

March 25, 2024

Chief Justice Heidi Brieger
Executive Office of the Trial Court
1 Pemberton Sq.
Boston, MA 02108

Chief Justice Stacey J. Fortes
Administrative Office
Edward W. Brooke Courthouse,
24 New Chardon St., 1st Floor
Boston, MA 02114

Re: Office of Alcohol Testing

Dear Chief Justice Brieger and Chief Justice Fortes,

A variety of concerning issues and problems with the Office of Alcohol Testing (OAT) have been discovered by Attorney Steven Panagiotis of Concord and Attorney Joe Bernard. Specifically, OAT certified breath test machines are not programmed with Massachusetts tolerance ranges, and are at times producing untruthful “pass” results. These issues deal directly with the maintenance and calibration of every Draeger Alcotest 9510 machine in Massachusetts. One of the most troubling factors was the degree of difficulty involved in identifying these problems. Most defense lawyers and prosecutors will be unable to identify this misleading information; it was only after countless hours of research that we were able to unearth these problems. The information is buried and the fact that the machines are not programmed consistent with Massachusetts standards is totally unfair and deceptive.

This troubling issue that has been discovered requires immediate remedial action. Based upon the nature of this issue, as further discussed below, we request that an immediate statewide moratorium be instituted on using breath test results to prosecute OUI offenses in the Commonwealth. During this moratorium, we request that an investigation into this issue be conducted and a hearing take place as to the full scope of the impact on the calibration and certification process.

As you are aware, the certification and calibration process was the main subject matter of the nine years of the statewide breath test litigation. The accuracy and manner in which the machine is calibrated are of vital importance to the scientific reliability of the results when it measures a citizen’s breath sample in the field. Each year, the Draeger 9510 breath test machines are brought

through a calibration process, utilizing a variety of measurement standards. Each standard needs to be measured for its precision and accuracy with a particular tolerance range. Unfortunately, we have learned that the tolerance ranges set for the calibration and certification process as prescribed by OAT's protocols are not programmed into the firmware. The machines have been programmed by the manufacturer (Draeger, Inc.) with completely different tolerance ranges that are not at all reflective of what the OAT protocol requires, producing "pass" results when the verification test actually fails. This is completely unacceptable to the entire criminal justice system, and OAT has known about this problem for quite some time.

During our many discussions with OAT, the laboratory privately informed us that instead of the machine being properly programmed with Massachusetts tolerance ranges, the laboratory has a lab technician monitor the machine in an effort to "catch" any inconsistent tolerance readings during the calibration process. We believe such a non-automated review is a recipe for disaster, especially considering the history of the OAT's past misconduct and failures. Moreover, such a practice is inconsistent with the spirit of the previous court orders in the Commonwealth v. Ananias, Dist. Ct., No. 1248CR1075 (Ananias litigation) and the Supreme Judicial Court's decision in Commonwealth v. Hallinan, 491 Mass. 730 (2023). We know from our past experiences with the drug lab and the nine year litigation with the breathalyzers that significant problems can arise due to human error.

To amplify the problem, we have discovered different instances where the machine falls out of the Massachusetts tolerance ranges, but nevertheless produces a "PASS" result on a critical document. In other words, the machine indicates a "passing" verification test when, in fact, the machine has failed at a specific ethanol concentration. In such an instance, the lab technician is supposed to remove the machine, set it aside, and, after a certain period of time, run the machine through another calibration and certification process.

A breath alcohol machine used in evidentiary cases should not be programmed to print "PASS" on a calibration report when the results do not meet the laboratory's acceptance criteria. During an automated calibration procedure, if an instrument measures outside of tolerance, the technician should be immediately alerted by the firmware so the issue can be investigated and resolved. Failing to detect out-of-specification conditions risks letting faulty breath alcohol machines remain in service, leading to incorrect breath alcohol results being used as evidence in OUI cases.

Calibration is a critical quality control procedure that is supposed to ensure the accuracy and proper functioning of the breath alcohol analyzer. By not utilizing an automated alert system for out-of-tolerance conditions, OAT is introducing an unnecessary risk of human error in the calibration and certification process. Despite the many inquiries we have made to OAT regarding this issue, OAT has done nothing to properly program the machine to reflect the Massachusetts

tolerance ranges during the calibration and certification process. The situation is extremely disturbing and misleading on a variety of different levels.

We are requesting an immediate investigation and hearing to determine the scope of this issue and its impact on the calibration and certification process. We are also requesting a statewide moratorium on the use of breath test results in OUI prosecutions and demanding OAT update the firmware to be consistent with the Massachusetts calibration tolerance ranges.

We have had too many experiences with OAT and the Draeger Alcotest 9510 machines malfunctioning to continue to presume that the machine maintains any reliability. Furthermore, although the communication and sharing of information by OAT has been much improved, this disturbing situation requires that immediate remedial action be taken by OAT.

Our discovery highlights an unacceptable flaw in the calibration process of the Draeger Alcotest 9510 by OAT. Breath test results impact personal lives and freedoms when used as evidence in OUI cases. The integrity of the breath testing program needs to be ironclad and this can only be accomplished through an automated process. Upgrading the calibration protocols to include automatic out-of-spec notifications based on OAT's calibration tolerance limits should be an easy decision to implement to protect the legitimacy of breath test results used in Massachusetts court.

We invite the Court to contact us with its thoughts, questions, and concerns.

Sincerely,

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