6-3000-6287-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

Concerning Proposed Rules of
the Department of Transportation
Relating to Operating
Standards for Special
Transportation Services

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on May 12, 1992, in South St. Paul.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 to hear public comment and determine whether the Minnesota Department of Transportation (Mn/DOT, Department or Agency) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by Mn/DOT after initial publication are impermissible substantial changes.

Donald J. Mueting, Assistant Attorney General, appeared on behalf of Mn/DOT. The Agency's hearing panel consisted of Elizabeth M. Parker, Director of the Office of Motor Carrier Safety and Compliance, Ward Briggs, an attorney with that office, and Richard Norberg, the Information Services Manager of that office.

Sixty-eight persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of the rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to June 1. Pursuant to Minn. Stat. § 14.15, subd. 1 (1990, as amended in 1992), five business days were allowed for the filing of responsive comments. At the close of business on June 8, the rulemaking record closed for all purposes. The Administrative Law Judge received a number of written comments from interested persons during the comment period. In addition, the Agency staff submitted written responses to issues discussed at the hearing, and proposed a change to the rule.

This Report must be available for review by all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Agency makes changes in the rule other than those recommended in this Report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On March 9, 1992, the Agency filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On March 20, 1992, the Agency mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice.

3. On March 30, 1992, a Notice of Hearing and a copy of the proposed rules were published at 16 State Register, page 2145.

4. On April 9, 1992, Mn/DOT corrected a duplicating error in its original mailing described in paragraph 2 above, by mailing a complete copy of the Notice to persons who had registered their names with the Agency.

5. On April 17, 1992, the Agency filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of Agency personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.
(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 12 State Register, page 77 on July 13, 1987 and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

6. On May 6, 1992, the Agency mailed a Notice of change of location of the hearing to all persons who had registered their names with the Agency. This Notice indicated that the hearing would be moved to a location approximately one-half mile from the previous one, and that the starting time would be delayed for one-half hour to allow persons an opportunity to get to the new location.

7. At the hearing on May 12, the Department distributed copies of three proposed technical changes, which were accompanied by a Supplemental Statement of Need and Reasonableness to explain them. The Department proposed these changes to the rules as published. The changes drew no criticism, either at the hearing or in post-hearing submissions. None of them are substantial changes.

8. In the case of each of the three mailings described in paragraphs 2, 4 and 6 above, the Agency mailed not only to its list of persons who had requested to receive notice, but also mailed to an additional list of certificate holders and other persons believed to have an interest in these rules.

9. The period for submission of written comments and statements remained open through June 1, 1992. Then, there followed a five-day period for responses. The record finally closed on June 8, 1992.

Nature of the Proposed Rules and Statutory Authority

10. Minn. Stat. § 174.30 (1990, as amended) empowers the Commissioner of Transportation to adopt rules prescribing:

> . . . standards for the operation of vehicles used to provide special transportation service . . . [but not] standards that unduly restrict any public or private entity or person from providing special transportation service because of the administrative or other cost of compliance.

The statute goes on to specify that the rules must include qualifications of drivers and attendants, safety of vehicles and necessary safety equipment, inspection and maintenance of vehicles and equipment, and minimum insurance requirements.

11. The Agency has documented its statutory authority to adopt the proposed rules.

12. The Legislature first directed the Agency to adopt rules in 1979. The Agency did adopt rules in 1981. Those rules were amended in 1983.

13. In 1987, the Legislature amended the statute to increase the Commissioner's responsibilities regarding inspection of vehicles and certification of providers. In response, the Agency published a Notice of Solicitation of Outside Information or Opinions in that year, and also held meetings with an operating standards committee composed of providers, agencies, and representatives of users. However, before rules could be adopted, new issues regarding sexual misconduct and other forms of abuse arose, and additional legislative action resulted. During the spring of 1991, the Legislature added more requirements for licensure. Then, in the fall of 1991, the United States Department of Transportation issued a final rule setting minimum guidelines and requirements for accessibility standards under the Americans with Disabilities Act. These events resulted in changes in Mn/DOT's proposed rules.

Small Business Considerations, Impact on Agricultural Land

14. Minn. Stat. § 14.115 (1990) requires the Agency to consider the impact of the proposed rules on small businesses. The Agency has addressed this requirement adequately in Part III of its Statement of Need and Reasonableness. The Agency recognizes that the vast majority of special transportation providers are "small businesses" and has taken a number of steps to minimize paper work and maximize consistency with federal standards. The Agency is well aware of the special limitation contained in in its rulemaking authority to the effect that it must avoid undue administrative or other costs of compliance. In its Statement of Need and Reasonableness, the Agency has documented steps which it has taken to respond to that statutory requirement.

15. The Agency is also required by Minn. Stat. § 14.11, subd. 2 (1990) to consider the impacts of the proposed rule on agricultural lands. It is the Agency's position, which the Administrative Law Judge accepts, that the proposed rules will not have any impact on agricultural lands. Therefore, there is no need for the Agency to comply with the requirements of Minn. Stat. §§ 17.80 to 17.84 before proceeding with the proposed rules.

Rule-by-Rule Analysis of Need and Reasonableness

16. Many of the proposed amendments drew no comments from the public, and are relatively simple and straightforward. The Administrative Law Judge will not spend time discussing them, as they are adequately justified in the Agency's Statement of Need and Reasonableness. Instead, time will be devoted to an analysis of those proposals which did draw substantial comment from the public or which, in the opinion of the Administrative Law Judge, require examination for compliance with statutory requirements. To the extent a proposed rule is not mentioned herein, the Administrative Law Judge has concluded that it has been justified as both needed and reasonable.

17. Competition between ambulance service providers and special transportation service providers has been the cause of controversy at both the legislative and administrative levels. Attempting to draw a bright line between the two services has been difficult at both levels. Some of the amendments proposed for adoption in this proceeding deal with the distinction between the two competing services.

18. Minn. Stat. § 174.29 (1990) defines special transportation service as:

> . . . transportation provided on a regular basis by a public or private entity or person that is designed exclusively or primarily to serve individuals who are elderly, handicapped, or disabled and who are unable to use regular means of transportation but do not require ambulance service, as defined in section 144.801, subdivision 4.

Minn. Stat. § 144.801, subd. 4, defines ambulance service as:

> . . . transportation and treatment which is rendered . . . preliminary to or during transportation to, from, or

> between health care facilities for ill or injured persons. . . . The term includes all transportation involving the use of a stretcher, unless the person to be transported is not likely to require ambulance service and medical treatment during the course of transport.

The gist of the difference between the two is treatment. If transportation and treatment are required, then an ambulance must be used.

19. In these rules, the Agency has proposed to amend the definition of "physical or mental impairment" which is one of the bases for the definition of special transportation service. The current definition contains a list of disorders, diseases and conditions which constitute "physical or mental impairment". In this proceeding, Mn/DOT is proposing to add the adjective "nonacute" to the list of conditions to recognize the fact that certain conditions in the list, such as epilepsy, may or may not be acute, and thus may or may not require ambulance service. As the Department pointed out in its final comments, a special transportation service provider may transport an epileptic person to a physician's office for a routine examination. However, if that person is undergoing a seizure, ambulance service would be required. The use of the word "nonacute" is an attempt to separate those two situations.

The proposed change, however, drew criticism from STS providers, who claimed that it failed to clarify the line, and instead just added to the confusion. They claimed it was merely an attempt by the ambulance providers to further limit the scope of permissible STS services. They provided a definition of "nonacute" which suggested that it was anything which was "lacking sharpness, briefness, or severity". They argued that a toothache, for example, could be acute in terms of being sharp or severe, but should not require an ambulance for transport to the dentist in any case. They believed that adding the term "nonacute" to the definition added vagueness, rather than clarity, and opened up further room for dispute between the competing services.

The Department, in response, argued that the definition of "acute" meant "reaching a crises rapidly", and that the definitional problem was not as simple as the STS providers would suggest. The Department explained the chain of statutory and rule definitions that make up the definitional scheme.

20. The Administrative Law Judge accepts the logic of the Department, as set forth in the final response. Technically, the Department is correct. The Department has justified the need for and reasonableness of its proposal.

21. Part 8840.5450 would add a completely new provision, which would prohibit a special transportation service provider from using, either in its name or its advertisements, words such as "medical," "life support," or other forms of those words, or any similar words that imply the availability of ambulance service.

In its Statement of Need and Reasonableness, the Department indicated that it had received complaints from STS passengers and others that some STS providers were transporting people who needed ambulance service. The Department also alleged that there was confusion among nursing home operators and clinic personnel regarding which service was appropriate for certain situations. The Department argued that this problem could be reduced by prohibiting STS providers from using misleading names or advertising.

STS providers responded to the proposal by pointing out that almost half of the STS providers use words such as "medical" or "med" or "medi" in their names, and that it would be a great hardship on those providers to have to abandon all of the investment which they have made in name recognition. They believe that there is no risk of public confusion, as the statewide growth of 911 emergency dispatching has directed more and more calls to well-trained personnel who would not confuse an STS provider for an ambulance provider. STS providers also believe that the public is protected by restrictions imposed by telephone companies, who will not list an STS provider under the term "ambulance" in yellow page advertising.

The STS providers also point out that many of them receive the majority of their income from Medical Assistance payments for transporting persons to and from doctors' offices, physical therapy sessions, etc. Medical Assistance will only pay for transportation related to medical purposes. STS providers do not operate like taxi cabs, and take nonmedically-involved people to nonmedically-involved locations. The essence of what separates them from a taxi cab, they argue, is that their clientele are unable to use regular means of transportation, but do not require ambulance service. Using terms like "medi-van" or "medi-cab" are a logical way to identify them as something other than taxi cabs, they claim.

The record contains more than 20 pages of yellow pages advertising from around the State (Ex. 24 and Attachment to Dakota Medical Transport letter). A review of these indicates that virtually every display advertisement would have to be rewritten if this rule were interpreted to literally prohibit any use of the word "medical" or its derivatives. Many of the ads would have to be rewritten simply because business names like "Medi-Ride Special Transportation" or "Medi-Van" would have to be changed. However, many of the advertisements also use terms such as "for routine medical transportation", "Medical Assistance accepted", "MA approved", "Medicaid approved", etc. During the hearing, a provider asked whether his advertising which states, "We do not provide transportation to individuals requiring medical treatment or life-support during transport", would be prohibited by the proposed rule. A Department representative at the hearing indicated that such a disclaimer would not be prohibited because what the rule prohibits is the use of the word "medical" or similar words in a way that implies the availability of ambulance service. In the case of advertising or information distribution, it is not the literal use of the word that is prohibited -- it is the use of the word in a certain manner which is prohibited by the proposed rule. Therefore, the advertisements that state "for routine medical transportation", "Medical Assistance accepted", etc. would not be prohibited by the proposed rule. The impact, therefore, would not be as great as some had feared.

The most confusing ads in the yellow pages come from providers who offer both ambulance and STS services. They combine the two services into a single ad. Most of the pure STS providers, on the other hand, use terms such as "nonemergency" or "routine". The Department may wish to review advertising which blends more than one service and determine whether or not it is causing some of the confusion.

22. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364

N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

23. The Administrative Law Judge concludes that the Department has met these tests, and has justified the need for and reasonableness of its proposal. Although there have been few actual instances of confusion documented in the record, the Department is aware of some. It is legitimate for the Department to adopt the rule, despite the adverse impacts it will have for those providers who will have to change their names. The Department could minimize those impacts by postponing the effective date of this particular rule, to allow affected businesses reasonable time to make the necessary changes.

24. Proposed Rule 8840.5400, subp. 1, would prohibit the use of a vehicle for STS until it had been inspected. The only deviation from this would be permitted when a certified provider acquires a newly-manufactured vehicle which is not equipped with a wheelchair securement device. In that case, the new vehicle could be used in STS service so long as it was inspected within 30 days of its receipt by the provider.

Providers complained that this new rule would prohibit the use of leased vehicles and "loaners" while their own vehicles were being repaired or were otherwise unavailable for a few days. The Department responded that in the case of used or leased vehicles, the provider might not know how well they were maintained. The provider would not know whether there were mechanical defects or other problems that could result in conditions likely to cause an accident or breakdown. The Department concluded that the risk to the public was too great to allow uninspected operation.

25. The Administrative Law Judge finds that the Department has justified the need for and reasonableness of its proposed rule. There will be hardships for providers who cannot arrange the loan of an already certified vehicle, or who cannot arrange for a quick inspection of a loaner or leased vehicle. However, those hardships must be weighed against the risks. The Administrative Law Judge concludes that the Department has justified its balancing of these factors.

26. Proposed Rule 8840.5700 requires annual inspections of each vehicle used in STS service, as well as random, unannounced inspections of at least five percent of the fleet on a quarterly basis. A later provision, contained in part 8840.5800, would require the Commissioner to suspend a provider's certificate of compliance if the provider failed to permit an inspection. Some providers expressed a concern that a provider who unintentionally or unavoidably missed a scheduled inspection might be suspended. The Department responded that it was not its intention to seek suspension except in the case of deliberate evasions. The Department believes that the words "failed to permit an inspection" are adequate to convey the concept of deliberate evasion. This interpretation is set forth in the Department's Response to Testimony. It is, therefore, available to any providers should the Department attempt to abuse the rule. The Administrative Law Judge finds that the rule has been justified as written, and that no amendment is necessary.

27. Proposed Rule 8840.5900, dealing with driver qualifications, drew comments because it imposes additional paperwork responsibilities on drivers (including volunteer drivers) which, in addition to new training requirements imposed by a rule to be discussed below, makes it more difficult for an individual to become a driver.

28. Existing Rule 8840.5900 requires a driver to obtain a physician's statement of freedom from conditions which interfere with safe driving. The current rule requires the statement be obtained "on a form prescribed by the Commissioner." The Department did not initially propose any change in this part of the rule, but upon receipt of a number of comments questioning the need for a special form, the Department proposed to delete the requirement that the physician's statement be "on a form prescribed by the Commissioner." This proposal was made at the hearing, subsequent to the publication of the proposed rules in the State Register. It drew no opposition, and is supported by a number of comments. The Department has justified it, and it is not a substantial change. It may be made.

29. The question of what kind of driver's license is required for a STS driver requires a complicated answer. It depends upon the region of the state, the ownership of the vehicle, and other factors. But the reason the answer is complicated is that the Legislature has set up a variety of different requirements, different exemptions, and different exclusions. What the Legislature has chosen to require, or not require, cannot be changed by these rules. It can only be changed by the Legislature itself. A number of people made comments and suggestions regarding the licensing scheme which the Department cannot adopt because the Legislature has mandated one thing or another. In the interests of brevity, those comments and suggestions will not be reviewed in this Report. Instead, the focus will be on departmental rules which are not necessarily dictated by statute, and thus are subject to the rulemaking process.

30. Proposed Rule 8840.5900, subp. 1 D(3)(b) requires that drivers not have been convicted, in the past three years, for operating a motor vehicle or motorcycle without insurance. Commentators questioned why that would be a legitimate reason to bar a driver since the provider will be insured. They argued that the insurance of the driver on his private vehicle is irrelevant. The Department responded that persons who drive without insurance show a lack of concern for the welfare and property of others, as well as a failure to accept the responsibility that accompanies driving privileges. It is concluded that the Department has justified the need for and reasonableness of its proposal, although in light of the comments made regarding the difficulty of obtaining drivers for STS services, the Department may wish to consider whether to withdraw the proposed rule in order to slightly increase the pool of available persons.

31. Proposed Rule 8840.5900, subp. 1 E. contains a long list of specific criminal statutes which a potential driver could not have been convicted of violating for the last 15 years. They range from murder and robbery to prostitution and drug violations. Although there were a few comments relating to specific crimes, most comments were directed at the procedures for obtaining criminal histories. Subpart 2 of the rule provides that providers must determine that, in most cases, the criminal record of the driver is clear of the offenses. The provider is also responsible for annually reviewing the driver's criminal record. A number of providers complained about the $8.00

cost of obtaining a criminal background check from the State's Bureau of Criminal Apprehension. The Administrative Law Judge concludes that it is reasonable to require a check, in spite of the cost, in order to protect the public from potential crimes.

32. A question was raised about the ability of a potential driver with a criminal record to obtain a variance which reflected the driver's rehabilitation. A concern was that a ten-year-old marijuana conviction, for example, ought not to be an absolute disqualification for STS driving, and that there ought to be a process whereby the driver could present facts to support his qualification for licensure. The commentator pointed, in particular, to Minn. Rule 9543.3080. This is a rule of the Department of Human Services, which permits a disqualified person to request reconsideration of a denial based upon a number of listed factors. These include the nature and severity of the disqualifying event, the consequences surrounding the disqualifying event, the relationship between the disqualification and the persons served by the licensed program, including the age and vulnerability of the criminal victims, similarity between the victim and the person served by the program, and documentation of successful completion of training or rehabilitation. It was urged that a similar procedure ought to be added to these rules in order to permit a potential driver to submit information that would show that licensure ought to be allowed despite a prior conviction.

33. The Administrative Law Judge agrees that the addition of such a procedure would be an improvement to the rule. However, the rule cannot be said to be unreasonable without it. The number of situations in which such a rule would be used would be so small that the benefits to be obtained from it would be de minimus, from the standpoint of the overall system. To the individual driver, of course, the benefits from a successful reconsideration would be great. But the rule cannot be said to be unreasonable without such a procedure.

34. Proposed Rule 8840.5910 deals with driver training requirements. There were two common complaints about its terms. The first was that there was insufficient time allowed to obtain training, particularly in non-metro areas where the required courses were only offered occasionally. The second complaint was that the cost of training was unreasonable, particularly in light of the large amount of staff turnover that occurs in these low-paying jobs.

35. With regard to the first complaint, relating to the timing of training, the Agency did make a change at the end of the comment period. As initially proposed and published in the State Register, the rule required that some courses be taken before any STS service was provided, but that all other required courses be completed within 45 days after beginning to provide STS service. After reviewing the comments, the Agency made a change that extended the 45-day period to 60 days in the case of one course -- passenger assistance training.

But that change meets only some of the criticisms directed at the rule. The rest of the criticisms remain -- that requiring the bulk of the training be completed within 45 days is unreasonable because courses are not available and, in particular, the least expensive training is not offered often enough to make it reasonably available to all providers in all parts of the State. The 45-day limit thus forces providers to use more expensive, or less convenient, training.

The Department responded to these criticisms by pointing out that 45 days was a reasonable balance between exposing persons to untrained drivers and accommodating the needs of providers. The Department acknowledged the legitimacy of the concerns, but reported that it had also received comments arguing for a total prohibition on driving until all courses had been completed. The Administrative Law Judge concludes that the Agency has documented the reasonableness of its position, and that the rule, as finally proposed, may be adopted.

36. A number of criticisms were also directed at the addition of a requirement for four hours of abuse-prevention training. This training would have to be completed within 45 days after beginning to drive. The complaints focused mainly on the length of time (four hours) and the cost. The Department points out, in its Statement of Need and Reasonableness, that these rules were delayed because of complaints of sexual misconduct and other abuse, and that a number of provisions adopted by the Legislature in 1991 were aimed at reducing the incidence of abuse. The Department argues that abuse laws, with their mandatory reporting requirements, are complicated, and that it simply takes time to get through all the material covering both adults and children. The Administrative Law Judge finds that the Department has justified its requirements for four hours of abuse-prevention training, and that the rule may be adopted.

37. One suggestion to minimize the cost and inconvenience of training, particularly in non-metro areas, was for the Department to allow modern technology to be used to deliver the training. Videotapes, satellite linkups, and similar methods could be used to reduce the cost and improve availability of at least some of the training. The Department should consider this suggestion in light of the concerns over cost and availability.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Agency gave proper notice of the hearing in this matter.

2. That the Agency has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Agency has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Agency after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 8th day of July, 1992.

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded; No Transcript.