



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER

Attorney General

March 24, 1975

Opinion No. 75- 129

Robert L. Pinet
County Attorney
Ottawa County Courthouse
Ottawa, Kansas 66067

Dear Mr. Pinet:

K.S.A. 1974 Supp. 65-1,109 provides in pertinent part thus:

"(a) From and after January 1, 1974, it shall be unlawful for any person to make any test of the human breath for law enforcement purposes, unless:

(1) Such person has complied with the rules and regulations of the secretary of health and environment adopted pursuant to K.S.A. 74-906, as amended, to govern the procedures, standards of performance and the qualifications, training, certification and annual testing of personnel for the testing of human breath for law enforcement purposes;"

You inquire whether this provision, and the reference to "any person," applies to all law enforcement personnel administering tests to determine the alcohol content of human breath for law enforcement purposes. It is our opinion that this requirement applies only to those individuals and technicians which actually operate the chemical and physical equipment within the laboratories throughout the state. The statute does not apply to those law enforcement officers who merely collect samples of breath to be turned over to a laboratory technician.

Webster's Seventh New Collegiate Dictionary, (1967 ed.), defines a test as, *inter alia*, "a means of testing: as (1): a procedure, reaction, or reagent used to identify or characterize a substance or constituent."

Mr. Robert L. Pinet
March 24, 1975
Page 2

The American College Dictionary, (1954 ed.), defines a test as, inter alia, "Chem. (a) the process of detecting the presence of an ingredient in a compound or the like, or of determining the nature of the substance, commonly by the addition of a reagent."

In a MOBAT, the specific test about which you have inquired, an arresting officer simply requires the subject to blow his breath into a tube, wherein it is collected in a vial filled with a chemical compound. This vial is then sealed, and sent to a laboratory, wherein it is compared to a known substance by means of a machine called a gas chromatograph. The actions of the arresting officer are merely those of evidence collecting. The actual testing of the breath is done by an operator or technician in the lab.

Therefore, by applying the definitions of "test" as noted above, the actions of the arresting officer are excluded, and those of the operator or technician are included. Thus we arrive at the conclusion that the statute in question is designed to apply only to those people actually operating a "test".

Whether lack of certification of an operator will render the results of a test administered by an uncertified operator inadmissible is a question that remains to be determined. Certification is, of course, prima facie evidence of qualification and competence to administer the test. It may be that absent certification, the qualifications of the operator, and the reliability of the test results may be established by other means.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:GFW:en