

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

In the Matter of the Proposed Exempt
Permanent Rules of the Department of
Public Safety Governing Ignition Interlock
Device Program, *Minnesota Rules*,
Chapters 7409 and 7503

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

On May 13, 2011, the Minnesota Department of Public Safety (Department) filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. §§ 14.386 and Minn. R. 1400.2400.

Based upon a review of the written submissions by the Department, and for the reasons set out in the Memorandum which follows below,

IT IS HEREBY ORDERED THAT:

1. The following rules or parts thereof are not approved:

7503.0100, subp. 4a
7503.1725, subp. 2.F.
7503.1725, subp. 3.B.
7503.1300, subp. 2.
7503.1700, subp. 1.
2. All other rules or parts thereof are approved.
3. The repeal of Minn. R.7503.0800, subpart 7 is approved.

Dated: May 27, 2011

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE

Minn. Rule pt. 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 ALJ then has five working days to review and approve or disapprove the rule. Minn. Rule pt. 1400.2400, subp. 5 provides 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 14 days of receiving it.

MEMORANDUM

Following legislative action in 2010, the Department of Public Safety (Department) proposes to adopt rules governing a new Ignition Interlock Device Program (IIDP). 2010 Laws of Minnesota, Chapter 366, sections 14 and 16 provide explicit authority for the Department to use the exempt procedures described in Minn. Stat. § 14.386 to adopt permanent rules governing the IIDP.

Minn. Stat. § 14.386 (a)(3) and Minn. R.1400.2400, subparts 1 and 3 direct the Office of Administrative Hearings to review the rules for legality. The applicable legal standards are set forth in Minn. R.1400.2100, items A and D to G.

Notice to Interested Persons and Comments from the Public

While Minn. Stat. § 14.386 does not require an agency adopting rules under that statute to provide notice to interested persons and the public, the Department chose to do so in this proceeding. The Department published notice of this rulemaking at its website on May 13, 2011. On the same date, it sent a copy of the proposed rules by electronic or U.S. mail to all individuals registered with it pursuant to Minn. Stat. § 14.14, subd.1a. In addition, it provided notice to the chairs and ranking minority members of the Senate Transportation Policy Committee and the House Transportation Policy and Finance Committee, the Senate Judiciary and Public Safety Policy Committee and the House Public Safety and Crime Prevention Policy and Finance Committee and the House Judiciary Policy and Finance Committee, along with numerous individuals who are members of the DWI Sanctions Task Force.¹ No comments were received in response to the notice.

¹ Proposed Order Adopting Exempt Permanent Rules ((May 13, 2011), pp.3-4. See www.dps.state.mn.us/dvs/PublicNotices.htm.

Use of the Exempt Rule Process

Minn. Stat. § 14.386 provides that an abbreviated and streamlined set of procedures for promulgating new 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.²

In exempt rulemaking, the legality determination is governed by the standards of Minn. R. 1400.2100, Items A and D to G.³ 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;
- 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 Minnesota Rules parts 7503.0100, 7503.1725, 7503.1300 and 7503.1700 as proposed by the Department conflict with other applicable law or are so vague and ambiguous as to be unconstitutional.⁴ 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 the proposed

² 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. *Compare generally*, Minn. Stat. § 14.386 (2010).

³ See, Minn. R. 1400.2400, subp. 3 (2009).

⁴ 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).

amendments. While all other modifications and repeals of rules included in this proceeding meet the requirements of Minn. Stat. § 14.386 and Minn. R.1400.2400, the Administrative Law Judge includes a number of recommendations for changes in wording and punctuation that will clarify the rules and make them more easily understood.

Analysis of the Proposed Rules

Proposed Language Which Is Defective

Minn. R. 7503.0100, subp.4a; 7503.1725, subp. 2.F; and 7503.1725, subp. 3.B:

The Department proposed language in three different places that would require a completed insurance certificate showing insurance “that is noncancelable for a period of at least 12 months.”⁵ The statute permits the commissioner to require that the insurance identification card “be certified by the insurance company to be noncancelable for a period not to exceed 12 months.”⁶ The proposed rule language is inconsistent with the statutory language. The Administrative Law Judge recommends the Department adopt language that reflects the language of the statute in each of the three places where the reference to the noncancelable insurance period requirement appears, as follows:

. . . noncancelable for a period ~~of at least~~ not to exceed 12 months

This change would cure the defect with rule language consistent with the statutory language.

Minn. R. 7503.1300, subp. 2:

The proposed subpart adds an exception to an existing provision governing the circumstances under which a driver’s license must be cancelled and denied.⁷ The amendment was proposed to make the rule consistent with the statutory language at Minn. Stat. § 169A.55, subd. 4 which does not permit for reinstatement following cancellation and denial under the circumstances described in subpart 2.B., thus rendering the subpart inapplicable under the law in effect as of July 1, 2011. The rule language as originally proposed by the Department read:

Subp. 2 **Multiple alcohol – or controlled-substance incidents.** The commissioner shall cancel and deny the driver’s license or the driving privilege of a person who:

A. . . .;

⁵ Proposed rule 7503.0100, subp. 4a (li. 2.16-2.17) and 7503.1725 (li. 7.18 and 8.14) (05/11/11).

⁶ 2010 Laws of Minnesota, Ch. 366, § 15, sub. 4(a) (emphasis added).

⁷ Proposed rule 7503.1300, subp. 2 (li. 4.13-4.15) (5/11/11).

- B. has incurred three of these incidents and a special review has been completed and entered in the driver's record within ten years of the third incident, except that this provision does not apply to a cancellation and denial occurring on or after July 1, 2011; or
- C. . . .

The Administrative Law Judge concludes that the proposed language quoted above is so vague and ambiguous as to be unconstitutional because of the repetition of the words "cancellation and denial" as both the condition and the consequence of the occurrence of an event. The Administrative Law Judge recommends that the Department adopt the following language to cure this defect:

- A. . . . ;
- B. has incurred three of these incidents and a special review has been completed and entered in the driver's record within ten years of the third incident, ~~except that this provision~~ subparagraph B. does not apply to a cancellation and denial if any of these incidents occurred ~~occurring~~ on or after July 1, 2011; or
- C. . . .

Minn. R. 7503.1700, subpart 1:

The Department proposed its amendment to this rule part, which set out circumstances under which a person would be required to participate in rehabilitation before the introduction of the IIDP.⁸ The Department's intention in proposing the amendment was to offer the IIDP as an alternative to the older rehabilitation track. The language as originally proposed read:

A person whose driving privilege has been canceled and denied prior to July 1, 2011, is subject to the provisions of this part. A person must complete rehabilitation whenever:

The Administrative Law Judge finds that this language is so vague and ambiguous as to be unconstitutional and, therefore, constitutes a defect in the rule. The language as proposed does not reflect the Department's intentions in proposing it. The defect can be cured by adding language, as follows:

A person whose driving privilege has been canceled and denied prior to July 1, 2011, is subject to the provisions of this part, unless the person chooses to participate in the Ignition Interlock Device Program. A person must complete rehabilitation or participate in the Ignition Interlock Device Program whenever:

⁸ Proposed rule 7503.1700, subpart 1 (li. 5.19-5.20) (5/11/11).

Recommended Changes in Proposed Rules

The changes discussed below are recommendations. They are not required for the remainder of the proposed rule to be approved by the Administrative Law Judge but are suggested for the sake of clarity and readability.

Minn. R. 7409.3600, subpart 1:

The Department states that the purpose of the amendment to this subpart is to enable “legal and controlled driving by reducing the duration of any applicable revocation period”⁹ The language as originally proposed reads:

One-half of the revocation or suspension period must be expired if the person has had a limited licenses with the previous 24 months, except that one-half of the revocation or suspension period does not apply to a program participant under Minnesota Statutes, section 171.306, subdivision 1, paragraph (c), who is subject to part 7503.1800, subpart 4d.

The Administrative Law Judge recommends that this paragraph be revised as follows:

One-half of the revocation or suspension period must be expired if the person has had a limited licenses with the previous 24 months, except that ~~one-half of the revocation or suspension period~~ this requirement does not apply to a program participant under Minnesota Statutes, section 171.306, subdivision 1, paragraph (c), who is subject to part 7503.1800, subpart 4d.

Minn. R. 7503.1650, subpart 1:

This language was proposed to ensure that individuals currently participating in the IIDP pilot project would be permitting to continue in the program subject to the same terms under which they began their participation.¹⁰ Implementation of the guidelines, rules and statutes governing the program as of July 1, 2011 should not change the rules for pilot project participants who are continuing in the pilot project, as long as they do not incur additional incidents. The language as originally proposed read:

A person whose driving privilege has been revoked under Minnesota Statutes, chapter 169A, for an impaired driving incident and is participating in the ignition interlock device pilot project under Minnesota Statutes, section 171.306, on or before June 30, 2011, is not subject to the ignition interlock device program requirements under Minnesota Statutes, section 171.306, on or after July 1, 2011.

⁹ Proposed Order, p. 5 (May 13, 2011); See Proposed rule 7409.3600, subp. 1.D. (li. 1.10-1.14) (5/11/11/).

¹⁰ Proposed Order, p. 9; See Proposed rule 7503.1650, subp. 1 (li. 4.19-4.24) (5/11/11).

The Administrative Law Judge recommends the following changes to clarify the Department's intent:

A person whose driving privilege has been revoked under Minnesota Statutes, chapter 169A, for an impaired driving incident and is continuously participating in the ignition interlock device pilot project under Minnesota Statutes, section 171.306, on or before June 30, 2011, is not subject to the ignition interlock device program guidelines, the rules governing the program, or the statutory requirements under Minnesota Statutes, section 171.306, in effect on or after July 1, 2011. Any subsequent alcohol and controlled substance incident incurred by a participant in the pilot project on or after July 1, 2011 will result in termination from the pilot project.

Minn. R. 7503.1650, subp. 2:

With this proposed language, the Department intended to specify the time requirements for individuals whose license or driving privilege was canceled or denied prior to July 1, 2011, but who choose to participate in the IIDP.¹¹ The language as originally proposed reads:

A person whose driver's license or driving privilege was canceled and denied under part 7503.1300, subpart 2, prior to July 1, 2011, and chooses to participate in the ignition interlock device program shall do so for not less than three years, or for a period of time that is based on the number of qualified impaired driving incidents as specified in Minnesota Statutes, section 169A.55, subdivision 4, whichever is longer.

Subpart 3 of this rule part similarly permits a person whose license or privilege was revoked before July 1, 2011 to participate in the IIDP, but specifies that such a person is "subject to the requirements of the program as if the revocation was effective on or after July 1, 2011."¹² For the sake of consistency, and to clarify that a person opting into the program under subpart 2 will be treated in the same manner as a person opting into the program under subpart 3, the Administrative Law Judge recommends adding language to subpart 2, as follows:

A person whose driver's license or driving privilege was canceled and denied under part 7503.1300, subpart 2, prior to July 1, 2011, and chooses to participate in the ignition interlock device program shall do so for not less than three years, or for a period of time that is based on the number of qualified impaired driving incidents as specified in Minnesota Statutes, section 169A.55, subdivision 4, whichever is longer. Such a participant is subject to the requirements of the program as if the cancellation and denial were effective on or after July 1, 2011.

¹¹ Proposed Order, p. 9; See Proposed rule 7503.1650, subp. 2 (li. 5.1-56.) (5/11/11).

¹² Proposed rule 7503.1650, subp. 3 (li. 5.7-5.11) (5/11/11).

Minn. R. 7503.1725, subp. 1:

The Administrative Law Judge recommends these technical corrections, for clarity:¹³

A person whose driver's license or driving privilege has been revoked or canceled and denied under part 7503.1300; Minnesota Statutes, section 169A.52; 169A.54; or 171.04, subdivision 1, clause 10; on or after July 10, 2011; is subject to the provisions of this part.

Minn. R. 7503.1725, subp. 2.D.:

The Administrative Law Judge recommends that the word "shall" be inserted before the word "require" at line 7.8 of the rule draft, so that the affected sentence states "If the commissioner has sufficient cause to believe that the person provided fraudulent documentation relative to the requirements under this part, the commissioner shall not accept the chemical use assessment report and shall require that the person complete a new chemical use assessment."¹⁴

Minn. R. 7503.1725, subp. 2.F.:

The rule subpart lists all of the requirements necessary for a person participating in the IIDP to be issued a limited licensed or limited licensing privilege. Because any vehicle equipped with an ignition interlock device must have proof of noncancelable insurance, the Administrative Law Judge recommends the following change to the language as proposed:¹⁵

Provide a certificate of insurance stating that the coverage for ~~the~~ any vehicle equipped with an ignition interlock device

Minn. R. 7503.1725, subp. 3.A.(1) and (2):

The Department acknowledges that chemical dependency treatment may involve participation in a program that is not a chemical dependency treatment program in the traditionally used sense of that term. The Department has chosen to broaden the scope of programs it will accept to those programs recommended in the chemical use assessment report.¹⁶ To clarify that intent, and for the sake of consistency in the rule, the Administrative Law Judge recommends the following change to the proposed rule language:

¹³ Proposed rule 7503.1725, subp. 1 (li. 6.1-6.4) (5/11/11).

¹⁴ Proposed rule 7503.1725, subp. 2.D. (li. 7.6-7.9) (5/11/11).

¹⁵ Proposed rule 7503.1725, subp. 2.F. (li. 7.17-7.19)

¹⁶ Proposed Order, pp. 10-11; See Proposed rule 7503.1725, subp. 2.D. (li. 6.24-7.1), 7503.1725, subp. 3.A. (1) and (2) (li. 8.7-8.11) (5/11/11).

- (1) the starting and ending dates of primary treatment, relapse treatment, or other programs;
- (2) verification of successful completion of all treatment or other programs

Minn. R. 7503.1775, subp. 6.C.:

The Administrative Law Judge recommends that the Department delete the word “adoption” from line 12.13. The Office of Administrative Hearings typically makes a recommendation in a contested case, which the Commissioner then considers. The Commissioner may or may not adopt some or all of the OAH recommendation in a contested case.

Minn. R. 7503.1775, subp. 6.D.:

The Administrative Law Judge recommends that the Department delete Item D in its entirety, and that the remaining items be re-lettered accordingly.¹⁷ The statement in Item D, “[a]lternative measures or conditions attached to the variance have the force and effect of the applicable rule” is confusing and unnecessary. The phrase “force and effect” is confusing because it is a legal phrase typically used in reference to properly adopted rules, which are legally distinct from variance conditions. Item D is unnecessary given the language of Item F, which states that a program participant who violates the conditions attached to a variance will be “subject to the enforcement actions and penalties attached to the applicable law or rule.”¹⁸ Item F provides the Department with the authority needed to enforce the conditions attached to a variance.

Conclusion

All of the recommended changes discussed above are consistent with the Department’s statutory authority in this proceeding and would add clarity and consistency to the rules as proposed. While the Department is required to make changes to the proposed rules found to be defective, it has discretion to choose whether to make changes as recommended, to make different changes, or to make no changes, to the rules where changes are recommended but not found to have defects. Any proposed rules and the proposed rule repeal not specifically addressed in this Order and Memorandum are approved.

B.J.H.

¹⁷ Proposed rule 7503.1703.1775, subp.6.D. (li. 12.15-12.17).

¹⁸ Proposed rule 7503.1703.1775, subp.6.F. (li. 12.20-12.22).