

**OPINION NO. 68-037****Syllabus:**

1. The term "law enforcement agency" as used in Section 4511.191 (A), Revised Code, refers to a police department, division of state highway patrol, sheriff, or board of township trustees.

2. Pursuant to the provisions of Section 4511.191 (A), Revised Code, law enforcement agencies may designate which test or tests are to be administered unless such person has refused to be tested pursuant to the provisions of Section 4511.191 (D), Revised Code.

3. The law enforcement agency designating which test or tests are to be administered is responsible for the expense of such test or tests.

4. The method of contracting with hospitals for chemical tests is within the sound discretion of the agency incurring the legal obligation for payment of the expenses of the tests.

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**To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio**  
**By: William B. Saxbe, Attorney General, February 23, 1968**

I am in receipt of your request for my opinion which reads as follows:

"As you are well aware, Ohio Revised Code Section 4511.191 and 4511.19 become effective January 1, 1968, and the method of implementing and carrying into effect said sections has been raised since ours is a rural county and we do not have a police lab or sheriff's lab that is equipped to conduct the tests under the standards imposed by these sections. The questions specifically are as follows:

"(1) Which law enforcement agency shall designate the tests to be administered in case the arrest is made by (a) the Sheriff's department (b) the city of Tiffin Police Department, (c) the City of Fostoria Police Department, (d) the Ohio State Highway Patrol operating in Seneca County, or (e) arrests by village constables or marshals?

"(2) Can the law enforcement agency (whoever that may be) require a blood test when the suspect

is willing to consent to either a breath test or a urine test or visa versa?

"(3) Who pays the costs of such tests in the event that (a) the suspect is found guilty, and (b) if the suspect is subsequently found not guilty or is not charged with a crime of operating a vehicle under the influence of alcohol and/or drugs?

"(4) Since in our area the City Hospital of Fostoria and the Mercy Hospital in Tiffin, Ohio are the only two facilities equipped to take and interpret such tests, is the proper method to enter into contracts with these agencies for the use of their facilities on the basis of (a) a per unit test, to-wit: a flat charge for the taking of the test, interpreting the test and testifying, or (b) a charge for the taking of the test and interpreting the test and (c) a charge for testifying at the rate of so much an hour or day, (d) a fee paid directly to the pathologist who bills separately in our area."

Section 4511.191 (A), Revised Code, which was enacted by Amended Substitute House Bill No. 380, effective January 1, 1968, reads in pertinent part as follows:

"Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered."

Section 2935.03, Revised Code, as amended by Amended Substitute Senate Bill No. 29, effective December 13, 1967, reads in pertinent part as follows:

"A sheriff, deputy sheriff, marshal, deputy marshal, or police officer shall arrest and detain a person found violating a law of this state, or an ordinance of a

municipal corporation, until a warrant can be obtained.

\* \* \* \* \*

"A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of a law of this state or an ordinance of a village, until a warrant can be obtained."

State highway patrolmen derive their authority to arrest by virtue of Sections 2935.03 and 5503.02, Revised Code, and are commonly referred to as law enforcement officers. (See State v. Hatfield, 30 O.O. 2d, 350). Black's Law Dictionary, Fourth Edition, defines law enforcement officer as "those whose duty it is to preserve the peace."

"Agency" is defined in Webster's Third New International Dictionary as:

"A department or other administrative unit of a government" and also as "a person or thing through which power is executed or an end is achieved."

It would appear that the legislature used the term "law enforcement agency" in a broad sense, the same that "law enforcement officer" is used in a broad sense, and that depending upon the organization of the governmental activity the term may be interpreted to mean a department (police department), or an elected official (sheriff), or a division, (division of state highway patrol), or in cases of police constables designed as such and paid by a board of township trustees pursuant to Section 509.01, Revised Code, the board of township trustees would be the law enforcement agency by which the constable is employed.

Thus, with respect to question 1 (a), the sheriff would be responsible for designating the tests to be administered; with respect to question 1 (b) and (c), the respective police departments; with respect to question 1 (d), the division of state highway patrol. With respect to question 1 (e), Section 737.15, Revised Code, provides in pertinent part that each village shall have a marshal appointed by the mayor and designated chief of police; thus, the police department would be the law enforcement agency in cases involving arrests by the village marshal or deputy marshal appointed under Section 737.16, Revised Code.

The answer to question two is contained in the literal word-

ing of the statute. Section 4511.191 (A), supra, clearly refers to test or tests, and there is no indication in the statute that the arrested person has a choice of the type of test to be administered; rather the statute clearly indicates that the option remains with law enforcement officials.

Inasofar as your third inquiry is concerned, Sections 4511.19 and 4511.191, Revised Code, are silent with respect to costs involved in the taking and the analyzing of the specimens of bodily substance, and a search of other Ohio statutes fails to reveal any authority for taxing such costs to the arrested person, regardless of the outcome of any subsequent criminal action, if any. As stated in 14 Ohio Jur. 2d, Costs, Section 2, pages 5 and 6:

"Costs are entirely dependent upon statute and may be regulated, changed, or entirely taken away at the will of the legislature. Accordingly, the word 'costs' is not synonymous with 'expense.' and expenses are costs only when made so by statute."

Inasmuch as the statute states that the test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this state while under the influence of alcohol and the law enforcement agency by which such officer is employed shall designate which of the tests shall be administered, it would appear logical for the law enforcement agency designating the test or tests to bear the expense thereof. In the actual operation of the taking and analyzing of bodily substance, it seems clear that the agency through use of its own equipment and personnel or by arrangement with other governmental organizations, hospitals, or private associations would incur the legal obligation for the expense, and it would seem to be a normal item of budget for the agency.

I note that you refer to "drugs" in question three. Drugs, of course, do not come within the purview of Sections 4511.19 and 4511.191, Revised Code, and therefore will not be considered in this opinion.

With respect to your final question, I do not feel that it is within the province of this office to attempt to delineate the best method of contracting for the chemical tests. This involves essentially a business judgment. Thus, the type of contract to be entered into with a hospital is within the discretion of law enforcement agency making the contract.

In conclusion, it is my opinion and you are so advised that:

1. The term "law enforcement agency" as used in Section 4511.191 (A), Revised Code, refers to a police department, divi-

sion of state highway patrol, sheriff, or board of township trustees.

2. Pursuant to the provisions of Section 4511.191 (A), Revised Code, law enforcement agencies may designate which test or tests are to be administered unless such person has refused to be tested pursuant to the provisions of Section 4511.191 (D), Revised Code.

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4. The method of contracting with hospitals for chemical tests is within the sound discretion of the agency incurring the legal obligation for payment of the expenses of the tests.