

FORMAL OPINION

drawal of accumulated deductions by a member while in service or employment, or upon his death during an existing "inactive" membership or upon expiration of the "inactive" membership account following the termination of service or employment.

We have been informed that the payment of the lesser withdrawal rate of interest as compared with the greater death rate has acted as a mechanism to encourage prompt termination of "inactive" membership accounts. The cessation of "inactive" membership accounts obviates the continued recognition of potential, substantial liabilities for such members with respect to the funding of the systems and this fact has been taken into account in the actuarial planning of the systems. We are further informed that, in the context of the facts posed, the withdrawal rate has been paid on "inactive" membership accounts for a considerable number of years. This practical administrative understanding and long standing practice are strongly indicative of the legislative meaning and intent and are entitled to great weight in construing the pertinent legislation. *Cf. Pringle v. N.J. Dept. of Civil Service*, 45 N.J. 329, 333 (1965); 2 Sutherland, *Statutory Construction*, § 5107, p. 520, (3rd Ed. 1943).

We, therefore, advise you for the foregoing reasons that the rate of interest which is to be paid on the accumulated deductions in the Annuity Savings Fund Account of a member in the PERS or TPAF who has died within two years after discontinuing his employment shall be at the rates authorized by N.J.S.A. 43:15A-41(a) and N.J.S.A. 18:13-112.36.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General of New Jersey*  
By: THEODORE A. WINARD  
*Deputy Attorney General*

April 7, 1967

HONORABLE JUNE STRELECKI, *Director*  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

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Dear Director Strelecki:

You have requested our opinion as to the meaning of the term "arrest" within the context of the Implied Consent Law, N.J.S.A. 39:4-50.1 et seq., and specifically, N.J.S.A. 39:4-50.4. By virtue of that law, any person who operates a motor vehicle on the roads of this state is deemed to have given his consent to the taking of a breath test in order to determine the content of alcohol in his blood. Should the operator refuse to consent to the taking of the test under proper circumstances, he may forfeit his driver's license or right to operate a motor vehicle within this state for six months.

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A person charged with refusing to submit to a test is entitled to a hearing before the Director of the Division of Motor Vehicles at which the following issues must be considered; (1) whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle on the public roads of this state while under the influence of intoxicating liquor; (2) whether the person was placed under arrest; (3) whether he refused to submit to the test upon request of the officer. N.J.S.A. 39:4-50.4.

Further, N.J.S.A. 39:4-50.4 provides, in pertinent part, as follows:

“If an operator of a motor vehicle, *after being arrested for a violation of section 39:4-50* of the Revised Statutes, shall refuse to submit to the chemical test provided for in section 2 of this act when requested to do so, the arresting officer shall cause to be delivered to the Director of Motor Vehicles his sworn report of such refusal in which report he shall specify the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was driving or operating a motor vehicle in violation of the provisions of section 39:4-50 of the Revised Statutes.” (Emphasis supplied.)

The issue confronting police officers apprehending motorists for drunk driving violations is when, and how, does an arrest take place within the routine enforcement procedures of these laws. The following discussion then is focused on the question of arrest as it applies to a routine drunk driving violation within the context of the Implied Consent Law.

An arrest is generally defined as “the taking into custody in order that [the suspect] may be forthcoming to answer for the commission of an offense.” *American Law Institute, Code of Criminal Procedure*. Such an abstract definition is not serviceable unless considered in the context of precise factual situations.

“There is no absolute test as to when an arrest occurs. The action of the police officer must be evaluated in the context of the circumstances in which it takes place . . . indeed even the use of formal language of arrest is not conclusive on this issue.” *State v. Bell*, 89 N.J. Super. 437 at 443 (App. Div. 1965); *cf. State v. Romeo*, 43 N.J. 188 (1964).

For this reason, we have chosen to answer this question with reference to the two most typical factual situations confronting a police officer in making an arrest for a violation of N.J.S.A. 39:4-50, *i.e.*; (1) where the offense is committed in the officer's presence, and (2) where he arrives at the scene after the fact.

### I.

In the first situation, where the offense is committed in the officer's presence, the typical factual composite may be described as follows. An officer on patrol sees a vehicle driving in an erratic manner. He stops the car for the purpose of eliciting certain information from the driver and making general observations. If the driver has been drinking intoxicating liquor, the officer will note the driver's physical appearance and behavior pattern. Ordinarily, he may smell alcohol on the offender's breath and he may note such items as bloodshot eyes, disheveled clothes, slurred

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speech, and difficulty of coordination. The police officer, after witnessing the erratic driving and making the essential observations of the person of the driver, may at that point determine that he has reasonable grounds to believe that this particular driver has been operating his vehicle in violation of N.J.S.A. 39:4-50. He will then inform the operator that he is bringing him down to the police station for further observations and tests.

In the above factual situation, it is our opinion that for purposes of N.J.S.A. 39:4-50.4, the arrest took place at the moment the police officer made his judgment, and informed the driver, that he would not be permitted to continue on his journey but that he was being taken to the police station for further tests.

While a police officer is permitted to make an arrest without a warrant for a motor vehicle offense committed in his presence, N.J.S.A. 39:5-25, the courts of New Jersey have recognized that every stopping of a person by a policeman does not necessarily amount to an arrest. Under certain conditions, the police are authorized to detain a person when confronted with a suspicious situation in order to ascertain whether or not a violation of the law has taken place, without effecting an arrest.

“A law enforcement officer has the right to stop and question a person found in circumstances suggestive of the possibility of violation of criminal law. . . . Such investigatory detention is not an arrest, ‘and the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest.’ ” *State v. Hope*, 85 N.J. Super. 551, 554 (App. Div. 1964); *State v. Bell*, *supra*; *People v. Mickleson*, 50 Cal. 2d 448, 380 P. 2d 658 (Sup. Ct. Calif. 1963); *People v. Rivera*, 14 N.Y. 2d 441, 201 N.E. 2d 32 (Ct. App. 1964); see also, *State v. Taylor*, 81 N.J. Super. 296 (App. Div. 1963).

In the fact situation here posited, when the policeman noted the erratic driving, he had the right to stop the vehicle and detain the driver for a brief period in order to ascertain whether or not a motor vehicle offense was being committed. While making his observations of the physical condition of the driver as well as his behavior, the policeman is conducting an investigatory detention. If, during the course of this investigation, it is learned that the driver had not been drinking and that the erratic driving was attributable to some cause which was not the fault of the driver and did not amount to a violation, the policeman would ordinarily release that person to continue on his way or render necessary assistance to him. In such circumstances there would be no arrest, in a legal sense, but merely an investigative detention. On the other hand, if after this brief period of detention the policeman makes observations which give him reasonable grounds to believe that a violation of N.J.S.A. 39:4-50 has occurred in his presence, he will not permit the driver to continue but will take him back to the police station for the purposes of conducting further tests, for the driver's own security as well as the safety of all others sharing that highway, and for the issuance of a summons. See R.R. 8:3-2(a) (2). As noted heretofore, at the point in time that the policeman has made this determination and orders the driver to accompany him to the police station, thereby interrupting his journey, the arrest has been made.<sup>1</sup>

## II.

The second most typical fact situation regarding arrest for drunk driving vio-

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lations involves the factual pattern wherein the police arrive at the scene of an accident. In such a case, the policeman will ordinarily request the drivers of the vehicles to wait for him in his car while he secures the area or cares for the injured, if any. When he questions the respective drivers, he may observe that one of them will exhibit the recognizable indicia of the consumption of alcoholic beverages, e.g., blood-shot eyes, slurred speech, the odor of alcohol, etc. He may also receive information from witnesses as to the subject's erratic driving or other behavior which would indicate that the driver had been drinking. After making these observations, the policeman will have reasonable grounds to believe that the person has been driving in violation of N.J.S.A. 39:4-50. Upon making this determination, the policeman will order the driver to accompany him to the station for further investigation. As in the former situation, at the point that the policeman makes this determination and informs the subject that he must accompany him, the arrest is executed.<sup>2</sup>

The above rules are submitted not as a precise statement as to when an arrest occurs but as a general guide in those situations which most typically confront police officers. The law of arrest cannot be articulated with specificity in the abstract and must be related to the particular case at hand with all of its individual ramifications. Further, the above opinion relates only to the narrow area of the law dealing with the subject of drinking driving offenses as they relate to the implied consent statutes. N.J.S.A. 39:4-50.1 through 50.7.

Very truly yours,

JOSEPH A. HOFFMAN  
*Assistant Attorney General*

1. The policeman should then inform the driver that he has reasonable grounds to believe that he has been driving in violation of N.J.S.A. 39:4-50 and that he is therefore being placed under arrest. On the other hand, formal language of arrest is not conclusive of this issue and it is sufficient if the driver is made aware that he is in police custody and that he has no legal option but to accompany the officer. *Cf. State v. Romeo, supra.*
2. In New Jersey the common law of arrest prevails except as modified by statute. Therefore, a policeman may arrest without a warrant where he has probable cause to believe that either a misdemeanor or a high misdemeanor has been committed and that the person he is arresting is committing or has committed the offense. *State v. Doyle*, 42 N.J. 334 (1964); *State v. Smith*, 37 N.J. 481 (1962). As noted heretofore, a policeman may arrest without a warrant when a motor vehicle offense is committed in his presence. N.J.S.A. 39:5-25. It is our opinion that a policeman may arrest a person without a warrant if there is reasonable cause to believe that a violation of N.J.S.A. 39:4-50 has been committed and that the person being arrested has committed that offense. N.J.S.A. 39:4-50.2 provides that a person who operates a motor vehicle on any of the roads in New Jersey has given his consent to the taking of a breath test provided the test is made after he has been arrested and "at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of . . . 39:4-50 . . ." As noted heretofore, N.J.S.A. 39:4-50.4 directs that one of the elements which must be proven in an implied consent hearing before the director of motor vehicles is "whether the arresting officer had reasonable grounds to believe the person had been driving . . . while under the influence of intoxicating liquor. . ." The clear implication of these provisions is that the Legislature has authorized the police in this state to make an arrest without a warrant, upon probable cause, for a violation of N.J.S.A. 39:4-50.