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D.C. reviewing DWI charges; accuracy of breath results in doubt

BY MARY PAT FLAHERTY

The equipment that D.C. police use to test for drunk drivers has given inaccurate results and District officials have begun a review of all DWI charges brought between October 2008 and February to look for questionable results, Attorney General Peter Nickles said.

It is not known how many cases will be affected or how officials will resolve those that have already been adjudicated. The problems are with the equipment that tests a driver's breath for blood alcohol content.

Nickles and Police Chief Cathy L. Lanier had previously said that they suspected problems with the equipment but released few details to the public, defense attorneys or their own officers about what led to their probe.

The department also will replace its old breath testers and retrain officers on a new system, according to an e-mail sent Friday to D.C. officers.

Moreover, internal memos obtained by The Washington Post, as well as interviews, show that D.C. police supervisors were alerted to systemwide trouble with the machines' accuracy and had explored remedies at least two weeks before the department made the issue public Feb. 26. Then, officials would say only that they had "recently become aware of a potential problem with the accuracy of its alcohol Intoxilyzer machines." That language later was repeated in identical releases from Nickles's office and the office of Mayor Adrian M. Fenty (D).

In mid-February, prosecutors began dropping DWI charges in court -- but kept pursuing related drunken-driving charges on the same cases -- without detailed explanations to defense attorneys, some of whom were weighing plea offers for their clients, according to another e-mail and interviews with five attorneys.

Nine of the 10 machines in use by District police are under scrutiny, according to Nickles, who said problems arose when their motors were replaced beginning in October 2008 and the machines were not correctly recalibrated. The equipment was adjusted last month, Nickles said, "but until we know they are perfect, we are reluctant to charge DWI. We feel we can be comfortable about perfection in a day or two."

Nickles said he cannot predict how many previous convictions might have been affected: "It may be hundreds; it may be tens of cases. We won't know until we complete our review," which he said would take several months.

The investigation would not affect the most serious cases, including those involving accidents, injuries or death. In those cases, blood or urine is tested, making the breath tests moot.

Nickles said the District also will begin replacing its Intoxilyzer 5000 machines with Intoximeter, a system used by U.S. Park Police in the District. The District has owned several Intoximeters for at least three years but has not deployed them, court records show.

Central to DWI cases

Breath test results are central to DWI cases. In the District, a driver can be convicted of DWI based solely on breath results that show blood alcohol concentrations above 0.08. No field sobriety tests are needed, unlike in cases of driving under the influence.

The DWI charge carries a mandatory five-day jail sentence for drivers with blood alcohol concentrations of 0.20 or higher -- a provision that makes test results more crucial, several defense attorneys noted.

E-mails on Feb. 14 and Feb. 18 from the police traffic safety and special enforcement branch to an assistant chief and other police staff show that the department knew it had a systemwide problem with the equipment. The e-mails indicate that officers also were trying to recalibrate the equipment to tighten up the testing for more accurate results.

That information was not shared, even as some defense attorneys weighed plea offers for their clients, an e-mail and interviews show.

On Feb. 12, the attorney general's office offered a client of attorney **Steven Kupferberg** a chance to plead guilty to a DUI count. In an e-mail the next day, the prosecutor wrote: "As I stated, the new offer is based on a reevaluation of the case. However, I do not believe that I mentioned the government will be entering a Nolle Prosequi [would not prosecute] for the count of Driving While Intoxicated." The e-mail said the DWI with its mandatory jail term would be dropped regardless of whether the client pleaded guilty to a lesser charge. But it did not reveal that the office had lost confidence in testing results.

The lack of information has angered numerous defense attorneys, who contend that prosecutors were obliged under a procedure in criminal cases, commonly known as the Brady rule, to reveal any

information that could help clear their clients. **Kupferberg** formally asked for such information in a letter in November. In a Feb. 1 reply, the prosecutor said he did not have anything to share.

Kupferberg's client took the DUI plea. "I don't believe we would have done that had we known they believed there were problems with the tests," he said. "To me, this was an ethical lapse on their part and intentionally so."

'Fully complied'

The prosecutor in that case did not respond to e-mail and phone messages requesting an interview. Said Nickles: "I know what Brady requires, and our office fully complied."

Challenging the accuracy of testing has long been a defense tool, but attorney Bryan Brown said the investigation into the District's equipment bolsters the argument and extends beyond the DWI cases. "It puts everything in doubt. If you aren't hitting the mark, you aren't hitting the mark," Brown said. The unit that repairs and calibrates the testing equipment had been directed for at least four years by Officer Kelvin King, who recently moved to the criminal investigations division, personnel records show. Ilmar Paegle, a civilian employee with the department, reviewed the unit earlier this year. Reached at his home, Paegle said, "I would like to talk, but I have been instructed not to make comments while the investigation continues."

King did not respond to interview requests.

Nickles said that the police department identified the problem in early February and that the issue was brought to his attention. "I commend Chief Lanier for catching it," Nickles said. It is not clear why routine audits did not catch errors that stretch back to 2008. Through a spokeswoman, Lanier said: "We are relying on experts to give us some of the answers. We have no comment at this time."

Kristopher Baumann, head of the Fraternal Order of Police Lodge 1, said union officials "wish this had been brought forth sooner and more told to all of us about what, if anything, is wrong. On the one hand, you don't want open season for drunk drivers, but also the public and our members need to have confidence in the equipment they are using to do their jobs." ■

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