

Government of the District of Columbia
OFFICE OF THE ATTORNEY GENERAL



Robert J. Hildum, Deputy Attorney General
Public Safety Division

June 4, 2010

D.C. Superior Court Trial Lawyers Association

C/O Betty Ballester, President (slam13@aol.com) and
Joseph Jorgens, Vice President (josephjorgens@att.net)

Via e-mail

Dear Ms. Ballester and Mr. Jorgens:

It has been reported that a number of Metropolitan Police Department (MPD) Intoxilyzer instruments were miscalibrated between September 2008 and February 2010. As a result of the miscalibration the instruments apparently produced results that were outside the acceptable margin of error to be considered accurate. In response to these reports, several defendants have filed motions to withdraw their guilty pleas to DWI because their breath scores were obtained using an affected Intoxilyzer.

OAG has substantially completed a review of its DWI prosecutions since September 2008 involving MPD instruments. After reviewing over 1100 cases, OAG has identified approximately 300 DWI convictions where breath scores were obtained from an affected Intoxilyzer. OAG is in the process of notifying the defendants and their counsel in those cases; however, that process may take several more weeks. Since many of the defense counsel are members of D.C. Superior Court Trial Lawyers Association, OAG is also hereby providing notice to your office so that you may take whatever action you deem appropriate. For your convenience, I have attached a list of cases in which we have determined that a miscalibrated instrument was used. I am also attaching a memo from MPD which identifies the instruments in question.

Ilmar Paegle, a DDOT contractor, discovered that some of the MPD Intoxilyzers were testing outside the acceptable range of error. At that time the cause of the problem was unknown. OAG was informed of the issue on February 4, 2010 and immediately stopped relying

upon MPD Intoxilyzer results until the scope and cause of the problem were determined. MPD recently completed its investigation and determined that in September of 2008, Officer Kelvin King, who was in charge of MPD's Alcohol Enforcement Program from 1995 to August 2009, began the process of replacing the motors in MPD's Intoxilyzers. The motors were changed as part of the routine maintenance of the instruments. Officer King worked closely with the manufacturer who provided assistance and instructions as to how to calibrate the instruments once the motors were changed. It is this calibration procedure that apparently produced the error discovered in February 2010. The MPD investigation has revealed that Officer King received detailed instructions from the manufacturer, was solely responsible for replacing the motors and did so with no malicious intent to purposely affect the instruments.

During the investigation, Mr. Paegle raised concerns about MPD's alcohol testing program and what type of accuracy testing protocol was required by D.C. Code § 50-2205.03. The statute requires that the breath testing instrument be tested within 3 months of its use and that it be found to be accurate.¹ The District, unlike other jurisdictions, has never codified any procedures or standards as to how the instruments accuracy shall be established. MPD, like other District law enforcement agencies that enforce the District's impaired driving laws, established their own procedures for maintaining the instruments many years ago. In MPD's case, the procedures were developed with the assistance of the Office of the Chief Medical Examiner. In cases that relied upon breath scores, as part of OAG's discovery policy, OAG provided defendants with a copy of MPD's Breath Test for Alcohol Operator Training Course (BTAOT Course) manual. This manual lays out in detail the protocols utilized by Officer King. A log was kept for each instrument which showed the date of the simulation or actual testing, the test results, the time of each test, the instrument number, the originating officer, the District, and the complaint number. MPD's policy and documentation have always been made available to defendants when requested.

Shortly after the discovery of the problem with MPD's instruments in February 2010, MPD decided to switch to Intoximeters for use in its impaired driving enforcement program. Moreover, OAG made a policy decision not to rely on scores obtained from MPD Intoxilyzers, regardless of whether the results were obtained before the instruments were miscalibrated or for the period of time that the instruments were re-certified after the problem was discovered and

¹ D.C. Code § 50-2205.03 states that "An official copy of the results of any ... breath test performed on a person ... shall be admissible as substantive evidence, without the presence or the testimony of the technician or of the police officer who administered the test ... provided, that the police officer or the technician certifies that the breath test was conducted in accordance with the manufacturer's specifications, and that the equipment on which the breath test was conducted has been tested within the past 3 months and has been found to be accurate ..."

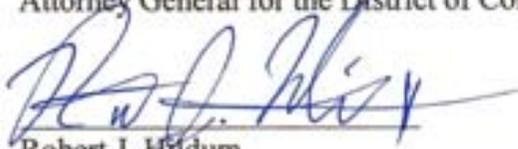
The statute goes on to say that "...that the person on whom any ... breath test has been performed, or that person's attorney, may seek to compel the attendance and the testimony of the technician or of the police officer in any proceeding by stating, in writing, the reasons why the accuracy of the test result is in issue and by requesting, in writing, at least 15 days in advance of the proceeding, that such technician or such police officer appear and testify in the proceeding. Any such person upon whom a blood, urine, or breath test is performed, shall be informed, in writing, of the provisions of this section at the time that such person is charged. After having been informed, failure to give timely and proper notice shall constitute a waiver of the person's (on whom the test has been performed) right to the presence and testimony of the technician or the police officer.

before MPD switched to Intoximeters. MPD is also in the process of finalizing an MOU with OCME to oversee specific aspects of the MPD program.

Finally, OAG is going to review all of the protocols utilized by any police department in the District of Columbia who enforce impaired driving laws and assist them in developing uniform policies for maintaining and testing their equipment.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia



Robert J. Hildum
Deputy Attorney General
Office of the Attorney General for the District of Columbia
Public Safety Division

Attachments: List of cases
MPD Memo April 1, 2010

CC: Hon. Lee F. Satterfield
Hon. Russell F. Canan