

CHAPTER 51

CHEMICAL BREATH TESTING

Authority

N.J.S.A. 39:4-50.3, 39:3-10.25 and 12:7-56.

Source and Effective Date

R.1996 d.480, effective September 16, 1996.
See: 28 N.J.R. 3710(a), 28 N.J.R. 4487(a).

Executive Order No. 66(1978) Expiration Date

Chapter 51, Chemical Breath Testing, expires on September 16, 2001.

Chapter Historical Note

Chapter 51, Chemical Breath Testing, was filed and became effective prior to September 1, 1969. Amendments to the original filing were adopted as R.1970 d.84, effective July 9, 1970. See: 2 N.J.R. 50(f), 2 N.J.R. 67(e). R.1972 d.10, effective January 24, 1972. See: 3 N.J.R. 267(a), 4 N.J.R. 27(b). R.1973 d. 354, effective December 17, 1973. See: 5 N.J.R. 390(a), 6 N.J.R. 21(c). R.1980 d.8, effective January 7, 1980. See: 11 N.J.R. 21(a), 12 N.J.R. 91(a). Amendments that replaced the entire text with new language were adopted as R.1982 d.187, effective June 21, 1982. See: 14 N.J.R. 376(a), 14 N.J.R. 660(a).

Pursuant to Executive Order No. 66(1978), Chapter 51 was readopted as R.1987 d.229, effective April 27, 1987. See: 19 N.J.R. 444(b), 19 N.J.R. 882(b). Pursuant to Executive Order No. 66(1978), Chapter 51 was readopted as R.1991 d.505, effective September 16, 1991. See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c). Pursuant to Executive Order No. 66(1978), Chapter 51 was readopted as R.1996 d.480, effective September 16, 1996. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. BREATH TESTING OPERATORS

13:51-1.1 Purpose of subchapter

This subchapter prescribes the requirements for certification of a person to conduct chemical analysis of the breath of a person arrested pursuant to N.J.S.A. 39:4-50 et seq., N.J.S.A. 39:3-10.13, N.J.S.A. 39:3-10.20, N.J.S.A. 39:3-10.24, N.J.S.A. 39:3-10.25, N.J.S.A. 12:7-34.19, N.J.S.A. 12:7-46, N.J.S.A. 2A:4A-23 or N.J.S.A. 12:7-54 et seq., the conditions under which certification can occur and the general rules for holders of certificates, pursuant to the statutory requirements of P.L. 1966, c.142, Sec. 3, as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), hereinafter denoted as N.J.S.A. 39:4-50.3; or P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25), hereinafter denoted as N.J.S.A. 39:3-10.25; or P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56), hereinafter denoted as N.J.S.A. 12:7-56.

Amended by R.1987 d.229, effective May 18, 1987.
See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added list of N.J.S.A. cites.

Amended by R.1991 d.505, effective October 7, 1991.
See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).

Added to list of N.J.S.A. citations.

Administrative correction.

See: 24 N.J.R. 857(a).

13:51-1.2 Definitions

For the purpose of this chapter, and subchapters 1, 2 and 3 thereof, the terms set forth herein are defined as follows:

"Approved instrument" shall mean a device or instrument approved by the Attorney General at N.J.A.C. 13:51-3.5 for use in the chemical analysis of the breath of a person arrested pursuant to the provisions of N.J.S.A. 39:4-50 et seq., N.J.S.A. 39:3-10.13, N.J.S.A. 39:3-10.20, N.J.S.A. 39:3-10.24, N.J.S.A. 12:7-34.19, N.J.S.A. 12:7-46 or N.J.S.A. 2A:4A-23.

"Approved methods" shall mean those steps or operations approved by the Attorney General at N.J.A.C. 13:51-3.6 for use in the chemical analysis of the breath of a person arrested pursuant to the provisions of N.J.S.A. 39:4-50 et seq., N.J.S.A. 39:3-10.13, N.J.S.A. 39:3-10.20, N.J.S.A. 39:3-10.24, N.J.S.A. 12:7-34.19, N.J.S.A. 12:7-46 or N.J.S.A. 2A:4A-23 on an approved instrument.

"Approved school" shall mean police training academies and schools as approved by the Police Training Commission

pursuant to N.J.S.A. 52:17B-67, et seq. It shall also include the Training Academy of the Division of State Police and any similar such academy, training center or school operated by or for the Department of Defense of the United States of America.

"Breath Test Coordinator/Instructor" is a person who meets the eligibility requirements as set forth at N.J.A.C. 13:51-2 and is duly appointed thereunder.

"Calendar year" shall mean all days of a year commencing with and including January 1 of a specific year and continuing through to and including December 31 of the same year.

"Certification" shall mean the approval by the Attorney General of a person as an operator, as herein defined, and shall mean said person is qualified and competent to perform chemical breath test analysis utilizing an approved method and an approved instrument as defined in this subchapter and as set forth at N.J.A.C. 13:51-3 as authorized by N.J.S.A. 39:4-50.3, N.J.S.A. 39:3-10.25 or N.J.S.A. 12:7-56.

"Operation of an approved instrument" shall mean operation of an approved instrument (as defined herein) by approved methods (as defined herein) for the operation of that approved instrument.

"Operator" shall mean a person who is certified as a Chemical Breath Test Operator to perform analysis of an arrested person's breath utilizing an approved method and an approved instrument, as defined in this subchapter and as set forth at N.J.A.C. 13:51-3 and pursuant to the provisions of N.J.S.A. 39:4-50.3, N.J.S.A. 39:3-10.25 or N.J.S.A. 12:7-56.

"Operator's certificate" shall mean a certificate issued under the authority of the Attorney General which bears the signatures or facsimile signatures of the Attorney General and the Superintendent of State Police.

"Organized police department" shall include all police and law enforcement agencies of the State of New Jersey; and all municipal and county police agencies of the various municipalities and counties of the State of New Jersey as established by law; and police agencies established by the laws of the United States of America within the Department of Defense.

"Recertification" shall mean the extension of the certification of an operator upon compliance with the training as required by this subchapter.

"Replica" shall mean a document which is an operator's certificate as defined in this section and which shall bear the signatures or facsimile signatures of the Attorney General and the Superintendent of State Police and which is of a size that permits it to be carried in the pocket, purse, wallet, etc., and includes replacements thereof as set forth at N.J.A.C. 13:51-1.12(c).

"Satisfactory completion of training" shall mean demonstrated competence of operation of chemical breath test analysis methods and devices or instruments approved by the Attorney General as set forth at N.J.A.C. 13:51-3, maintenance of a passing course average and passing a written examination.

Amended by R.1987 d.229, effective May 18, 1987.

See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added N.J.S.A. cites to "approved instrument", "approved methods", "calendar year", "operator" and "replica".

Amended by R.1991 d.505, effective October 7, 1991.

See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).

Added N.J.S.A. cites to "approved instrument", "approved methods", "certification", "operator".

13:51-1.3 Certification

(a) For the purpose of prosecution, no operator may conduct a valid analysis of an arrested person's breath under the provisions of N.J.S.A. 39:4-50.3, N.J.S.A. 39:3-10.25 or N.J.S.A. 12:7-56, unless such operator has been issued a valid operator's certificate which is current at the time of the analysis of an arrested person's breath and which attests that such operator is then qualified and competent to conduct such analysis utilizing an approved method and an approved instrument as set forth at N.J.A.C. 13:51-3.

(b) Certification of a person as an operator shall be by recommendation of the Superintendent of the State Police to the Attorney General upon the satisfactory completion of training as more fully set forth at N.J.A.C. 13:51-1.6.

Amended by R.1987 d.229, effective May 18, 1987.

See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added N.J.S.A. 12:7-56.

Amended by R.1991 d.505, effective October 7, 1991.

See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).

In (a), added "N.J.S.A. 39:3-10.25".

13:51-1.4 Prerequisite for application for certification

An applicant for certification as an operator must be a sworn, full-time member of an organized police department for a minimum of one year after graduation from an approved school; except that members of a police or law enforcement agency of the Department of Defense of the United States of America may apply at any time after graduation from an approved school.

13:51-1.5 Application for operator's certification

Application shall be made in writing to the Division of State Police by the Chief of Police or other executive head of the organized police department of which the applicant is a sworn full-time member.

13:51-1.6 Requirements for certification

(a) Initial certification requires satisfactory completion of training consisting of a minimum of five days of training prescribed and conducted by the Division of State Police. Such training shall include:

1. Instruction in the metric system;

2. Instruction in mathematical calculations as required;
3. Statutory and case law;
4. Instruction and training in the operation of the approved instrument;
5. Laboratory practice with air samples passed through test solutions of alcohol and air samples taken from human subjects;
6. A written examination and a test for competency.

(b) Certification of an applicant upon an approved instrument other than that which the applicant was previously trained and certified, requires that the applicant be a certified breath test operator and whose certification is both current and valid and requires satisfactory completion of training consisting of a minimum of two days of training prescribed and conducted by the Division of State Police. Such training shall include:

1. Statutory and case law, instruction and training in the operation of the approved instrument;
2. Instruction and training in the operation of the approved instrument;
3. Laboratory practice with air samples passed through test solutions of alcohol;
4. A written test and a test for competency.

(c) A person who has received a post graduate degree from an institution of higher education in the field of chemistry or biochemistry or a person licensed as a doctor of medicine shall be deemed to have met the requirements of satisfactory completion of training and may be recommended for certification, provided said person also passes a test for competency in the operation of the approved instrument as administered by a Breath Test Coordinator/Instructor of the Division of State Police.

(d) Recertification of an operator, whose certification is not subject to suspension for any reason or revoked, requires satisfactory completion of training consisting of a minimum one day of training as prescribed and conducted by the Division of State Police. Such training shall include:

1. Statutory and case law;
2. Instruction and training in the operation of the approved instrument;
3. Laboratory practice with air samples passed through test solutions of alcohol;
4. A written examination and a test for competency.

(e) Reinstatement and recertification of an operator whose certification is suspended pursuant to N.J.A.C. 13:51-1.8(a) and to whom the requirements as set forth at

N.J.A.C. 13:51-1.8(b) apply requires satisfactory completion of training as set forth at N.J.A.C. 13:51-1.6(d).

(f) Reinstatement and special recertification of an operator whose certification is suspended pursuant to N.J.A.C. 13:51-1.8(a) and to whom the requirements as set forth at N.J.A.C. 13:51-1.8(c) apply requires satisfactory completion of training consisting of a minimum of three days of training prescribed and conducted by the Division of State Police. Such training shall include:

1. Statutory and case law;
2. Instruction and training in the operation of the approved instrument;
3. Laboratory practice with air samples passed through test solutions of alcohol;
4. A written examination and a test for competency.

Case Notes

Recertification of breathalyzer operator whose certification has been suspended for less than one year for failure to recertify. *State v. Ernst*, 230 N.J. Super. 238, 553 A.2d 356 (A.D.1989), certification denied 117 N.J. 40, 563 A.2d 811.

13:51-1.7 Duration of certification

(a) An operator's certification will be documented by the issuance of a certificate and replica which shows that said operator has completed the required course of training, including the date of the course completion and type of approved instrument upon which the operator has been certified. Said certification as evidenced by the certificate and replica shall be valid throughout the remainder of the calendar year corresponding to the date of course completion and shall remain valid throughout the next two calendar years.

(b) An operator's certification will be deemed continued as valid upon the satisfactory completion of training for recertification as described at N.J.A.C. 13:51-1.6(d). Recertification shall be valid throughout the remainder of the calendar year corresponding to the completion date of the recertification course and shall remain valid throughout the next two calendar years.

(c) The certification of an operator which has been suspended pursuant to N.J.A.C. 13:51-1.8(a) and who has been reinstated and recertified pursuant to N.J.A.C. 13:51-1.8(b) or N.J.A.C. 13:51-1.8(c) will be deemed to be valid for all purposes as of and from the date of reinstatement and recertification. This reinstatement and recertification shall thereafter be valid throughout the remainder of the calendar year corresponding to the date of reinstatement and recertification and shall remain valid throughout the next two calendar years.

(d) The recertification and/or reinstatement and recertification of an operator pursuant to N.J.A.C. 13:51-1.6(d), N.J.A.C. 13:51-1.6(e) or N.J.A.C. 13:51-1.6(f), whichever

applies, is considered validated when the replica is signed and dated by a Breath Test Coordinator/Instructor.

Case Notes

Recertification in one day counsel of breathalyzer operator whose certification has been suspended for less than one year for failure to recertify. *State v. Ernst*, 230 N.J.Super. 238, 553 A.2d 356 (A.D.1989), certification denied 117 N.J. 40, 563 A.2d 811.

13:51-1.8 Suspension and reinstatement of operator's certification

(a) The certification of an operator will be automatically suspended on the date set for expiration of the operator's present valid certification as set forth at N.J.A.C. 13:51-1.7 if said operator has not satisfied the requirement for recertification as set forth at N.J.A.C. 13:51-1.6(d) before the expiration of said valid certification.

(b) An operator whose certification is suspended for failing to be recertified as set forth at N.J.A.C. 13:51-1.6(d) and who has been automatically suspended for less than one year from the date of the automatic suspension must attend and satisfy the requirements of the reinstatement and recertification course as set forth at N.J.A.C. 13:51-1.6(e) conducted by the Division of State Police. Reinstatement and recertification under this subsection must be completed before one year from the date of automatic suspension otherwise the operator must satisfy the requirements as set forth at N.J.A.C. 13:51-1.8(c).

(c) An operator whose certification is suspended for failing to be recertified as set forth at N.J.A.C. 13:51-1.6(d) or N.J.A.C. 13:51-1.6(e) and who has been automatically suspended for one year or more from the date of the automatic suspension must attend and satisfy the requirements of a reinstatement and special recertification course as set forth at N.J.A.C. 13:51-1.6(f) conducted by the Division of State Police.

(d) Any test conducted to analyze a person's breath pursuant to procedures and methods contained in this chapter by an operator whose certification is suspended or automatically suspended, at the time such test is conducted, shall be considered invalid for presentation in evidence or testimony in a court of law or administrative hearing.

Case Notes

Recertification in one day course of breathalyzer operator whose certification has been suspended for less than one year for failure to recertify. *State v. Ernst*, 230 N.J.Super. 238, 553 A.2d 356 (A.D.1989), certification denied 117 N.J. 40, 563 A.2d 811.

13:51-1.9 Revocation of certificate

(a) The Attorney General may revoke an operator's certification after consideration of a request or recommendation for revocation by the Superintendent of State Police.

(b) A request or recommendation for revocation will be made to the Attorney General when an operator is determined to be ineffective or incompetent by the Superintendent of State Police.

(c) A request or recommendation that an operator's certification be revoked must be in writing and addressed to the Superintendent of State Police and must state the reason(s) for the request or recommendation for revocation. The replica certificate of the operator who is the subject of the request or recommendation must accompany the request or recommendation for revocation unless it is otherwise unobtainable.

(d) The following persons are authorized to initiate a request or recommendation for revocation:

1. A Breath Test Coordinator/Instructor; or
2. Chief of Police of the organized police department of which the operator is a sworn member; or
3. Executive head of the organized police department of which the operator is a sworn member.

(e) Upon receipt of a request or recommendation for revocation, the Superintendent of State Police shall cause a written Notice of Suspension to be delivered to the operator who is the subject of the request or recommendation. A copy of the Notice of Suspension shall also be delivered to the Chief of Police or executive head of the organized police department of which the operator is a sworn member. The Notice of Suspension shall state:

1. The effective date of suspension;
2. The reason(s) revocation has been requested or recommended;
3. The name and title of the person originating the request or recommendation for revocation; and
4. Information that the operator may request a hearing on the request or recommendation for revocation by serving the Superintendent of State Police with written notice of such request within 30 days of the date the notice of suspension was signed and dated by the Superintendent of State Police.

(f) Failure to request a hearing as set forth at N.J.A.C. 13:51-1.9(e) within the time allotted shall be considered an absolute waiver of any right to a hearing.

13:51-1.10 Hearing and determination on a request or recommendation for revocation

(a) The purpose of a hearing is to assist the Superintendent of State Police in arriving at a determination on the request or recommendation for revocation as set forth at N.J.A.C. 13:51-1.9(b). Where no hearing is conducted the Superintendent of State Police may make his determination based on the written documentation supplied in the request or recommendation to revoke or other materials supplied in support or opposition thereto.

(b) The hearing will be conducted by the Superintendent of State Police or by an officer designated by him. The hearing officer may, at his discretion, cause the operator to be given a written or oral examination or a competency test or any combination of such tests to arrive at a determination. Such tests may be given by a Breath Test Coordinator/Instructor or other person so designated by the Superintendent or the hearing officer.

(c) Upon conclusion of the hearing or review when no hearing is requested, the Superintendent of State Police will recommend, in writing, to the Attorney General whether the operator's certification should be revoked, including the reasons to support such recommendation; or if the operator's certification should be reinstated and the reasons in support thereof. Reinstatement may be conditioned upon the suspended operator satisfying certain training or other requirements. The Attorney General shall determine, in his sole discretion, what conditions or other requirements must be met before reinstatement can become effective.

(d) An operator recommended for reinstatement with conditions or other requirements as set forth at N.J.A.C. 13:51-1.10(c), who fails to satisfy and successfully complete said conditions or other requirements within a reasonable period of time, may be recommended by the Superintendent of State Police to the Attorney General for revocation of the operator's certification.

13:51-1.11 Restoration of revoked certifications

The Attorney General may restore a revoked certification when he is satisfied that the cause for revocation has been removed. An operator whose certification is revoked may apply for a new operator's certification after the expiration of 12 months from the date of revocation, or final judgment thereon, whichever is later. Application shall be pursuant to the provisions of N.J.A.C. 13:51-1.4 and N.J.A.C. 13:51-1.5, but shall be subject to review by the Superintendent of State Police. The applicant must complete the training as set forth at N.J.A.C. 13:51-1.6(a); but may not commence such training until any other requirements imposed by the Superintendent of State Police are satisfied. Upon satisfactory completion of training and any other prerequisites, the Superintendent of State Police may recommend certification of the applicant to the Attorney General.

13:51-1.12 Return, loss and/or replacement of replica

(a) If an operator's certification is suspended or revoked pursuant to N.J.A.C. 13:51-1.9 and/or N.J.A.C. 13:51-1.10, or if the operator resigns, retires or leaves the police department for any reason, it shall be the responsibility of the Chief of Police or other executive head of the organized police department or law enforcement agency where the operator serves or served to retrieve the replica certificate from the operator and return the same to the Division of State Police with a notation of the reason for the return.

(b) If a replica has been lost or is otherwise in need of replacement, the operator or Chief of Police or other executive head of the organized police department of which the operator is a member shall notify the Breath Test Unit of the Division of State Police in writing of such loss or need of replacement. Lost replicas must be reported immediately.

(c) A replica will be replaced for an operator when the operator's replica has been lost and duly reported as lost, pursuant to N.J.A.C. 13:51-1.12(b) or is otherwise in need of replacement. The replacement replica will bear the date of issuance of the replacement and bear the signatures or facsimile signatures of the Attorney General and the Superintendent of State Police. The reverse side of the replacement replica will show the date of the operator's original certification and the date of the operator's most recent recertification.

13:51-1.13 Administration

Administrative files will be maintained by the Division of State Police and will include the present and past status of all persons certified as operators.

SUBCHAPTER 2. BREATH TEST COORDINATOR/INSTRUCTORS

13:51-2.1 Eligibility requirements

(a) To be eligible as a Breath Test Coordinator/Instructor a person must be a sworn member of the New Jersey State Police, hold a current and valid Breath Test Certificate and be a holder of:

1. A certificate in police training issued by the New Jersey Police Training Commission; or
2. An instructor certificate issued by the United States Armed Forces; or
3. Certification from a duly accredited school of education; or
4. Instructor certificate issued by the Division of State Police, Training Bureau.

(b) The Attorney General may waive the instructor certification requirement, if he is satisfied such person has equivalent background and experience to instruct breath test applicants and operators.

(c) The Attorney General's approval will be in the form of a letter to the person approved as a Breath Test Coordinator/Instructor and will be reflected on the operator's replica certificate by the words Breath Test Coordinator/Instructor.

13:51-2.2 Training and functional qualifications

(a) A Breath Test Coordinator/Instructor will have specialized training as prescribed by the Division of State Police and have the knowledge to properly perform the following functions:

1. Preparation and checking of chemicals used for testing;
2. Presentation of the scientific theory of approved instruments and approved methods;
3. Inspection and maintenance of approved instruments;
4. Instruction in courses for operators and applicants;
5. Make a request or recommendation for revocation of an operators certification;
6. Validate replica certificates held by certified breath test operators as provided at N.J.A.C. 13:51-1.7 (Duration of certification).

Case Notes

Inspection certificates of breathalyzer were admissible evidence as business records and reports of a public official; admission into evidence in instant case error due to State's failure to authenticate records or lay foundation for business records qualification. *State v. McGeary*, 129 N.J.Super. 219, 322 A.2d 830 (App.Div.1974).

SUBCHAPTER 3. APPROVED INSTRUMENTS AS METHODS OF CHEMICAL BREATH TESTING

13:51-3.1 Purpose of subchapter

Pursuant to the provisions of P.L. 1966, c.142, Sec. 3, as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56); hereinafter denoted N.J.S.A. 39:4-50.3, N.J.S.A. 39:3-10.25 or N.J.S.A. 12:7-56, respectively, the provisions of this subchapter set forth the instruments and methods approved by the Attorney General for the chemical analysis of the breath of a person arrested pursuant to the provisions of N.J.S.A. 39:4-50, et seq., N.J.S.A. 39:3-10.13, N.J.S.A. 39:3-10.20, N.J.S.A. 39:3-10.24, N.J.S.A. 12:7-34.19, N.J.S.A. 12:7-46 or N.J.S.A. 2A:4A-23.

Amended by R.1987 d.229, effective May 18, 1987.
See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added N.J.S.A. cites.
Amended by R.1991 d.505, effective October 7, 1991.
See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).
Added to list of N.J.S.A. cites.

13:51-3.2 Application for approval

(a) The Superintendent of State Police is designated by the Attorney General as the official to whom all applications for approval of instruments, methods and operational functions shall be made.

(b) Primarily, evaluation will be dependent upon test results reflecting reliability for satisfactory specificity, precision and accuracy. The instrument and component parts necessary for operation shall be supplied at the expense of the applicant.

(c) Any evaluating reports by the applicant or independent investigating groups shall be forwarded with the instrument along with operating servicing and maintenance manuals, schematic drawings and other detailed information.

(d) Upon completion of evaluation of an instrument, method and/or operational function, the Superintendent shall recommend approval or rejection of the same to the Attorney General. The Attorney General, upon review of the recommendations, shall approve or reject the instrument, method and/or operational function pursuant to law (N.J.S.A. 39:4-50.3, N.J.S.A. 39:3-10.25 or N.J.S.A. 12:7-56).

Amended by R.1987 d.229, effective May 18, 1987.

See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added N.J.S.A. 12:7-56.

Amended by R.1991 d.505, effective October 7, 1991.

See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).

In (d), added "N.J.S.A. 39:3-10.25".

Case Notes

Breathalyzers manufactured by successor corporation did not have to be recertified where prior approval was by model and not manufacturer. *State v. Laurick*, 231 N.J.Super. 464, 555 A.2d 1133 (A.D.1989), certification granted 117 N.J. 52, 563 A.2d 819, reversed 120 N.J. 1, 575 A.2d 1340, certiorari denied 111 S.Ct. 429, 498 U.S. 967, 112 L.Ed.2d 413.

Fact that manufacturer was not on approved list, did not render inadmissible results of tests on its breathalyzer. *State v. Samarel*, 231 N.J.Super. 134, 555 A.2d 40 (A.D.1989).

13:51-3.3 Training Breath Test Coordinator/Instructors

(a) Upon approval of an instrument, method and/or operational function as described in N.J.A.C. 13:51-3.2, factory personnel shall train an initial class consisting of Breath Test Coordinator/Instructors (see N.J.A.C. 13:51-2) at the expense of the applicant.

(b) The initial training course shall include the history of the instrument, nomenclature of the operational controls, detailed operating instructions, nomenclature of all parts and their functions, maintenance and repair of the instrument and class participation in the operation of the device including laboratory practice with air passed through test solutions of alcohol of strengths known and unknown to the class participants.

13:51-3.4 Periodic inspection of approved instruments

Periodic inspection of all approved instruments used in this State in connection with the prosecution of a person pursuant to the provisions of N.J.S.A. 39:4-50 et seq., N.J.S.A. 39:3-10.13, N.J.S.A. 39:3-10.20, N.J.S.A. 39:3-10.24, N.J.S.A. 12:7-34.19, N.J.S.A. 12:7-46 or N.J.S.A. 2A:4A-23 shall be made by a Breath Test Coordinator/Instructor. The results of such periodic inspections shall be recorded on forms provided by the Superintendent of State Police and the originals thereof shall be maintained by the Division of State Police.

Amended by R.1987 d.229, effective May 18, 1987.

See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added N.J.S.A. cites.

Amended by R.1991 d.505, effective October 7, 1991.

See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).

Added to list of N.J.S.A. cites.

Case Notes

There was no requirement that breath testing device be recertified every 30 days. *State v. Sandstrom*, 277 N.J.Super. 354, 649 A.2d 901 (A.D.1994).

State Police Coordinator certifications satisfied the spot checking requirement for the admission of breathalyzer readings; production of assay certificates was not required. *State v. Maure*, 240 N.J.Super. 269, 573 A.2d 186 (A.D.1990), appeal granted 122 N.J. 377, 585 A.2d 382, affirmed 123 N.J. 457, 588 A.2d 383.

Failure to specifically approve particular manufacturers did not render results of breathalyzer test inadmissible. *State v. Samarel*, 231 N.J.Super. 134, 555 A.2d 40 (A.D.1989).

Inspection certificates of breathalyzer were admissible evidence as business records and reports of a public official; admission into evidence in instant case error due to State's failure to authenticate records or lay foundation for business records qualification. *State v. McGeary*, 129 N.J.Super. 219, 322 A.2d 830 (App.Div.1974).

13:51-3.5 Approved instruments for performing chemical analysis of a person's breath

(a) The Breathalyzer, Model 900, is an instrument approved by the Attorney General pursuant to P.L. 1966, c.142, Sec. 3, as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, for the testing of a person's breath by chemical analysis.

(b) The Breathalyzer, Model 900A, is an instrument approved by the Attorney General pursuant to P.L. 1966, c.142, Sec.3, as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, for the testing of a person's breath by chemical analysis.

(c) The Dominator Albreath is an instrument approved by the Attorney General pursuant to P.L. 1966, c.142, Sec. 3 as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, for the testing of a person's breath by chemical analysis.

(d) The Alco-Tector is an instrument approved by the Attorney General pursuant to P.L. 1966, c.142, Sec. 3, as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, for the testing of a person's breath by chemical analysis.

Amended by R.1985 d.441, effective September 3, 1985.

See: 17 N.J.R. 1531(a), 17 N.J.R. 2141(b).

Deleted (e).

Amended by R.1987 d.229, effective May 18, 1987.

See: 19 N.J.R. 444(b), 19 N.J.R. 882(b).

Added N.J.S.A. cites.

Amended by R.1991 d.505, effective October 7, 1991.

See: 23 N.J.R. 2248(b), 23 N.J.R. 3032(c).

Added to list of N.J.S.A. cites in (a), (b), (c), (d).

Case Notes

Breathalyzers manufactured by purchaser of patent and manufacturing rights did not have to be recertified where prior certification was of breathalyzer and not the manufacturer. *State v. Laurick*, 231 N.J.Super. 464, 555 A.2d 1133 (A.D.1989), certification granted 117 N.J. 52, 563 A.2d 819, reversed 120 N.J. 1, 575 A.2d 1340, certiorari denied 111 S.Ct. 429, 498 U.S. 967, 112 L.Ed.2d 413.

Failure to specifically approve particular manufacturers did not render results of breathalyzer test inadmissible. *State v. Samarel*, 231 N.J.Super. 134, 555 A.2d 40 (A.D.1989).

Finding that modified version of breathalyzer came within Attorney General's approval of breathalyzer; drunken driving conviction upheld. *State v. Yerkes*, 189 N.J.Super. 147, 458 A.2d 1345 (Law Div.1983).

Breathalyzer operator required to dispose of each test ampoule at the examination's conclusion; spot checking of a random ampoule is sufficient prima facie proof that chemicals in test ampoule were of proper kind and mixed in proper proportion. *State v. Dickens*, 130 N.J.Super. 73, 325 A.2d 353 (App.Div.1974).

13:51-3.6 Approved methods for performing chemical analysis of a person's breath utilizing an approved instrument

(a) Breathalyzer, Model 900 and Model 900A:

1. The Breathalyzer, Model 900 and 900A, both being approved instruments, have been demonstrated to contain functional and operational components that are the same or perform the same or similar operations or functions and operate utilizing the same principal or theory of chemical breath analysis and utilize the same chemical compounds interchangeably in the analysis process. The term "Breathalyzer" as utilized in this chapter shall mean both the Breathalyzer, Model 900 and Model 900A.

i. Any operator or Breath Test Coordinator/Instructor whose certificate specifies Breathalyzer is deemed trained and certified on the Breathalyzer Model 900 and Breathalyzer, Model 900A.

2. A Breathalyzer check off list may be used with this device and may be prepared by either the manufacturer of the Breathalyzer or the organization using the Breathalyzer. The check off list, if used, shall contain at least the following items:

i. Preparation:

(1) Turn Switch to "on"; wait until thermometer shows 50 degrees Centigrade plus or minus three degrees;

(2) Gauge reference ampoule and place in left hand holder;

(3) Gauge test ampoule; open; insert bubbler and connect to outlet.

ii. Purge:

(1) Turn to "take"; flush; turn to "analyze";

(2) When red empty signal appears, wait 90 seconds, turn on light, balance.

iii. Analysis:

(1) Set scale Pointer on start line;

(2) Turn to "take"; take breath sample; turn to "analyze";

(3) When red empty signal appears, wait 90 seconds, turn on light; balance;

(4) Record answer; dispose of test ampoule; turn to "off".

(b) Dominator Albreath:

1. The Dominator Albreath, being an approved instrument, has been determined to contain operational and functional components that are the same or perform the same or similar operations or functions as the Breathalyzer as described at N.J.A.C. 13:51-3.6(a)1. It is further determined that this instrument operates upon the same principal or theory as the Breathalyzer and utilize the same chemical compounds in the analysis process as the Breathalyzer.

2. The steps of operation in the check off list applicable to the Breathalyzer as found at N.J.A.C. 13:51-3.6(a)2 shall also apply to the operation of the Dominator Albreath when a check off list is employed.

(c) Alco-Tector:

1. The Alco-Tector, being an approved instrument, has been determined to operate on the same basic principle or theory and utilizes the same chemical compounds in the analysis process as the Breathalyzer as described at N.J.A.C. 13:51-3.6(a)1.

2. An operational check off list may be used with this device and may be prepared by either the manufacturer of the Alco-Tector or the organization using the Alco-Tector. The check off list, if used and prepared by an organization other than the manufacturer herein, shall contain, at least, the following information:

i. Preparation:

(1) Turn switch to "on", depress standby button, wait for thermometer to reach operating temperature of 120 to 130 degrees Fahrenheit;

(2) Gauge reference ampoule and place in left holder;

(3) Gauge test ampoule, open, insert bubbler, connect to outlet.

ii. Purge:

(1) Depress purge button number 1 for flush, wait 30 or 45 seconds, depress bubbler button number 2;

(2) When red empty signal appears, wait 90 seconds, depress balance button number 3 and balance.

iii. Analysis:

(1) Set blood alcohol pointer on start line;

(2) Depress sample button number 4, take breath sample, depress bubbler button number 5, record time;

(3) When red empty signal appears, wait 90 seconds, depress red button number 6 and balance;

(4) Record answer; dispose of test ampoule, depress number 1 button for 30 to 45 seconds, depress number 2 button until red light appears, depress standby button.

Amended by R.1985 d.441, effective September 3, 1985.
See: 17 N.J.R. 1531(a), 17 N.J.R. 2141(b).

Deleted (d).

Correction: (a)2i(3): added "open;"
See: 21 N.J.R. 171(e).

Case Notes

State Police Coordinator certifications satisfied the spot checking requirement for admission of breathalyzer readings; production of assay certificates was not required. *State v. Maure*, 240 N.J.Super. 269, 573 A.2d 186 (A.D.1990), appeal granted 122 N.J. 377, 585 A.2d 382, affirmed 123 N.J. 457, 588 A.2d 383.

Breathalyzers manufactured by purchaser of patent and manufacturing rights did not have to be recertified where prepurchase certification was of breathalyzer and not the manufacturer. *State v. Laurick*, 231 N.J.Super. 464, 555 A.2d 1133 (A.D.1989), certification granted 117 N.J. 52, 563 A.2d 819, reversed 120 N.J. 1, 575 A.2d 1340, certiorari denied 111 S.Ct. 429, 498 U.S. 967, 112 L.Ed.2d 413.

Testing of breathalyzer machine using a reference ampoule and testing ampoule was not sufficient random testing. *State v. Dohme*, 229 N.J.Super. 49, 550 A.2d 1232 (A.D.1988).

Right to challenge presumption that breathalyzer ampoules stamped with same batch number are filled from source with constant composition. *State v. Dohme*, 229 N.J.Super. 49, 550 A.2d 1232 (A.D.1988).

Right of trooper to opine that breathalyzer test results in coordinator's certificate were within manufacturer's printed tolerances. *State v. Dohme*, 229 N.J.Super. 49, 550 A.2d 1232 (A.D.1988).

Finding that modified version of breathalyzer came within Attorney General's approval of breathalyzer; drunken driving conviction upheld (also citing former N.J.A.C. 13:51-21). *State v. Yerkes*, 189 N.J.Super. 147, 458 A.2d 1345 (Law Div.1983).