4-17-0395

IN THE ILLINOIS APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

JOSHUA D. MEYERS, Plaintiff–Appellant, v. LEO P. SCHMITZ , Director of the Illinois State Police, Defendant– Appellee	Appeal from Sangamon County Circuit Number: 15–MR–1066 Trial Judge: Rudolph Braud

REPLY BRIEF OF PLAINTIFF – APPELLANT JOSHUA D MEYERS

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ORAL ARGUMENT REQUESTED

ARGUMENT

I. INTRODUCTION

Whether or not another state's laws comport with the Act's definition of "substantially similar" is a matter on which reasonable minds can differ. For example, some might consider it reasonable that, in its surveys, ISP asked about restrictions imposed on the ability to "possess" firearms, even though the pertinent part of the definition looks to the issue of "carrying" them. But, some might consider this decision unreasonable, and—like Appellant Josh Meyers here—they might point to other provisions of the applicable state's law to show that the "substantially similar" definition is in fact met. Likewise, while 20 Ill. Admin. Code 1231.110(c) provides that ISP will "determine which states are substantially similar . . . by surveying all other states," the manner of "surveying" is left open. Who will ISP survey—just government officials, or other interested parties as well? Will ISP conduct an independent analysis, or will it just rely on the responses? Again, reasonable minds will differ—but the answers to these questions will impact the ultimate conclusions reached. Indeed, when ISP conducted a new survey in 2015, three of the four approved states *changed*.

Ultimately, this case boils down to ISP's attempt to have its cake and it eat too. On the one hand, ISP asserts that it does not need to accept applications from, or provide hearings to, anyone who lives in a state it has determined to not meet the "substantially similar" standard. But on the other

hand, ISP asserts that its survey determinations about what states do or do not meet that definition are not "rules" and are accordingly not subject to notice and comment rulemaking procedures. The result is that ISP has conclusively determined a question—one subject to debate and dispute—and it has done so without providing anyone with any ability to question whether its determination is appropriate or proper. This runs directly against the key APA purpose of "increas[ing] the opportunity for members of the public to have input into the formulation of agency policies which affect them." *Senn Park Nursing Center v. Miller*, 118 Ill. App. 3d 504, 509 (1st Dist. 1983).

This result cannot stand. ISP does not have the authority to simply do what it thinks may be right or appropriate, but instead must operate within the confines of the APA. Either ISP must permit non-residents like Meyers to submit applications and make a showing that the "substantially similar" definition is met, or it must publish its proposed survey determinations in the Illinois Register and consider and address comments as to their substance. And here, in the case at bar, the Court should order both—ruling that the "substantially similar" survey determinations are invalid as unpromulgated rules and ordering ISP to consider Meyers's application since ISP cannot rely on those unpromulgated rules "for any purpose," 5 ILCS 100/5-10(c), including to refuse to consider his application.

II. THE "SUBSTANTIALLY SIMILAR" DETERMINATIONS ARE EXERCISES OF RULEMAKING POWERS

In his opening brief, Meyers showed that ISP is engaged in rulemaking when it concludes, decisively, that certain states do or do not have laws that are "substantially similar" to those of Illinois. AT Br. 16-17.[1] These state-by-state determinations are "rules" because they "contain [a] policy of general applicability," *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 400 (1990), and "affect the rights and procedures available to people and entities outside the agency," *Senn Park*, 104 Ill. 2d at 178; *see* AT Br. 17. For example, ISP's determination that Florida is not "substantially similar" affects the rights and procedures available to every single person living in Florida, as they cannot apply for licenses as a result of this conclusion. And finally, these determinations are not mere exercises of internal management. Rather, the determinations are "interpretive rules" because they "advise the public of the agency's construction of the statutes and rules which it administers." *Windy City Promotions, LLc. v. Illinois Gaming Board*, 2017 IL App (3d) 150434, ¶24 (quoting *Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011)); *see* AT Br. 18-19. The determinations are also "policy statements" because they express the agency's "future intentions." *Windy City*, 2017 IL App (3d) 150434 at ¶25; *see* AT Br. 18-19.

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[1] Appellant references his opening brief as "AT Br.____" and Appellee's Brief as "AE Br._____"

ISP makes three arguments in response. First, ISP makes the strawman argument (pp. 31-37) that there is no "incongruence" or "systemic problem" with its reliance on the survey responses to determine the "substantially similar" issue. Next, ISP argues (AE Br. 37-40) that its "substantially similar" determinations are not "rules," but are instead mere "guides," statements of "internal management" or "implementation[s] of an existing regulation." And finally, ISP argues (AE 31-40) that Meyers forfeited arguments in the Circuit Court. All of these arguments fail.

A. ISP's "Substantially Similar" Determinations are "Rules" Because They Conclusively Determine the Rights and Procedures Applicable to All Non-residents

The core of ISP's response is its claim (AE Br. 38) that the "substantially similar" conclusions it has reached are nothing more than "statement[s] concerning [ISP's] internal management that do[] not affect private rights and procedures available to individuals outside the agency." On its face, this claim is untenable. ISP's construction of the surveys and its interpretation of the results w*holly* determines whether the vast majority of Americans, who do not reside in Illinois, can even apply—so it plainly does affect the rights and procedures available to those outside ISP.

And indeed, the cases that ISP cites do not support ISP's position here. For example, in *Senn Park Nursing Center v. Miller*, the court addressed an agency's adoption of a "new inflation-update procedure" that changed the amount of Medicaid benefits that were otherwise payable. *See* 104 Ill. 2d at 177. The Circuit Court, the Appellate Court, and the Supreme Court all agreed

that this new procedure was a "rule" because it "implements a policy of the agency" and "affect[s] the rights and procedures available to people and entities outside the agency." *Id.* at 178. Here, of course, the "affect" on rights and procedures is markedly more severe than a percentage change in the amount of benefits that would otherwise be payable. When ISP concludes that a state's laws do not meet the "substantially similar" definition, the result is that all residents of the state cannot apply at all.

The decision in *Alternate Fuels, Inc. v. Director of the Illinois EPA*, 215 Ill.2d 219 (2004), is readily distinguished because it concerned an interpretation used only in a particular case. The interpretation was not a "rule" because it was not "a statement of general applicability," but was instead "based on a particular set of facts." *See id.* at 247-48. There was no indication that the agency was going to use the interpretation elsewhere. *See id.* In contrast, ISP relies on the surveys it has prepared and interpreted to determine the eligibility of all non-residents.

ISP's other cases are also readily distinguished. *See* AE Br. 38-39. *Donnelly v. Edgar*, 117 Ill. 2d 59 (1987), for example, addressed a provision in an internal procedure manual that established a hearing review panel to internally review the recommendations that hearing officers made after hearings. *See id.* at 63-64. Significantly, this provision expressly provided that the internal review was to "insure" that decisions were "in accordance with" applicable state laws and regulations. *See id.* at 64. The provision did not itself

do anything to determine how the applicable laws and regulations applied to the general public—and it accordingly "d[id] not affect the private rights of persons who come before the Secretary seeking restricted driving permits." *Id.* at 65. Of similar import is *Manor Healthcare Corp. v. Northwest Community Hospital*, 129 Ill. App. 3d 291 (1st Dist. 1984), which concerned a document that "merely applie[d] formulae set forth in Board Rule 3B.09.B.03 to determine the bed-need figure for each planning area." *Id.* at 297. This document did not "implement, apply, interpret, or prescribe law or policy" because it just set forth a mathematical calculation mandated by the application of the validly published regulation. *See id.* ISP's "substantially similar" determinations, in marked contrast, resolve issues that the terms of both the Act and the "substantially similar" definition leave open, and which are subject to interpretation and debate.

Finally, *Walk v. Illinois Department of Children & Family Services*, 399 Ill. App. 3d 1174 (4th Dist. 2010), concerned a provision in an internal "policy guide" that provided a procedure for employees to follow when investigating child-confinement cases and referred the employees to a published regulation that was pertinent. *See id.* at 1185. This policy guide did not determine what rights or procedures were available to the general public, which were otherwise specified in published laws that applied irrespective of the policy guide's existence. And, *People v. Carpenter*, 385 Ill. App. 3d 156 (2d Dist. 2008), concerned ISP's temporary approval of a breath-testing device pursuant to a

validly adopted regulation that authorized it to do just that. *See id.* at 159. After reversing the trial court on statutory interpretation grounds, the court rejected the defendant's alternative argument that the order granting temporary approval had itself been a "modification" of the underlying rule. *See id.* at 165-66. The court explained that the order "d[id] not constitute an independent rule" but was instead "an authorized application of" the regulation already in place. *Id.* at 166. ISP's "substantially similar" determinations are square pegs to these round holes. The "substantially similar" determinations conclusively interpret a provision of law that could reasonably be interpreted in other ways.

The much more analogous decision—cited in Meyers's opening brief—is *Windy City Promotions, LLC v. Illinois Gaming Board*, 2017 IL App (3d) 150434. There, a statute defined the term "gambling device," and the agency had published a document on its website that applied that definition to reach the conclusion that certain types of video gaming devices were prohibited. *See id.* ¶¶ 5, 16. The website document explaining how the law would be applied was not a wholly internal document or a mere recitation of laws that were already in force. Rather, the document was in "interpretive rule" because it "advise[d] the public of the agency's construction of the statutes and rules which it administers" and "represent[ed] the [agency's] reading of statutes it administers." *Id.* ¶¶ 24-25 (citations omitted). It was also a "policy statement" because it expressed the agency's "future intentions." *Id.* ¶ 25. Both conclusions

are just the same here—ISP's substantially similar determinations advise the public of how it is interpreting the "substantially similar" definition and how it intends to act in the future.

B. ISP's Appeal to "Incongruence" or "Systemic Problems" is Misguided

In his moving brief, Meyers pointed to several factors that bolster the conclusion that the survey determinations are rules, not mere restatements of existing law, not least of which is the fact that subtleties in Florida law turned on the manner in which ISP chose to phrase its survey questions. *See* AT Br. 16-19, 29-32. ISP responds (AE Br. 31-32) by attempting to change the issue to a discussion of "systemic problems" and "incongruence." This attempt fails. The survey procedure was an invalid method of rulemaking not because of any of the "grounds" cited by ISP, but rather, because it conclusively determined an issue that affects the rights and procedures of multitudes of non-residents.

Indeed, ISP's own arguments in defense of its approach effectively concede that this approach was an act of rulemaking. For example, ISP tacitly concedes that its survey questions addressing "substantial similarity" went beyond the terms of the definition in the Administrative Code by asking about voluntary mental health restrictions that attach to the act of *possessing* firearms, vis-à-vis the act of *carrying* them. *See* App. Br. 32. This decision was particularly pertinent in the case of Florida residents such as Meyers because under Florida law, a broader swath of mental health issues will prevent the issuance of a license to carry a gun than will prevent an individual from merely

possessing one. *See* AT. Br. 29-31. And thus, a survey question that tracked the language of the published definition could very well have generated a different response. *See id.* ISP does not materially dispute this, but it claims that its decision to use a survey that used different language was "*entirely consistent*" with the definition. *See* AE Br. 32 (emphasis added). ISP explains that it was reasonable to look to possession "because important criteria *could* be contained in statutes other than a state's designated concealed carry statute," which "*could* incorporate provisions of possession statutes." *Id.* (emphasis added). And indeed, perhaps this is a reasonable way to put the survey together, and perhaps it isn't—but that is the very point. ISP's survey procedure is an *interpretation* and *policy* statement as to a debatable issue upon which reasonable minds can differ, and it is one that takes place outside the confines of the APA.

Likewise, ISP's argument that the survey procedure was valid because "[t]here were intelligible standards to guide the Department's use of its discretion" beguiles the actual issue. *See* AE Br. 34. ISP made binding determinations about issues that were subject to debate—and it did so in private, without providing the public with the ability to comment on its proposed interpretations. These discretionary determinations decided—conclusively—the rights and procedures that applied to broad swaths of individuals.

ISP argues that there is nothing wrong with its decision to rely on the responses to the surveys it drafted, rather than conducting its own research. *See* AE Br. 35-36. And again, perhaps ISP is right that this is *reasonable*—but the problem is that an agency interpretation and policy statement that determines the rights and procedures applicable to others is a "rule" that must comply with the requirements of the APA, whether it is reasonable or not.

Finally, it is significant that while ISP disputes some of the points that Meyers made in his opening brief, it does not dispute that its ultimate "substantially similar" conclusions changed significantly when it chose to use a revised survey in 2015—three of the four approved states changed. *See* AT Br. 9, 31-32. It also does not dispute that in 2015 it relied in part on narratives included with the responses it received to determine the issue. *See* AT Br. 16-17. There is no way to avoid the conclusion that the construction of the surveys impacts the results of the survey determinations, and that the interpretation of survey results is not a simple mechanical operation.

C. The Validity of ISP's Survey Arrangement is—and has Always Been—a Keystone Issue

The central issue in this case has always been the invalidity of the approach that ISP used to determine the "substantially similar" issue—and it most certainly has not been forfeited. Meyers raised this issue from the start, and it connects directly to his asserted injuries.

Meyers's original injury was the "cancellation" (or revocation) of his CCL after he moved to Florida. This occurred because Florida's laws were "not

considered to be substantially similar to the law in the state of Illinois based upon a survey that had been sent by the Illinois State Police to each state." MSJ ¶ 8 (A. 036); *see also* Complaint ¶ 8 (A. 004). Next, Meyers could not apply for a non-resident CCL because ISP's "application process stops an applicant from completing the application if the applicant is a resident of any state that [ISP] has pre-determined to be a state [with] laws [that] are not substantially similar to the laws of the state of Illinois." MSJ ¶ 13 (A. 013); *see also* Complaint ¶ 13 (A. 006). "Meyers attempted to present evidence that he qualified for a Non-Resident CCL card but the ISP decision refused to consider that issue." MSJ ¶ 16 (A. 036). Meyers's Motion for Summary Judgment closed by arguing that his inability to apply amounted to "an unpromulgated rule, and the rules as adopted deny the rights for administrative hearing and judicial review to candidates like Josh Meyers. Those rules are unlawful or unauthorized." MSJ (A. 040). Meyers requested that the court issue an order "declaring that the Non-Resident Concealed Carry Rules of the Illinois State Police are invalid and enter an order prohibiting enforcement of those rules against Plaintiff and for such other relief as authorized by law." *Id.*

Furthermore, in response to ISP's Motion for Summary Judgment, Meyers argued that the survey approach was improper because ISP had "'predetermined' th[e] issue in a way that does not allow notice and an opportunity for applicants to participate." MSJ Response p. 11 (C. 506). Meyers argued that ISP did not have "authorization to . . . to simply announce on a

website which applicants would or would not be eligible," but had instead "done what our courts repeatedly have prohibited" by "giv[ing] itself authority to predetermine a statutory qualification on an *ex parte* basis and, to rely simply on an unauthenticated survey question with no further inquiry." *Id.* Meyers argued that the appropriate "remedy [was] a determination by this court that the Illinois State Police use[d] its rule making authority improperly in predetermining that applicants from almost every state in the country would not even be eligible to submit an application for a Non- Resident CCL permit." *Id.* pp. 11-12. (C. 506-507)

This is far more than would be needed to prevent forfeiture. Issues raised on appeal need only be "'commensurate with' those raised before the trial court." *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 22 (quoting *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 509 (1988)). It is enough if an "argument [on appeal] is essentially what [was] argued in the trial court, albeit with slightly different wording and reliance on different authority." *Hebrew University of Jerusalem v. Zivin*, 2015 IL App (1st) 150606, ¶ 25. This standard is easily met because Meyers has argued that ISP's survey procedure improperly decided the "substantially similar" question outside the confines of the APA from the start.

Finally, while it seems clear that forfeiture is not actually at issue here, to whatever extent it might be, "the waiver rule is a principle of administrative convenience, an admonition to the parties; it is not a jurisdictional requirement

or any limitation upon the jurisdiction of a reviewing court." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504-05 (2002). Rather, "a reviewing court may, in furtherance of its responsibility to provide a just result and to maintain a sound and uniform body of precedent, override considerations of waiver that stem from the adversarial nature of our system." *Id.* at 505 (citations omitted).

III. THE APPROPRIATE RELIEF IS NOT JUST TO STRIKE THE UNPROMULGATED RULE, BUT ALSO TO ALLOW APPLICATIONS

ISP argues (AE Br. 31) that the only appropriate relief is to "redetermine which states are substantially similar to Illinois and/or promulgate a regulation." *See* AE Br. 31 (citing *Windy City Promotions, LLC v. Illinois Gaming Board*, 2017 IL App. (3d) 150434, ¶ 28). Meyers certainly agrees that an order striking the unpromulgated rule is necessary. *See, e.g.*, *Senn Park*, 104 Ill. 2d at 181. But on the facts presented here, the Court should do more.

The Act provides that ISP "*shall* by rule allow for non-resident license applications from any state or territory . . . with laws . . . that are substantially similar to the requirements to obtain a license under this Act." 430 ILCS 66/40(b) (emphasis added). This expresses the General Assembly's desire that non-residents who otherwise meet the requirements of the Act will be able to apply for and obtain licenses, subject to the caveat that they come "from" a "substantially similar" state. However, for the entire 5-year period the Act has been in existence, ISP has not properly executed this duty. Rather, ISP has improperly relied on unpublished acts of rulemaking to disqualify the vast

majority of non-residents. Yet, these unpromulgated acts of rulemaking "may [not] be invoked by the agency for any purpose." 5 ILCS 100/5-10(c).

At this juncture, a ruling from this Court that overturns the survey scheme could have a pernicious result. One option for ISP—an option that Meyers has pushed—is to make final "substantially similar" determinations in the context of individual non-resident applications. (For example, ISP could use surveys, but it could also allow applicants to provide additional information to supplement the responses.) However, ISP may instead refuse to consider *any* non-resident applications until after it has properly adopted a new regulation.

This would make the situation materially worse. Currently, non-residents in four (improperly) approved states can apply, but this would result in *all* non-residents being ineligible. ISP cites *Windy City* to support its argument that the Court can do nothing more than declare the rule invalid, *see* AE Br. 31, but the setting in *Windy City* was materially different. There, the court struck down a website document as an unpromulgated interpretive rule, but it declined the plaintiff's request to enjoin the agency from posting documents on its website again. *See Windy City*, 2017 IL App (3d) 150434 at ¶¶ 27-28. The court's statement that the appropriate relief was to strike the invalid rule was made in this context, and indeed, the court's resolution of the matter left people free to use the devices at issue, rather than leaving them unable to do so until the agency took action. Here, in the present case, an order

that requires ISP to consider the submissions of non-residents who contend they live in states that meet the definition will best comport with the legislative intent—which is to affirmatively allow for applications from non-residents so long as the "substantially similar" consideration is addressed.

IV. THE DENIAL OF A HEARING AND THE "CANCELLATION" OF MEYERS' CONCEALED CARRY LICENSE WERE UNLAWFUL

In part III of its brief, ISP argues that Meyers has no right to relief on his claims about the department procedure under which it "cancelled" the FOID and CCL licenses held by Meyers. Plaintiff argued in detail in part I of his brief that ISP lacked authority to unilaterally "cancel" his licenses. The policy decision to use the word "cancel" was a practice used in order to deny the statutory right to a hearing. ISP also argues that these issues become moot because of the "remand" order of the circuit court.

The fact that the Circuit Court ordered ISP to provide the hearing that Meyers had requested does not make Meyers's claim arising out of ISP's previous practice moot. For example, in *Ackerman v. Illinois Department of Public Aid*, 128 Ill. App. 3d 982 (3d Dist. 1984), the court found that an agency's practice of conducting hearings by telephone conflicted with an applicant's statutory right to appear in person. *See id.* at 982-83. Even though the practice had not been promulgated as a rule, it "had the effect, force and impact of a rule." *Id.* at 984. Thus, even though the court had granted the substantive relief the plaintiff' sought, the plaintiff's claim for attorney's fees under the APA continued. This is also true here. ISP abandoned its practice only in

response to Meyers's suit. Aside from ordering ISP to conduct a hearing, the Circuit Court should also have issued a declaration that the failure to do so was improper and awarded attorney's fees. The record here reveals a deliberate and organized policy of ISP to simply cancel existing FOID or CCL licenses and to deny an opportunity for a hearing.

ISP tries to give the impression that the e-mails denying Meyers's request for a hearing were merely erroneous communications from an employee rather than official policy, but the record does not support this characterization. The Complaint made specific allegations, documented with exhibits containing official communications from ISP. In Exhibit B to the Complaint (A. 017), the defendant admitted that official communications concerning CCLs were to be directed through an internet service that used the name "ASK_CCL@ISP.state.il.us"—and it is this portal that Meyers used to communicate concerning the cancellation of his licenses. In Exhibit E (A. 026), Meyers used an official Request for Administrative Review form to ask for an administrative hearing with the Director of ISP. In Exhibit F (A. 030), Meyers received a response telling him that he was not eligible for administrative review. The person speaking for ISP advised: "You were not denied, revoked, or suspended. Your license was cancelled as you are no longer eligible for a resident concealed carry license. You would have to reapply as an out-of-state resident." (A-030)

Meyers then attempted to apply for a non-resident CCL. He was blocked. As to the CCL, the ISP official's communication stated: "If Florida responds to our survey, stating they are substantially similar, you could then reapply." In other words, eligibility turned entirely on the survey response—whether it was accurate or not. This is not compliant with the statutory mandate that ISP make the determination "by rule." The communication from ISP went on to explain that his attempt to apply was deemed an incomplete application which was cancelled out by ISP. The message went on to advise that an official communication signed by the Director would be sent to him later. (A-032) Clearly, this is a statement of official policy. And that policy is not promulgated in any rule. The policy is to deny certain applications by preventing a complete submission.

Motion for Summary Judgment, Exhibit J (A. 067), showed that Meyers's CCL was indeed "cancelled" and his application status marked incomplete. Although it is difficult to see on the Exhibit, the ability to check the process for starting a non-resident CCL application was grayed out, meaning it would not work on the computer screen. This was confirmed at the administrative hearing. (C. 381-382) The Director's decision adopted the ALJ's finding on this. (C. 414)

Finally, in paragraph 15, Meyers alleged that these communications refusing to grant him a hearing were done pursuant to the authority of the

Director. (A-006, ¶15) At no time did the defendant deny these allegations. No claim was asserted that the communications were unauthorized in any way.

ISP argues that it did nothing but apply the law to a given set of facts in a particular case. (AE Br. 22) It argues that the simple misapplication or misinterpretation of the law by an employee does not create a rule. The record, however, contradicts any claim that this was a random or unauthorized act, nor even a simple misapplication of the law. Meyers very clearly pointed to the provisions of law that required a hearing and received a clear official response. He is entitled to a declaration that ISP must comply with the hearing requirements of the APA when it purports to "cancel" either a FOID or CCL. As the ALJ found, the official procedure programmed into the application portal intentionally denied the ability to complete an application. This policy is contrary to law and is an unauthorized rule.

The record from the administrative hearing includes ISP's refusal to hear the most important issue that Meyers raised: his entitlement to apply for a non-resident CCL. The transcript in the administrative record shows the issue properly raised and the response from ISP denying that the hearing ordered by the court required any determination on the CCL. (C. 385-389, C. 414 and C. 411) The Complaint filed by Meyers in this case seeks a declaration that applicants from other states have a right to an administrative hearing if their non-resident applications are denied.

Finally, ISP argues that Meyers failed to present sufficient evidence at Summary Judgment that the cancellation of his license was done pursuant to an unpromulgated rule in violation of the APA. (AE Br. 23) ISP refused to allow evidence concerning the CCL during the administrative hearing that it had sought. Now ISP argues that the lack of a record—which was caused by ISP's own refusal to allow evidence and argument on the CCL issue—precludes review of that issue in this court. (see ISP argument at C. 391-392) This brings in to sharp focus the problem caused by ISP's refusal to comply with the APA requirements of notice and an opportunity for hearing whenever a license is cancelled. This court should reject this argument.

V. THE DEPARTMENT VIOLATED THE ACT AND THE APA.

A. THE ACT REQUIRED A HEARING

The heart of this appeal lies in the interplay between the statutory right to notice and a hearing and the adoption and use of appropriate rulemaking by agencies of the state. In section IV. A. ISP argues that section 87 of the Act provides no relief to an applicant like Meyers. Defendant acknowledges four circumstances when the hearing is required. These include any time that a CCL application is denied, whenever the Department fails to act on a license within 90 days after receipt, and whenever a license is revoked or suspended. Remarkably, ISP claims that none of these circumstances happened. (AE Br. 24)

The application that Meyers attempted to submit was denied. The department deemed the application incomplete and, therefore, rejected it. The inability to complete the application was caused by the Department deliberately following a policy of preventing applicants from being able to use the online computer application process for residents in 45 states. If it wasn't denied, certainly the Department failed to act on it within 90 days of its receipt. A computer application programmed to preclude the completion of applications certainly is either a denial or an action by the Department that allows it to refuse to act on the application. The refusal to act continued for over a year.

There also is no question that Josh Meyers had a CCL that was revoked. He requested a hearing which was granted only on the revocation issue. For the CCL, Meyers requested a hearing concerning the revocation of that license without consideration of his application for a non-resident CCL. The request to consider a non-resident application was clearly denied without a hearing.

The Department argues that no hearing was required because Meyers was not entitled to apply in the first place. Consequently, the Department argues that Meyers gets none of the protections of either the Act or the APA.

ISP interprets section 40 of the Act as a prohibition against accepting any applications unless the non-resident has first been determined to live in a state whose laws are "substantially similar" to the Illinois law. See 430 ILCS 66/40 (b), (c). But that section of the law does not *prohibit* applications from any individual. Instead, section 40 mandates that the Department *shall* by rule

allow for non-resident license applications. Interpreting this under the plain meaning of the words used in the statute, there has to be some process by which ISP follows the requirement that it shall, by rule, allow non-resident applications to be submitted. ISP urges this court to approve its policy of making *ad hoc* decisions, while claiming that such decisions are beyond any kind of appeal, hearing or judicial review.

If ISP argues that it is making the determination of which states would qualify under section 40, then it would have to make those determinations "by rule" as required by section 40. It did not do so. The only rule that it promulgated to determine the "substantially similar" issue is the definition published at 20 Ill. Admin. Code 1231.10. No promulgated rule makes the actual determination. Obviously, listing states on a website is not an act of rulemaking authorized by the Administrative Procedure Act. And indeed, ISP made changes to the listing on its web site solely on the basis of unverified survey answers. Recall that Meyers was told that to be able to submit an application, he merely had to get Florida to submit a different survey response.

ISP argues that "a hearing under section 87 is extended only to those eligible to apply and not to those not eligible to apply." (AE Br. 27) But no such statutory provision exists. How can an applicant know whether he is even allowed to file an application? There is no promulgated rule announcing that determination. The applicant cannot get a hearing to prove that his home state has similar laws. Defendant makes the unsupported argument that it alone

can decide and then keep changing its determination with no right of judicial review.

B. THE APA REQUIRES A HEARING FOR NON-RESIDENT APPLICANTS LIKE MEYERS.

ISP argues that the APA does not require a hearing when a non-resident is not permitted to apply. ISP recognizes section 10-65(b) of the APA which requires that an existing license shall continue in full force and effect until the final agency decision has been made on an application for either the renewal of a license or a new license with reference to any activity of a continuing nature. 5 ILCS 100/10-65(b). ISP argues this is inapplicable because this is not a case involving the renewal of a CCL, and because there is no suggestion that Meyers had any "continuing" rights. However, these arguments change the language of the statute by using the phrase "continuing" rights. The statutory provision applies when there is an application for "a new license with reference to any activity of a continuing nature." *Id*.

In his first communications, Josh Meyers requested that the cancellation of his CCL be considered together with his application to continue his rights to oncealed carry by emans of a new non-resident license. His request matches the statutory language. The license of Josh Meyers should have been continued in full force and effect until Josh Meyers received a final agency decision on his non-resident application.

ISP claims that there is no right to an application in the first place and certainly not one that would provide a right to a hearing. As noted above, the

Act provides that a denial of an application qualifies an individual for a hearing. Thus, section 65 of the APA mandated that a hearing be held. Further, the provisions of section 65(b) require a "final agency decision," which only can happen when an administrative agency first conducts a hearing.

The existence of a final administrative decision is one step of the hearing process provided for in section 50 of the APA. That section states that a final decision or order that is averse to a party in a contested case has to be stated in writing and part of the record of the hearing. Final decisions must include findings of fact. 5 ILCS 100/10-50. Under subsection (c), decisions by an agency in a contested case are void unless they are conducted in compliance with the APA. 5 ILCS 100/10-50(a), (c). ISP claims that section 65 of the APA says nothing about a hearing. (AE Br. 28) It does reference a "final decision" which only comes from a contested case hearing.

ISP concludes on page 30 that a hearing does not take place until there is an administrative decision denying or revoking a license. It flies in the face of all reason to treat the actions of the department as anything other than a denial of Meyers attempt to apply for a non-resident CCL. Because the department refused to allow the application to be filed and refused to allow a hearing on the issue, the court is left with an incomplete record for review on the question of whether Josh Meyers meets the eligibility requirements for a non-resident license. ISP's argument amounts to a claim that it may, on an *ad hoc* basis, decide that certain states' laws are not substantially similar and

deny an opportunity to applicants from those states to even challenge that determination. This is inconsistent with the Act and APA.

CONCLUSION

The Court should declare ISP's survey scheme an invalid act of unpromulgated rulemaking and enjoin ISP from relying on its survey determinations for any purpose. Unless and until ISP adopts a valid regulation, it must allow all non-residents to apply.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) & (b). The length of this Reply Brief, excluding the Rule 341(c) certificate of compliance and the certificate of service is 5,991 words.

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