

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY**

**In the Matter of the Adoption of
the Exempt Rules of the Department
of Public Safety Governing Drivers'
Licenses and Vehicle Records;
Proof of Identity and Residency.
Minnesota Rules, Chapter 7410.**

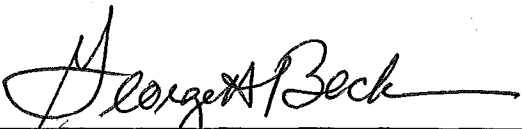
**ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.388**

The Department of Public Safety ("Department" or "agency") is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minnesota Statutes, section 14.388(1). On June 3, 2002, the Office of Administrative Hearings received the documents from the agency required to be filed under Minnesota Statutes, section 14.386 and Minnesota Rules, part 1400.2400. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The proposed amendments, adoptions, and repeal of rules Governing Drivers' Licenses and Vehicle Records; Proof of Identity and Residency, Minnesota Rules, Chapter 7410, adopted by the Department of Public Safety, are **DISAPPROVED** because the Department has not adequately justified its use of Minnesota Statutes, section 14.388(1).
2. The attached Memorandum is incorporated and made a part of this Order.

Dated this 7th day of June, 2002.



GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

The Department of Public Safety (DPS) submitted rules adopted under the exempt rulemaking process to the Office of Administrative Hearings for review on June 3, 2002. The rules submitted govern what documentation is required to apply for a Minnesota driver's license or permit, or a state identification card. At present a driver's license may be obtained by signing an application listing a Minnesota residence. The new rule would require proof of residency in Minnesota and (1) proof of citizenship, or (2) permanent U.S. resident status, or (3) indefinite authorized presence status, or (4) a lawful short-term admission (e.g., a visa).

A license issued based upon a visa would expire when the visa expired, but could be extended for six months by proof of an application to the federal government for an extension of the short term admission document. No license can be issued if the lawful short-term admission document expires 60 days or less from the date of application. The new provisions would no longer allow the use of a driver's license from another state as proof of identity. Additionally, the issuance of a driver's license without a photograph, for religious reasons, would no longer be allowed.

The Department contends that these rules are properly adopted under the good cause exemption from the normal rulemaking requirements of the Minnesota Administrative Procedure Act.¹ The normal process requires written justification for the rules, the opportunity for a public hearing, written public comment, and a report on the rules by an administrative law judge. In order to take advantage of the exempt process an agency must show that the normal rulemaking process is "unnecessary, impracticable, or contrary to the public interest..." For this rule, the DPS must also demonstrate that the rule addresses "a serious and immediate threat to the public health, safety, or welfare." The statute directs the Office of Administrative Hearings to determine whether an agency has provided adequate justification for use of the exempt process.

The Department argues that there is a serious and immediate threat to the public safety resulting from domestic terrorism, beginning on September 11th and continuing to the present with predictions of further incidents. It has submitted copies of news articles and other reports to substantiate the immediacy of the threat of terrorism and the need to strengthen homeland security. It argues that drivers' licenses are gateway documents for establishing a legitimate identity and states that several of the September 11th terrorists were able to obtain false drivers' licenses due to lax and inconsistent state standards. DPS argues that a lengthy rulemaking process is contrary to the public interest since the threat is real and an incident may occur that is enabled by a false driver's license.

The Chief Administrative Law Judge has received several written comments objecting to the use of the exempt rulemaking process to adopt these rules.² Each points out that the subject matter of the rules was debated in the just concluded legislative session in connection with anti-terrorism legislation and no action was taken. The commentators suggest that this topic is one of great public interest and should not be put into law through an abbreviated rulemaking process without public input.

¹ Minn. Stat. §14.388.

² Comments were submitted by the Minnesota Civil Liberties Union, Jewish Community Action, Professor Peter Erlinder of William Mitchell College of Law, and the Minnesota Chapter of the National Lawyers Guild, among others.

The commentators argue that there is no serious and immediate threat within the meaning of the exempt rule statute because nine months has elapsed since September 11th and because there has been no showing that immigrants with expired visas who are or would be driving in Minnesota are an immediate threat. As to the substance of the rule, the commentators assert that a full rulemaking process should consider whether or not this new rule is necessary or workable, whether or not the commissioner has statutory authority to address immigration issues through licensing of drivers, whether or not the rule conflicts with the four-year license period in statute, and whether or not there are equal protection problems in the rule's treatment of immigrants.

An exempt rule record is inadequate to make a decision on issues such as these. And, in fact, the Minnesota Supreme Court has determined that rules involving questions of important social and political policy should generally be adopted through the normal APA rulemaking process.³ Another important consideration is that because the Department chose not to adopt a rule prior to the legislative session, but did so only after an unsuccessful effort at obtaining legislation, this process has the unfortunate appearance of the executive branch attempting to circumvent the legislative process without public input.

However, agencies can adopt significant rules through the exempt process if the appropriate showing is made. Exempt rules adopted under Minn. Stat. § 14.388 (1) and (2) are valid only for two years and then the agency must adopt them through the normal process. But, in this case the Department has not adequately demonstrated either that a serious and immediate threat to the public safety exists that justifies overlooking public comment, or that a full rulemaking process would be contrary to the public interest. It has not shown that the need for immediate action outweighs the benefit of public participation in rulemaking.

The Department is surely attempting to address in good faith the very real problem of domestic terrorism. The submission by DPS demonstrates the nature of this problem nationally. Yet based upon this record, the immediacy of the threat, insofar as it can be addressed through drivers' licenses, has not been shown. There is no compelling evidence that this rule must be adopted now, rather than after a hearing and a public comment period. Given the nature of the rule and its impact on a large number of people, a delay in adoption, accompanied by the benefit of public input, appears to be more in the public interest than proceeding with an exempt rule. It is therefore determined that the agency has not provided adequate justification for its use of exempt rulemaking and the rule submission is not approved.

³ McKee v. Likins, 261 N.W.2d 566, 577 (Minn. 1977); Swenson v. State Dept. of Pub. Welfare, 329 N.W.2d 320, 324 (Minn. 1983).