers, members of Congress, and members of the Iowa legislature, including all 100 seats in the Iowa House of Representatives. Iowa House District 55 covers parts of Fayette, Winneshiek, and Clayton counties. After the returns were reported on election night, the incumbent, Michael Bergan, was the apparent winner. Each county then conducted their official canvass of the votes during the week after the General Election. At the end of the county canvass, Mr. Bergan had won by a margin of seven votes. The challenger, Kayla Koether, requested a recount of the votes in Winneshiek and Clayton counties. After the recount, Mr. Bergan had won by a nine-vote margin.

At issue in this election contest are 33 absentee ballots received by the Winneshiek County Auditor after the election date of November 6, 2018, but prior to the canvass of the votes. These absentee ballots were not counted by the Winneshiek County Absentee and Special Voters Precinct Board, as they did not meet the statutory requirements to be counted. Specifically, under Iowa Code § 50.24, the canvassing board must “contact the chairperson of the special precinct board before adjourning and include in the canvass any . . . absentee ballots which were received

after the polls closed in accordance with section 53.17 and which were canvassed by the special precinct board after election day.” Iowa Code § 53.17(2) provides the circumstances under which absentee votes arriving after election day can be counted:

In order for the ballot to be counted, the return envelope must be received in the Commissioner’s office before the polls close on election day or be clearly postmarked by an officially authorized postal service or bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before election and received by the commissioner not later than noon on the Monday following the election.

It is undisputed the 33 absentee ballots at issue did not bear any officially authorized postmark signifying a date of entry into the mail system. (Ex. 14.) Nor did the ballots contain an “intelligent mail barcode” permitting the Winneshiek County Auditor to trace the mailpiece, as Winneshiek County does not use intelligent mail barcode tracing in its elections. (Ex. 7, pp. 8-9.). Because the envelopes did not meet the statutory requirements for counting absentee ballots received after election day, they were properly not counted in the canvass.

On November 29, 2018, Ms. Koether filed an action in the Iowa District Court for Polk County, requesting, among other relief, that the court order opening and counting of the 33 absentee ballots. On December 20, 2018, the Court denied Ms. Koether’s request, concluding the sole remedy lay with the legislature under Iowa Code chapters 57 and 59. Pursuant to Iowa Code section 59.1, Ms. Koether served her Statement of Intention to Contest Election on December 21, 2018. In her Statement, she requests this body (1) open and count all validly cast ballots under Iowa law; (2) recanvass the House District 55 election including all validly cast ballots; and (3) recertify the House District 55 election.

The threshold issue before the election contest committee is whether the ballots should be counted. This necessarily involves deciding a threshold legal issue of statutory interpretation: whether the internal processing barcode applied by the post office and used internally for sorting

and routing mail constitutes an “intelligent mail barcode” under Iowa Code § 53.17. If this body answer that question in the negative, there is no need for further proceedings on her second and third requests, given the unopened absentee ballots at issue cannot be counted as a matter of law.

Ms. Koether contends a postal processing barcode spray-painted on the return envelope by the post office is equivalent to the intelligent mail barcode referenced in Iowa Code § 53.17. (Ex. 5.) Unlike intelligent mail barcode tracing, which provides a report to the mailer of date and time of entry into the mail system (*see* Ex. 16), information associated with the postal processing barcode is not accessible to the mailer or otherwise publicly available. Rather, the postal processing barcode is for the post office’s internal use in sorting and routing mailpieces to their correct destination.¹ Because considering the postal processing barcode an “intelligent mail barcode” under § 53.17 is contrary to legislative intent, including the language, legislative history, and administrative interpretations of the statute, Ms. Koether’s election challenge fails, and the ballots cannot be counted.

LEGAL ARGUMENT

At this stage of the election challenge, the sole, central question before the committee is the legislature intended by the phrase “intelligent mail barcode” under Iowa Code § 53.17. “The polestar of statutory interpretation is legislative intent.” *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 889 (Iowa 2017) (quoting *State v. Conner*, 292 N.W.2d 682, 684 (Iowa 1980)). In determining legislative intent, this body should seek an interpretation “that will advance, rather than defeat, the statute’s purpose.” *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 588 (Iowa 2011) (quoting *Klinge v. Bentien*, 725 N.W.2d 13, 18 (Iowa 2006)). Legislative intent is “derived not only from the language used but also from the statute’s subject matter, the object sought to be

¹ *See* USPS, *How a Letter Travels*, https://about.usps.com/publications/pub100/pub100_078.htm (last visited Jan. 15, 2019).

accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations.” *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016) (quoting *State v. Dolhman*, 725 N.W.2d 428, 431 (Iowa 2006)). Because applying these tools of construction to the phrase “intelligent mail barcode” under Iowa Code § 53.17 makes clear the legislature intended “intelligent mail barcode” to refer to the postal service’s intelligent mail barcode tracing system applied by county auditors, not an internal postal processing barcode, the absentee ballots were properly rejected.

I. The Plain Meaning of the Words in Context Supports that “Intelligent Mail Barcode” Refers to Intelligent Mail Barcode Tracing (“IMb Tracing”).

“The first step in ascertaining the true intent of the legislature is to look at the statute’s language.” *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 729 (Iowa 2008). The legislature provides an absentee ballot received after General Election but before the county canvass may be counted if it is “clearly post-marked . . . or bear[s] an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the election.” Iowa Code § 53.17(2). Neither the Iowa Code nor the administrative rules define intelligent mail barcode. Rather, intelligent mail barcode is a trademarked term of the United States Postal Service. (Ex. 3.) The Mailing Standards of the United States Postal Service Domestic Mail Manual defines an intelligent mail barcode as:

An Intelligent Mail barcode is the USPS-developed barcode that mailers use to encode routing and tracking information on mail that can be read by automated mail processing equipment to sort mail and to provide tracking information to the mailers. An Intelligent Mail barcode consist of 65 vertical bars, each representing one of four possible states: full bar, ascender, tracker, and descender. These 65 bars encode a string of 31 digits, divided into two parts: a 20-digit tracking code and an 11-digit routing code (when required). The 11-digit routing code may contain a ZIP Code, a ZIP+4 code, or a delivery point code, unless required to contain a certain level of code in specific applications; no correction digit is needed within an Intelligent Mail barcode. . . .

(Ex. 15, § 1.3.1.)

In other words, an intelligent mail barcode is a barcode placed on a mailpiece *by the mailer* that allows the mailer to take advantage of services such as IMb Tracing and pricing discounts. (Ex. 4, § 1-2.) “A mailer’s proper application of these barcodes allows the Postal Service to generate IMb Tracing scan data and distribute this data to the mailer.” *Id.* Mailers using approved² intelligent mail barcodes for Imb Tracing can directly obtain information, without further post office involvement, indicating when and where incoming replies were mailed. *See* (Ex. 4, § 5-1.) (providing guide for retrieving data and sample data); (Ex. 16.). The intelligent mail barcode ordinarily is printed by the mailer either above or below the destination’s address. (Ex. 16, at § 2-5.1.1.)

By contrast, the post office uses multiple other barcodes for the identification of mail in its internal processes, including fluorescent identification barcoding and postal processing barcodes. (Ex. 2.) Though the barcodes may look similar and contain some of the same information, they are “constructed differently” from mailer-applied intelligent mail barcodes, utilizing different formatting for barcode requirements. (Ex. 20, § 11.3.2, p. 54.) Only the post office can produce these barcode formats, and they are expressly “intended for production and utilization solely by the Postal Service.” (Ex. 20, § 1.2, p.1.) Thus, when the postal service spray-paints the postal processing code onto a mailing, no tracing data is transmitted to or accessible by the mailer. *See id.* Rather, the sole method for mailers to obtain tracing data showing when

² The United States Postal Service outlines a specific process to be followed by mailers who wish to take advantage of intelligent mail barcodes. (Ex. 3.) Mailers must apply for a unique “Mailer Identifier” with the postal service. *Id.* Then, mailers must design their barcode using the approved postal service format. *Id.* It is only after completing this process that mailers may subscribe to IMb Tracing, which allows mailers to receive mail processing data. (Ex. 4, § 2.1) (requiring submission of 20 sample mailpieces barcoded with proper intelligent mail barcodes with subscription application).

mailpieces entered the postal stream requires use of the *mailer*-applied intelligent mail barcode and IMb tracing system. *See id.*

“Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning.” Iowa Code § 4.1(38). Technical terms include both legal terms of art, as well as terms of art in a profession. *See Helmers v. City of Des Moines*, 2018 WL 1634136, at *8 (Iowa Ct. App. Apr. 4, 2018) (Danilson, C.J., concurring specially) (noting, for technical terms, “the better approach is to defer to experts or specialized dictionaries); *see also Peterson v. Modern Bhd. of Am.*, 101 N.W. 289, 290 (Iowa 1904) (“Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate.”). There can be no doubt the phrase “intelligent mail barcode” is a technical term, as the words “intelligent,” “mail,” and “barcode” only possess a sensible meaning when used together in the context of the USPS’s technical use of that phrase. An “intelligent mail barcode” providing a mailer information about the date a piece of mail is introduced into the mail system, as evidenced by the post office’s own manuals and official documents, is the *mailer*-applied code used in connection with IMb Tracing.³

Moreover, statutory language must be interpreted “according to the context” in which it is used. Iowa Code § 4.1(38). The statute must be assessed in its entirety, not just in isolated words

³ This is true notwithstanding the postal service’s capitalization of the phrase. In the Iowa Code, proper nouns are only to be capitalized in the case of proper names of persons, states and political subdivisions, countries, nationalities, bodies of water, holidays, months, and publications. (Ex. 12.) The Iowa Bill Drafting Guide provides the following by way of example: “Cedar county,” “city of Waterloo,” “Nishnabotna river,” “Grove street,” “state of Illinois,” [and] “Iowa state university of science and technology.” Given drafters general aversion to capital letters, it is unsurprising the postal service’s trademarked phrase “intelligent mail barcode” was not capitalized. Moreover, capitalization is not considered substantive in a statute, as the Iowa Code editor is not permitted to “alter the sense, meaning or effect of any Act of the general assembly,” but nonetheless possesses authority to “change capitalization” within the Code. Iowa Code § 2B.13.

or phrases. *Sanon v. City of Pella*, 865 N.W.2d 506, 511 (Iowa 2015). As the Iowa Supreme Court has indicated,

To properly discern [legislative] intent, it is necessary to examine the whole act of which the statutory provision in question is a part. Particularly relevant are substantively related provisions adopted in the same legislative session. From this examination of related provisions, an overall legislative scheme may become evident.

Abbas, 893 N.W.2d at 889; *see also* Iowa Code § 4.6(4); *Olympus Aluminum Prods., Inc. v. Kehm Enter., Ltd.*, 930 F. Supp. 1295, 1313 (N.D. Iowa 1996) (noting the rule statutes must be construed together “appl[ies] with particular force when the statutes in question were passed at the same session of the legislature”).

Examining the statutory language in context, it is clear the legislature intended the phrase “intelligent mail barcode” under Iowa Code § 53.17 to mean mailer-applied barcodes used for Intelligent Mail Tracing, rather than the postal processing code. Section 53.17 was amended to allow tracing via intelligent mail barcode as an alternative to postmarking via passage of House File No. 2273 on May 27, 2016. 2016 Iowa Acts (86 G.A.) ch. 1121 §§ 11, 12, 13, 14. The act amended several sections of Iowa Code § 53.17, adding language as follows (with additional language in bold):

- At subsection (1)(b), stating if the absentee ballot is mailed by a voter’s designee, “the envelope must be mailed within seventy-two hours of retrieving it from the voter or within the time to be postmarked **or, if applicable, to have the intelligent mail barcode traced to a date of entry into the federal mail system** not later than the day before the election, whichever is earlier.”
- At subsection (2), stating in order for the ballot to be counted, it must be received before election day “or be clearly postmarked by an officially authorized postal service **or bear an intelligent mail barcode traceable to a date of entry into the federal mail system** not later than the day before the election, whichever is earlier.
- At subsection (4)(f), stating the requirement for a designee to fill out a receipt with a statement the ballot will be delivered to the commissioner’s office within seventy-two hours or before the closing of the polls on election day, or that the

completed ballot will be mailed to the commissioner within seventy-two hours of retrieving it “or within time to be postmarked, **or, if applicable, to have the intelligent mail barcode traced to a date of entry into the federal mail system.**”

2016 Iowa Acts (86 G.A.) ch. 1121 §§ 11, 12, 13. These sections must be read together. As noted, the words “if applicable” appear in two of the three amended sections. *See id.* §§ 11, 13. The use of language indicating the intelligent mail barcode may be used only “if applicable” suggests some condition precedent must be satisfied—here, the auditor signing up for IMb Tracing—prior to utilizing the service. *See* Iowa Code § 53.17(1)(b); *id.* § (f). If processing barcodes used internally by the postal service had been intended, as the challenger suggests, it would render such language superfluous, as such barcodes would be present in every instance. *See In Interest of G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996) (“The statute should not be construed so as to make any part of it superfluous unless no other construction is reasonably possible.”).

Moreover, as enacted, House File 2273 contains two sections, sections 15 and 16, not codified but passed by the legislature and signed by the governor into law. 2016 Iowa Acts (86 G.A.) ch. 1121, §§ 15 & 16.⁴ Section 15 provides the state commissioner shall “prepare a report related to the use of intelligent mail barcodes by county commissioners during the 2016 general election.” Acts 2016 (86 G.A.) ch. 1121, § 15.⁵ The report is to contain the “number of county

⁴ Sections of statutes passed into law but not found in the code are still routinely relied upon when searching for legislative intent. *See* Karen K. Wallace, *Does the Past Predict the Future?: An Empirical Analysis of Recent Iowa Supreme Court Use of Legislative History as a Window into Statutory Construction in Iowa*, 63 Drake L. Rev. 239, 268 (2015); *see also* Schaefer v. Putnam, 841 N.W.2d 68, 79 (Iowa 2013) (relying on section not codified); *Drake Univ. v. Davis*, 769 N.W.2d 176, 185 (Iowa 2009) (same).

⁵ Section 15 provides,

Sec. 15. Report. The state commissioner of elections shall prepare a report related to the use of intelligent mail barcodes by county commissioners of elections during the 2016 general election. The report shall include information on the number of county commissioners of elections utilizing intelligent mail barcodes

commissioner of section utilizing intelligent mail barcodes on absentee ballot return envelopes.” *Id.* Section 15’s requirement the report specify “the number” of commissioners using intelligent mail barcodes clarifies their use was intended to be optional and elected (consistent with IMb Tracing), not a measure automatically applied by the post office. *See id.* Otherwise, there would be no need for a report containing “the number” of commissioners who had elected such an option, as postal processing barcodes would always be present. *See id.* Indeed, the state commissioner’s report itself bolsters such an interpretation, as the Secretary of State certified only six states had reported use of intelligent mail barcoding during the 2016 election— Winneshiek county not among them. (Ex. 7, pp. 8-9). Following receipt of the report listing only, the legislature did not amend the code or otherwise indicate “intelligent mail barcode” had been interpreted incorrectly. *See Iowa Ins. Inst. v. Core Grp. of Iowa Ass’n for Justice*, 867 N.W.2d 58, 76 (Iowa 2015).

Finally, other subsections of § 53.17 contradict the interpretation advanced by the challenger. As a practical matter, substantial post service involvement, including the challenger’s interpretation would require some unspecified communications with the postal service after every election day, transmission of absentee envelope data to the postal service, agreement and action on the part of the postal service to devote personnel to read the postal processing barcodes, and then AN attempt to determine, for each mailpiece, when it entered the mail system. (Ex. 13). Nowhere in Iowa § 53.57 is such involvement with the postal service

on absentee ballot return envelopes and statistics from such county commissioners detailing the number of absentee ballots counted in such counties as a result of the use of intelligent mail barcodes, along with any additional information deemed appropriate by the state commissioner. The county commissioners shall provide the state commissioner with information and statistics requested by the state chairpersons and ranking members of the general assembly’s standing committees on state government and to the legislative services agency by January 17, 2017.

2016 Acts, § 15.

contemplated. When should such a trip to the post office be made? Who at the post office should be contacted? What obligation does the postal service have to devote resources to such a request? Who should contact the post office (the county commissioner, the state commissioner, a member of the Special Voters Precinct Board, or some group of them)? How, during this process of providing the ballot envelopes to the postal service, is a reliable chain of custody and preservation of the ballots ensured? None of these questions exists if, as intended, “intelligent mail barcode” is given its proper and understood definition of referring to IMb Tracing.

Notably, when the legislature intended for the commissioner to involve the federal postal service in the state election process, it has expressly said so. *See id.* § (3) (specifying “the commissioner shall contact the post office serving the commissioner’s office at the latest practicable hour before the canvass by the board of supervisors for that election, and shall arrange for absentee ballots received in that post office but not yet delivered . . . to be brought to the commissioner’s office”). The presence of such language in other statutory election provisions, but not with respect to intelligent mail barcodes, is telling. *See Iowa Individual Health Benefits Reins. Ass’n v. State Univ. of Iowa*, 876 N.W.2d 800 (Iowa 2016) (applying similar reasoning, stating if legislature intended to act, “it presumably would have used those terms to describe it, as it has done in numerous other statutes”); *Star Equip., Ltd. v. State, Iowa Dep’t of Transp.*, 843 N.W.2d 446, 455 (Iowa 2014) (indicating when legislature provided language in other sections, it clearly “knows how” to so instruct). The absence of such language relating to interpreting intelligent mail barcodes signifies the legislature did not contemplate a process whereby postal service officials would need to be contacted. The legislature intended to refer to the intelligent mail barcodes as used by the IMb Tracing system, which can provide data

to directly to the mailer (here, the county auditor) sufficient to allow the mailer to determine the date and time of reply mailings.

II. Legislative History of Iowa Code § 53.17 Expressly Refers to IMb Tracing.

The legislative history of § 53.17(2) further illuminates that “intelligent mail bar code” was intended to mean IMb Tracing, not internal post office barcoding. “Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps . . . understand the context and purpose of a statute.” *State v. Ahitow*, 544 N.W.2d 270, 272 (Iowa 1996) (quoting Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 Cal. L. Rev. 845, 848 (1992)).

Originally, as passed by the House and introduced to the Senate, House File 2273 contained no mention of intelligent mail barcodes. H.F. 2273, 86th G.A., explanation (Feb. 15, 2016). It was not until amendment S-5128, proposed by Senator Jeff Danielson, that language related to intelligent mail barcodes first appeared. *See* Amendment S-5128, H.F. 2273, 86th G.A., (Apr. 14, 2018). Speaking in favor of the amendment, Senator Danielson expressly referenced IMb Tracing, stating auditors would need to “purchase th[e] service,” and such program was meant to be “an option” elected by auditors, not automatic:

Senator Danielson: 5128 solves a persistent problem we’ve had for a number of years. Iowa’s current law as it relates to absentee ballots relies on the post office procedure called postmarking. Our law says a ballot is not valid if it has not been received on Monday night of an election week, with a valid postmark. The problem is the postal service cannot guarantee every ballot will be postmarked because of their internal technology procedures

This year we have a technology called bar code, I’m gunna use generally bar code technology but it is the IMB tracing system, it is a service offered by the post office. This amendment says that the postmark procedures is still there and available, but if an individual auditor would like to purchase this service from the postal office barcodes will be provided and put on the return envelope for every absentee ballot and then the postal service can guarantee near certainty for the date and time it passed through their system, if that is before midnight on Monday that ballot can be counted and we’ve solved the cases [where] the postmark is not

there and it was in time so we will count more votes and enfranchise more Iowa votes because their efforts will show up.

You should know this was a bipartisan agreement we've worked with the House, the Secretary of State's Office, we think it's an elegant solution but we also do not think it is time to mandate it at this time. So the language says it is an option for auditors in this calendar year, primary and general election that are coming up, and then the Secretary of State will give us a report in January that says here are the counties that used it and here is the data to track those ballots and hopefully will show that we have actually counted more votes because of it.

(Ex. 19). There was no further discussion, and amendment S-5128 was adopted unanimously as written immediately following Senator Danielson's comments. S.J. 694. 86th G.A. (2016).

Though remarks of a single legislator are not controlling, "when they are consistent with the statutory language and other legislative history, they provide evidence of [the legislature's] intent." *Brock v. Pierce Cty.*, 476 U.S. 253, 263 (1986); *see also D.C. v. Heller*, 554 U.S. 570, 605 (2008) ("Legislative history . . . is considered persuasive by some, not because [it] reflect[s] the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding." (internal quotation marks omitted)). This is particularly true when, as here, the sponsor and drafter of the disputed amendment made the statements. *See N.E. Bancorp, Inc. v. Bd. of Governors of Fed. Res. Sys.*, 472 U.S. 159 169-70 (1985). Senator Danielson's comments on the Senate floor are consistent with the statutory language in context, indicating "intelligent mail barcode" was intended to refer to mailer-applied barcodes used with IMb tracing.

III. The State Commissioner of Elections, the Administrative Agency Tasked with Administering the Code, Interprets "Intelligent Mail Barcode" in the Context of IMb Tracing.

"Rules promulgated by an agency represent the agency's interpretation of the Iowa Code provisions the legislature gave it to administer." *Off. of Consumer Advoc. v. Iowa Utilities Bd.*, 744 N.W.2d 640, 643 (Iowa 2008). Administrative interpretations are a proper source of

legislative guidance. Iowa Code § 4.6(6); *see also Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58, 77 (Iowa 2015) (noting that when interpreting “a bread-and-butter statutes regularly administered by the agency,” administrative interpretation entitled to “some weight); *Becker v. Iowa Dep't of Human Servs.*, 661 N.W.2d 125, 128–29 (Iowa 2003) (“We give weight to administrative interpretation of statutes that agencies administer.”).

When an agency is clearly vested with discretion to interpret a statute, the agency’s interpretation is entitled substantial deference by those tasked with its interpretation. *See* Iowa Code § 17A.19(11) (noting courts must “give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency”); *id.* § 17A.19(10)(l) (noting agency interpretation may be disregarded only when “irrational, illogical, or wholly unjustifiable” if interpretation has been vested in discretion of agency). “Indications that the legislature has delegated interpretive authority include ‘rule-making authority, decision-making or enforcement authority that requires an agency to interpret the statutory language, and the agency’s expertise on the subject or term to be interpreted.” *UnityPoint Health Cedar Rapids d/b/a St. Luke’s Hosp. v. Iowa Dep’t of Pub. Health*, 17-1317, 2019 WL 141006, at *4 (Iowa Ct. App. Jan. 9, 2019) (quoting *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518-19 (Iowa 2012)).

Section 16 of House File 2273 expressly grants the state commissioner of elections the power to adopt emergency rules to implement the use of intelligent mail barcodes, stating the commissioner has the power to adopt emergency rules “to implement the provisions of the division of this Act.”⁶ 2016 Iowa Acts (86 G.A.) ch. 1121 § 16. The Iowa Supreme Court has

⁶ Section 16 provides,

Sec. 16. Emergency rules. The state commissioner of elections may adopt emergency rules under section 17A.4, subsection 3, and section 17A.5, subsection

found similar language include a grant of interpretive authority. *See Iowa Right to Life Comm. v. Tooker*, 808 N.W.2d 417, 429–30 (Iowa 2011) (finding authority to adopt rules “for the implementation of this section” resulted in deference); *Birchansky Real Est., L.C. v. Iowa Dep’t of Pub. Health, State Health Facilities Council*, 737 N.W.2d 134, 138 (Iowa 2007) (noting power to adopt rules “necessary . . . to implement this division” included interpretive authority); *ABC Disposal Sys., Inc. v. Dep’t of Nat. Resources*, 681 N.W.2d 596, 602 (Iowa 2004) (same).

Moreover, each of the provisions the commissioner is tasked “to implement” necessitates interpreting the phrase “intelligent mail barcode.” 2016 Iowa Acts ch. 1121 § 16; *see Renda v. Iowa Civ. Rights Comm’n*, 784 N.W.2d 8, 12 (Iowa 2010) (stating when an agency must “necessarily interpret [a] term in order to carry out its duties,” it is more likely power to interpret the term was clearly vested in the agency); *see also Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 769 (Iowa 2016) (“We are more likely to conclude the legislature clearly vested interpretive power in an agency when the agency necessarily must interpret the statutory language at issue in carrying out its duties and no relevant statutory definition applies.”). For example, it would be nearly impossible for the commissioner to “prepare a report related to the use of intelligent mail barcodes” under Section 15 of House File 2273 without knowing what the phrase means. 2016 Iowa Acts ch. 1121 § 15.

Finally, the statutory provision being interpreted, relating to the proper procedures for counting absentee ballots, is a “substantive term within the special expertise of the agency.” *Renda*, 784 N.W.2d at 14. Indeed, no other place in the Iowa Code uses the phrase “intelligent mail barcode;” its use is unique to absentee voting. *See id.* “The secretary of state is designated

2, paragraph “b,” to implement the provisions of this division of this Act and the rules shall be effective immediately upon filing unless a later date is specified in the rules. Any rules adopted in accordance with this section shall also be published as a notice of intended action as provided in section 17A.4.

as the state commissioner of elections,” and “shall prescribe uniform election practices and procedures.” Iowa Code § 47.1. Moreover, with respect to absentee ballots referenced in § 53.18, the Commissioner has authority to determine whether a ballot received before election “contains a defect that would cause the absentee ballot to be rejected.” *See Id.* §§ (3) & (4) (giving the Commissioner powers to adopt rules pertaining to the rejection of ballots and notification of the need for replacement ballots). It would be incongruous to suggest the Commissioner has the power to reject absentee ballots based on defects, and yet does not have the power to interpret what constitutes such a defect under the Code. *See id.*

Pursuant to its rulemaking authority, the Secretary of State promulgated administrative rule 721-21.14(53), titled “Intelligent Mail barcode (IMb) Tracing.” Under the rule, “[a] commissioner may choose to use Intelligent Mail barcode (IMb) Tracing (IMb Tracing) to determine when an absentee ballot has entered into the federal mail system as an alternative to a traditional postmark verification.” *Id.* This rule not only expressly references the postal services’ trademarked IMb Tracing program, but provides specific rules regarding how election officials are to use the data acquired from the postal service program when counting ballots. *Id.* For example, if the commissioner elects to use IMb Tracing by registering with the postal service and application of an intelligent mail barcode, certain action must be taken with respect to the IMb Tracing data report, including:

e. The information provided by the commissioner to the board must contain the numeric value assigned to the IMb barcode and a full report from the United States Postal Service.

f. A board member from each political party for partisan elections or two members from the board for nonpartisan elections shall review the IMb Tracing information provided by the commissioner and shall certify the information by initialing the envelope and report.

Id. Based on this rule, can be no question that “intelligent mail barcode,” as interpreted by the agency, contemplates use of the IMb Tracing, not the internally applied processing code, which provides no “report” or information automatically accessible to the commissioner. *See id.*

IV. As a Practical Matter, Using Postal Processing Codes Would be Unworkable.

A final rule of statutory interpretation counseling against the challenger’s suggested interpretation is that in general statutes should be interpreted so that they are reasonable or workable. *State v. Iowa Dist. Ct.*, 889 N.W.2d 467, 472–73 (Iowa 2017) (“Practicality is . . . important.”); *see also* Iowa Code § 4.6(5) (noting the “consequences of a particular construction” may be considered).

Adopting the challenger’s interpretation of “intelligent mail barcode,” which would mandate use of internal post office processing codes for counting absentee ballots, would create significant logistical issues. First, as referenced above, adoption of such an interpretation would necessitate voluntary cooperation and personnel resources of the postal service, with no guidance or protections provided on how such communications or processes are to be fairly and consistently carried out. *See* Iowa Code § 53.17.

Other practical issues are evidenced by the events at hand. Given that the postal service expressly states processing codes are for federal postal service use only (*see* Ex. 20), it is not entirely clear the federal postal service can or would voluntarily read and disclose information obtained using its postal processing codes. Indeed, when the Winneshiek County auditor attempted to obtain from the postal service information regarding the date and time the 33 ballots

at issue entered the mail system, the postal service had to check with legal counsel to verify such information could be provided—and even then with a court-order.⁷ (Ex. 13.)

All of these issues are avoided by interpreting “intelligent mail barcode” as used in by the postal service connection with IMb Tracing, as clearly articulated in the IAC 721-21.14. With IMb Tracing, data evidencing time and place of reply mailings is immediately and directly available to the county auditor, with the information received from the postal service readily verifiable. The county commissioner thus would immediately be able to determine, by use of the intelligent mail barcode and without any additional involvement of the federal post office, whether absentee ballots were timely mailed.

CONCLUSION


The Iowa Supreme Court has made clear “insuring the orderly conduct of elections” is a legitimate government interest. *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978). Interpreting “intelligent mail barcode” as used by the post office in connection with IMb Tracing is consistent with the context of the statute, the legislative history, agency interpretations, and the practical need for the timely and consistent administration of elections.

Winneshiek County is not set up for, and does not use, intelligent mail barcode tracing to confirm the date a ballot is mailed, and the law does not permit use of a different methodology. Accordingly, the late-received ballots without postmarks were lawfully rejected by the Winneshiek absentee and special voters precinct board. Because the challenger is not entitled to

⁷ This is to say nothing of the potential time delays in a process that would follow from the challenger’s proposed course of action. For example, Winneshiek County has a population of approximately 20,000, while Polk County has a population of approximately 480,000. Assuming absentee ballots are proportional to population, Polk County would have 24 times the number of absentee ballots as Winneshiek (in this instance, corresponding to approximately 800 absentee ballots). *See* Iowa Code § 50.24 (requiring canvassing to occur within a week of general election).

relief on this threshold issue upon which her other claims depend, this body should deny the challenger's requested relief in its entirety.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon party listed below on January 16, 2019 by

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