

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

K.L.,)
)
Appellant,)
)
v.)
)
STATE OF ALASKA, DEPARTMENT OF)
ADMINISTRATION, DIVISION OF MOTOR)
VEHICLES,)
)
Appellee.)
)

Case No. 3AN-11-05431 CI

Memorandum Decision Re: Appeal of License Cancellation

K.L. has appealed the decision of an Administrative Hearing Officer ("AHO") concerning actions taken by the Department of Administration, Division of Motor Vehicles ("DMV").

I. FACTS AND PROCEEDINGS

K.L. is a male-to-female transgendered person who lives her life as a female. K.L.'s United States passport identifies her as female, as does her medical certificate to operate as a pilot, her airman certificate, and her work identification.

In 2009, K.L. applied for and received an Alaska driver's license with a sex designation of male. Approximately five months later, on May 25, 2010, K.L. completed an application for a renewed Alaska driver's license, in which she submitted a Certificate of Name Change to change her name from D.L. to K.L. On this application K.L. indicated her sex as female. On June 12, 2010 the DMV accepted the Certificate of Name Change and issued a new license to K.L. with a female sex identifier.

The DMV's Standard Operating Procedure ("SOP") D-24 sets forth the procedures used by the DMV when an applicant seeks to change information on his or her driver's license. While the DMV merely accepts the applicant's word for changes in weight, height, hair color, and eye color, a medical certification of a sex change was required before the DMV would change the sex code on an individual's license.

The DMV employee processing K.L.'s initial application was apparently new to the DMV, and it is unknown whether proof of sex change surgery was requested from K.L. Once the DMV realized that there was no documentation reflecting a surgical change of male-to-female, an Order of Cancellation notice was sent to K.L. This notice, sent by the DMV on July 9, 2010, indicated that K.L. could avoid cancellation by presenting verification from a doctor that a surgical change was performed.

K.L. disputed the cancellation of her license and requested an administrative hearing. The issues for the administrative hearing were as follows:

- (1) Whether the State of Alaska has the authority to cancel a license;
- (2) Whether the State erred in issuing a license to K.L.;
- (3) Whether the DMV's SOP D-24 is actually a regulation that was not promulgated in accordance with the Administrative Procedure Act of AS 44.62; and
- (4) Whether the DMV's policy requiring a medical certification of a sex change violates K.L.'s rights to informational privacy, medical decision-making, autonomy, equal protection, and due process as guaranteed by the Alaska Constitution, article 1, §§ 1, 7, and 22.

An administrative hearing was held on January 3, 2011, and a decision was issued on January 31, 2011.¹

The Administrative Hearing Officer ("AHO") first concluded that Alaska Statute 28.15.161(a)(2) provides the State with the authority to cancel a license if there is an error or defect in the license.²

The AHO also concluded that SOP D-24 is a regulation that was not promulgated in accordance with the Administrative Procedure Act ("APA") of AS 44.62.³ The AHO cited to *Kenai Peninsula Fisherman's Coop. Assn., Inc. v. State*⁴ for the proposition that "once a procedure is deemed a regulation that has not been adopted according to the Administrative Procedure Act standards, it becomes invalid and there can be no further reliance on the policy until the procedures required by the APA [are] observed."⁵

Thus, the AHO held that the DMV cannot rely on SOP D-24, and therefore has no authority to change the sex on a license until such time that a regulation is adopted

¹ Appellant's Excerpt of R. at 51.

² *Id.* at 53, 55.

³ *Id.* at 54-55.

⁴ 628 P.2d 897, 906 (Alaska 1981).

⁵ Appellant's Excerpt of R. at 55.

that complies with the Administrative Procedure Act.⁶ The AHO then found that any licenses issued under that policy were done so in error and would be deemed invalid pursuant to *Kenai Peninsula Fisherman's Coop. Assn., Inc.*⁷ Because the sex code on the license issued to K.L. was changed from male to female without any legal authority, the AHO concluded that the license was issued in error and is not valid.⁸

Based on this holding, the AHO refrained from making findings on whether there was a violation of K.L.'s right to informational privacy, medical decision-making, autonomy, or equal protection.⁹

On February 7, 2011, the AHO sent a letter clarifying that the decision invalidating SOP D-24 was specific only to the language regarding change of sex on a license. According to the AHO, all other portions of SOP D-24 were either internal policies or based on adopted statutes or regulations.

II. ISSUES FOR CONSIDERATION

K.L. does not challenge the AHO's determination that SOP D-24 was a regulation not promulgated in accordance with the APA and is therefore invalid. Rather, K.L. raises the following arguments:

- (1) The AHO committed reversible error by misinterpreting and misapplying AS 25.15.161 to find that K.L.'s license contained an "error";
- (2) The DMV's refusal to permit a transgender person to correct the sex designation on his or her driver's license or, in the alternative, permit a correction only upon proof of surgery: (a) violates fundamental liberty and privacy rights, and/or (b) violates the right of equal protection; and
- (3) The appropriate remedy is the promulgation of an administrative regulation, similar to policies in a growing number of states, which does away with proof of surgical treatment, focusing instead on gender identity and expression.

III. DISCUSSION

As discussed below, the Court finds that the AHO correctly concluded that K.L.'s license contained an "error" sufficient to warrant cancellation. The Court further concludes, however, that the absence of any regulation allowing licensees to change

⁶ *Id.* at 55-56.

⁷ *Id.* at 55.

⁸ *Id.* at 55-56.

⁹ *Id.* at 55.

the sex designation on their driver's license impermissibly infringes on a constitutionally-protected zone of privacy.¹⁰

A. Standard of Review

The Alaska Supreme Court has identified four different standards of review for appeals from administrative agency decisions:

The "substantial evidence" test is used for questions of fact. The "reasonable basis" test is used for questions of law involving agency expertise. The "substitution of judgment" test is used for questions of law where no expertise is involved. The "reasonable and not arbitrary" test is used for review of administrative regulations.¹¹

This case presents questions of law where no agency expertise is involved and constitutional principals about which courts have specialized knowledge and experience. Therefore, the appropriate standard for this case is the "substitution of judgment" test.

In addition, AS 28.15.166(m) specifically concerns judicial review of driver's license revocations after an administrative hearing, and provides that the superior court "may reverse the department's determination if the court finds that the department misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by the evidence in the record."

B. The AHO Did Not Error in Finding that K.L.'s License Contained an "Error"

The parties do not dispute the AHO's determination that the portion of SOP D-24 requiring surgical proof of sex change was a regulation not promulgated in accordance with the APA, and is therefore invalid. Nevertheless, K.L. maintains that the AHO committed reversible error by misinterpreting and misapplying AS 28.15.161 to find that K.L.'s license contained an "error."

AS 28.15.161 provides that "[t]he department shall cancel a driver's license upon determination that there is an error or defect in the license."¹² An "error" in this respect

¹⁰ Because the Court's decision is based on the right to privacy, the Court will not reach the issue of whether K.L.'s equal protection rights have also been violated.

¹¹ *Handley v. State, Dept. of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (citing *Jager v. State*, 537 P.2d 1100, 1107 n. 23 (Alaska 1975)).

¹² AS 28.15.161(a)(2).

includes "an error or defect in the document issued or the application for issuance or because the person holding the document is no longer entitled to it."¹³

Here, the AHO concluded that the DMV could no longer rely on the portion of SOP D-24 regarding sex designations because the policy was actually a regulation which had to be adopted in accordance with the APA. By the same reasoning which led to that conclusion, it follows that any new policy regarding a change of the sex designation on one's license would also be subject to the procedures required by the APA.¹⁴ Thus, in effect, the AHO's decision left the DMV with no procedure by which licensees can change the sex designation on their license, regardless of whether sex reassignment surgery has been completed. As a result, without any valid regulation providing a procedure for changing the sex designation on a license, and in the absence of any specific statutory direction on the issue, the DMV has no authority to do so.

Here, K.L.'s original Alaska driver's license had a sex designation of male. After K.L. changed her name and applied for an amended driver's license, the DMV issued her a new Alaska license with a female sex identifier. Because the DMV had no authority to change the sex designation on a driver's license, however, the change from male to female on K.L.'s license constituted an "error in the document issued." As such, the AHO correctly determined that K.L.'s license contained an "error" sufficient to warrant cancellation.

C. *The Absence of a Procedure for Changing the Sex Designation on a Driver's License Infringes on the Right to Privacy*

Having determined that the AHO's decision was not erroneous, the more significant issue in the case concerns the constitutional implications of that decision. Again, the parties do not dispute the AHO's determination that the portion of SOP D-24

¹³ AS 28.90.990(a)(1).

¹⁴ While the definition of a "regulation" is not so broad as to "encompass every routine, predictable interpretation of a statute by an agency[.]" the APA procedures must be followed when an agency's practice or interpretation of a statute is expansive or unforeseeable, imposes additional requirements of substance, or alters its previous interpretation of a statute. *See Alyeska Pipeline Serv. Co. v. State, Dep't of Envtl. Conservation*, 145 P.3d 561, 573 (Alaska 2006); *Smart v. State, Dept. of Health & Social Serv.*, 237 P.3d 1010 (Alaska 2010). Because a person's "physical description" can change in many ways over time, the DMV's policies regarding changes in weight, height, hair, or eye color are foreseeable and predictable interpretations of the DMV's statutory authority, and they do not impose any additional substantive requirements. A policy regarding change of sex on a driver's license, however, is not an obvious, commonsense interpretation of the DMV's statutory authority, as a person's sex usually does not vary during a person's life. Therefore, any new policy regarding a licensee's change of sex designation would be subject the procedures required by the APA.

requiring surgical proof of sex change is now invalid. As such, the constitutionality of that invalid policy is now moot.¹⁵ However, because the DMV now has *no* procedure for changing the sex designation on a driver's license, the issue before this Court is whether the absence of any procedure for changing the sex designation on an individual's license impermissibly infringes on the privacy rights of license holders such as K.L.¹⁶ Stated otherwise, the issue is whether the Alaska Constitution affirmatively *requires* the DMV to have a procedure in place for licensees to change the sex designation on their license.

Unlike the federal Constitution, Alaska's constitution provides an explicit right to privacy.¹⁷ "Because this right to privacy is explicit, its protections are necessarily more robust and 'broader in scope' than those of the implied federal right to privacy."¹⁸ However, "the rights to privacy and liberty are neither absolute nor comprehensive ... their limits depend on a balance of interests' that will vary depending on the importance of the rights infringed."¹⁹

When the state burdens or interferes with a fundamental aspect of the right to privacy, it must demonstrate a "compelling governmental interest and the absence of a less restrictive means to advance that interest."²⁰ On the other hand, when state action interferes with non-fundamental aspects of privacy, "the state must show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest."²¹ Thus, this Court must consider both the nature and

¹⁵ K.L. argues that the constitutionality of SOP D-24 should be reviewed under the public interest exception to the mootness doctrine. The Alaska courts, however, "have repeatedly declined to apply 'the public interest exception to unusual factual circumstances that [are] unlikely to repeat themselves or situations where the applicable statute or regulation [is] no longer in force.'" *Alaska Spine Institute Surgery Center, LLC v. State, Dept. of Health & Social Servs.*, 266 P.3d 1043, 1045 (Alaska 2011) (quoting *Akpik v. State, Office of Mgmt. & Budget*, 115 P.3d 532, 535 (Alaska 2005)). Here, because SOP D-24 is no longer in force, the Court will refrain from reaching the constitutionality of that policy.

¹⁶ At oral argument on February 6, 2012, the DMV informed the Court that it currently has no intention of adopting any new policy concerning changes of sex designation on licenses.

¹⁷ Article I, section 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed."

¹⁸ *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (quoting *Ravin v. State*, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J., concurring)).

¹⁹ *Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 356 (Alaska 2011) (quoting *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001)); *see also Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469, 476 (Alaska 1977) (While "[n]either the state nor the federal right to privacy is absolute, ... it is part of the judicial function to ensure that governmental infringements of this right are supported by sufficient justification.").

²⁰ *Sampson*, 31 P.3d at 91.

²¹ *Id.*

extent of the privacy invasion and the strength of the state interest in not having a procedure in place allowing licensees to change the sex designation on their license.

1. *The Nature and Extent of the Privacy Invasion*

Cases interpreting the right to privacy have recognized at least two interests protected by the right. One is an individual's interest in personal autonomy and independence in decision-making.²² Another is an individual's interest in protecting sensitive personal information from public disclosure.²³ With respect to this latter interest, the Alaska Supreme Court has explained that, "[i]n short, ... the right of privacy embodied in the Alaska Constitution is implicated by the disclosure of *personal* information about oneself."²⁴

A common thread woven into our decisions is that privacy protection extends to the communication of "private matters," or, phrased differently, "sensitive personal information," or "a person's more intimate concerns[.]" This is the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety.²⁵

For example, in *Falcon*, a physician challenged the constitutionality of a statute that required him to disclose the names of his patients in order to serve on a school

²² See, e.g., *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009) ("the right to make decisions about medical treatments for oneself or one's children is a fundamental liberty and privacy right in Alaska."); *Planned Parenthood of Alaska*, 171 P.3d at 581 (prohibiting doctors from performing abortions on minors without parental consent or judicial authorization violates fundamental right to privacy and personal autonomy); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 966-69 (Alaska 1997) (hospital could not prohibit abortions from being performed because a woman's control of her body and the choice whether or when to bear children, including the choice whether to accomplish or prevent conception, falls within the fundamental right to reproductive autonomy); *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972) (school board could not regulate the appearance of school children and require that male students wear short hair because right to privacy includes fundamental right to control one's appearance); *Ravin*, 537 P.2d at 503-04 (although the consumption of marijuana is not a fundamental right under our constitution, the right to privacy includes the right to possess and consume small quantities of marijuana in the home); *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974) (stating that Alaskans have "valu[ed] the autonomy of the individual and [one's] freedom of choice" and recognizing the "paramount importance" of the individual's right to decide whether "to present one's own case.").

²³ See e.g., *Falcon*, 570 P.2d at 479-80 (in certain situations, disclosure of information concerning the physician-patient relationship must yield to the right to privacy); *Rollins v. Ulmer*, 15 P.3d 749 (Alaska 2001) (recognizing that public disclosure of medical condition could be stigmatizing and invasive of the right to privacy); *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997) (in certain situations, right to privacy protects public employees and private contractors from public disclosure of their involvement in state program); *Gunnerud v. State*, 611 P.2d 69, 72 (Alaska 1980) (right to privacy provides protection from unnecessary disclosure of private medical records); *State, Dep't of Revenue v. Oliver*, 636 P.2d 1156, 1166-67 (Alaska 1981) (recognizing that privacy right protects communications involving "a person's more intimate concerns," including information about one's personal finances).

²⁴ *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986) (emphasis in original).

²⁵ *Id.* (internal citations omitted).

board.²⁶ The court noted “that where applicable rules or regulations insure that [potentially stigmatizing personal] information will be available only to authorized personnel in the context of a valid governmental program, no constitutional violation has occurred.”²⁷ However, because the statute in *Falcon* made the disclosures available to the public, and because the disclosures could potentially reveal the nature of a patient's ailment, the court held that the statute posed an impermissible threat to protected privacy rights.²⁸ To prevent an infringement of these rights, the court enjoined the State from applying the law to physician-patient situations until it adopted appropriate curative regulations.²⁹

In *Rollins*, the court considered a challenge to a law requiring medical marijuana users to register with the Department of Health and Social Services.³⁰ The court noted that “[i]t can hardly be disputed that the medical marijuana registry requires disclosure of sensitive information: mere presence in the registry identifies a person as suffering from a ‘debilitating medical condition’ and as being a marijuana user.”³¹ The court agreed that “the general publication of this information could be stigmatizing and invasive of the right to privacy.”³² Nevertheless, because the law explicitly required the department to keep the registry confidential, the court found no violation of the constitutional right to privacy.³³

In *Alaska Wildlife Alliance*, a wildlife group sought disclosure of the names and time sheets of public employees and private contractors involved in a state wolf control program.³⁴ The Alaska Department of Fish and Game provided the group with the records, but redacted the names of select employees involved in the program.³⁵ Although one's name and status as a public employee or private contractor tells little about the individual's personal life, the court found that the disclosure of such information implicated the right to privacy because various state offices had received

²⁶ 570 P.2d at 470.

²⁷ *Id.* at 749.

²⁸ *Id.* at 479-80.

²⁹ *Id.* at 480.

³⁰ *Rollins*, 15 P.3d at 750.

³¹ *Id.* at 752.

³² *Id.*

³³ *Id.* at 753.

³⁴ *Alaska Wildlife Alliance*, 948 P.2d at 978.

³⁵ *Id.*

letters and phone calls which threatened the lives and property of individuals involved in the program.³⁶ Thus, the court concluded that “where there are credible threats against the lives of public employees and private contractors, their expectation that the state will protect them by not disclosing their names is legitimate.”³⁷ The court further concluded that the wildlife group’s interest in “verifying accountability of public funds” did not justify putting the Department’s employees and private contractors at risk of harm.³⁸ Therefore, the court upheld the Department’s redaction of the names.³⁹

The Alaska courts have yet to consider the right to privacy in the context of one’s status as a transgender or transsexual. However, the Second Circuit has recognized that “[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.”⁴⁰ Like HIV, “transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.”⁴¹ Therefore, “individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.”⁴²

Here, K.L. asserts that one’s status as being transgendered is private, sensitive personal information. K.L. asserts that a driver’s license that does not match a person’s expressed gender identity forces disclosure of one’s transgendered status. This, in turn, can also result in disclosure of a sensitive medical condition known as Gender Identity Disorder. K.L. argues that the disclosure of this information can not only cause severe embarrassment and anxiety, but can also result in an individual being placed at risk of harm, harassment, or subject to discrimination.

The Court agrees that one’s transgendered status is private, sensitive personal information. Here, however, the fact that the DMV currently has no procedure allowing licensees to change the sex designation does not *directly* threaten the disclosure of this personal information. Nevertheless, the Court finds that such a threat is imposed *indirectly*. While Alaska law does not require anyone to obtain a driver’s license, such a

³⁶ *Id.* at 980-81.

³⁷ *Id.* at 980.

³⁸ *Id.* at 981.

³⁹ *Id.*

⁴⁰ *Powell v. Schriver*, 175 F.3d 107 (2nd. Cir 1999).

⁴¹ *Id.*

⁴² *Id.*

license is necessary to enjoy the benefits of operating a motor vehicle in the state.⁴³ Furthermore, individuals are often required to furnish their driver's license to third parties as a form of identification.⁴⁴ When a person such as K.L. furnishes a driver's license bearing a male sex designation, the discrepancy between the license and their physical appearance can lead to the forced disclosure of the person's transgendered status. Thus, while the DMV is not the entity requiring disclosure or the entity actually disclosing this information, the threat of disclosure is nonetheless real. The situation is somewhat analogous to the court's observation in *Falcon* that, in particular situations, "disclosure of the mere fact that an individual has visited a certain physician may have the effect of making public certain confidential or sensitive information."⁴⁵ For example, where a physician engages in a specialized area of practice (such as treating sexual problems or venereal disease), the disclosure of a patient's identity can also reveal the nature of the treatment.⁴⁶

Therefore, the Court finds that K.L.'s privacy expectation in this regard is entitled to protection. However, the Court does not find it necessary to determine at this time whether this expectation implicates fundamental aspects of the right to privacy. The Court is not now suggesting that K.L. has a fundamental right to have the gender designation changed on her driver's license. K.L.'s expectation that the routine disclosure of her driver's license will not expose her transgendered status to the public at least implicates non-fundamental aspects of the privacy right. Therefore, the State must show that not allowing anyone to change the sex designation on their driver's license bears a close and substantial relationship to the furtherance of a legitimate state interest.

2. The Strength of the State Interest

The DMV essentially puts forth the state's interests in having accurate documentation and identification and preventing fraud or falsification of identity documents. The DMV argues that the ability to change weight, height, hair color, and eye color, but not gender, bears a fair and substantial relation to the clear legislative

⁴³ See AS 28.15.011 (drivers must be licensed).

⁴⁴ See, e.g., AS 28.15.131 (license to be carried and exhibited for inspection upon the demand of a peace officer or other authorized representative of the Department of Public Safety).

⁴⁵ *Falcon*, 570 P.2d at 479.

⁴⁶ *Id.* at 479-80.

goal of having driver's licenses that do not contain errors, misinformation, or inaccuracies that can be used to perpetuate identification theft, fraud, or other malfeasance. According to the DMV, the current scheme substantially furthers the legitimate state goal of issuing accurate and fixed forms of identification that cannot be readily changed or manipulated, and of dealing with the licensure of drivers in a comprehensive and uniform manner. As discussed below, however, the Court finds that the DMV's current licensing scheme regarding sex designations does not bear a close and substantial relationship to the furtherance of these interests.

As to the state's interest in having accurate documentation and identification, the Court agrees with K.L. that a licensing policy based on the appearance of one's physical features concealed from public view can undermine the accuracy of identification of individuals based on driver's licenses. With respect to the DMV's policy on weight, height, hair color, and eye color, this policy is reasonable as it concerns those physical features which are visibly expressed to the public. Thus, allowing licensee's to change the description of such features will allow for more accurate identification of individuals based on driver's licenses. On the other hand, one's sex designation concerns physical features which are concealed from and not apparently discernable to the public. By not allowing transgendered individuals to change their sex designation, their license will inaccurately describe the discernable appearance of the license holder by not reflecting the holder's lived gender expression of identity. Thus, when such individuals furnish their license to third-persons for purposes of identification, the third-person is likely to conclude that the furnisher is not the person described on the license.

In addition, the Court agrees with K.L. that the absence of any procedure for changing the sex designation on an individual's license can create discrepancies and inaccuracies between Alaska driver's licenses other forms of government issued identification. For example, persons such as K.L. can obtain a United States passport with a female sex designation by providing a physician's medical certification declaring that the applicant has had appropriate clinical treatment for gender transition.⁴⁷ Therefore, as is the case with K.L., this can lead to discrepancies between an individual's Alaska driver's license and United States passport.

⁴⁷ Appellant's Supp. R. at 5-7.

Likewise, the current DMV scheme can even create discrepancies among Alaska driver's licenses with respect to current license holders and new license applicants. For example, if an individual such as K.L.—who holds both a United States passport and a secondary form of identification with a female sex designation (e.g., a pilot's license)—were to apply for an Alaska driver's license for the first time, it is possible that the DMV would issue her a license describing her sex as female. On the other hand, where such a person has already obtained an Alaska license, any subsequent license is required to have the original sex designation. Therefore, some transgendered licensees may hold an Alaska driver's license reflecting their lived gender identity, while others may not.

Thus, for the reasons above, the Court finds that the DMV's absence of any procedure for changing the sex designation on an individual's license does not bear a close and substantial relationship to the furtherance of the state's interest in accurate documentation and identification. Indeed, the absence of any such policy can actually result in inaccurate and inconsistent identification documents.

As to the state's interest in preventing fraud or falsification of identity documents, the DMV admits that it has seen no evidence of fraud resulting from the sex designation on one's license. Because it is conceivable that such fraud could be accomplished, the Court finds that some regulation concerning the procedure for changing the sex designation on a license is necessary. However, the DMV's outright refusal to allow anyone to change the sex designation on their license does not bear a close and substantial relationship to the prevention of such fraud.

3. Conclusion

The Court finds that K.L.'s expectation that the routine disclosure of her driver's license will not expose her transgendered status at least implicates non-fundamental aspects of the right to privacy. The Court further finds that the DMV's absence of any procedure for changing the sex designation on an individual's license indirectly threatens the disclosure of this sensitive personal information. Finally, the Court finds that the DMV's current practice does not bear a close and substantial relationship to the furtherance of the state interests put forth by the DMV. As such, the Court concludes that the absence of any procedure allowing licensees to change the sex designation on their license impermissibly interferes with K.L.'s right to privacy.


VI. DECISION

Having concluded that the DMV's current scheme impermissibly interferes with K.L.'s right to privacy, the DMV is hereby ordered to adopt a new regulation—in accordance with the safeguards provided by the APA—providing a procedure allowing licensees to change the sex designation on their driver's license.⁴⁸ The DMV shall have 180 days to comply with this order.⁴⁹

While the DMV's current scheme will remain in effect until a new regulation becomes effective, K.L.'s privacy interests must be protected in the interim. Therefore, the stay of K.L.'s license cancellation will continue to remain in effect until the new regulation becomes effective, at which point K.L. shall have the opportunity to comply with the new regulation. If the DMV determines that K.L. is again unable to comply with the regulation, any new constitutional questions arising from the details of the regulation must be asserted by future challenge in separate proceedings.

IT IS SO ORDERED.

3/12/12
Date


Michael Spaan
Superior Court Judge

I certify that on 3/13/12
a copy of the above was mailed
to each of the following at their
addresses of record.

Bakalar
Stenson

AV
A. Vigil – Administrative Assistant

⁴⁸ This Court does not suggest the form or scope of such regulation, so long as it provides a procedure by which individual's may change the sex designation on their license. Indeed, certain restrictions on the procedure may be both reasonable and necessary. However, the Court does advise the DMV to take into consideration the constitutional implications that such a regulation may have on the right to privacy and the protection of sensitive personal information.

⁴⁹ At oral argument the DMV informed the Court that it would not take long to adopt a new procedure. The Court has allowed 180 days to comply with this order because of the delays inherent in adopting regulations under the APA. If the DMV needs more time to adopt this regulation it should file a motion for an extension of time.