

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

In the Matter of the Proposed Rules of the  
Department of Public Safety Governing  
Driver Information, Licensing, and Testing;  
Minnesota Rules Chapter 7410

**REPORT OF THE CHIEF  
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minnesota Rules, part 1400.2240, subpart 4. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge, dated March 7, 2012, in all respects.

In order to correct the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall either take the action recommended by the Administrative Law Judge, make different changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minnesota Statutes, section 14.15, subdivision 4.

If the agency chooses to take the action recommended by the Administrative Law Judge, or if the agency chooses to make other changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the *State Register*, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated this 9<sup>th</sup> day of March, 2012

s/Raymond R. Krause

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RAYMOND R. KRAUSE  
Chief Administrative Law Judge

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**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Barbara L. Neilson conducted a hearing in this rulemaking proceeding commencing at 9:00 a.m. on January 10, 2012, in Room 200 of the State Office Building, 100 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, Minnesota. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one or when ordered by the agency. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

E. Joseph Newton, General Counsel, represented the Department of Public Safety (the Department or DPS) at the hearing. The members of the Department's hearing panel were Jacqueline Cavanagh, Legislation and Rules Coordinator for the Department's Driver and Vehicle Services Division (DVS); Patricia McCormack, Director of the DVS; Joan Kopcinski, Driver Services Program Director; Jane Landwehr, Driver Services Compliance Manager; Sue Kendrick, Driver Services Issuing Supervisor; and Jim Purcell, Management Analyst. One member of the public signed the hearing register.

The Department received written comments on the proposed rules prior to the hearing. After the hearing, the Administrative Law Judge kept the administrative record

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<sup>1</sup> Minn. Stat. §§ 14.131 through 14.20. Unless otherwise specified, all references to Minnesota Statutes are to the 2010 version.

open for an additional twenty calendar days, until Monday, January 30, 2012, to allow interested persons and the Department to submit written comments. Thereafter, the record remained open for an additional five business days, until Monday, February 6, 2012, to allow interested persons and the Department to file a written response to any comments received during the initial comment period.<sup>2</sup> Two written comments were received and considered during the rulemaking process,<sup>3</sup> along with the Department's responses.<sup>4</sup> To aid the public in participating in this matter, comments were posted on the Department's website shortly after they were received.<sup>5</sup> The hearing record closed for all purposes on February 6, 2012.

## NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the

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<sup>2</sup> See Minn. Stat. § 14.15, subd. 1.

<sup>3</sup> The post-hearing submissions from members of the public have been marked and received into the record as Public Exhibits (Exs.) 1 and 2.

<sup>4</sup> The Department's responses were marked and received into the record as Exs. P and Q.

<sup>5</sup> See <https://dps.mn.gov/divisions/dvs/news/Pages/enhanced-drivers-licenses-and-id-cards.aspx>.

proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.

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

## **FINDINGS OF FACT**

### **Nature of the Proposed Rules**

1. The Minnesota Department of Public Safety is authorized by state law to regulate the licensure and driving privileges of individuals who operate vehicles on Minnesota roads. In this rulemaking proceeding, the Department proposes to amend its rules to adopt identity and residency requirements for Minnesota residents who wish to obtain an Enhanced Driver's License (EDL) or an Enhanced Identification Card (EID).

2. An EDL or EID is a state-issued document that denotes identity and citizenship. It is specifically designed for cross-border travel into the United States by land or sea and cannot be used for air travel. An EDL or EID will be issued only to Minnesota residents who are also United States citizens who choose to apply for and purchase it in lieu of a regular driver's license or identification card. It will entitle the resident to the same privileges as a current Minnesota driver's license or identification card. According to the Department's Statement of Need and Reasonableness, a radio frequency identification chip will be embedded in EDL/EID cards and a machine-readable zone will be included on the back of the card. The radio frequency identification chip will permit information contained in the card to be read from a distance and ensure that border traffic will be able to be managed more quickly and efficiently. Personal information will not be stored on or transmitted from the card; such information will be housed in a secure database and there will only be a number on the card which points to that information.<sup>6</sup>

3. The proposed rules were prompted by regulations issued by the United States Department of Homeland Security (DHS) and legislation enacted by the Minnesota Legislature in 2010. The DHS's Western Hemisphere Travel Initiative (WHTI) regulations, which became effective in 2009, require all travelers to present a passport or other document that denotes identity and citizenship when entering the United States in order to strengthen border security and facilitate entry for US citizens.

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<sup>6</sup> Statement of Need and Reasonableness (SONAR) at 2-3 (citing <http://www.getyouhome.gov/html/rfid/RFID.html>); Ex. L (Testimony of Jacqueline Cavanagh).

The WHTI regulations also included provisions relating to the issuance of EDLs and EIDs, in order to provide U.S. citizens with an acceptable, low-cost travel document for entry to the United States by land or sea from Canada, Mexico, the Caribbean, or Bermuda. EDL and EID contain identifier technology and security features approved by the DHS and are designed to improve speed and efficiency at border crossing stations.<sup>7</sup> States wishing to establish an EDL/EID program must enter into an agreement with DHS to develop an acceptable EDL/EID document.<sup>8</sup>

4. In 2010, the Minnesota Legislature authorized the Department to enter into an agreement with the Secretary of DHS to develop an EDL and EID for Minnesota to be designated by the Secretary as acceptable documents to denote identity and citizenship for purposes of entering the United States at land and sea ports of entry. The legislation permitted EDL and EID to be issued in Minnesota beginning in January 2013, and required the Commissioner of Public Safety to amend Minnesota Rules parts 7410.0100, 7410.0400, and 7410.0410, to require applicants for EDL or EID to prove United States citizenship and otherwise comply with applicable requirements of Min. Stat. § 171.06, subd. 3.<sup>9</sup>

5. As of the date of the rulemaking hearing, the Department had not yet finalized its agreement with the Secretary of DHS. The DHS and the Department are continuing to negotiate the Memorandum of Agreement that will establish the shared commitment by the state and federal government to support the voluntary project of EDL/EID issuance in Minnesota. In formulating and proposing these rule amendments, the Department has relied on the draft Business Plan provided by DHS as part of the Memorandum of Agreement. The draft Business Plan sets forth the federal requirements relating to the EDL/EID process. In the Department's view, the Business Plan supports the rational basis and need for the Department's proposed rules. Where practicable, the Department has also been guided by the policies of other states that are currently issuing EDL/EID.<sup>10</sup> The Department expects that any further changes to the draft Memorandum of Agreement and Business Plan will be minor in nature, and has elected to proceed with this rulemaking proceeding even though the documents have not yet been executed.<sup>11</sup>

6. EDL and EID cards currently are being issued by several other states, including New York, Michigan, Vermont, and Washington, as well as the Canadian provinces of British Columbia, Manitoba, Ontario, and Québec.<sup>12</sup>

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<sup>7</sup> 8 C.F.R. §§ 212, 235; 22 C.F.R. §§ 41, 53.

<sup>8</sup> 73 Fed. Reg. 28421 (April 3, 2008).

<sup>9</sup> Minn. Laws Ch. 316, Sections 1-18.

<sup>10</sup> SONAR at 3-4. The draft Memorandum of Agreement and the draft Business Plan were received into the hearing record as Exs. N and O.

<sup>11</sup> Hearing Testimony of Pat McCormack; Ex. L (Testimony of Jacqueline Cavanagh).

<sup>12</sup> SONAR at 2.

## Rulemaking Legal Standards

7. Under Minnesota law, one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts.<sup>13</sup> In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>14</sup> The Department prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by comments made by staff and witnesses who spoke on behalf of the Department at the public hearing, and by the Department's written post-hearing submissions.

8. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>15</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>16</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>17</sup> The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>18</sup>

9. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.<sup>19</sup>

10. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with the rule adoption procedure, whether the proposed rules grant undue discretion, whether the Department has statutory authority to adopt the rules, whether the rules are unconstitutional or illegal,

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<sup>13</sup> Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100. Unless otherwise specified, all references to Minnesota Rules are to the 2011 version.

<sup>14</sup> *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

<sup>15</sup> *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

<sup>16</sup> *Greenhill v. Bailey*, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>17</sup> *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>18</sup> *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

<sup>19</sup> *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

whether the rules involve an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>20</sup>

11. Because the Department suggested changes to the proposed rules after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if the differences are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice; the differences are a logical outgrowth of the contents of the notice of hearing, and the comments submitted in response to the notice; and the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.<sup>21</sup>

12. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests; whether the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of hearing; and whether the effects of the rule differ from the effects of the proposed rule contained in the notice of hearing.<sup>22</sup>

#### **Procedural Requirements of Chapter 14**

13. The Minnesota Administrative Procedures Act<sup>23</sup> and the rules of the Office of Administrative Hearings<sup>24</sup> set forth certain procedural requirements that are to be followed during agency rulemaking.

14. By letter dated June 8, 2011, the Department requested that the Office of Administrative Hearings review and approve its Additional Notice Plan for publishing a Request for Comments. By letter dated June 14, 2011, Administrative Law Judge Eric L. Lipman approved the Additional Notice Plan.

15. On June 27, 2011, the Department published a Request for Comments on Possible Amendments to Rules Governing Driver's License Information, Licensing, and Testing for the Issuance of Enhanced Drivers Licenses and Enhanced Identification Cards in the State Register. The Request for Comments was published at 35 State Reg. 2042. On the same date, the Department posted a copy of the Request for Comments on the Department's website.<sup>25</sup>

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<sup>20</sup> Minn. R. 1400.2100.

<sup>21</sup> Minn. Stat. §14.05, subd. 2(b).

<sup>22</sup> Minn. Stat. § 14.05, subd. 2(c).

<sup>23</sup> The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-14.47.

<sup>24</sup> The OAH rules governing rulemaking proceedings are set forth in Minnesota Rules part 1400.2000 through 1400.2240.

<sup>25</sup> Ex. A.

16. As required by Minn. Stat. § 14.131, the Department asked the Commissioner of the Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefits of the proposed rules on local units of government.<sup>26</sup>

17. In a memorandum dated October 14, 2011, Keith Bogut, Executive Budget Officer for Minnesota Management & Budget, noted that he had reviewed the Department's proposed rule amendments and concluded that they will have no fiscal impact on local units of government.<sup>27</sup>

18. By letter dated October 25, 2011, the Department requested that the Office of Administrative Hearings confirm that Administrative Law Judge Barbara L. Neilson would conduct a hearing on the proposed rules on January 10, 2012. Along with the letter, the Department filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR).

19. In a letter dated October 28, 2011, Judge Lipman approved the Department's Hearing Notice and Additional Notice Plan and confirmed that Judge Neilson would preside at the January 10, 2012, rule hearing.

20. On November 2, 2011, the Department electronically sent a copy of the SONAR to the Legislative Reference Library as required by law.<sup>28</sup>

21. On November 2, 2011, the Department mailed the Notice of Hearing to all persons and associations on its Rulemaking List and to individuals and organizations identified in its Additional Notice Plan.<sup>29</sup>

22. On November 2, 2011, the Department mailed copies of the Notice of Hearing, SONAR, and Proposed Rules to the authors of SF 345 and HF 1005 (the enabling legislation regarding Minnesota Law 2010, Chapter 316) as well as the Chairs and Ranking Minority Members of the Senate Transportation Budget and Policy Committee, the Senate Judiciary and Public Safety Budget and Policy Committee, the House Transportation Policy and Finance Committee, and the House Public Safety and Crime Prevention Policy and Finance Committee.<sup>30</sup>

23. On November 7, 2011, the Department published the Notice of Hearing in the State Register at 36 State Reg. 539.<sup>31</sup>

24. On December 29, 2011, the Department filed with the Office of Administrative Hearings a copy of amendments that it intended to propose to the rules, along with explanatory information.

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<sup>26</sup> Ex. K2; SONAR at 4.

<sup>27</sup> Ex. K2.

<sup>28</sup> Ex. E.

<sup>29</sup> Ex. G.

<sup>30</sup> Exs. K1, K.3. The Department clarified in an email message dated March 6, 2012, that Rep. Mullery should have been identified in Exs. K1 and K3 as the ranking member on the House Public Safety and Crime Prevention Policy and Finance Committee.

<sup>31</sup> Ex. F.

25. The hearing on the proposed rules was held on January 10, 2012, at the State Office Building in St. Paul, Minnesota. During the hearing, the following documents were received into the hearing record:

- A. the Request for Comments as published in the State Register on June 27, 2011 (35 State Reg. 2042);<sup>32</sup>
- B. a copy of the proposed rules dated November 30, 2010, including the Revisor's approval;<sup>33</sup>
- C. a copy of the SONAR;<sup>34</sup>
- D. the Certificate of Mailing a copy of the SONAR to the Legislative Reference Library on November 2, 2011;<sup>35</sup>
- E. a copy of the Department's Notice of Hearing as published in the State Register on November 7, 2011 (36 State Reg. 539);<sup>36</sup>
- F. a Certificate attesting to the accuracy of the Department's mailing list and a Certificate attesting that the Notice of Hearing was mailed to all persons and associations on the Department's rulemaking list and all individuals and organizations identified in the Additional Notice Plan;<sup>37</sup>
- G. a copy of the letter of transmittal and email message sent to individuals and organizations regarding the proposed rules;<sup>38</sup>
- H. copies of written comments received by the Department from members of the public prior to the public hearing, and the Department's letters in response;<sup>39</sup>
- I. certificates attesting that the Request for Comments and the Notice of Hearing and SONAR were mailed to the authors of SF 345 and HF 1005 and to the Chairs and Ranking Minority Members of the Senate Transportation Budget and Policy Committee, the Senate Judiciary and Public Safety Budget and Policy Committee, the House Transportation Policy and Finance Committee, and the

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<sup>32</sup> Ex. A.  
<sup>33</sup> Ex. C.  
<sup>34</sup> Ex. D.  
<sup>35</sup> Ex. E.  
<sup>36</sup> Ex. F.  
<sup>37</sup> Ex. G.  
<sup>38</sup> Ex. H.  
<sup>39</sup> Ex. I.

House Public Safety and Crime Prevention Policy and Finance Committee, along with a copy of the transmittal letters;<sup>40</sup>

J. a copy of the October 14, 2011, memorandum from Keith Bogut, Executive Budget Officer for Minnesota Management & Budget, regarding the fiscal impact and benefits of the proposed rules with respect to local governments;<sup>41</sup>

K. a copy of a press release dated June 24, 2011, announcing that the Department was inviting public comment on the proposed rulemaking;<sup>42</sup>

L. a copy of notices placed on the Department's website regarding the proposed rules;<sup>43</sup>

M. a written copy of the testimony provided by the Rules Coordinator during the January 10, 2012, public hearing;<sup>44</sup>

N. a copy of the Department's proposed additional amendments to the proposed rules;<sup>45</sup>

O. a copy of the draft version of the Enhanced Driver's License Memorandum of Agreement between the State of Minnesota and the U.S. Department of Homeland Security;<sup>46</sup> and

P. a copy of the draft version of the State of Minnesota Business Plan for Implementation of the Enhanced Driver's License/Identification Card.<sup>47</sup>

26. The Administrative Law Judge finds that the Department met the procedural requirements under applicable law and rules.

### **Additional Notice**

27. Minn. Stat. §§ 14.131 and 14.23 require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. On October 25, 2011, the Department submitted an additional notice plan to the Office of Administrative Hearings in which it stated that it would notify over 800 individuals and organizations of the proposed rules (including organizations that advocated on behalf of the legislation, the Minnesota Department of

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<sup>40</sup> Exs. K1, K3; March 6, 2012, email from J. Cavanagh.

<sup>41</sup> Ex. K2.

<sup>42</sup> Ex. K4.

<sup>43</sup> Ex. K5.

<sup>44</sup> Ex. L.

<sup>45</sup> Ex. M.

<sup>46</sup> Ex. N.

<sup>47</sup> Ex. O.

Transportation, deputy registrars, driver's license agents, driver education programs, commercial driving training schools, law enforcement offices, U.S. Customs and Border Patrol personnel located in Minnesota, state agencies focused on tourism and trade relations, and the consular offices of Canada, Mexico, and certain Caribbean countries). The Department also indicated that it would publish all public notices associated with this rulemaking on the Department's website. The additional notice plan was reviewed and approved by Judge Lipman on October 28, 2011. During the rulemaking proceeding, the Department certified that it had sent the Notice of Hearing and proposed rules to the individuals and organizations identified in the Additional Notice Plan.<sup>48</sup>

28. The Administrative Law Judge finds that the Department has fulfilled its additional notice requirements.

### **Statutory Authority**

29. The Department relies upon Minn. Laws 2010, Chapter 316, Sec. 17, as the source of its statutory authority to adopt these rules. That provision states:

The commissioner of public safety shall amend Minnesota Rules, Parts 7410.0100, 7410.0400, and 7410.0410, so that an applicant for an enhanced driver's license or enhanced identification card must prove United States citizenship and otherwise comply with applicable requirements of Minnesota Statutes, section 171.06, subdivision 3. The amendments must be adopted pursuant to Minnesota Statutes, sections 14.131 to 14.20.

30. The Administrative Law Judge concludes that the Department has statutory authority to adopt the proposed rules.

### **Impact on Farming Operations**

31. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

32. In its SONAR, the Department noted that the proposed rules would have no known impact on farming operations. The Department did, however, notify the Agricultural Marketing and Development Division of the Minnesota Department of Agriculture of this rulemaking in light of any potential impact on the development of international market opportunities for Minnesota agricultural products.<sup>49</sup>

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<sup>48</sup> Ex G1.

<sup>49</sup> SONAR at 8.

33. There is no evidence that the proposed rules affect farming operations. Accordingly, the Administrative Law Judge concludes that the Department was not required to notify the Commissioner of Agriculture.

### **Regulatory Analysis in the SONAR**

34. Minn. Stat. § 14.131 requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. Each of these factors, and the Department's analysis, are discussed below.

35. The first factor requires "a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule." In its SONAR, the Department indicated that the proposed rule will affect Minnesota residents who are also United States citizens who choose to apply for an EDL or EID. The Department noted the rule itself does not impose costs because the EDL or EID is optional.<sup>50</sup>

36. The second factor requires consideration of "the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues." In the SONAR, the Department stated that no agency is likely to incur additional implementation or enforcement costs if the proposed rules are adopted. The Department acknowledged that there is an additional fee of \$15 associated with the EDL or EID, but asserted that this amount is needed to cover costs associated with strict federal requirements that all levels of the issuing process including the identity and residency document intake, applicant interview, and the security features of the EDL or EID card itself.<sup>51</sup>

37. The third factor requires "a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule." The Department stated in the SONAR that there were no less costly or less intrusive methods available to bring about the proposed changes other than rulemaking by the Department because (1) rulemaking is required under Minnesota Laws 2010, chapter 316, and (2) the Department must comply with federal requirements in order to issue an EDL or EID.<sup>52</sup>

38. The fourth factor requires "a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule." The Department states in its SONAR that it considered no other methods for achieving the purpose of the proposed rule because, in its view, "there is no alternative method of

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<sup>50</sup> SONAR at 7.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

achieving the rule's purpose, a purpose that is mandated by legislation and based on federal requirements."<sup>53</sup>

39. The fifth factor specifies that the agency must assess "the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals." In the SONAR, the Department stated that it has concluded that the proposed amendment has no effect on the costs of compliance. The Department acknowledged that an applicant who does not already have a driver's license for Minnesota or another jurisdiction may incur costs in obtaining other acceptable photo identification, and there may be costs involved in obtaining certain proof of identity and residency documents. However, the Department believes that any such costs are likely to be reasonable.<sup>54</sup>

40. The sixth factor requires a description of "the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals." In the SONAR, the Department noted that it has been directed by the Legislature to adopt the proposed rules and that, if the Department failed to engage in rulemaking, it would not be able to ensure that the identity and residency documents required by the DHS were used in Minnesota applications for an EDL or EID.<sup>55</sup>

41. The seventh and final factor requires "an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference." In the SONAR, the Department noted that the proposed rule amendments are intended to be in compliance with federal DHS requirements.<sup>56</sup>

42. The Administrative Law Judge concludes that the Department has adequately considered the other regulatory factors required by Minn. Stat. § 14.131.

### **Performance-Based Regulation**

43. The Administrative Procedure Act also requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.<sup>57</sup> A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.<sup>58</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Minn. Stat. § 14.131.

<sup>58</sup> Minn. Stat. § 14.002.

44. In its SONAR, the Department indicated that the proposed rule amendments meet this standard. The Department asserted that it attempted to identify and include as many proof of identity and proof of residency documents in the proposed rules as possible, while staying within the parameters of the federal EDL/EID requirements.<sup>59</sup>

45. The Administrative Law Judge finds that the Department has met the requirements set forth in § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

### **Consultation with the Commissioner of Management and Budget**

46. Under Minn. Stat. § 14.131, the Agency is also required to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

47. By letter dated October 12, 2001, the Department requested that Minnesota Management and Budget conduct a review of the proposed rule amendments under Minn. Stat. § 14.131. In a response dated October 14, 2011, Keith Bogut, Executive Budget Officer with Minnesota Management and Budget, noted that the proposed rules “deal only with citizen’s requirements to prove their identity and residency, and these interactions are the sole responsibility of the Department of Public Safety.” Accordingly, Mr. Bogut concluded that the proposed rules will have no fiscal impact on local units of government.<sup>60</sup>

48. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131.

### **Compliance Costs for Small Businesses and Cities**

49. Under Minn. Stat. § 14.127, the Department must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

50. In its SONAR, the Department stated that the proposed rules do not impose any new costs on small businesses or cities. The Department also emphasized that Minn. Stat. §§ 171.066 and 171.068 prohibit an employer from requiring an EDL or EID as a condition of employment.

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<sup>59</sup> *Id.* at 9.

<sup>60</sup> Ex. K2; SONAR at 9.

51. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.127 and approves that determination.

### **Adoption or Amendment of Local Ordinances**

52. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>61</sup>

53. The Department determined that no town, county, or home rule charter or statutory city would be required to adopt or amend an ordinance or other regulation to comply with the proposed rule. The Department stressed that the EDL or EID is optional for individuals.<sup>62</sup>

54. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128 and approves that determination.

### **Analysis of the Proposed Rules**

55. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined; it will not include a detailed discussion of each rule part. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

56. Public comment on the proposed rules was limited. Prior to the rulemaking hearing, Doug McNeil, Deputy Minister of Infrastructure and Transportation for the Province of Manitoba, and Marilyn McLaren, President and CEO for Manitoba Public Insurance, filed a letter in which they expressed support for the proposed rules and offered assistance with Minnesota's implementation of its EDL/EID program. They noted that Manitoba's 2009 EDL/EID initiative has been effective and appreciated by frequent travelers and border residents who would otherwise have no need for a passport. They indicated that the joint programs in Washington, British Columbia, Michigan, New York, Vermont, Ontario, and Quebec have also been successful.<sup>63</sup> Donald Overlander referenced the proposed rules in an email message in which he questioned the need for his son to submit a Social Security number when applying for a standard Minnesota driver's instructional permit.<sup>64</sup> The Department responded that

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<sup>61</sup> Minn. Stat. § 14.128, subd. 1.

<sup>62</sup> SONAR at 9.

<sup>63</sup> See Ex. I-1 (Letter from Doug McNeil and Marilyn McLaren to Jacqueline Cavanagh dated Dec. 9, 2011).

<sup>64</sup> See Ex. 1-2 (Email message from Donald Overlander to Jacqueline Cavanagh dated Dec. 8, 2011)

applicants must provide a Social Security number only when seeking the optional EDL/EID.<sup>65</sup> Mr. Overlander thereafter submitted a further email message thanking the Department for the clarification but continuing to express concern about statements allegedly made by Department employees suggesting that a Social Security number was required for all citizens.<sup>66</sup>

57. One member of the public--a representative from the Consulate General of Canada--attended the rulemaking hearing as an observer, but did not offer an oral or written comment. Following the hearing, two written comments were received from members of the public. Ernie Bartucci, Assistant Deputy Minister of the Ministry of Intergovernmental Affairs for the Province of Ontario, submitted a letter expressing Ontario's support for Minnesota's plans to move forward with the EDL program. He indicated that Ontario launched its EDL program in 2009 and strongly favors Minnesota developing a similar program. He noted that EDLs are a less expensive alternative to passports and will improve security and efficiency at the Canada/United States border. In his view, the EDL program will foster a sense of community, preserve jobs, and encourage retail trade and tourism on both sides of the border.<sup>67</sup> In its response to Mr. Bartucci's letter, the Department expressed appreciation for Ontario's support of the Minnesota EDL/EID program and its willingness to consult with Minnesota program administrators about its experiences and best practices.<sup>68</sup>

58. Philip Schwartz also filed a written comment expressing support for the EDL program. He asked if it would be possible to incorporate hunting and fishing licensing or endorsements with the Canadian authorities and expressed his willingness to pay an additional fee if this were possible.<sup>69</sup> The Department responded that Mr. Schwartz's proposal to include a hunting and fishing licensing endorsement on an EDL or EID would exceed the scope of this rulemaking proceeding. The Department noted that such a policy would require legislative approval as well as changes to federal law relating to the EDL/EID program to permit state agency action of this nature.<sup>70</sup> The Administrative Law Judge agrees that an attempt to include hunting and fishing privileges in the EDL/EID program at this juncture would likely exceed the rulemaking authority granted by the Legislature as well as the permissible scope of this rulemaking proceeding.

59. No member of the public objected to any of the proposed eligibility or documentation requirements contained in any of the proposed rule amendments or modifications.

60. At the rulemaking hearing, the Department proposed adding several additional amendments to the proposed rules. The changes that were substantive in nature are discussed in the Part-by-Part Analysis below.

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<sup>65</sup> See Ex. 1-2 (Email message from Jacqueline Cavanagh to Donald Overlander dated Dec. 21, 2011).

<sup>66</sup> See Ex. 1-2 (Email message from Donald Overlander to Jacqueline Cavanagh dated Dec. 22, 2011).

<sup>67</sup> See Public Ex. 1 (Letter from Ernie Bartucci to ALJ dated Jan. 20, 2012).

<sup>68</sup> See Ex. P (Letter from Pat McCormack to Ernie Bartucci dated Jan 30, 2012).

<sup>69</sup> See Public Ex. 2 (Email message from Philip Schwartz to ALJ dated Jan. 30, 2012).

<sup>70</sup> See Ex. Q (Email message from Jacqueline Cavanagh to Philip Schwartz dated Feb. 1, 2012).

## **Part-by-Part Analysis of Proposed Rules**

### **Minn. Rule Part 7410.0100 - Definitions**

61. The amendments to Part 7410.0100 as initially proposed would define “enhanced driver’s license or EDL” and “enhanced identification card or EID” as having the meanings given to them in Minn. Stat. § 171.01, subds. 31a and 31b; define “utility services” to include “landline telephone, mobile phone, electric light, gas or delivered fuel, garbage collection, or water for which a person receives an invoice for service on a recurring basis;” and clarify that the requirements for residence address and permanent mailing address for an EDL or EID are the same as for a regular driver’s license and identification card.

62. A “professional license” is one of several documents that an applicant for an EDL or EID may present for proof of residency in the state. The term is not defined in the Department’s current rules or in the original version of the proposed rules. At the hearing, the Department proposed adding an additional subpart 10a which would define “professional license” to mean:

any requirement by law to be licensed or registered by the state of Minnesota in order to carry on or practice a trade, employment, occupation or profession within this state and any requirement by law to renew the license or certificate of registration at stated intervals and to pay a fee for such renewal on or before a specified date, or be subject to revocation of the license or certificate or other penalties.

63. The proposed amendments to part 7410.0100 are necessary and reasonable to clarify to EDL/EID applicants what is meant by the defined terms and assist them in understanding the types of documents on which they may rely to prove residency. The modification to include a definition of “professional license” adds clarity to the rule and does not render the rule substantially different from the rule as originally proposed.

### **Minn. Rule part 7410.0400 – Documenting Proof of Name, Date of Birth, Identity**

64. Part 7410.0400 of the Department’s existing rules identify the types of documentation that will be deemed acceptable to prove name, date of birth, and identity of those who are seeking standard driver’s licenses, permits, identification cards, or vehicle certificates of title or registration. The proposed amendments to Part 7410.0400 describe the documents that must be provided by applicants for EDL or EID in order to prove their name, date of birth, and identity. In some instances, EDL/EID applicants are permitted to rely upon the same types of documents as those seeking standard licenses; in other instances, EDL/EID applicants must meet more stringent requirements, as outlined in the draft Memorandum of Understanding and draft Business Plan.

65. The Department proposed a number of modifications to the proposed rule during the hearing, and provided an explanation of the reasons for each change. Many

of the modifications are minor changes intended to correct errors, ensure that references to EDL and EID applicants are incorporated where appropriate in the rule, and improve the readability of the rule. For the most part, the other modifications broadened the scope of the documents that could be presented by applicants for EDL/EID.

### **Subpart 1, Item A**

66. Subpart 1, item A of the Department's existing rules indicates that applicants for standard licenses, identification cards, permits, and motor vehicle title or registration may present an expired Minnesota driver's license, permit, or identification card that expired within the past year (if it does not bear the applicant's photograph or image) or 5 years (if it does). In its proposed rules, the Department suggested adding the qualifying phrase "Except for an applicant for an enhanced driver's license or an enhanced identification card" to the beginning of item A. The Department explained in its SONAR that it is making this proposal because, under the draft Business Plan, an applicant for an EDL or EID cannot present an expired driver's license, identification card, or permit.<sup>71</sup>

67. Although the language proposed by the Department is not defective, the Administrative Law Judge believes that it is somewhat confusing. This portion of the proposed rule does not convey in a straightforward fashion that EDL/EID applicants cannot rely upon an expired document. In fact, the proposed language may suggest to some readers that EDL/EID applicants are not limited by the one- or five-year expiration periods but instead are permitted to rely on documents with expiration dates that exceed those periods. For that reason, the Administrative Law Judge recommends that the Department consider modifying the language of the proposed amendment to clarify its intent. The Department could, for example, substitute the phrase "With respect to applications for a driver's license, permit, identification card, or vehicle certificate of title or registration by an owner who is an individual," at the beginning of item A, and also include the following sentence at the end of item A: "Under part 7410.0410, subpart 4a, item Q, only a valid Minnesota driver's license, valid identification card, or valid permit can be presented as proof of residency for applicants for an enhanced driver's license or enhanced identification card." Language of this nature would be consistent with the intent of the Department but would clarify the rule language and avoid any possible confusion about whether or not applicants for an EDL or EID are permitted to rely upon an driver's license, identification card, or permit that has been expired for a longer period than that specified in item A. If the Department chooses to clarify the rule in this fashion, it will not result in a rule that is substantially different from the rule as originally proposed.

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<sup>71</sup> SONAR at 12. The Department's proposed amendment to Part 7410.0410 more clearly states that one of the two forms of documentation that can be provided by applicants for EDL or EID to prove residency is a "valid Minnesota driver's license, valid Minnesota identification card, or valid permit." See proposed subp. 4a, item Q (as further amended during the rulemaking hearing).

## Subpart 1, Items D - H

68. The draft Business Plan specifies that applicants for an EDL/EID will be required to provide documents demonstrating their eligibility, including a photo identity document, documentation showing the applicant's date of birth, proof of the person's Social Security number, and documentation showing the applicant's name and address of the applicant's principal residence. The applicant must demonstrate that he or she is a Minnesota resident and a United States citizen and provide documentation of legal name changes. The draft Business Plan states that birth certificate information will be verified using the Electronic Verification of Vital Events system. The Plan also specifies that the Department will use automated address verification to verify the address with the U.S. postal Service and confirm that the applicant's address is legitimate, and not a post office box or business address. Applicants will also be interviewed. If documents cannot be authenticated, the Business Plan specifies that the applicant will be denied an EDL/EID.<sup>72</sup>

69. The proposed amendments would create new items D through H setting forth a broad array of documents that may be used by applicants for EDL/EID to provide satisfactory proof of date of birth; full legal name; Social Security number; photographic identity; and United States citizenship.

70. For example, the proposed rule states that an applicant must present one of the following documents as proof of full legal name (provided that the document has not already been used as proof of identity): a birth certificate; U.S. Department of State Consular Report of Birth Abroad; valid U.S. passport; certificate of naturalization; certificate of citizenship; American Indian Card or Minnesota tribal identification card; U.S. military photo identification card; original Social Security card; federal or Minnesota W-2, SSA-1099, or non-SSA-1099 form; valid driver's license, identification card, or permit issued by Minnesota or another state in the U.S.; U.S. military or military dependent identification card; valid city, county, state, or federal employee identification card; U.S. high school or college identification card with a certified transcript; veterans universal access identification card; Minnesota unemployment insurance benefit statement issued no more than 90 days before EDL or EID application; federal or state income tax return or statement for the most recent tax filing year; Minnesota property tax statement for the current year; Minnesota vehicle certificate of title issued with past 12 months; filed property deed or title for current residence issued within past 12 months; Supplemental Security Income award statement issued within past 12 months; a Minnesota professional license that is not expired; a selective service card that is not expired; or military orders that are still in effect at the time of application. In the event that an applicant's full legal name does not match all other identity documents presented for an EDL or an EID, the proposed rules require an applicant to verify the name change by presenting a copy of a certified marriage certificate; a certified copy of a court order specifying the name change; or a certified copy of a divorce decree that sets forth the name change.

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<sup>72</sup> See Ex. O at 3-5.

71. The Department has shown that the proposed amendments to subpart 1, as modified at the hearing, are needed and reasonable to provide guidance to the public regarding the types of documents that will constitute sufficient proof of name, date of birth, Social Security number, and U.S. citizenship for issuance of an EDL or EID. The modifications to the language of the proposed rules are within the scope of the rulemaking as originally announced in the Notice of Hearing, and the final version of the proposed rule is not substantially different from the rule as originally proposed.

### **Subpart 3b**

72. As modified at the hearing, the proposed rules would further amend Part 7410.0400 by adding a new subpart 3b, items A and B:

#### **Subp. 3b. Verification of EDL or EID documents.**

A. The commissioner shall verify the authenticity of all identity documents presented by an applicant for an enhanced driver's license or enhanced identification card.

B. The commissioner shall deny an application for EDL or EID if the issuance of or authenticity of any document submitted under this part and part 7410.0410, subpart 4a cannot be verified with the issuing jurisdiction or issuing entity and if there is reason to believe that any document submitted:

1. is inconsistent with the department record; or
2. appears to be altered or fraudulent.

73. In its SONAR, the Department acknowledged that "the commissioner routinely verifies submitted documents for authenticity," but stated that the amendment reflected in item A "is necessary and reasonable because this is also a requirement under DHS requirements with respect to the issuance of an EDL or an EID."<sup>73</sup> In the explanatory materials offered at the hearing, the Department merely indicated that it was proposing to add the language in item B to "specify the commissioner must deny an application for EDL or EID if the commissioner cannot verify the authenticity of or issuance of identity and proof of residency documents submitted by applicant." The Department further asserted that "[t]his language is consistent with the commissioner's existing authority under part 7410.0400, subp. 3a."<sup>74</sup>

74. Subpart 3a of the Department's existing rules states:

Subp. 3a. **Verification.** The department must be able to verify with the issuing jurisdiction the issuance of and authenticity of the primary or secondary document presented.

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<sup>73</sup> SONAR at 16.

<sup>74</sup> Ex. M at 5.

- A. Verification is required if:
- (1) the document provided by the applicant is inconsistent with the department record;
  - (2) the document provided by the applicant appears to be altered or fraudulent;
  - (3) there is reason to believe the applicant is not legally present in the United States; or
  - (4) there is reason to believe the applicant is not who the applicant claims to be.
- B. If a document is presented that cannot be verified, notice of refusal shall occur in accordance with the procedures in part 7410.0425.

Part 7410.0425 of the Department's existing rules requires that applicants receive a written notice of refusal and be provided with an opportunity for administrative and judicial review under part 7410.0425.

75. The Administrative Law Judge concludes that the language of proposed Subpart 3b, items A and B, is defective because it is overly vague, is inconsistent with due process principles, and has not been shown to be needed and reasonable. A rule is impermissibly vague if it fails to provide sufficient standards for enforcement<sup>75</sup> or is so indefinite that one must guess at its meaning.<sup>76</sup> Item A of Subpart 3b provides no standards to guide the Commissioner in what should be done to "verify the authenticity of all identity documents" presented by EDL/EID applicants. It is not clear from the language of the proposed rule whether the required verification effort is limited to checking with the entity that issued the document or if it requires the Commissioner to take the types of steps mentioned in the draft Business Plan (e.g., contacting the U.S. Postal Service to verify an applicant's address and checking the Electronic Verification of Vital Events system to verify an applicant's birth certificate)<sup>77</sup> or engage in other, unspecified activities. In addition, Item B is inconsistent with due process principles because it merely states that an application shall be denied under the specified circumstances, without setting forth what, if any, recourse is available should an application be denied. In its SONAR and other submissions, the Department did not address this question or offer any explanation why the procedural protections set forth in Subpart 3a of the existing rules should not apply to EDL/EID applicants. Finally, the Department has not shown the need for or reasonableness of proposed Subpart 3b. Subpart 3a of its existing rules already requires that the Department verify with the

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<sup>75</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

<sup>76</sup> *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001); *Humenansky v. Minnesota Bd. of Md. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995).

<sup>77</sup> The proposed rules already require in Part 7410.0410, subp. 4b, that the Commissioner verify the address information provided by applicants for EDL or EID with the United States Postal Service.

issuing jurisdiction the issuance of and authenticity of documents that are presented. Subpart 3a also requires verification of a document provided by an applicant if the document “is inconsistent with the department record” or “appears to be altered or fraudulent.” Moreover, Part 7410.0425 of the Department’s existing rules permits the Department to request additional documentation or refuse to accept documentation if the documents provided by the applicant appear to be altered or fraudulent.

76. To correct the defect in Subpart 3b, the Administrative Law Judge suggests that the Department withdraw proposed new subpart 3b, items A and B and, if deemed necessary, amend the language of existing Subpart 3a to clarify that it also applies to EDL and EID applicants. The suggested approach would not result in a rule that is substantially different than the rule as originally proposed.

### **Minn. Rule Part 7410.0410 – Proof of Residency**

77. In its proposed rules, the Department added a new Subpart 4a to Part 7410.0410. Subpart 4a lists various documents that will be deemed acceptable to provide satisfactory proof that an applicant for an EDL or EID resides in the state of Minnesota. Applicants are required to present two different forms of documentation from the list in order to meet the requirement. In its SONAR, the Department indicated that it looked to other states that currently issue EDL/EID and attempted to develop a comprehensive list of 20 documents that cover a broad range of socioeconomic groups. In determining the acceptable issuance dates of the documents identified in the proposed rules, the Department took into consideration the typical cycle in which the various types of documents are issued. As a result, the Department asserted that it is reasonable to require in the proposed rules that certain of the referenced documents (such as utility bills, bank statements and unemployment insurance benefit statements) to have been issued no more than 90 days before an application for an EDL or EID is filed. The proposed rule also identifies several other documents that are issued annually that may be presented as long as they were issued no more than 12 months before the application is filed, such as income tax, property tax, and Supplemental Security Income statements. Finally, an applicant is allowed to present as proof of residency one of several documents that may have a longer duration, such as a valid Minnesota driver’s license or identification card, a Selective Service card, or a Minnesota professional license.

78. At the hearing, the Department proposed modifying the rule as originally proposed to increase the issuance period for a United States high school or college identification card from 90 days to 180 days to render the rule consistent with the same requirement for photographic identity and reduce the likelihood that an applicant may need to seek re-issuance of the same document within a narrow time frame. The Department also modified the rule as originally proposed to refer to a “certified” transcript to facilitate the commissioner’s verification of the issuance and authenticity of the document.<sup>78</sup>

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<sup>78</sup> See Ex. O at 6.

79. In the proposed rules, the Department also included a new Subpart 4b which requires the Commissioner to verify the address information provided by an applicant for an enhanced driver's license or enhanced identification card with the U.S. Postal Service. The proposed rule is consistent with language contained in the draft Business Plan.<sup>79</sup>

80. The Department has shown that its proposed amendments to Part 7410 are needed and reasonable to ensure that appropriate residency requirements are put in place for the issuance of an EDL and an EID. The modifications made to this portion of the rule after the Notice of Hearing was issued were minor and technical in nature and did not cause the rule as finally proposed to be substantially different from the rule as originally proposed.

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

### **CONCLUSIONS**

1. The Department gave proper notice of the hearing in this matter. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The Department has demonstrated 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), except as noted in Finding 75.

3. The Department 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. 4; and 14.50 (iii), except as noted in Finding 75.

4. The amendments to the proposed rules suggested by the Department after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

5. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 2 and 3, as noted in Finding 76.

6. Due to Conclusions 2 and 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department

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<sup>79</sup> See Ex. O at 4.

from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

Dated: March 7, 2012.

s/Barbara L. Neilson

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BARBARA L. NEILSON  
Administrative Law Judge

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