



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

March 21, 1978

ATTORNEY GENERAL OPINION NO. 78-121

Colonel Allen Rush  
Superintendent  
Kansas Highway Patrol  
Building 2, Suite 130  
200 East Sixth Street  
Topeka, Kansas 66603

Re: Crimes and Offenses--Blood Alcohol Tests--Certification

Synopsis: Personnel, apparatus and procedures followed in the taking of samples of human breath for testing for blood alcohol content for law enforcement purposes, as implemented and operational in March, 1976, by the Kansas Highway Patrol are not subject to certification, licensing and periodic inspection by the Secretary of Health and Environment.

\* \* \*

Dear Colonel Rush:

You inquire whether certain equipment which is used in the taking of samples of human breath for blood alcohol testing are required to be tested and certified pursuant to K.S.A 65-1,107 and regulations adopted pursuant thereto.

As background, you advise that in 1969, the Kansas Highway Patrol initiated a program for testing human breath for blood alcohol content by a system involving gas chromatography and remote breath sample collection. The program provided the Patrol and other law enforcement agencies with a simple, efficient and accurate means of determining the blood alcohol level of persons arrested or detained for driving while under the influence of intoxicating liquor, with reduced dependence on blood tests with their attendant problems of availability and testimony. Under

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the supervision and with the approval of the Department of Health and Environment, the breath gathering and testing equipment was updated in late 1975. The updated system, known as the "Intoximeter Mark IV" system, was selected and became operable in March, 1976. It is concerning that system that your question arises.

The testing device itself is a gas chromatograph. Seven of these machines are in use throughout the state by the Patrol, and are operated only by trained, tested and licensed or certified personnel of the Patrol. Your question arises specifically concerning the specimen gathering system, known as the "Indium Encapsulation System," which permits remote gathering of human breath samples by troopers and police officers. The system consists essentially of a small box, known as a "crimper box," and tube made of indium, a soft metal tube, in which the breath sample itself is captured. The box is equipped with a manually operated crimping device, or jaws, and a thermostatically controlled heater. To take a sample of breath, the small indium tube is inserted in the box in a channel designed to secure the tube, and the heater is activated to heat the tube sufficiently to prevent the condensation of moisture therein. When the necessary temperature is reached, a small red light indicates that fact. The suspect is instructed to expel breath into the tube, and while breath is passing through it, the trooper manually closes the crimper jaws, capturing breath sample in three separate segments of the tube, which are sealed by the crimper jaws. The tube containing the sample is then forwarded for testing by licensed operators using tested and certified gas chromatography devices located regionally throughout the state.

You advise that the position has been taken by a member of the staff of the Office of Laboratories and Research of the Kansas Department of Health and Environment that the specimen gathering equipment described above must be approved and certified by the Secretary of Health and Environment, that the procedures followed in taking samples of human breath for blood alcohol testing must likewise be approved, and that all operators of the equipment, i.e., all troopers and many local law enforcement officers, must be certified and licensed therefor by the Secretary, and testimony to that effect was presented in the Sumner County District Court in *State v. Ast*, 77 TR 3957. You inquire whether there is any statutory basis for this position.

K.S.A. 1977 Supp. 65-1,107 authorizes the Secretary of Health and Environment to adopt rules and regulations governing

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"(c) the procedures, qualifications of personnel and standards of performance in the *testing of human breath for law enforcement purposes*, including procedures for the periodic inspection of apparatus, equipment and devices approved by the advisory commission for the *testing of human breath for law enforcement purposes*; and (d) prescribe the requirements for the training, certification and periodic testing of persons who operate apparatus, equipment or devices for the *testing of human breath for law enforcement purposes*." [Emphasis supplied.]

Compliance with these rules and regulations is mandatory. K.S.A. 1977 Supp. 65-1,109 provides in pertinent part thus:

"(a) 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 adopted pursuant to K.S.A. 1975 Supp. 65-1,107 . . . 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*; and

(2) the apparatus, equipment or device used by such person *in the testing of human breath for law enforcement purposes* is of a type approved by the secretary of health and environment . . . ." [Emphasis supplied.]

Thus, rules and regulations adopted by the Secretary of Health and Environment under K.S.A. 1977 Supp. 65-1,107 extend to the "training, certification and testing of persons who operate apparatus, equipment or devices for the testing of human breath for law enforcement purposes," the apparatus, equipment and devices used in the testing itself, and the procedures followed in conducting those tests. Apparently, it is argued that the taking of breath samples or specimens is an integral part of the "testing of human breath for law enforcement purposes."

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Obviously, the taking of a breath sample and the testing of that sample are entirely separate procedures. The analysis of a sample involves complex and sophisticated equipment and procedures, requiring special training for the personnel conducting the tests. The taking of a sample by the trooper in the field is an entirely mechanical procedure, unrelated in time and place to the analysis of that sample itself. Presumably, it may be argued that the validity of the test itself must depend upon the care and skill with which the sample is taken, and that the accuracy of the results depend upon an assured level of training of troopers and other officers operating the sample-gathering equipment, and certification and periodic inspection of the sampling apparatus.

It is clear, however, that this is not the case. The test itself detects any error in the procedure followed in taking the sample, or any defect in the sampling device itself. As indicated above, the only nonmechanical feature of the "crimper box" is the thermostatically controlled heating device. If it does not heat properly, or if the officer takes the sample before the proper temperature is reached, condensation will form which results in an impossibly high reading. As the court pointed out in *State v. Tiernan*, 206 N.W.2d 898 (Iowa 1973),

"If there was any inadequacy in showing the tube was heated, it would not preclude admitting the tests results. The evidence could still be received in view of the further testimony that the moisture, if present, would have invalidated rather than altered the test." 206 N.W.2d at 901.

If the crimping jaws failed properly to seal the indium tube in which the breath sample was captured, the resulting dissipation of the sample would lower the reading.

In short, any error or defect in either the procedure used in taking the sample or in the equipment used for that purpose which distorts the test result to reflect an incorrectly high reading is detected by the test itself. Moreover, the trooper who takes the sample is always available to testify to the procedure which he followed, and is subject to cross-examination as to the procedure used.

Throughout K.S.A. 1977 Supp. 65-1,107 *et seq.*, the authority of the Secretary extends to the "testing of human breath for law

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enforcement purposes." As stated above, as a merely mechanical matter, sampling and testing are physically unrelated procedures. Moreover, there is clearly no such intimate relationship between the sampling procedure and equipment and the testing itself that the latter term need be given such an extraordinarily expansive construction here, to include mere capturing of a breath sample.

The obvious purpose of K.S.A. 1977 Supp. 65-1,107 *et seq.* was and is to assure the scientific accuracy of test results, through certification of testing personnel, testing, inspection and certification of testing equipment, and approval of test procedures. All testing devices, responsible personnel and testing procedures have been so approved. Clearly, the tests so approved as described above foreclose any error in the test results. Indeed, the only error in the taking of a sample which can result in an incorrectly high reading is reflected by moisture condensation in the sample, which the testing procedure itself detects. Stated otherwise, the integrity of the testing program for blood alcohol samples in no way requires that the phrase "testing of human breath for law enforcement purposes" be construed to include anything other than what it clearly imports, the testing itself, and not the mere taking of breath samples for subsequent testing. Necessarily, of course, the regulations adopted by the Secretary pursuant to K.S.A. 1977 Supp. 65-1,107 likewise extend no further than the authorizing statute, to personnel, equipment and procedures used in testing itself.

Accordingly, it is my opinion that the remote breath sample gathering apparatus, officers operating this equipment, and the procedures followed in the taking of breath samples for blood alcohol testing for law enforcement purposes are not subject to certification, testing and licensure by the Secretary of Health and Environment.

Yours truly,



CURT T. SCHNEIDER  
Attorney General

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