

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF PUBLIC SAFETY  
Driver and Vehicle Services Division

In the Matter of the Proposed Permanent  
Rules Governing Drivers' Licenses and  
Vehicle Records; Minnesota Rules, part  
7410.0100 Definitions; part 7410.0400  
Documenting Proof of Name, Date of Birth,  
Identity; part 7410.0410 Proof of Residency;  
part 7410.1810 Driver's License and  
Identification Card Image; and Repeal of part  
7410.1800 Driver's License Photograph.

**REPORT OF THE  
CHIEF ADMINISTRATIVE LAW JUDGE**

This matter comes to the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.15, subd. 3 and Minn. R. 1400.2240, subp. 4, provisions requiring review of an Administrative Law Judge's findings that a proposed agency rule should not be approved.<sup>1</sup> Those provisions require the Chief Administrative Law Judge to then "review the rule and the judge's report and prepare a report within ten days."

The standard of review is the same for the ALJ and the Chief ALJ. Both "must review the hearing record and must disapprove the rule if the judge makes any of the findings in part 1400.2100, items A to G."<sup>2</sup>

The Administrative Law Judge approved a number of changes to the agency rules, but did not approve those listed below. As a result, the Chief ALJ review is limited to those items disapproved by the ALJ and the reasons set forth for their disapproval. Those items not approved by the ALJ were:

1. The proposed proof of residency rule (7410.0410).
2. The proposed verification of identity documents (7410.0400, subp. 3a).
3. The proposed requirement for a full-face image on a driver's license or identity document (7410.1810) and the repeal of the current religious exemption (7410.1800).
4. The proposed changes to its list of primary and secondary documents, deleting Canadian documents and requiring unexpired Permanent Resident or Resident Alien cards.

After review of the rule-making record and the ALJ Report, the Chief ALJ agrees with the ALJ that proposed rule on the verification of identity documents does not meet the definition of a rule and that the proposed rule requiring a full face image on the license or identity document needs additional language to meet the constitutional test established by the Minnesota Supreme Court.

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<sup>1</sup> The ALJ concluded some of the proposed rules did not meet the requirements of Minn.Stat. §§ 14.131 to 14.18.

<sup>2</sup> Minn. R. 1400.2240, subp. 2.

The ALJ's findings that these portions of the rule are defective are APPROVED. As required, this Report will contain a statement of changes or actions necessary for approval of the disapproved rules.<sup>3</sup>

The Chief ALJ does, however, respectfully disagree with the ALJ and concludes that the agency has established both the legality and the reasonableness of and need for the proposed proof of residency rule and the proposed changes to its list of primary and secondary documents. Findings made by the ALJ that these portions of the rule are defective are NOT APPROVED.

### **Proof of Residency (7410.0410)**

The Chief ALJ respectfully disagrees with the ALJ's analysis of this portion of the proposed rule. For the following reasons, the Chief ALJ concludes that this proposed rule change has been demonstrated to be necessary and reasonable. The Chief ALJ also concludes that the Department has adequate statutory authority to adopt the rule and that it is not inconsistent with either state or federal law.

#### Statutory Authority

The Administrative Law Judge concluded that the Department has no legal authority to condition the grant of a driver's license or state identification card on proof that the applicant is lawfully present in the United States. The Chief ALJ disagrees with that interpretation. The legislature recently amended Minn. Stat. § 171.06, subd. 1 to add language stating that "All applications requiring evidence of legal presence in the United States must be signed in the presence of a person authorized to accept the application, or the signature on the application may be verified by a notary public."<sup>4</sup> (Emphasis added.) That language specifies the signature requirements for license and identification card applicants who need to provide evidence that they are legally present in the United States. This legislative change clearly anticipates the Department of Public Safety requiring that information in some circumstances.

While the statute only discusses proof of legal presence in the United States in conjunction with forms of the application for a license or identity card, the ALJ's interpretation of agency authority overlooks the case law that gives broad authority to agencies seeking to adopt rules in areas of their expertise. It also does not recognize the reality that a driver's license or identify card has uses far beyond the operation of a motor vehicle. The legislature has recognized that these are state issued documents used to establish identity in non-vehicular situations.<sup>5</sup> It also allows the data collected from issuing these documents to be used for law enforcement investigations and prosecution.<sup>6</sup> These documents are, in fact, gateway documents as the agency suggests.<sup>7</sup>

Although it would be clearer if language concerning evidence of lawful presence appeared elsewhere in the statute, the courts have said that when the legislature amends a statute by changing the wording of the original version, "it is presumed that the legislature intended to

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<sup>3</sup> Minn. R. 1400.2240, subp. 4 states, in part, "If the chief judge disapproves the rule, the chief judge must explain why and tell the agency what changes or actions are necessary for approval."

<sup>4</sup> This requirement also applies to first time applicants and those with a change of status.

<sup>5</sup> The anticipated use of the driver's license as an identification document is clear by the legislative prohibition against issuing an identification card to any person with a driver's license. Minn. Stat. § 171.07, subd. 3.

<sup>6</sup> Minn. Stat. § 171.07, subd. 1a.

<sup>7</sup> Tr. 14.

effect a change in the law rather than a clarification of the law.”<sup>8</sup> Through this amendment, the legislature manifested its intent that the Department be authorized to require individual applicants for licenses and identification to provide evidence they are legally present in the country.

Further, the Minnesota Supreme Court has clearly stated that when an enabling statute is subject to different interpretations, weight is to be given an agency’s interpretation of a statute it is charged with administering.<sup>9</sup> Other case law supports the argument that an agency has broad authority over areas of its expertise. In a case challenging the Department of Commerce’s regulation over cosmetology, the Court of Appeals said:

If the legislature wished to have exclusive control over licensing, it would not have granted the DOC rule-making authority. In sum, given the traditional deference this court gives to an agency’s expertise, the legislature’s decision not to act, and the very purpose behind legislative grants of authority to regulatory agencies, we find no merit in petitioners’ argument that the rule exceeds the scope of the enabling statute.”<sup>10</sup>

The Commissioner of Public Safety has been given specific authority to set standards for license applications, including valid forms of identification<sup>11</sup> and has expertise in the areas of licensing, identification and public safety.<sup>12</sup> The Chief ALJ is thus satisfied that the Department has established its authority to consider lawful presence in Minnesota in the licensing process.

#### State Judicial Rulings on Use of Immigration Status

The ALJ concluded that Minnesota Supreme Court cases bar the Department of Public Safety from requiring proof of lawful status in the country as a condition for issuing a license or identification card. After reviewing those cases, the Chief ALJ disagrees and concludes the cases are distinguishable from the issue posed by these proposed rules. Each of those cases involved situations where individuals without current legal status in the United States were being denied benefits of the system in which they had participated through living and working in Minnesota. In Nagaraja v. Commissioner of Revenue<sup>13</sup> the issue was eligibility for property tax refunds, in Correa v. Weymouth Farms, Inc.<sup>14</sup> the question was eligibility for workers’ compensation benefits after a work-related injury, and in Flores v. Department of Jobs and Training<sup>15</sup> the question was eligibility to receive unemployment benefits after working sufficiently long to otherwise qualify.

In this matter, the Department has an affirmative role to assure the integrity of the documents they issue, and the database they establish can be used for law enforcement and child support enforcement. The recent legislative amendment envisioned that individuals applying for a license or identification card may be required to provide evidence of legal presence in the

<sup>8</sup> Thompson Plumbing Company, Inc. v. McGlynn Companies, 486 N.W.2d 781 (Minn. Ct. App. 1992).

<sup>9</sup> Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 242 (Minn. 1984) (citing Krumm v. R.A. Nadeau Co., 276 N.W. 2d 641 (Minn. 1979)).

<sup>10</sup> Rocco Altobelli, Inc. v. Department of Commerce, 524 N.W. 2d 30, 36 (Minn. Ct. App. 1994); see also Minnesota League of Credit Unions v. Department of Commerce, 467 N.W.2d 42, 47 (Minn. Ct. App. 1991), aff’d 486 N.W. 2d 399 (Minn. 1992).

<sup>11</sup> Minn. Stat. § 171.061, subd. 6.

<sup>12</sup> Minn. Stat. § 171.015 (creating a driver’s license division within Public Safety).

<sup>13</sup> 352 N.W.2d 373 (Minn. 1984).

<sup>14</sup> \_\_\_ N.W.2d \_\_\_, C9-02-1172 (Minn. July 3, 2003).

<sup>15</sup> 411 N.W.2d 499 (Minn. 1987).

country to the Department. This is unlike the employment or tax situation where the individual has been living in the state, working for an employer, paying rent and taxes but faced with efforts to deny them benefits arising from those activities for which they were otherwise eligible.

While the Supreme Court has afforded benefits to individuals working in Minnesota without legal status, the issue here is whether the Department can consider and note legal status in the issuance of a driver's license or identification card, the primary identification document issued and relied on by the state. The Chief ALJ concludes that these prior cases do not prohibit the Department from considering and noting legal status.

### Federal Preemption

The ALJ concluded that federal law preempted the ability of the Department of Public Safety to promulgate the proposed rule on residency. The Chief ALJ respectfully disagrees with that conclusion.

The proposed rule relies on federal determinations of immigration status. It does not attempt to create a different state standard for immigration into the United States. To complete its role as an issuer of a state license and identification document, the Department can legitimately rely upon documentation issued by the federal government. It has also established a variance process to allow individuals without the specified federal documents to establish their legal status.

In Hines v. Davidowitz,<sup>16</sup> the Supreme Court rejected Pennsylvania's requirement that aliens register annually. This is distinguishable from the situation at hand. The proposed rule seeks instead to rely on federal determinations on legal status as the basis of assuring individual identity and eligibility for a state issued driver's license or identity document. It does not seek to separately regulate aliens. Thus, the rule neither constitutes regulation of immigration, nor is there a direct conflict with federal law. The U. S. Supreme Court has said, "...the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus preempted by this constitutional power..."<sup>17</sup>

To argue that the state cannot rely on federally issued documents to determine lawful residence turns the issue of federal preemption on its head. If the state took the position that one can be a lawful resident of Minnesota – complete with license or identification card – regardless of compliance with federal immigration law, the state would be establishing a separate system for immigration into Minnesota or would be, at a minimum, failing to cooperate with federal immigration authority. Such an outcome would clearly violate the United States Constitution's grant of authority to the federal government, "to establish a uniform Rule of Naturalization, and "regulate commerce with foreign nations."<sup>18</sup> The Department of Public Safety's proposed rules properly defer to federal determinations on the issue of lawful presence in the United States and one of its states – Minnesota. The proposed rules are not preempted by any federal law or constitutional provision.

### Need and Reasonableness

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<sup>16</sup> 312 U.S. 52 (1941).

<sup>17</sup> De Canas v. Bica, 424 U.S. 351, 355 (1976).

<sup>18</sup> U.S. Const., Art. 1, § 8.

The burden to demonstrate the need for a proposed rule, as well as its reasonableness, lies with the agency. In order to be reasonable, a rule "must be rationally related to the agency's objective."<sup>19</sup> The Chief ALJ concludes that the agency has established that rational relationship between the proposed residency rule and its objectives. The Department has a duty to assure the integrity of license/identification documents it issues. Not only are they used to help increase public safety on the roads but the data may be used for criminal investigation and prosecution as well as child support enforcement. The legislature has required the agency to take steps to assure the integrity of the license and identification document.<sup>20</sup> Taking steps to assure the integrity of the card it issues and the data it relies on is a reasonable agency objective.

The agency presented information that without the requirements in these proposed rules, Minnesota licenses and identification cards were being issued to persons who did not have authorization to be in the United States or whose authorization had expired.<sup>21</sup> The state does not have authority to grant residency to an individual who does not have authority from the federal government to be in the country. The agency further demonstrated that the proposed rules will make the issuance of state license/identity documents consistent with federal residency and admission standards.<sup>22</sup>

The Chief ALJ agrees with the Report of the ALJ that the facts presented by the agency linking the proposed rules to specific recommendations for minimizing the risk of terrorist attacks are not strong. However, the record does establish that states and the national government are seeking ways to strengthen their coordination and the integrity of the documents they issue to help keep unauthorized persons from entering and remaining in the United States.<sup>23</sup> A state driver's license and identity card is one piece of the overall system of establishing identity. The agency is not required to prove by a preponderance of the evidence that its rule is needed and reasonable. Rather, it must set out affirmative facts. As the Minnesota Supreme Court has observed, an agency may "make judgments and draw conclusions from suspected, but not completely substantiated relationships between facts, from trends among facts, from theoretical projections, from imperfect data, from probative preliminary data not certifiable as "fact" and the like."<sup>24</sup> So the Department need not prove actual public safety and terrorist misuse of a driver's license in Minnesota. Rather, it has established through the data and argument presented that its proposed rule is rationally related to state and national security.<sup>25</sup>

Proposed subp. 8 regarding the status check date on the license or identification card is needed and reasonable as being rationally related to the agency purpose of issuing Minnesota license and identification documents to individuals entitled to them. The status check affects tourists and other temporary visitors and the date reflects the time a federally authorized admission period is scheduled to end.<sup>26</sup> The agency indicated only 0.45% of licenses or identification

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<sup>19</sup> Minn. R. 1400.2100.

<sup>20</sup> Minn. Stat. § 171.07, subd. 9.

<sup>21</sup> SONAR pgs. 5 and 20.

<sup>22</sup> See SONAR p. 4, Need to Protect Public Safety; SONAR p. 5, Coordination with Federal Standards; SONAR p. 21, discussion with John B. Klow, INS Deputy District Director.

<sup>23</sup> Ex. 18, beginning at p. 56 discusses increased governmental coordination.

<sup>24</sup> Manufactured Housing Institute, 247 N.W.2d at 244.

<sup>25</sup> In Jewish Community Action, et al. v. Comm'r of Public Safety, CX-02-1214, (Minn. Ct. App. March 11, 2003) the Court of Appeals agreed that the Department had demonstrated a serious and immediate threat due to terrorism in the United States when it adopted its temporary driver's license rule.

<sup>26</sup> Transcript, p. 20.

cards have been issued with a status check date.<sup>27</sup> The agency need to assure the integrity of the documents it issues and to minimize the potential for their misuse is adequate support for the proposed provision allowing for status check and cancellation if the period for lawful admission has expired. The Department argues that if an individual is no longer authorized to be in the United States it is reasonable to cancel the state document that was issued based on presence in Minnesota. The agency does have authority to cancel licenses and identification cards.<sup>28</sup> The Chief ALJ is persuaded that to be able to identify on the licenses and identification cards the date on which individuals no longer are authorized by the federal government to stay in the country – and thus no longer eligible to hold a Minnesota license or identification card - is reasonable.

Review of the statutory responsibilities of the Department of Public Safety and the agency presentation about the need to assure that the licenses and identification documents are issued based on accurate identification and to individuals who have the legal right to be residents of Minnesota are persuasive that the proposed rules are rationally related to the agency objective.

### **Verification of Identity Documents (7410.0400, subpart 3a)**

The Chief ALJ approves that portion of the ALJ Report found in paragraphs 91 and 92. For the Department to adopt this portion of the rule, it is necessary to provide a level of specificity greater than "if necessary". It should also state the consequence if a document is presented and cannot be verified.

### **Proposed Requirement for a Full-face Image (7410.1810)**

The ALJ Report sets forth the legal standards established by the Minnesota Supreme Court to resolve conflicts between state proposals and religious beliefs.<sup>29</sup> While the Chief ALJ agrees with the ALJ that the rule as proposed is defective, the Chief ALJ concludes that the agency may correct the defect by adding language as discussed later.

These proposed rules govern both the issuance of licenses for driving and for state identification cards. That the legislature anticipated both cards would be used for identification purposes is clear from the requirement that an individual may be issued either a license or an identification card, but not both.<sup>30</sup> The state interest in a photograph on the license or identity card holder is more than for driving a vehicle. The legislature has specifically permitted use of the file images created in the process of issuing drivers' licenses or identification cards for law enforcement purposes in the investigation and prosecution of crimes and for child support enforcement.<sup>31</sup> The law envisions that the identification of the license or identification card holder is necessary for broader state purposes including criminal law enforcement investigations.

The Chief ALJ is persuaded from the record that the state's interest in assuring accurate identification of the holder of a driver's license or state identification card is a sufficiently

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<sup>27</sup> SONAR p. 21.

<sup>28</sup> Minn. Stat. § 171.14. While lack of continued lawful admission to the country is not a listed reason for cancellation found in Minn. Stat. § 171.04, the general provisions of subd. 1(10) provide one basis for the action.

<sup>29</sup> Paragraphs 142 through 157.

<sup>30</sup> Minn. Stat. § 171.07, subd. 3,

<sup>31</sup> Minn. Stat. § 171.07, subd. 1a.

compelling interest to warrant some intrusion on firmly held religious beliefs.<sup>32</sup> Against this state interest to positively identify license and identity card holders, it is necessary to ask if there is a less intrusive way of accomplishing that identification for those individuals who have strongly held religious beliefs about revealing their faces.

The case of State v. Hershberger<sup>33</sup> relied on by the ALJ, illustrates the need to leave open the possibility of achieving the state objective by a less intrusive means. In that case, Amish people objected to using the state specified signs to identify their slow moving vehicles on the highways. The Supreme Court found the less intrusive alternative of using reflective tape and a red lantern to identify vehicles when on the road an acceptable alternative. In that case the Court said, "To infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means."<sup>34</sup>

Society's interest in being able to accurately identify the bearer of a Minnesota driver's license or identification card is clear. Identification of the driver of a vehicle is important as is having accurate information for law enforcement investigation and prosecution. In Hershberger, the public safety needs of making the vehicle more visible could be met through alternative means. In this case, the record is not clear that there are less intrusive alternatives than a photograph showing facial details. The ALJ refers to an alternative of maintaining a photo in the database but not appearing on the license at paragraph 153. The Chief ALJ has been unable to find references in the record to this alternative. This alternative deserves consideration by the Department. If, however, it will not satisfy the Department's public safety concerns, at a minimum, it should add a specific reference in this section of the rule to the variance process for individuals objecting to photographs on religious grounds. The reference should specify that the agency will consider variance requests from individuals who hold sincere religious beliefs against public display of the facial features when those individuals propose alternative means of identification. The Chief ALJ is not in a position, based on this record, to provide specific suggested identification markers, but concludes that the agency is under an obligation to leave open the possibility for less religiously sensitive alternatives to be proposed.

#### **Repeal of the Religious Exemption Rule (7410.1800)**

The Chief ALJ respectfully disagrees with the conclusion of the ALJ that the agency did not establish the need for and reasonableness of repealing the current rule allowing for an exemption from the photograph requirement on licenses and identification documents. As discussed earlier, the Chief ALJ concludes that the new language proposed in 7410.1810 is sufficient so long as the recommended change is adopted.

#### **Changes to the List of Primary and Secondary Documents. (7410.0400, subpart 2, items B,C,E, F; item G, subitem (4); 7410.0400, subpart 3, item E.)**

The ALJ determined that the Department had failed to demonstrate the need for and reasonableness of the above changes which deleted certain Canadian documents and the addition of an unexpired Permanent Resident or Resident Alien card to the lists. The ALJ's

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<sup>32</sup> The record indicates that there are two views in the Muslim community whether it is necessary to veil the face. For women who do adopt the veil, the proposed rule creates a conflict with their religious beliefs. Transcript, p. 81.


<sup>33</sup> 462 N.W. 2d 393 (Minn. 1990).

<sup>34</sup> Id. at 399.

determination was based on the conclusion that the Department did not have authority to require proof of residence as a condition for the issuance of a license/identity card.

As described above, the Chief ALJ has concluded that the Department's proposed residency rule is needed and reasonable and not unlawful. Therefore, for the reasons discussed above, the proposed changes to these sections of the proposed rules are necessary and reasonable and may be adopted.

Dated this <sup>29<sup>th</sup></sup> day of July, 2003.

  
KENNETH A. NICKOLAI  
Chief Administrative Law Judge