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CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

COMMISSIONS, BOARDS AND INSTITUTIONS: DEPARTMENT OF CRIMINAL JUSTICE SERVICES.

Substantial, rather than strict, compliance with regulatory procedure for validating breath test device is sufficient. Regulatory procedure complies with statutory requirements for validating breath tests to be used as evidence in prosecutions.

The Honorable George W. Grayson
Member, House of Delegates
January 12, 2001

You ask whether a licensee must comply strictly with the regulatory procedure for validating a breath test device prior to conducting a test to determine the alcohol or drug content of a person's blood. If not, you ask whether such procedure complies with the requirements of § 18.2-268.9 of the *Code of Virginia*.

Your inquiries pertain specifically to the numbering in the *Virginia Administrative Code* of the Regulations for Breath Alcohol Testing, which has been changed to reflect the transfer by the 1996 Session of the General Assembly of the Division of Forensic Science from the Department of General Services to the Department of Criminal Justice Services.¹ As a result and pursuant to its authority,² the Department of Criminal Justice Services amended the regulations to reflect the change.³ The amended regulations became effective November 23, 2000.⁴

The regulation pertaining to the methods and procedures of conducting breath tests have been changed as follows:

The licensee^[5] shall verify that the breath test device is properly calibrated and in proper working order by conducting a room air blank analysis prior to analysis of the breath of the person and by conducting a validation test with a control sample ~~immediately following the analysis of the breath of the person~~ *as part of the test protocol.*^[6]

This regulation is "procedural in nature."⁷ "Substantial compliance therewith shall be deemed sufficient."⁸

Section 18.2-268.9 provides for the validity of a breath test so that test results may be used as evidence in prosecutions by the Commonwealth. For a chemical analysis of a person's breath to be valid as evidence in a prosecution for driving under the influence, it must "be performed by an individual possessing a valid license to conduct such tests, with a type of equipment and in accordance with methods approved by the Department of Criminal Justice Services, Division of Forensic Science."⁹ In addition, the individual conducting a breath test "shall issue a certificate which will indicate that the test was conducted in accordance with the Division's specifications."¹⁰ Section 18.2-268.9 is enacted as part of Article 2, Chapter 7 of Title 18.2, relating to driving a motor vehicle while intoxicated. Statutes relating to the same subject "are not to be considered as

isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement."¹¹ Section 18.2-268.11 provides that "[s]ubstantial compliance" with "[t]he steps set forth in §§ 18.2-268.2 through 18.2-268.9 relating to taking, handling, identifying, and disposing of blood or breath samples are procedural and not substantive," and "shall be sufficient."¹²

"The principle of substantial compliance, which is predicated upon a failure of strict compliance with applicable requirements, operates to replace the protective safeguards of specificity with a less exacting standard of elasticity, in order to achieve a beneficial and pragmatic result."¹³ A "'prejudicial irregularity in test procedures'" does not defeat "'admissibility of the certificate but only affect[s] its weight as evidence of the alcoholic content of [the defendant's] blood.'"¹⁴ "Simply put, the statute does not require proof of the accuracy of an individual test as a prerequisite to admissibility of the resulting certificate."¹⁵

Accordingly, it is my opinion that a licensee need only comply substantially with the regulatory procedure for validating a breath test device prior to conducting a test to determine the alcohol or drug content of a person's blood. In addition, I am of the opinion that the regulatory procedure complies with the requirements of § 18.2-268.9.

¹See 17:3 Va. Regs. Reg. 395-98 (Oct. 23, 2000); *see also* 1996 Va. Acts chs. 154, 952, at 265, 2329, respectively (transferring responsibilities of Division of Forensic Science from Department of General Services to Department of Criminal Justice Services).

²See § 9-170(1) (empowering Department of Criminal Justice Services to promulgate regulations pursuant to Administrative Process Act, §§ 9-6.14:1 to 9-6.14:25).

³See 17:3 Va. Regs. Reg., *supra*, at 395-98.

⁴*Id.* at 395.

⁵"'Licensee' means a person holding a valid license from the [Division of Forensic Science] to perform a breath test of the type set forth within these regulations under the provisions of § 18.2-268.9 of the Code of Virginia, or a parallel local ordinance." *Id.* (quoting 6 Va. Admin. Code 30-190-10 (amending 1 Va. Admin. Code 30-50-10 (Law. Coop. 1996))).

⁶*Id.* at 396 (quoting 6 Va. Admin. Code 20-190-110(3) (amending 1 Va. Admin. Code 30-50-90(C) (Law. Coop. 1996))).

⁷*Id.* at 395 (quoting 6 Va. Admin. Code 20-190-20 (amending 1 Va. Admin. Code 30-50-20 (Law. Coop. 1996))).

⁸*Id.*

⁹Section 18.2-268.9.

¹⁰*Id.*

¹¹Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting former edition of 73 Am. Jur. 2d *Statutes* § 188 (1974)); *see also* 1995 Op. Va. Att'y Gen. 69, 70.

¹²The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. *See* *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); *see also* *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; *id.* at 127, 129, and opinions cited therein.

¹³*Snider v. Com.*, 26 Va. App. 729, 733, 496 S.E.2d 665, 667 (1998) (quoting *Coleman v. Pross*, 219 Va. 143, 158, 246 S.E.2d 613, 622 (1978)).

¹⁴*Woolridge v. Com.*, 29 Va. App. 339, 344, 512 S.E.2d 153, 155-56 (1999) (quoting *Anderson v. Com.*, 25 Va. App. 26, 30, 486 S.E.2d 115, 117 (1997) (quoting *Stroupe v. Commonwealth*, 215 Va. 243, 245, 207 S.E.2d 894, 896 (1974))).

¹⁵*Id.* at 345, 512 S.E.2d at 156.

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