

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44 and 14.45.

MEMORANDUM

Pursuant to Minn. Stat. § 14.381, subd. 1(a), a person may petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that “an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.”

At issue in these proceedings is whether the Department of Commerce’s September 5, 2008, announcement amounts to interpretive rules.

The Administrative Law Judge concludes that the declarations that the licensing of consumer small loan lenders is “required regardless of whether the lender has a physical presence in Minnesota,” and that “[p]ayday lenders will also be required to comply with the limits on loan amounts, fees and charges, and other requirements of state law,” amount to new interpretative rules. Accordingly, a grant of OLA’s request for relief is warranted.

Regulatory Background

Minn. Stat. § 47.60 regulates the provision of small consumer loans – including “payday lending.” Under this statute, the amount of charges and fees that may be sought by lenders is capped and rollover loans are prohibited.¹

Minn. Stat. § 47.60, subdivision 3, further provides that:

Before a person other than a financial institution as defined by section 47.59 engages in the business of making consumer small loans, the person shall file with the commissioner as a consumer small loan lender. The filing must be on a form prescribed by the commissioner together with a fee of \$250 for each place of business and contain the following information in addition to the information required by the commissioner:

(1) evidence that the filer has available for the operation of the business at the location specified, liquid assets of at least \$50,000; and

¹ See, Minn. Stat. § 47.60, subd. 2 (2006).

(2) a biographical statement on the principal person responsible for the operation and management of the business to be certified.

Revocation of the filing and the right to engage in the business of a consumer small loan lender is the same as in the case of a regulated lender license in section 56.09.²

Likewise important, as noted immediately above, Minn. Stat. § 47.60 links consumer small loan lending with regulated lender licensing under Minnesota Statutes, Chapter 56. Included within Minn. Stat. § 56.18, is an important regulatory exemption:

No loan made by a person not authorized hereunder in an amount regulated by this chapter for which a greater rate of interest, consideration, or charges than is permitted by the laws of this state has been charged, contracted for, or received, wherever made, shall be enforced by a licensee in this state, and every person in anywise participating therein in this state shall be subject to the provisions of this chapter, provided, that the foregoing shall not apply to loans legally made in another state.³

Factual Background

The OLA is a professional trade association representing lenders in the online payday loan industry. OLA's members include online payday lenders who make loans through the Internet to Minnesota consumers, but have no physical presence in Minnesota.

In 2004 and 2006 respectively, two members of the OLA wrote to the Department regarding the applicability of the licensing requirements of Minn. Stat. § 47.60. In 2004, Terry R. Meyer, Chief Examiner of the Department of Commerce's Financial Examinations Division, wrote to CashnetUSA, an OLA member from Illinois, stating:

Your December 14, 2004 letter questions the need to license your firm, an on-line deferred deposit lender, in Minnesota. Without a physical location the current statutes do not permit licensing out-of-state lenders. Minnesota Statutes, Section 56.18, "Unlicensed persons not to make loans" addresses this in the last sentence; "that the foregoing shall not apply to loans legally made in another state". Therefore, loans could be

² See, Minn. Stat. § 47.60, subd. 3 (2006) (emphasis added).

³ See, Minn. Stat. § 56.18 (2006) (emphasis added).

made to Minnesota residents as described in your letter from your licensed locations, the later being identified in the note and disclosures.⁴

Similarly, in September of 2006, Chief Examiner Meyer wrote to the counsel for an OLA member from Nevada, Cash America Net of Nevada, stating:

Your letter of August 25, 2006 questioned if a regulated lender license, under Minnesota Statutes, Chapter 56, is required for your client, Cash America Net of Nevada, LLC. That firm offers payday loans under a Nevada small loan license and would not have a physical location in Minnesota. The firm proposes to make payday loans via the internet from its Nevada location.

Section 56.18 entitled "Unlicensed Persons not to make Loans" would allow the activity based on its last sentence; "that the foregoing shall not apply to loans legally made in another state."⁵

Consistent with this guidance, the Department of Commerce's website lists among the requirements for licensure as a "Consumer Small Loan Company," a "Minnesota location."⁶

On or around September 5, 2008, the Minnesota Department of Commerce issued a press release with the heading "Out of state Payday Lenders now subject to Department of Commerce licensing and regulation." The release stated in part:

The Minnesota Department of Commerce announced today it is now requiring all payday lenders making small denomination, short-term loans to Minnesota residents via the internet be licensed pursuant to Minnesota law. Licensing is required regardless of whether the lender has a physical presence in Minnesota. Payday lenders will also be required to comply with the limits on loan amounts, fees and charges, and other requirements of state law.

After further review of Minnesota law and statute the Department is now of the opinion that a payday loan made via the internet is made in the state where the borrower resides and the payday lender making such a loan is subject to Minnesota laws and licensure. As a result, all payday lenders making loans to Minnesota residents via the internet must meet the new licensing requirements effective December 1, 2008.

⁴ See, OLA Petition, Exhibit B (emphasis added).

⁵ See, OLA Petition, Ex. C (emphasis added).

⁶ See, OLA Petition, Ex. D (<http://www.state.mn.us/portal/mn/jsp/content.do?subchannel=-536893539&programid=536914608&sc3=null&sc2=null&id=-536881352&agency=Commerce/>)

Financial institutions, including state or federally chartered banks or savings associations, industrial loan and thrift companies licensed under Chapter 53, regulated lenders licensed under Chapter 56, or any operating subsidiary of a financial institution, are not subject to the licensing requirements of Section 47.60, the Consumer Small Loan statute. As an alternative, a payday lender may apply for an industrial loan and thrift company license under Chapter 53 of the Minnesota Statutes; however, the Chapter 53 license requires a physical presence in Minnesota.⁷

In its petition for relief from this Office, the OLA asserts that the “September 5, 2008 Press Release represents a complete reversal of interpretation and legal application as previously articulated by the Department and as understood by OLA and its members.”⁸

Analysis

1. Does the September 5, 2008 Pronouncement Qualify as a Rule?

The Minnesota Administrative Procedure Act (MAPA) defines a “rule” as:

every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.⁹

Further, those interpretations of existing rules which “make specific the law enforced or administered by the agency,” and are not either long-standing positions of the agency or within the plain meaning of the statute, are deemed to be “interpretative rules.”¹⁰ Like substantive rules, an agency’s interpretative rules are valid only if they are promulgated in accordance with MAPA.¹¹

Likewise important, is that Executive Branch agencies are granted considerable discretion to decide whether to develop regulatory policy “deductively,” by promulgating

⁷ See, OLA Petition, Ex. A (emphasis added).

⁸ See, OLA Petition, at 3.

⁹ Minn. Stat. § 14.02, subd. 4 (2006).

¹⁰ See, e.g., *Mapleton Community Home, Inc. v. Minnesota Dep’t of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) (“[a]n agency interpretation that ‘make[s] specific the law enforced or administered by the agency’ is an interpretive rule that is valid only if promulgated in accordance with the [Minnesota Administrative Procedures Act]” (quoting *Minnesota-Dakotas Retail Hardware Ass’n v. State*, 279 N.W.2d 360, 364 (Minn. 1979))).

¹¹ See, *In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. App.), review denied (Minn. 1993) (citing, *Mapleton Community Home*, and *Minnesota-Dakotas Retail Hardware Ass’n*, *supra*).

a new rule, or “inductively,” through a series of individual adjudications.¹² The appellate courts have instructed that every executive branch agency has the “flexibility and discretion to depart from formal rulemaking” when application of a given legal standard to a particular set of facts seems clear.¹³

A few points deserve special emphasis. The first is that the Department’s September 5, 2008 announcement is a “statement of general applicability.” The Department declared that “all payday lenders making small denomination, short-term loans to Minnesota residents via the internet be licensed pursuant to Minnesota law” and that “all payday lenders making loans to Minnesota residents via the internet must meet the new licensing requirements effective December 1, 2008.” This declaration makes clear that the Department’s plan is to apply the state’s licensing requirements to all small loan lenders after December 1 and that no policy will be developed on a case-by-case basis.¹⁴

Second, the Department’s September 5, 2008 announcement is a “statement of future effect.” The Department declared that “payday lenders making loans to Minnesota residents via the internet must meet the new licensing requirements effective December 1, 2008.” The Department does not apparently claim that it has always insisted such lenders must meet Minnesota’s licensing requirements, or that such lenders needed to be licensed in September, October or November of 2008. In the Department’s view, the licensing requirements are effective 87 days after the agency gave fair warning to the industry.¹⁵

Third, the Department’s September 5, 2008 announcement was “adopted to implement or make specific the law enforced or administered by that agency.” As the Department explained in its release, it is “now of the opinion that a payday loan made via the internet is made in the state where the borrower resides and the payday lender making such a loan is subject to Minnesota laws and licensure.” The announced change in the Department’s view was circulated to implement and make specific the Consumer Small Loan statutes administered by the agency.¹⁶

¹² See, *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981).

¹³ See, *AAA Striping Service Co. v. Minnesota Dep’t. of Transp.*, 681 N.W.2d 706, 717-18 (Minn. 2004); compare also, *L&D Trucking v. Minnesota Dep’t. of Transp.*, 600 N.W.2d 734, 736 (Minn. App. 1999); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894-95 (Minn. App. 1988).

¹⁴ Compare, *Reserve Life Insurance Co. v. Commissioner of Commerce*, 402 N.W.2d 631 (Minn. App.) review denied (Minn. 1987) (it was reasonable for the Commissioner to assess the validity of insurance policy provisions on a case-by-case basis where it would be “nearly impossible” to state in advance all of the possible applications of the statutory terms ‘unfair, inequitable, misleading (and) deceptive’).

¹⁵ See, *Memorandum in Response to the Section 14.381 Petition of the Online Lenders Alliance*, at 9 (hereafter “The Department’s Memorandum”) (“the Department issued the press release to provide the industry a fair opportunity to achieve compliance”).

¹⁶ See, *The Department’s Memorandum*, at 7 (“The September new release, which was mailed to all known interested parties, advised the industry of the Department’s decision to apply the statute”).

For these reasons, unless some exception to the requirement to promulgate an interpretative rule applies in this case, the prospective inclusion of now-unregulated companies under Minnesota’s licensing standards amounts to a rule.¹⁷

2. Does the Agency Pronouncement Follow Directly from the Plain Meaning of the Statute?

It is important to note that when an agency’s interpretation of the law follows from the plain meaning of a statute, the agency is not deemed to have engaged in rulemaking.¹⁸ As the Department argues, it should not be obliged to undertake “expensive and time-consuming” rulemaking each time that it “revisits the reading of a statute’s plain language.”¹⁹

While the Department sets forth the correct rule of law – namely, that the implementation of a regulatory choice made by the Legislature in a statute does not require a subsequent round of agency rulemaking in order to become effective – that rule is not dispositive in this case. This is because the terms “engages in the business of making consumer small loans,” do not specify whether they are meant to apply to lenders who have no physical presence within Minnesota.

The Department concedes that, until recently, it read the statutes differently than it does today. For a time, the Department held the view that a firm did not engage in the business of making consumer small loans, as those terms are used in the statute, if the lender was not physically present in Minnesota. Now, “[a]fter further review of Minnesota law and statute the Department is ... of the opinion that a payday loan made via the internet is made in the state where the borrower resides and the payday lender making such a loan is subject to Minnesota laws and licensure.”²⁰ Although the Department has offered opposite readings of the statute, at different times, either viewpoint can reasonably follow from the terms “engages in the business of making consumer small loans.”

Likewise significant, the Department does not read the statutory terms so broadly as to purport to regulate all loan transactions with Minnesota residents. There are exceptions in the view that the agency announced. For example, the Department does not insist that a Nevada lender that makes loans to Minnesota residents, while those

¹⁷ Minn. Stat. § 14.06 (a) (2006) (“Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public”).

¹⁸ See, e.g., *Cable Communications Bd. v. Nor-West Cable Communications P’ship*, 356 N.W.2d 658, 667 (Minn. 1984) (“Generally, if the agency’s interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule”).

¹⁹ See, *The Department’s Memorandum*, at 7.

²⁰ See, OLA Petition, Ex. A (emphasis added).

residents are Wisconsin, submit to licensure in Minnesota.²¹ Therefore, the statutory terms “engages in the business of making consumer small loans” have a narrower and more specialized meaning than the phrase “those who make small loans.”

For these reasons, something more than resorting to the plain meaning of these terms is needed in order to know how broad the licensure requirements of Minn. Stat. § 47.60 are to be applied. The statutory terms are ambiguous and require interpretative steps so as to arrive at the agency’s hoped-for understanding.

The Department’s reading of the statutory terms, as announced on September 5, 2008, is an interpretation that “make[s] specific the law enforced or administered by that agency.” As such, rulemaking is required before the licensing requirements of Minn. Stat. § 47.60 may be applied to lenders who do not have a physical presence in Minnesota.

E. L. L.

²¹ *The Department’s Memorandum*, at 3 (“[A] Minnesota resident who travels to a neighboring state to obtain a payday loan would not be protected by the statute”).