

Colorado to retest 1,700 blood samples from DUI cases after lab employee's errors uncovered

By Felisa Cardona The Denver Post The Denver Post

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The state is retesting 1,700 DUI blood samples after a laboratory employee failed to follow proper procedures, which skewed the results of the tests.

The mistakes open the door for defense lawyers to challenge all of the blood testing in driving-under-the-influence cases conducted by the Colorado Department of Public Health and Environment's lab.

"There was a situation where an outside lab ran a sample that caused us to rerun a sample, and we were able to track that to a certain employee who was not following the standard operating procedures," health department spokesman Mark Salley said.

The lab processes DUI bloodwork for 225 law enforcement agencies in Colorado. Some law enforcement agencies, including Denver police, have their own labs. Others contract the bloodwork out to an independent lab.

So far, the state has tested 250 of the samples and found 10 with inaccurate results, Salley said.

Salley said the inaccurate results were in the defendants' favor because they showed a lower blood-alcohol reading than the second analysis. For example, a first, inaccurate reading on which a suspect's charges were based might have said the blood-alcohol content was a 0.10 percent, when in reality it was 0.17 percent.

"As soon as we were aware of the situation we took action," Salley wrote in an e-mail. "We are reanalyzing all samples using standard methodology and standards and controls. Once a retest is completed the appropriate district attorney's office is notified and they can pursue the case with a new analyst."

Colorado public defender Douglas Wilson said his office hasn't been notified of the laboratory errors.

"You would think somebody might share this with everyone," Wilson said. "I have not heard a peep."

The Denver Post obtained a March 21 e-mail written by lab supervisor Cynthia Silva Burbach that says lab employee Mitchell Fox-Rivera was fired for unsatisfactory performance March 14 and that the errors were discovered March 9.

Salley declined to confirm the name the employee but said the department is retesting all of the employee's work, which spans a period of about five months.

"Please ask all DDA's (prosecutors) that have pending cases with Mr. Fox-Rivera to call the main lab," Burbach wrote in her memo. "These samples are being moved to the front of the line."

Colorado Springs attorney Steven Katzman was notified that some of his client's cases were tested by Fox-

Rivera, and he plans to challenge the evidence.

"A judge or a jury is going to be entitled to know the full extent of what was reported, and you are going to wonder what is the discrepancy and can we trust anything?" he said.

Katzman said DUI laboratory errors occurred a couple of years ago at the Colorado Springs Police Department's lab and several samples had to be retested.

"In some situations, they had people who had pled to cases and they had to reopen some cases," Katzman said. "And in one or two cases, people shouldn't have been charged and it created a mess."

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This story has been corrected in this online archive. Due to incorrect information provided by the state health department, the number of DUI blood tests retested was incorrect. 250 tests have been reexamined.

Colorado lab tech blames boss for mistakes on DUI blood sample tests

By Felisa Cardona The Denver Post The Denver Post

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A state toxicology lab tech fired for mistakes made on DUI blood samples is fighting to keep his job and blaming the supervisor who signed off on his work.

The state is retesting 1,700 driving-under-the-influence blood samples after Mitchell Fox-Rivera failed to follow standard operating procedures in the lab, which resulted in incorrect readings, according to an e-mail written by his supervisor that was obtained by The Denver Post.

Defense lawyers and DUI defendants who had bloodwork processed through the Colorado Department of Public Health and Environment's lab are challenging the tests in court.

In an e-mail to The Post, Fox-Rivera says he was a recent college graduate and a relatively new employee and that a review of his lab data was supposed to be overseen by supervisor Cynthia Silva Burbach.

Health-department spokesman Mark Salley declined to comment on Fox-Rivera's allegations Monday because it is a personnel matter.

Fox-Rivera was hired in October, five months after he graduated from the University of Colorado at Colorado Springs. He was fired March 14 after an outside lab ran a sample he had tested and found an error.

"According to our standard operating procedure, I was responsible for performing an 'initial review of the data,' " Fox-Rivera wrote. "I worked under the toxicology supervisor, Cynthia Burbach and her lead quality control employee."

Fox-Rivera wrote that Burbach was responsible for reviewing his work.

"Because the procedures require that I perform the initial review, and the toxicology supervisor review all the data, it was anticipated that mistakes would occur and be corrected," he wrote. "It was not my role to review the data for forensic and litigation needs."

In a revised affidavit obtained by The Post on Monday, Burbach wrote that the "technician did not follow the standard operating procedure and failed to properly operate a standard piece of equipment."

Burbach's affidavit does not say whether she was supervising the technician at the time but says "procedures are in place to ensure that this error is not repeated."

The state lab processes DUI bloodwork for more than 200 law enforcement agencies in Colorado.

The state has completed retesting of 600 samples and has found 10 with inaccurate results, Salley said.

Colorado lab director says DUI errors aided suspects, but 2 retested lower

By Felisa Cardona The Denver Post The Denver Post
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A state health department lab director swore under oath that faulty DUI tests by her lab favored defendants, but at least two of those tests reported a higher blood-alcohol reading than the actual result.

The Colorado Department of Public Health and Environment is retesting 1,700 blood samples from driving-under-the-influence suspects after officials said a lab tech failed to follow standard operating procedures, resulting in incorrect readings.

So far, the state has retested 800 of the blood samples handled by the lab tech and found 10 with errors.

In an affidavit signed under oath April 20, toxicology lab supervisor Cynthia Silva Burbach claimed that among the samples that had been retested, 10 ultimately had a higher blood-alcohol content than reported by the lab tech.

"Ten (samples) have been found to have an actual BAC significantly higher than reported by the technician," she wrote. "To date, no retest has resulted in a lower actual BAC than was originally reported."

Mark Salley, a spokesman for the health department, told The Denver Post last month that the erroneous tests favored the defendants because they were reported at a lower blood-alcohol level than was reality, meaning defendants were not overcharged.

But defense attorney Steven Katzman said his client's initial blood-alcohol test showed a bad reading of 0.218 percent when it was tested Nov. 3. The retest conducted April 6 showed it was actually a 0.199 percent.

"Ms. Burbach's affidavit is inaccurate because she said no retests had resulted in a lower BAC than originally reported," Katzman said. "She didn't say there weren't any statistically lower. That is not accurate, and she knew that at least two weeks before because she signed the retest before the affidavit was done."

Burbach signed her affidavit 16 days after that defendant's test was redone.

Another defendant, who didn't want to be named because his case is pending, provided copies of his tests, which show the first erroneous result in November put his blood-alcohol result at 0.146 percent.

The second test, conducted in April 13 — seven days before Burbach signed the affidavit — shows his blood-alcohol content was at 0.134 percent.

Salley maintains there is no discrepancy in Burbach's affidavit because the difference in results is less than 10 percent, which he said is not scientifically significant.

"The standard operating procedure for the state lab allows for a 10 percent variation between results when

the same sample is run multiple times," he wrote in an e-mail. "Significant variation, in this case is any variation outside of 20 percent. The 10 samples referenced above are all outside the 20 percent variation. These samples were all originally reported out in the defendants favor, a lower Blood Alcohol Content."

But chemist Robert Lantz, director of Rocky Mountain Instrumental Laboratories, said the 20 percent variation does make a difference.

"The idea that a disagreement of 20 percent between assays of ethanol is acceptable is ridiculous," he wrote in an e-mail. "Ethanol is a very easy assay. Our agreement is generally +/- 0.003 between the four results that we obtain on each sample."

Katzman said the difference in his client's blood-alcohol result also affects jail time. In Colorado, jail time is mandatory for people convicted of DUI with a blood-alcohol content above 0.20 percent.

The lower and higher test readings are an indicator to Katzman that the health department doesn't know what caused the problems in testing.

The fired lab tech, Mitchell Fox-Rivera, is contesting his dismissal and puts part of the blame on his supervisor, Burbach, who signed off on his work.

"If you buy what she said in her affidavit, that (Fox-Rivera) wasn't using the proper volume of blood, then all of the samples should be wrong in the same way," Katzman said. "You shouldn't have some that were higher and some that were lower."

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