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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0040**

1A Smart Start, Inc., et al.,
Petitioners,

vs.

Minnesota Department of Public Safety, et al.,
Respondents.

**Filed August 20, 2018
Rules declared valid
Smith, John, Judge***

Minnesota Department of Public Safety

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Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and Smith, John, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We declare valid the performance standards contained in the 2016 certification guidelines of the Minnesota Department of Public Safety because the performance standards are not prohibited by the plain language of Minn. Stat. § 171.306 (Supp. 2017).

FACTS

Petitioners 1A Smart Start, Inc., et al., manufacture and market ignition-interlock devices. These devices are “designed to measure breath alcohol concentration and to prevent a motor vehicle’s ignition from being started by a person whose breath alcohol concentration measures 0.02 or higher.” Minn. Stat. § 171.306, subd. 1(b). They are part of a program providing certain offenders an opportunity to safely regain driving privileges. *See id.*, subds. 3, 4. The devices are installed with a camera to photograph the driver when he or she submits a breath sample.

The commissioner of public safety is tasked with establishing “performance standards and a process for certifying” ignition-interlock devices. *Id.*, subd. 2(a); *see also* Minn. Stat. § 171.01, subd. 28 (2016) (defining “commissioner” to include authorized agents). Manufacturers must seek annual certification for a device. Minn. Stat. § 171.306, subd. 2(b). According to petitioners, there are five manufacturers and providers of certified devices in Minnesota.

The department of public safety (DPS), through its driver and vehicle services (DVS) division, periodically publishes the performance standards and certification guidelines for device manufacturers. The 2016 certification guidelines contain “real-time

reporting” performance standards. “Real-time” is defined in the guidelines as the “instant transmission of ignition interlock data, including photos, to the manufacturer’s website for viewing by DVS without delay as cellular reception permits.” Essentially, real-time reporting allows for instant notification if an ignition-interlock-device user fails a test or fails to comply with testing. Violations were previously reported, at least in part, via monthly downloads. Under the real-time performance standards:

- a. There shall be constant communication between the manufacturer’s server and relay unit while the device is in use. All data, including photos, shall be available for viewing on the website within 5 minutes from when the data was recorded on the device. This includes any last event data recorded after power off (e.g., skipped 10-minute rolling retest window data).
- b. [Devices] [s]hall have the capability to periodically awaken . . . for data retrieval when not in use.
- c. The date of the last upload shall be noted on the participant’s web account.
- d. A reliable cellular company shall be used as well as a cellular contract that includes roaming charges. In cases where there is no cellular reception, the device shall store the data and send it as soon as cellular reception is available.
- e. If a participant’s device has not transmitted data after 5 days, the manufacturer shall contact the participant to determine why data is not being transmitted. If the data cannot be transmitted after 10 days, the manufacturer shall contact the Department . . . to indicate why the data is not being transmitted.

In this declaratory-judgment action under Minn. Stat. section 14.44 (2016), petitioners challenge the real-time performance standards contained in the 2016 certification guidelines. Petitioners assert that the performance standards conflict with

2017 statutory amendments that prohibit DPS from establishing performance standards that require ignition-interlock devices “to use or enable location tracking capabilities without a court order.”¹ Minn. Stat. § 171.306, subd. 2(a); *see* 2017 Minn. Laws ch. 83, art. 1, §§ 1-3, at 351-53. Petitioners argue that the real-time performance standards in the 2016 certification guidelines require such location tracking capabilities, and therefore violate section 171.306, subdivision 2(a).

DECISION

This court has original jurisdiction over preenforcement challenges to the validity of administrative rules. Minn. Stat. § 14.44; *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). A preenforcement challenge “questions the process by which the rule was made and the rule’s general validity before it is enforced against any particular party.” *Coal. of Greater Minn. Cities*, 765 N.W.2d at 164 (quotation omitted). We may declare a rule invalid if it violates the constitution, is in excess of statutory authority of the adopting agency, or was adopted without compliance with rulemaking procedures. Minn. Stat. § 14.45 (2016).

Petitioners solely assert that the real-time performance standards exceed DPS’s statutory authority because the standards are prohibited by Minn. Stat. § 171.306.

¹ Under the amendments, “[t]he manufacturer of a certified device must include with an ignition interlock device contract a separate notice to the program participant regarding any location tracking capabilities of the device.” Minn. Stat. § 171.306, subd. 2(c). And, the commissioner shall not permit location tracking devices to be enabled unless ordered to do so by a court. *Id.*, subd. 3(g).

Appellate courts “apply the de novo standard of review to the question of whether the [agency] has exceeded its statutory authority” and “resolve any doubt about the existence of an agency’s authority against the exercise of such authority.” *In re Application of Minn. Power*, 838 N.W.2d 747, 753 (Minn. 2013) (quotation omitted). While administrative agencies have the authority to implement the language of a statute, an agency cannot adopt a conflicting rule. *GH Holdings, LLC v. Minn. Dep’t of Commerce*, 840 N.W.2d 838, 842 (Minn. App. 2013).

We first examine the plain language of both Minn. Stat. § 171.306 and the real-time performance standards to determine whether a conflict exists. We will look beyond the plain language of a statutory or regulatory provision only if the text is ambiguous. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 21 (Minn. 2009). “Ambiguous text is susceptible to more than one reasonable meaning.” *Id.*

Section 171.306, subdivision 2(a), prohibits DPS from establishing any performance standards “that, directly or indirectly, require [ignition-interlock] devices to use or enable location tracking capabilities without a court order.” The term “location tracking capabilities” is defined as “the ability of an electronic or wireless device to identify and transmit its geographic location through the operation of the device.” Minn. Stat. § 171.306, subd. 1(c).

The real-time performance standards do not expressly require location tracking capabilities. That is, the standards make no reference to geolocation capabilities or the retention of location data. Though the real-time performance standards refer to the

transmission of “data,” nothing in the guidelines indicates that geographic location is amongst the data to be gathered and transmitted.

The issue then is whether the real-time performance standards indirectly require ignition-interlock devices to use or enable location tracking capabilities without a court order. In this vein, petitioners assert that the real-time performance standards require devices to be equipped with, at a minimum, cellular capabilities.² Petitioners argue that cellular communication necessarily generates cell-site location information (CSLI). CSLI involves multiple wireless towers receiving a wireless signal, allowing the location of that signal to be triangulated. Petitioners assert that section 171.306 prohibits devices that generate CSLI because such devices have location tracking capabilities. Petitioners’ argument is unavailing for two reasons.

First, the term location tracking capabilities is defined as “the ability of an electronic or wireless *device* to identify and transmit its geographic location *through the operation of the device*.” *Id.* (emphasis added). Regarding CSLI, as petitioners concede, it is the information stored in wireless towers that is used to “analyze the device’s position,” and it is the wireless tower data which “can then be used to triangulate the location” of the device. Therefore, it is not the *devices* that are identifying geographic location, but rather mechanisms outside the devices using data likewise contained outside the devices. This

² Petitioners appear to both argue that the real-time performance standards effectively require ignition-interlock devices to use global-positioning-system (GPS) technology, and concede that devices can meet the standards using only cellular technology. These positions are seemingly contradictory. At any rate, nothing in the plain language of the real-time standards requires GPS capabilities. There is no mention of GPS capabilities in the real-time standards.

type of geolocation falls outside the restrictions imposed under the plain language of Minn. Stat. § 171.306, subd. 1(c).

Second, although the real-time performance standards may require devices to create CSLI, there is nothing in the record, or in the real-time standards, indicating that this CSLI will enable location tracking “without a court order.” *Id.*, subd. 2(a). Minnesota has enacted restrictions on the government’s ability to obtain electronic-device location information without a warrant. *See* Minn. Stat. § 626A.42 (2016). Further, in *Carpenter v. United States*, the Supreme Court recently held that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI,” and the government’s acquisition of CSLI maintained by third-party providers constitutes a search under the Fourth Amendment. 138 S. Ct. 2206, 2217 (2018). The real-time performance standards do not even reference CSLI, let alone enable access to that information without a court order.

In a preenforcement action, we do not engage in broad and far-reaching scrutiny of a rule based on hypothetical facts, rather we simply determine if a rule is facially valid. *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 241 (Minn. 1984). The plain language of section 171.306 does not prohibit the real-time performance standards. The real-time performance standards do not require ignition-interlock devices to have the capability to identify and transmit location. Further, though the performance standards may require CSLI to be generated, they do not enable location tracking via CSLI without a court order. We therefore declare the real-time performance standards to be valid rules.

Rules declared valid.