SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART 44

----------X

MARIA CUBAS, ROBERT McINTYRE, ERIS LUMI, John Doe II and John Doe IV

Plaintiffs,

Index No. 112371/04

-against-

RAYMOND MARTINEZ, INDIVIDUALLY and as COMMISSIONER, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

DECISION AND ORDER

Defendant.

----------X

HON. KAREN S. SMITH

Plaintiffs' application for a preliminary injunction is granted in part and denied in part as more fully provided below. Defendant's cross-motion to dismiss the instant application is granted solely to the extent of (a) dismissing all claims against defendant George E. Pataki, (b) dismissing all claims relating to the denial of non-driver identification cards to persons seeking asbestos removal licenses without prejudice to re-assert such claim upon adding a necessary party, and is denied in all other aspects.

Plaintiffs are a group of three named individuals and two John Doe individuals[1], all of whom are long term residents of New York City. Each of these plaintiffs allege to have been injured by the policies and practices of the defendant New York State Department of Motor Vehicles ("DMV"), the administrative agency which has the legislatively delegated duty to provide drivers' licenses, learners' permits and non-driver identification cards to New York State residents. Defendant Raymond Martinez is the Commissioner of the New York State

[1] Plaintiffs who have chosen to be identified as "John Doe" claim that they are doing this out of fear of harassment and retaliation due to their immigration status. The parties to this action are in the process of working on an agreement to enable those plaintiffs to reveal their true identity. Prior to the issuance of this decision, the parties stipulated to plaintiffs' withdrawal of three of the John Doe plaintiffs.

Department of Motor Vehicles ("Commissioner").

Plaintiffs bring an action seeking declaratory and injunctive relief to prohibit DMV from following certain policies and from engaging in certain practices which plaintiffs maintain are illegal and discriminatory. The specific policies and practices plaintiffs complain of are as follows:

(1) DMV's refusal to issue new drivers' licenses, renewal licenses, learners' permits, or non-driver identification cards to persons who do not provide, along with the other statutorily mandated documentation, documents from the Department of Homeland Security ("DHS")/Immigration and Naturalization Service ("INS")[2] showing that they are currently authorized to remain in this country (referred to as the "legal presence requirement"),

(2) DMV's plan to suspend drivers' licenses for approximately 270,000 current drivers[3] for allegedly failing to present a valid social security number, without informing them that, as an alternative to the social security number requirement, they could submit a letter from the Social Security Administration ("SSA") stating that they are ineligible to receive a social security number (referred to as the "SSA ineligibility letter"), and

(3) DMV's establishment of a "Temporary Visitor Program" for non-citizens, which (I) grants new drivers' licenses, renewal licenses, learners' permits, and non-driver identification cards only to those non-citizens who can present INS documentation showing that they have received authorization to remain in the United States for at least one year with six months left on their authorization (referred to as the "one year six/month rule"), (ii) sets the expiration date on their license to coincide with the expiration date on their immigration papers, even if the applicant is entitled to an automatic extension on the time they are authorized to remain in the country, and (iii) issues the license of such persons with the phrase "Temporary Visitor"on the license.

Plaintiffs claim that the legal presence requirement and the one year/six month rule (1) exceeds DMV's statutory authority, (2) was established in violation of Article 4 §8 of the

---

[2]As the INS has been merged within DHS, these two agencies will be referred to interchangeably.

[3]According to DMV, this figure is closer to approximately 252,000 persons.

New York State Constitution and §§ 202 and 203 of New York State's Administrative Procedure Act ("SAPA"), and (3) violates the equal protection and due process clauses of the United States and the New York State Constitutions.

Plaintiffs now move for preliminary injunctive relief enjoining defendants from engaging in these practices. To succeed on a motion for preliminary injunctive relief plaintiff must show (1) a likelihood that they will succeed on the merits of the case, (2) that they will suffer irreparable injury if the relief requested is not granted before trial, and (3) that in balancing the equities on both sides, the balance tips in plaintiffs' favor (*Aetna Insurance Co. v. Capasso,* 75 NY2d 860 [1990]; *Albini v. Solork Assocs., et al.,* 37 AD2d 835 [2d Dept 1971]).

LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs have made a *prima facie* showing of the likelihood that they will succeed on the merits of (1) the portion of their claim prohibiting DMV from denying plaintiffs new drivers' licenses, renewal licenses, learners' permits, or non-driver identification cards based on either the proof of the applicant's legal presence or on the applicant's immigration status, (2) the portion of their claim which challenges the policies and practices of DMV on the establishment of the Temporary Visitor Program and the imposition of the one year/six month rule, and (3) the portion of their claim which seeks to enjoin DMV from taking any further action in regards to suspending licenses of persons who were sent a letter which failed to inform them of the option of providing a SSA ineligibility letter in lieu of a social security number.

THE FACTS

<u>The Department of Motor Vehicles, the Vehicle and Traffic Law and Applicable Regulations</u>

Prior to 1959, the New York State Department of Motor Vehicles ("DMV") was a bureau in the Department of Taxation. In 1959 the New York State Legislature established the DMV as an independent state agency (Vehicle and Traffic Law § 200), with the duty of licensing drivers

throughout the state (Vehicle and Traffic Law §501[1]). Since then, its legislatively mandated purpose has been to assure that licenses are issued to persons who are fit to drive. The provisions establishing the DMV, the powers of the commissioner, the criteria for issuing licenses and non-driver identification cards, taking drivers tests, and all of the other provisions involved in the administration of the agency are codified in the New York State Vehicle and Traffic Law ("VTL"). In addition, regulations have been formerly promulgated pursuant to the State Administrative Procedure Act ("SAPA"), to further carry out the mandates of the legislature.

VTL §501[1] states that " the commissioner shall issue classified drivers' licenses as provided in this article." Prior to 1995, applicants for new drivers' licenses, renewal licenses, or non-drivers identification cards were required to "furnish such proof of identity, age and fitness as may be required by the commissioner" (VTL §502[1], §502 [6][a], and §490). In 1995 VTL §502[1] and §502 [6][a] were amended to require applicants to provide a social security number as a prerequisite for obtaining an initial drivers' license and a renewal license respectively. This provision was enacted as part of reforms in the state's welfare laws and was designed primarily as a means of locating persons who were delinquent in their child support payments[4] (*Stoianoff v Commissioner of Motor Vehicles*, 107 F Supp 2d 439, 448 [SDNY, 2000], *affd*, 2001 US App LEXIS 11000 [2001]]). In 2002, VTL § 490 was amended to include the requirement of a social security number as a prerequisite for obtaining a non-drivers identification card. Included in the legislative record to the amendment of VTL § 490 is a memorandum, written by DMV, which refers to the social security number requirement as providing "an additional element of verification to the identification process." (New York Legislative Annual 149, Memorandum of the Department of Motor Vehicles 2002 c232). 15 NYCRR §3.9, promulgated by the Commissioner on July 24, 1991 and amended on December 11, 2002, made it possible for an applicant who was not eligible for a valid social security number to provide proof of his or her ineligibility and thereby satisfy the social security number requirement. By issuance of an internal memorandum(referred to by DMV as a "mailbag"), the Commissioner required that proof of ineligibility to receive a social security number be submitted in the form of a letter from the Social Security Administration ("SSA"), dated within thirty days of the application, which states

[4] McKinney's 1995 Session Laws of New York: Memorandum relating to Ch. 81

that the applicant is not eligible to receive a social security number (referred to as the "SSA ineligibility letter") (Mailbag # 79-2001, September 6, 2001, attached as Exhibit F to the Traschen Affidavit in support of defendant's motion to dismiss and in opposition to plaintiffs' request for a preliminary injunction, hereafter referred to as the "Traschen Affidavit.").

VTL §§ 503[1][a] states that "...drivers' licenses shall be valid from the date of issuance until a date of expiration determined by the Commissioner...[who] may extend the period of the validity of a license in a manner and form proscribed by him..."

In order to carry out its functions, the VTL §508[1]authorizes the commissioner to appoint agents to act on his behalf with respect to the acceptance of applications and the issuance of licenses and permits prescribed in this article, and further authorizes the commissioner to ". . . prescribe the internal procedures to be followed by [his] agents with respect to such matters." VTL § 508 [2] requires that applications ". . . shall be in a manner and on a form or forms prescribed by the commissioner . . ." and that applicants ". . . shall furnish all information required by statute and such other information as the commissioner shall deem appropriate."

DMV's Policies and Practices, Past and Present

To carry out its statutory mandates, DMV issues internal procedures to enable its employees to verify the identity, age, fitness and social security numbers of applicants. Prior to April 2002, the DMV followed a "point system" whereby applicants were required to provide certain documents which were assigned various points which were then used to verify the applicant's name and date of birth. Among the documents which DMV accepted for verifying the applicant's identity were foreign birth certificates, which were accepted as proof of date of birth, and foreign passports, which were accepted as proof of the applicant's name. If an applicant presented a social security number, four additional points of identification were required. If an applicant presented a SSA ineligibility letter in lieu of a social security number, six points of identification were required.

On or around April 19, 2002, DMV issued new internal procedures, ostensibly to verify the identity of persons who apply for drivers' licenses and non-driver identification cards in a more efficient and cost effective manner. DMV provided its personnel with a new list of

acceptable documents that could be used as proof of identity. No longer will DMV accept foreign passports or foreign birth certificates. If an applicant does not have a valid social security number, DMV will only accept current immigration documents which establish legal presence for proof of name and date of birth. (Traschen Affidavit, Exhibit I). Persons who submit a SSA ineligibility letter in lieu of a social security number are required to present, along with the traditional documentation relied upon in the point system, the DHS documentation submitted to SSA to obtain the ineligibility letter. Furthermore, the DHS documentation must establish that the applicant meets the legal presence requirement and satisfies the one year/six month rule.

In or around January 2003, DMV commenced the "Temporary Visitor Program" which was designed to provide temporary licenses and non-driver identification cards to persons whose DHS documents show that they are not seeking to remain in this country permanently. Once such applicants are so identified, they are required to present their DHS documents which must show that they meet the one year/six month rule. If they are found to qualify, such persons are given a license or non-driver identification card with the words"Temporary License" written on the face of the document. The expiration dates of the temporary licenses coincide with the expiration dates on the applicants' immigration papers, irrespective as to whether the applicants are entitled to an automatic renewal of their authorization to remain in the country.

If any applicant cannot satisfy the legal presence requirement or the one year/six month rule, DMV will not issue that applicant either a driver's license (whether the applicant seeks a license for the first time or seeks to renew a valid license) or a non-driver identification.

The Suspension Letters

Sometime in 2002, DMV obtained access to SSA's data base and began verifying applicants' social security numbers. As part of the Social Security Number Verification Project, DMV learned that there were many persons who held drivers' licenses, learners' permits, or non-driver identification cards, whose social security numbers were invalid, who had no social security number or who had provided different identification information to DMV and the SSA. Out of the 11.5 million persons holding New York State drivers' licences, DMV found that they

were unable to verify social security numbers for approximately 600,000 persons (Traschen Affidavit, para. 41). DMV sent letters to all 600,000 persons threatening to suspend their licenses unless they contacted DMV within the next fifteen days and provided DMV with a valid social security number. The letter contained no information about the option of providing a SSA ineligibility letter as an alternative to submitting a social security number. Of the 600,000 letters sent, according to DMV figures, all but approximately 252, 000 persons have responded to date. DMV has not yet revoked the licenses of those 252,000 persons.

DMV'S NEW REGULATIONS FOR OBTAINING A DRIVER'S LICENSE OR A NON-DRIVER IDENTIFICATION CARD ARE *ULTRA VIRES*

The Legal Presence Requirement

DMV does not dispute that its current documentation requirements include "proof consistent with lawful presence in this country" (Traschen Affidavit, par. 8) and that, at present, DMV will not license or renew individuals who do not present a valid social security number or documentation which shows the applicant meets the legal presence requirement. DMV argues, however, that the legal presence requirement is an unintended by-product of the statutory requirement that DMV verify the identity, age and social security number, or ineligibility letter, for all applicants prior to issuing licenses to them. DMV argues that establishing these regulations is within its discretion as provided by VTL § 501[1], which requires applicants to furnish proof of identity and age "as may be required by the commissioner, and VTL § 508, which authorizes DMV to establish procedures to verify the information provided by applicants.

On their face, these provisions give the commissioner seemingly unfettered discretion to demand any document he deems appropriate. However, the scope of the commissioner's power is limited by the principles that govern all administrative rule-making. "An administrative agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the legislature." (*Tze Chun Liao v. New York State Banking Dept.*, 74 NY2d 505, 509 [1989]). While the legislature may authorize an agency to develop rules consistent with legislation (*In the Matter of Edward Nicholas, et al. v Alfred E. Kahn, as Chairmen of the Public Service Commission and Administrative Head of the New York State Department of Public*

Service, et al., 47 NY2d 24, 31 [1979]), those rules can only extend so far as to implement the law as it exists, and agencies have no authority to create rules out of harmony with the statute. (*Jones v. Berman*, 37 NY2d 42, 53 [1975]).

An agency has no discretion where a statute is clear on its face. The statutory requirements to obtain a license are proof of: 1) identity, 2) age, 3) fitness, and 4) a social security number or ineligibility for a social security number. DMV may exercise its discretion to request documentation to verify those elements, including all of the INS/DHS documents. However, under this state's law, **DMV cannot make current immigration documents, or any other documentary proof of one's immigration status, the <u>only</u> documents that are acceptable to verify an applicant's identity** because such a policy creates a *de facto* fifth requirement (legal presence) that is not currently part of the statute. DMV cannot use its rule making authorization to usurp the function of the legislature by creating requirements for eligibility which appear nowhere in the statute. This rule is an unauthorized exercise of DMV's rule-making power and will, in all likelihood, be held invalid.

Consider the following example. If DMV decided that marriage certificates are the best verifiable forms of identification and issued an internal procedure requiring a marriage certificate to verify each applicant's identity, DMV could argue that the internal procedure was only issued to carry out the function of verifying identity. Nevertheless, any persons not married would be precluded from obtaining a driver's license. Since it is clear from the face of the statute that being married is not a requirement to obtain a driver's license, the establishment of such a procedure would be an arbitrary abuse of DMV's discretion. The same is true of DMV's "internal procedure" which is in question in the current case. The implementation of the rule requiring legal presence is an arbitrary abuse of DMV's discretion and is *ultra vires*. DMV's characterization of the legal requirement as a mere by-product of their obligation to verify identity conflates identity with immigration status. Identity is not the same as immigration status. Nor is immigration status the only way to verify identity.

In the case of applicants who submit a SSA ineligible letter in lieu of a social security number, DMV argues that it must be allowed to verify these letters as they are easy to forge and have been found to have been falsified. While verification of the SSA ineligibility letter is a rational goal, one cannot lose sight of the fact that the social security number was originally added

to the VTL for the purpose of identifying dead beat parents, and that the SSA ineligibility letter rule is merely an outgrowth of that requirement. When §490 was amended in 2002, the legislature did not include a provision requiring legal presence as a prerequisite for a license. As such, DMV has no statutory authorization to create such a rule. Nor has DMV the ability to grant itself such authorization on the basis of its own legislative memorandum, which states that a social security number could be used as an "...additional element of verification to the identification process..." If a SSA ineligibility letter does not clearly state that SSA has found the applicant ineligible for receipt of a social security number, DMV may reject the letter. However, if the letter appears on its face to have the appropriate statement of ineligibility and the DMV questions the authenticity of the letter, the DMV must find a procedure to verify the authenticity of the letter which does not add a legal presence criterion to those mandated by statute.

Even if these policies were within DMV's discretionary powers, evidence in the record indicates that DMV's primary motivation has little to do with the identity of the applicants and more to do with national security issues. The April 19, 2002 "mailbag", sent to all DMV employees as a prelude to the change in the verification procedures demonstrates that the legal presence rule is clearly intended to be more than a mere by-product of DMV's statutorily mandated duties. The mailbag states:

> "Change of Proof of Date of Birth Requirements Driver License, Lerner Permits and Non-Driver Identification: **requiring proof of date documentation is the single most important tool for preventing applicants, who do not have legal presence, from obtaining New York State driving privileges or New York State photo documents.** For example, an applicant who doesn't have legal status may be able to meet our six points of proof of name requirements without using an INS document. **It is this proof of date of birth documentation that will prevent applicant's who do not have legal presence from obtaining New York State DMV photo documents or privileges.**" (emphasis added)

(Exhibit O, Page 2 to Maier Affidavit submitted by Plaintiffs in support of their application for Preliminary Injunctive Relief). The statement: "...an applicant who doesn't have legal status may be able to meet our six points of proof of name requirements without using an INS document" makes it appear that the purpose of these requirements is not to verify applicant's identity, but

rather to gather intelligence on the status of non-citizens and to deprive them of their mobility if they remain in the country after the expiration of their visa.

Defendant Martinez's speech, made on August 19, 2004 to the New York State Assembly's Transportation Committee (Traschen Affidavit, Exhibit A), reinforces this view.[5] In his speech, characterized by defendant as "describ[ing] the purpose and effects of DMV's current identification and social security number verification procedure," the Commissioner stated that "[t]he events of 9/11 changed the course of history." He advised his listeners that "we must move forward, recognizing that the world has changed, and do everything we can to prevent such acts from reoccurring... [a]s a means of protecting against and preparing for terrorist attacks, . . . standards [must] be set for the issuance of birth certificates and sources of identification, such as driver licenses." He then pointed out that:

> Here in New York, as in most states, the Department of Motor Vehicles is the main source and, very often, the only source, of government issued photo identification of our residents. The 9/11 Commission confirmed what we had already known - that the issuance of driver licenses and non-driver identification cards would never again be a pro forma exercise. As a result, we at DMV, along with most other state DMVs throughout the nation, have reexamined our licensing and identification requirements and procedures to make sure we are doing everything we can to protect our citizens.

Keeping our citizens and the citizens of the world safe from terrorists' acts is crucial. Some state legislatures have passed specific legislation either denying driver's licenses to persons who are unable to verify their legal status in this country or have opted to require that a statewide identification card other than a driver's license be carried by its citizens or have issued drivers' licenses which clearly state that they are not to be used for identification (Calif. Vehicle Code §12801-5; Tenn. Code Anno § 55-50-331 [2004]). To date, the New York State Legislature has done none of those things. Nor has the legislature imposed a "legal presence" requirement or delegated the task of implementing such a requirement to the DMV. The difficulty and complexity of competing policy determinations, the fight against terrorism and the requirement that only

[5] Exhibit G - Supervisor's Guidelines for Applications and Exhibit K - License Renewal Instructions, attached to the Traschen Affidavit, are replete with immigration information while information relating to verification of identity is conspicuous by its absence.

persons fit to drive be licensed, mandates that the legislative body be permitted to provide for the implementation of basic policy through the use of specialized agencies concentrating upon one particular problem at a time. (*see, In the Matter of Edward Nicholas, et al, supra.*). DMV cannot be an enforcer for the DHS. It simply lacks the expertise and, more importantly, it has not been empowered by the state legislature to carry out that function.

The Temporary Visitors Program

DMV relies on VTL § 503 [1][a], which authorizes the commissioner to establish expiration dates for licences as the basis for its exercise of discretion in establishing the Temporary Visitors Program. Unlike the legal presence requirement, the Temporary Visitors Program, according to DMV, "...reflects a practical administrative concern with respect to issuing a license that will be usable for a period of six months or less, since the process from learner's permit to license generally takes more than six months" (Page 21 of defendant's Memorandum of Law). The DMV further states that: "DMV believes its bad public policy to have valid driver's identification documents such as licenses and permits in circulation whose legitimate owners should have no use for them." While there may be logic to DMV's position, the fact remains that it is the legislature's function to determine what is and is not "bad public policy" and to take action through legislation to implement good public policy. DMV cannot usurp the legislatures's function no matter how outraged, upset or motivated it is about any issue. "As an arm of the executive branch of government, an administrative agency may not, in the exercise of its rule making authority, engage in broad-based public policy determinations" (*Rent Stabilization Assoc. of New York* City, *Inc. v. Higgins*, *[1993]*, *citing Boreali v Axelrod*, *Supra,* at 9 [1987]), This is particularly true, where the agency has failed to comply with the minimal requirements in SAPA.

DMV'S FAILURE TO FORMERLY PROMULGATE THE NEW REGULATIONS VIOLATES THE NEW YORK STATE CONSTITUTION AND SAPA

DMV's imposition of the requirement that all applicants for drivers' licenses, learners' permits and non-driver identification cards submit only documents which prove legal presence and the establishment of the Temporary Visitor Program, with all of those programs' other features

referred to above, without formerly promulgating these rules, violates Article 4 § 8 of the New York State Constitution and §§ 202 and 203 of SAPA.

There is no dispute that the legal presence requirement and the one year/six month rule came about solely through the issuance by DMV of internal memoranda. DMV never filed these rules with the secretary of state, nor were the new rules published in the state register. DMV claims that it is not required to follow SAPA in relation to the imposition of the requirements of either legal presence or the one year/six month rule as they are not "rules" within the meaning of SAPA and are thus not subject to SAPA.

Article 4 §8 of the New York State Constitution states that:

> No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, authority, or commission shall be effective until it is filed in the office of the Department of State.

SAPA expands on the state constitutional provision by providing in pertinent part, that: "no rule shall become effective until it is filed with the secretary of state and the notice of adoption is published in the state register." (SAPA § 203 [1]). § 202 [1] of SAPA further provides that:

> Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule... [t]he notice of the proposed rule making must appear in the state register at least forty-five days prior to ... (ii) the first public hearing on a proposed rule for which such hearing is required.

SAPA §102 [2][a][I] defines a rule as "the whole or part of each agency statement of general applicability that implements or applies law ... or the procedure or practice requirements of any agency...." SAPA §§102 [2][b][i]&[iv] exclude from the definition of a rule: "rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public" and "forms and instructions and interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory."

Defendant argues that the "legal presence requirement"is not a "rule" requiring conformity

with the dictates of SAPA. According to defendant, it is an internal procedure designed to enable the Commissioner and his staff to more efficiently verify the information provided by the applicant so as make sure that no fraud is perpetrated on the public, and is specifically authorized by VTL §508 [2].

Defendant further argues that the one year/six month rule is not a "rule" requiring conformity with the dictates of SAPA as it involves (1) a cost saving, in that it saves DMV from issuing licenses for such short periods of time, (2) a safety measure, as it prevents licenses which from being used for nefarious purposes, and (3) is more efficient. However, even if cost savings is a valid consideration for such policies, at no time in the course of these proceedings, nor in any of defendant's submissions, has defendant offered any evidence that there are cost savings from these new regulations or what such savings might be. Moreover, the Court of Appeals has specifically rejected the use by an agency of concerns over cost savings as an excuse for the agency to impose its own ideas of sound public policy, where the statute does not expressly provide for such considerations. (*Boreali v Axelrod*, *supra* at 12). On the issue of safety, the legislature is the proper body to determine the efficacy of these policies as a safety measure. DMV's claim that access to DHS's data bank and documents is the most efficient way to verify applicants' identities, is belied by the fact that DMV has only begun to avail itself of this new DHS data bank since the instant lawsuit was filed, as of October 2003, over a year after the new policies were instituted.

A rule is "any kind of legislative or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future." (*People v. Cull*, 10 NY2d 123, 126 [1961].)

Clearly both the legal presence requirement and the Temporary Visitor Program constitute procedures which establish a pattern or course of conduct for the future which significantly affect the rights available to the public. Under the temporary visitor program non-citizens who are unable to prove that they qualify under the one year/six month rule have been denied and will continue to be denied driver's licences and non-driver identification cards. These requirements cannot be characterized as only "internal procedures", as provided for in VTL §508, as (1) these regulations directly and significantly affect a segment of the public over which the respondent exercises direct authority (*cf, Schwartfigure v. Hartnett,* 83 NY2d 296, 302 [1994]) and (2) the effect and/or impact of the regulations are primarily external in nature, as it effects the public. Even if these regulations were found to serve a legitimate function (such as to more easily and

readily verify the identity of applicants for licenses, learner's permits, and non-driver identification cards), the primary thrust of the regulations is substantive in nature, imposing a fifth requirement, proof of the legality of the applicant's immigration status at the time of their application. Such regulations clearly fit within the definition of a rule or regulation subject to SAPA, as they constitute "a fixed general principle[s] to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers...." (*Roman Catholic Diocese of Albany v. New York State Department of Health*, 66 NY2d 948 [1985].)

DMV argues that because it exercises its discretion by granting exemptions to applicants unable to produce the INS documentation, the one year/six month requirement cannot be considered a rule and is thus outside the scope of SAPA. As plaintiffs point out, whether it is 1 year/6 months or 1 year/4 months, the essence of the rule is "legal presence." While DMV's internal procedures addressed to supervisors in considering exemptions to the one year/six month rule suggest some items to be considered in making a determination, there are no real standards set forth as to how to weigh these standards. By failing to promulgate standard or guidelines behind the exemption procedure, which is necessary to insure a meaningful judicial review, DMV has further deprived plaintiffs of safeguards against arbitrary administrative action. (*See In the Matter of Edward Nicholas, et al.*, *supra.* at 33).

Plaintiffs' Claim Involving the Department of Labor

Unlike the legal presence and one year/six month rules, plaintiffs are unable to sustain their burden of proving the likelihood of success on the merits of the portion of their claim which seeks to enjoin DMV from refusing to provide non-driver identification cards on the basis of immigration status to persons seeking annual renewal of their asbestos handler license issued by the New York State Department of Labor (DOL).

According to the complaint, in mid 2003, the DOL entered into a Memorandum of Understanding with the DMV whereby the DMV would take over the processing of photographs for all applicants for asbestos licenses seeking certification in asbestos related occupations. Prior to July 2003, the DOL generated all such photographs. After July 2003, persons seeking renewal of their licenses were required to obtain photo identification cards from DMV and to use the DMV

licence number or client id number on the DOL applications. DMV has denied these plaintiffs non-driver identification cards on the same basis as all other plaintiffs - the failure to provide proof of legal presence and compliance with the one year/six month rule. However, there is nothing in the statute which requires DMV to issue such photo identification cards to this class of applicants. Vehicle and Traffic Law §§ 490 [2] & [3] provides in pertinent part that:

> 2. Application. Any person to whom a driver's license or learner's permit has not been issued by the commissioner, or whose driver's license or learner's permit is expired, suspended or revoked, may make application to the commissioner for the issuance of an identification card.
>
> 3. Issuance (of non-driver identification card) (a)(1) The commissioner shall upon submission of an appropriate application... and being satisfied that the person described is the applicant and that such applicant meets the requirements set forth in subdivision 2 of this section, issue to such applicant a nontransferable identification card.

As can be seen from the language of the statute, such identification cards are provided only to persons who have not been issued a driver's license or learner's permit, or whose license or permit has expired, been suspended or revoked. The plaintiffs in this action seeking this relief do not appear to fall within any of these categories and there is no provision in the statute requiring DMV to provide non-driver identification cards to persons in the category herein, i.e. persons seeking certification from DOL as an asbestos handler. The Memorandum of Understanding between DMV and DOL does not confer a right as between DMV and the applicants for the asbestos license. The dispute here is between the applicants and Department of Labor, which is not a party to the action. The court thus denies a preliminary injunction on this aspect of the relief requested in so far as it calls for the issuance of photo identification cards to persons who do not fall within the applicable statutory categories.

Having found that plaintiffs have made a *prima facie* showing of the likelihood that they will prevail at trial on the merits of all (but one) of their claims on the basis that the commissioner has acted in excess of his authority and in violation of the New York State Constitution and SAPA, the court need not reach the question at this stage in the proceedings whether defendant's policies and practices violate the equal protection and due process clauses of the New York State and federal constitutions. The court next examines whether plaintiffs will suffer irreparable injury if

they are denied the relief requested.

IRREPARABLE INJURY

Plaintiffs have established imminent and irreparable injury if the court denies their request for relief. Plaintiffs who have sought and continue to seek renewal licenses since these policies and practices have been imposed, have had their renewal applications denied based on these challenged policies and practices. Those plaintiffs who face suspension of their licences are living with a sword of Damocles over their heads.

DMV claims that the 252,000 persons who have yet to respond to letters threatening them with suspension are not aggrieved as their licenses have not yet been suspended and that DMV is merely encouraging these people to contact DMV to further discuss these matters. In making this argument DMV ignores the fact that (1) the letter fails to state that the recipient of the letter may submit a SSA ineligibility letter in lieu of a social security number, (2) DMV requires that the recipients of the letter produce INS documents authorizing their legal presence in the country, which is not required by the statute, and (3) the letters give the recipients only 15 days to contact DMV or face suspension of their license. Under such circumstances, it is no wonder that so many of the people who were sent such letters have failed to respond. Despite assurances from DMV's counsel at oral argument that DMV has not yet decided whether to actually begin suspending these drivers' licenses, as things currently stand there is nothing preventing DMV from taking such action. Given that DMV appears to have instituted these new policies without any general announcement to the public, there is little reassurance for these plaintiffs that such action will not be taken.

By its own admission in its papers, DMV's entry into this realm has caused it to mistakenly deny the right take a driver's test to at least one of the named plaintiffs (Lumi) who, as DMV admits, is qualified to take his drivers test. DMV states that it is now prepared to correct this error. But such palliative actions cannot undo the harm already suffered by this plaintiff nor protect those persons similarly situated, too confused or afraid to come forward to assert their rights.

Plaintiffs argue that many of the plaintiffs, who live in areas where there is no easy access to public transportation, are dependent on driving their cars to carry out the daily tasks of living. According to the complaint, as a result of the inability to drive, plaintiffs face the inability to either

partially or fully perform their job duties (McIntyre and John Doe IV), which has resulted in either a vast reduction of income or a complete loss of income further threatening the family's ability to pay for medication or for the parochial school in which their child is enrolled (John Doe IV). As a result of these denials, at least one of the plaintiffs has been unable to take a sick child for ongoing medical treatments for her epilepsy (McIntyre) or carry on all of the other daily tasks of living such as shopping for food, taking children to school, etc. There is no question, under these circumstances, that these plaintiffs face irreparable injury.

BALANCING THE EQUITIES

Plaintiffs have faced and will continue to face serious injuries if these practices continue. DMV argues that administrative convenience and the cost of providing drivers' licenses for persons here on a temporary basis require the rules to continue as they currently exist. However, administrative convenience is not a sufficient basis to deny plaintiffs the relief they seek. As this decision merely requires defendants to promulgate these contested rules in accordance with §202 and §203 of SAPA, which is neither onerous nor constitutes an unduly long process, the court finds that the balance of equities favor plaintiffs in this matter.

The court is not requiring DMV to rescind the approximately 252,000 remaining unanswered warning letters sent as of the filing of this motion. The court is simply enjoining DMV from taking any further action in relation to those 252,000 license holders unless and until DMV sends said persons a follow up letter informing them of the SSA ineligibility letter alternative to the social security number. Nor should this be a problem as DMV admits that the "vast majority of those (252,000 people) are eligible for a social security number, or have them but simply have not bothered to fix their records, or have not received the mailing because they changed address without notifying DMV as required by statute"(Traschen Affidavit, paragraph 43).

In oral argument, the court agreed, as per the request of defendant's counsel, to provide defendant with time to seek appeal of this order and if unsuccessful, defendant may return for a further stay of this order to enable defendant to establish guidelines to carry out their statutory authority within the guidelines of this order. The grant of this particular request, as provided below, further prevents any substantial negative impact on DMV.

In addition, the court is concerned that the wholesale denial of motor vehicle licenses to persons who are unable to comply with defendant's immigration status requirements will lead to much more serious consequences, such as people driving without valid licenses, and hence without insurance, and an even greater inability to track the whereabouts of hundreds of thousands of New York residents.

As for defendant's motion to dismiss, by finding that plaintiffs have met their burden of demonstrating a likelihood of success on the merits, the court has gone far beyond the legal sufficiency of the pleadings. As such, defendant's cross-motion to dismiss for legal insufficiency must be denied (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]).

One note of caution. This decision is not meant in any way to prohibit DMV from routing out and taking action against those who commit fraud, either by the submission of fraudulent information or fraudulent documents to obtain licenses, or other forms of fraud, or those who are trying to escape parental obligation for child support. The only activity here which is being enjoined is the use of either the legal presence requirement and/or the one year/six month rule, or any other basis related to an applicant's immigration status, as a basis for denying any resident's application for a driver's license, renewal license, learner's permit, or non-driver identification card until changed by the state legislature or by the promulgation of formal rules as required by SAPA. This decision does not prohibit the demand for and use of social security cards, as required by the statute, nor the SSA ineligibility letter, as provided in the regulations, for the purposes they were intended. Nor does this decision prohibit DMV from setting procedures to verify the identity, age, and fitness of the applicants. It simply may not use immigration status nor reject documents which do not evidence proof of legal presence or compliance with the one year/six month rule as a basis for verification of these items.

For all of the above reasons, defendant's cross-motion to dismiss is denied and plaintiff's motion for preliminary injunctive relief is granted as provided below. Accordingly, it is hereby

ORDERED that defendant, its employees, agents, representatives are ENJOINED AND RESTRAINED during the pendency of this action, from requiring or in any way imposing a legal presence requirement or any immigration status as a condition to receipt of a driver's license, renewal license, learner's permit or non-driver identification card, and it is further,

ORDERED that defendant, its employees, agents, representatives are further ENJOINED

AND RESTRAINED during the pendency of this action, from maintaining a "Temporary Visitor's Program" which requires applicants to comply with the one year/six month rule as a condition of receiving a driver's license, renewal license, learner's permit or non-driver identification card, which establishes expiration dates for licenses based on an applicant's immigration status, and which includes on the face of the card the words "temporary visitor," and it is further

ORDERED that, pursuant to CPLR § 6312[b], plaintiffs shall pay an undertaking for any damages and costs defendants may sustain by reason of this injunction, if it is finally determined that plaintiffs were not entitled to an injunction. The amount of the undertaking shall be fixed at a hearing to be held on Thursday, May 26, 2001 at 2:15 p.m.

This order is STAYED for five business days from receipt of the order with notice of entry to allow defendant time to seek appeal in the Appellate Division, and, if denied, may return to this court to seek a further stay in order to establish guidelines in keeping with this order.

The parties are ordered to appear in Part 44 for a Preliminary Conference on May 26, 2005 at 2:15 p.m.

Dated: May 9, 2005
New York, New York

_____
Karen S. Smith, J.S.C.