

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

In the Matter of the Proposed Exempt Permanent
Rules Relating to the Ignition Interlock Device
Program; Minnesota Rules Parts 7503.0800,
7503.1675, 7503.1725, and 7503.1800

**ORDER ON REVIEW OF RULES
UNDER MINN. STAT. § 14.386
AND MINN. R. 1400.2400**

This matter came before Administrative Law Judge Barbara L. Neilson upon the application of the Driver and Vehicle Services Division of the Department of Public Safety (Department) for a legal review of the above-entitled rules under Minn. Stat. § 14.386 and Minn. R. 1400.2400. The Department filed documents with the Office of Administrative Hearings seeking review and approval of the rules on February 25, 2014.

Based upon a review of the written submissions by the Department, and for the reasons set forth in the attached Memorandum,

IT IS HEREBY ORDERED THAT:

1. The Department has the statutory authority to adopt these proposed rules using the exempt rulemaking process, pursuant to Minn. Stat. § 171.306, subd. 8.
2. The following rules or parts thereof are not approved:
7503.1000, subpart 1;
7503.1675;
7503.1725, subpart 1; and
7503.1725, subpart 5(B).
3. All other rules or parts thereof are approved.
4. The repeal of Minn. R.7503.0800, subpart 2, is approved.

Dated: March 11, 2014

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

Minn. R. 1400.2400, subp. 4a, provides that, when a rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review after it has revised the proposed rules. The Administrative Law Judge then has five working days to review and approve or disapprove the rule. Minn. R. 1400.2400, subp. 5, states that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by a Judge. The request must be made within five working days of receiving the Judge's decision. The Chief Administrative Judge must then review the agency's filing, and approve or disapprove the rule within fourteen days of receiving it.

MEMORANDUM

The Department proposes to amend its existing rules governing the Ignition Interlock Device Program (IIDP). Minn. Stat. § 14.386(a)(3) and Minn. R.1400.2400, subps. 1 and 3, direct the Office of Administrative Hearings to review the rules for legality.

Use of the Exempt Rule Process

The IIDP is governed by Minn. Stat. § 171.306. Subdivision 8 of that statute describes the Commissioner's rulemaking authority as follows:

In establishing the performance standards and certification process of subdivision 2 and the program guidelines of subdivision 3, the commissioner is exempt from chapter 14, including section 14.386. If rules are otherwise necessary to implement this section, the commissioner may adopt, amend, and repeal rules using the exempt procedures of section 14.386, except that paragraph (b) shall not apply.

The current rule amendments do not relate to the performance standards or certification process for devices used in the IIDP or the guidelines for participation in the IIDP. As a result, the Commissioner is required to follow the exempt rulemaking process set forth in Minn. Stat. § 14.386. Because the statute applicable to IIDP rules specifies that Minn. Stat. § 14.386(b) does not apply, these rules will not be subject to the two-year limitation that ordinarily applies to exempt rules.

Minn. Stat. § 14.386 provides that an abbreviated and streamlined set of procedures for adopting rules may be used when the Legislature specifically exempts the rules from the provisions of chapter 14. In these circumstances, the legal review completed by OAH is narrower than in the usual rulemaking process.¹

¹ For example, unlike a more typical rulemaking proceeding, rules exempt from the general requirements of chapter 14 are not examined as to their need or reasonableness.

In exempt rulemaking, the legality determination is governed by the standards of Minn. R. 1400.2100, Items A and D to G.² These standards state:

A rule must be disapproved by the judge or chief judge if the rule:

A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

* * *

D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;

E. is unconstitutional or illegal;

F. improperly delegates the agency's powers to another agency, person or group; [or]

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law. . . .

For the reasons detailed below, portions of the rules proposed by the Department conflict with applicable law or are so vague and ambiguous as to be unconstitutional.³ Because these portions of the proposed rules fail to meet the requirements for exempt rulemaking, the Department must either change or delete the language of these provisions. The other modifications included in this proceeding meet the requirements of Minn. Stat. § 14.386 and Minn. R.1400.2400 and have been approved.

Analysis of the Proposed Rules – Defective Language

Minn. R. 7503.1000, subp. 1 – Administrative Review of Suspension, Revocation, Disqualification:

The amendment to this provision apparently was proposed to make the Department's rules consistent with the language of newly-enacted Minn. Stat. § 171.187. That statute specifies that a person whose driver's license is suspended based upon certain criminal vehicular operation or manslaughter allegations or charges is entitled to seek administrative review of the license suspension by the Commissioner

² See Minn. R. 1400.2400, subp. 3.

³ In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

“at any time” during the suspension.⁴ In addition, the statute states that “a person may request a review of the suspension by the commissioner if the suspension has been in place for at least three months and the person has not been indicted or formally charged with the underlying crime that resulted in the license suspension.”⁵

The Department’s proposed amendment to part 7503.1000 states:

Subpart 1. **Right to administrative review.** A person whose driver’s license is suspended under Minnesota Statutes, section 171.187, revoked under Minnesota statutes, section 169A.52, or who is disqualified under Minnesota Statutes, section 171.165, subdivision 2, has the right to an administrative review of the revocation order or disqualification under the procedure specified in part 7409.4600, subparts 1 to 4, and Minnesota Statutes, section 169A.53, subdivision 1.

The language of the rule, as amended, does not specify that a person whose license is suspended under Minn. Stat. § 171.187 has the right to an administrative review of the *suspension* order, as is required by that statute. It also does not mention that Minn. Stat. § 171.187 sets forth procedures for such a review and grants a right to request a review if the person has not been indicted or formally charged with the underlying crime within three months of issuance of the suspension order.

The Administrative Law Judge concludes that the proposed language is defective because it conflicts with applicable law. To cure this defect, it is recommended that the language of the rule be further revised as follows:

Subpart 1. **Right to administrative review.** A person whose driver’s license is suspended under Minnesota Statutes, section 171.187, revoked under Minnesota statutes, section 169A.52, or who is disqualified under Minnesota Statutes, section 171.165, subdivision 2, has the right to an administrative review of the suspension order, revocation order or disqualification under the procedure specified in part 7409.4600, subparts 1 to 4, ~~and~~ Minnesota Statutes, section 169A.53, subdivision 1, and Minnesota Statutes, section 171.187, subdivision 4.

The suggested language would clarify that individuals have the ability to seek administrative review of suspension orders under Minn. Stat. § 171.187, subd. 4.

Minn. R. 7503.1675 – Ignition Interlock Device program; Termination

As proposed, this rule part states:

Pursuant to Minnesota Statutes, section 171.306, subdivision 5, paragraph (b), the commissioner shall terminate a program participant’s participation in the program for a nonprogram violation under Minnesota

⁴ Minn. Stat. § 171.187, subd. 4(a).

⁵ *Id.*, subd. 4(b).

Statutes, chapter 169, or a departmental action under Minnesota Statutes, chapter 171, with the exception to [sic] Minnesota Statutes, section 171.17, subdivision 1, paragraph (a), clause (1), or Minnesota Statutes, section 171.187, for a violation of Minnesota Statutes, section 609.21, subdivision 1, clause (2), item (i) or (iii); (3); or (4), resulting in bodily harm, substantial bodily harm, or great bodily harm, that results in the withdrawal of a program participant's driving privilege for more than one year.

The Administrative Law Judge concludes that the language of this rule as amended is so vague and ambiguous as to be unconstitutional and, therefore, is defective. The proposed language does not clearly reflect the Department's intentions or provide fair warning to the regulated public of circumstances that will warrant termination of a person's participation in the IIDP.

It is difficult to suggest specific language to cure this defect because the Administrative Law Judge is unsure of the Department's intentions. It is suggested that the Department clarify the language of the amendment and include it in a proviso after the end of the current rule. For example, the rule might state (to the extent consistent with the Department's intent):

Pursuant to Minnesota Statutes, section 171.306, subdivision 5, paragraph (b), the commissioner shall terminate a program participant's participation in the program for a nonprogram violation under Minnesota Statutes, chapter 169, or a departmental action under Minnesota Statutes, chapter 171, that results in the withdrawal of a program participant's driving privilege for more than one year; provided, however, that this rule part does not apply to a driver whose license has been revoked under Minnesota Statutes, section 171.17, subdivision 1, paragraph (a), clause (1), or a driver whose license has been suspended under Minnesota Statutes, section 171.187.

Minn. R. 7503.1725 - Ignition Interlock Device Program; Rehabilitation

Subpart 1

Rule part 7503.11725 pertains to chemical dependency treatment and other programs and requirements that must be completed for persons to be eligible for a limited license with ignition interlock device installation. As originally proposed, subpart 1 states:

Subpart 1. **When applicable.** A person whose driver's license or driving privilege has been revoked or canceled and denied under part 7503.1300 or Minnesota Statutes, section 169A.52; 169A.54; or 171.04, subdivision 1, clause (10), on or after July 1, 2011, and revoked or suspended under Minnesota Statutes, section 169A.55, subdivision 5, effective July 1, 2014, and only applies to certain criminal vehicular operation offenses committed on or after that date, is subject to the provisions of this part. . . .

The vague and ambiguous language used in the rule fails to provide fair warning of the circumstances that will render a person subject to the requirements of the rule. The use of the conjunctive “and” between the two clauses suggests that a person must have committed violations in both of the described categories to be subject to the provisions of the rule, and thus conflicts with the statutes referenced in the rule. In addition, Minn. Stat. § 169A.55, subd. 5, merely governs *reinstatement* of driving privileges after revocation or suspension has been ordered under Minn. Stat. §§ 171.17, subd. 1(a)(1), or 171.187; for that reason, the rule should reference the latter statutes as the source of revocation or suspension rather than Minn. Stat. § 169A.55. For all of these reasons, the proposed language is defective.

To cure this defect, the Administrative Law Judge suggests that the rule be revised along the following lines:

Subpart 1. **When applicable.** The following persons are subject to the provisions of this part:

- A. A person whose driver’s license or driving privilege has been revoked or canceled and denied under part 7503.1300 or Minnesota Statutes, section 169A.52; 169A.54; or 171.04, subdivision 1, clause (10), on or after July 1, 2011; and
- B. a person whose driver’s license or driving privilege has been revoked or suspended under Minnesota Statutes, section 171.17, subd. 1(a)(1), or Minnesota Statutes, section 171.187 for certain criminal vehicular operation offenses committed on or after July 1, 2014.

Subpart 5(B)

The Department proposes to amend subpart 5, item B of Part 7503.1725 to require that regular and consistent use of the ignition interlock device must be evidenced by at least 30 “initial” breath alcohol concentration tests of less than .02 per month. There is no definition in the existing rules or in the proposed amendments of what the Department means by an “initial” breath alcohol concentration test. It is unclear whether the first test taken on a particular calendar day or a test taken a certain time period after a prior test would qualify as an “initial” test, or if the Department has some other definition in mind.

In light of this ambiguity, those subject to the rules would not have fair notice of what they will need to show to demonstrate regular and consistent use of the device. In addition, the rules do not provide any limitation on the Department’s exercise of discretion in deciding what tests will be deemed to constitute “initial” tests. This undue vagueness and unfettered discretion constitutes a defect in the rules. To correct the defect, the Administrative Law Judge recommends that the Department incorporate a definition or further specificity in the rule to clarify what is meant by an “initial” test.

Other Recommended Changes

The following modifications are not required but are merely suggested for clarity of the rulemaking record. First, prior to resubmission by the Department, it would be helpful if the Order Adopting the Rules were modified to provide further explanation of the reasons for the changes that are proposed in the above rule amendments. This will help ensure an accurate understanding of the Department's intentions. Second, it is recommended that the Order Adopting the Rules be carefully proofread and typographical errors be corrected (such as the statement that the IIDP began on "July 1, 1022" and the reference to repealed Minn. Stat. § 169.121). Although these modifications are not required, additional clarification will assist in the further review of these rule provisions upon resubmission.

B. L. N.