

PROTECTIVE CUSTODY

POLICY & PROCEDURE NO. 5.07	ISSUE DATE: July 27, 2015
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MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED:	REVISION DATE: _____

I. GENERAL CONSIDERATIONS AND GUIDELINES

The abuse of alcohol is a serious, nationwide public health problem. The compulsive use of alcohol has an adverse effect not only on the alcoholic but on their families, their employers, and the community as a whole.

Excessive drinking often results in serious breaches of the public peace, damage to property, assault and battery, and other more serious crimes. Family neglect and domestic violence situations requiring police attention often involve alcohol abuse. The broken homes which often result are considered a major factor contributing to juvenile delinquency.

Historically, arrests for "drunkenness" have constituted a high proportion of police activity in every community. In the past, except for traffic violations, more arrests were made for drunkenness than for all other offenses combined. The punitive approach to this social problem has been costly, time-consuming and ineffective. This, of course, has not been the fault of the police, for they previously had no other recourse.

In an attempt to resolve this long-standing problem, Massachusetts law now provides that public intoxication is not a crime. Alcoholism is a disease. By statute, detoxification facilities and related programs are provided for the treatment and rehabilitation of persons suffering from

alcoholism.¹ Chapter 111B also provides for the protective custody of persons incapacitated from consuming alcohol.² **A person who is incapacitated from drugs alone does not fall under the provisions of this law.** A person who has been taken into protective custody is not considered to have been arrested or charged with a crime.

Nothing contained in Chapter 111B shall affect any laws, ordinances, by-laws, resolutions or regulations against driving after drinking alcohol, driving under the influence of alcohol, or other similar offenses that involve the operation of motor vehicles, machinery or other hazardous equipment.

II. POLICY

It is the policy of this department to:

- A. Comply with the requirements of Massachusetts General Law Chapter 111B when taking an incapacitated person into protective custody.

III. DEFINITIONS

- A. *Alcoholism*: A medically diagnosable disease characterized by chronic, habitual or periodic consumption of alcoholic beverages resulting in the (i) substantial interference with an individual's social or economic functions in the community or (ii) the loss of powers of self-control with respect to the use of such beverages.
- B. *Facility*: Any public or private place, or portion thereof, providing services especially for the detoxification of intoxicated persons or alcoholics.
- C. *Incapacitated*: The condition of an intoxicated person who, by reason of the consumption of intoxicating liquor, is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly.

IV. PROCEDURES

A. Taking into Custody

1. In the absence of an accompanying crime, an officer shall not arrest an intoxicated person.

2. IF: An officer encounters a person who is intoxicated and by reason of the consumption of intoxicating liquor is:
 - a. Unconscious; or
 - b. In need of medical attention; or
 - c. Likely to suffer or cause physical damage or harm; or
 - d. Disorderly
3. THEN: the officer may assist the person, with or without his/her consent to:
 - a. His/her residence; or
 - b. A treatment facility; or
 - c. The police station.
4. Officers shall call for an ambulance when an intoxicated person is unconscious.
5. In order to determine whether or not a person is intoxicated, an officer may request such person to submit to reasonable tests of coordination, coherency of speech, and breath. Examples of such tests are listed at the end of this Policy and Procedure.

B. Search and Transportation

1. Prior to transportation, an officer is required to make a search of the incapacitated person and his/her immediate surroundings to discover any dangerous weapons that may be used against the officer or other persons present.

NOTE: The Massachusetts Supreme Judicial Court ruled in 1989 that a "pat down" search of an incapacitated individual who is being taken into protective custody which detected the presence of drugs was lawful. The Court ruled that the inevitable discovery exception to the exclusionary rule was applicable since the same evidence would have been inevitably discovered when an inventory search was

conducted upon arrival at the police station.³ A similar result was obtained when the same Court in 1987 ruled that a gun discovered in a pat down search of an incapacitated individual was lawfully seized.⁴

2. Before transporting an incapacitated person, the officer-in-Charge shall be notified so that [s]he may arrange for assistance, if available. If an incapacitated person is to be transported to his/her residence or a treatment facility, the Officer-in-Charge shall make arrangements for such transportation.
3. If an officer comes upon, or responds to a call in regard to, an incapacitated person, the officer shall be aware of and immediately consider the possibility of other ailments.
 - a. An incoherent, unsteady or unconscious person, for example, might be suffering from an epileptic seizure, insulin shock, diabetic coma, stroke, heart attack, or brain injury.
 - b. If the officer, relying on his/her own judgment and field experience, believes the above or similar conditions may be present, [s]he shall immediately make arrangements for medical treatment in accordance with departmental procedures.
4. Officers shall extend the same considerations to an incapacitated person that they would offer to a person suffering from any other illness.

C. **At Station**

1. Upon arrival at the station, all persons detained for protective custody shall be processed according to the department's policy on ***Detainee Processing***. However, the intake report is not and shall not be treated as an arrest record.
2. BREATHALYZER: Any incapacitated person assisted to the police station shall have the right after arriving at the station to request and be administered a breathalyzer test and shall immediately be informed in writing of such right.
 - a. The following notice will be provided.

NOTICE OF RIGHTS

(Protective Custody Cases)

THIS IS TO INFORM YOU THAT PURSUANT TO CHAPTER 111B, SECTION 8 OF THE MASSACHUSETTS GENERAL LAWS, YOU HAVE THE RIGHT TO REQUEST AND BE ADMINISTERED A BREATHALYZER TEST. IF YOU ARE TO BE HELD IN PROTECTIVE CUSTODY, YOU ALSO HAVE THE RIGHT TO MAKE ONE TELEPHONE CALL AT YOUR OWN EXPENSE ON YOUR OWN BEHALF.

- b. Breathalyzer test results shall be utilized as follows:
 - i. 0.10 OR GREATER: If the reading (which indicates the percentage of alcohol in a person's blood) is 0.10 or more, the person shall be presumed to be intoxicated, and shall be placed in protective custody at the police station or transferred to a detoxification facility.
 - ii. LESS THAN 0.05: If the reading is 0.05 or less, the person shall be presumed not to be intoxicated and shall be released from custody forthwith.
 - iii. BETWEEN 0.05 AND 0.10: If the reading is more than 0.05 and less than 0.10, no presumption based solely on the breathalyzer test shall be made. In this event, a reasonable test of coordination or speech coherency must be administered to determine if the person is intoxicated.
3. Telephone Calls
 - a. IN PROTECTIVE CUSTODY: Any person presumed intoxicated and to be held in protective custody at a police station shall, immediately after such presumption, have the right and be informed of the right to make a telephone call at his/her own expense and on his/her own behalf.
 - b. DETOXIFICATION FACILITY: Any person presumed intoxicated who is assisted by a police officer to a

detoxification facility shall have the right to make one phone call at his/her own expense and on his/her own behalf and shall be informed forthwith upon arriving at the facility of said right. (See above Notice of Rights).

4. JUVENILES: The parent or guardian of any person under the age of eighteen to be held in protective custody at a police station shall be notified forthwith upon his/her arrival at said station or as soon as possible thereafter. Upon the request of the parent or guardian, such person shall be released to the custody of the parent or guardian.⁵
5. NOTIFICATION OF DETOX FACILITY: If an incapacitated person is assisted to the police station, the Officer-in-Charge or his/her designee shall immediately notify the nearest treatment facility that an incapacitated person is being held under protective custody. If suitable treatment services are available, the Massachusetts Department of Public Health shall thereupon arrange for the transportation of the person to the facility.
6. LENGTH OF CUSTODY: If a treatment facility is not available, the person may be held in protective custody at the station for the shorter of the following periods:
 - a. Up to 12 hours;
 - b. Until [s]he is no longer incapacitated.
7. An officer may use such force as is reasonable and necessary to carry out the procedures herein, with the exception of tests for determining intoxication. Persons may not be forced to take a breathalyzer test or to perform sobriety tests.

D. **Detaining**

1. An unconscious person shall never be placed in a cell unattended at any time. In such cases, immediate medical care shall be provided in accordance with departmental procedures.
2. The officer-in-charge, or his/her designee, shall take every precaution to ensure that all persons held in protective custody are prevented from harming themselves in any way

by monitoring such persons in accordance with the department policy on ***Detaining Prisoners***.

3. Persons to be released from protective custody prior to the expiration of the maximum statutory twelve-hour holding period, who will be released into their own care and custody, should have a breathalyzer test administered to determine that their level of intoxication is below the legal limit of .10. Those who are still above the legal limit of .10 or who decline to take a breathalyzer test (which is their right) should not be released to their own custody.

NOTE: Individuals who are released on bail following an arrest for driving under the influence of alcohol may be placed in protective custody if they are still "incapacitated" as defined in c. 111B. The foregoing considerations regarding release will govern a decision to release such individual from protective custody.

E. Reports

1. A report of protective custody shall be made indicating:
 - a. The date, time, and place of custody;
 - b. The name of the assisting officer and Officer-in-Charge;
 - c. Whether the person held in custody exercised his/her right to make a phone call; and
 - d. Whether the person held in custody exercised his/her right to take a breathalyzer test, and the results of the breathalyzer test if taken.
2. Such record shall not be treated, for any purposes, as an arrest or criminal record.
3. A patrol officer shall file a report indicating the nature of the incident which gave rise to any police involvement, the method of handling the problem, and any injuries observed on the incapacitated person including their cause and medical treatment, if any.

4. Officers should be aware that Massachusetts Law authorizes police officers (and certain other persons) to file a petition in an appropriate district court requesting that a person who is an alcoholic (or drug dependent person) be committed for a period not to exceed thirty days to an in-patient public or private facility approved by the Department of Public Health.⁶ Where appropriate, police officers should advise the family and friends of an alcoholic of the procedures available under this law.

V. TESTS FOR DETERMINING INTOXICATION

Balance

Have the subject stand on one foot with his/her arms outstretched; repeat with the other foot. Next, have the subject stand with his/her feet together, arms by his/her side, and eyes closed. Note any loss of balance, swaying, and jerky motions by the subject.

Walking and Turning

Have the subject walk, in a heel to toe manner, a straight line of about twenty (20) feet. Just before the subject reaches the end of the line, direct him/her to quickly turn and walk heel to toe back to the starting point. Note any deviations from the line by the subject as well as any difficulty or loss of balance experienced by him/her in walking and turning.

Finger to Nose

Have the subject stand with his/her feet together, arms extended to the side, and eyes closed. Direct him/her to touch the tip of his/her nose with the index finger of his/her right hand; repeat with the left index finger. Note if and where the index fingers touch and the degree of certainty with which the subject moves.

Coins

Place several coins of different denominations on the floor. Ask the subject to pick up a particular coin and hand it to you; repeat. Note any loss of balance by the subject as [s]he performs this task.

Alphabet

Ask the subject to recite the alphabet (A to Z) and note any omissions or difficulties.

NOTE: No officer is to administer any type of test which has not been approved by the Chief of Police in advance.

Indications of Alcohol Consumption

Only persons who are incapacitated by consumption of alcohol (not other drugs) may be taken into protective custody. In addition to conducting tests to determine intoxication, officers must be careful to observe and make note of all indications that the intoxication is due to the consumption of alcohol. The odor of alcoholic beverages on the subject's breath; the presence of open alcoholic beverage containers on his/her person or in his/her car when stopped; any admission by the subject that [s]he has been drinking or is drunk; any statements to the same effect by his/her companions and any other indications of alcohol use should be so noted.

¹M.G.L. c. 111B

²M.G.L. c. 111B, s. 8

³ *Com. v. O'Connor*, 406 Mass. 112, 546 N.E.2d 336 (1989)

⁴ *Com. v. Tomeo*, 400 Mass. 23, 507 N.E.2d 725 (1987)

⁵ M.G.L. ch.111B, s. 8

⁶M.G.L. c. 123, s. 35

