

# IMPAIRED DRIVERS

POLICY & PROCEDURE NO. <b>5.05</b>	ISSUE DATE: ___02/01/17
	EFFECTIVE DATE: ___02/01/17
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: <b>1.2.7; 61.1.11</b>	REVISION DATE: _____

## I. GENERAL CONSIDERATIONS AND GUIDELINES

In 2003, thirteen year old Melanie Powell was killed by a repeat drunk driver while walking to the beach. The efforts of her parents and grand-parents were the driving force behind the passage of Melanie's Law, which took effect in 2005.

This law changed the way police process persons arrested for operating under the influence of alcohol, increased penalties for those convicted of the crime, and increased the license suspensions of those who refuse to submit to a chemical test.

The law also introduced the use of ignition-interlocking devices to keep intoxicated offenders from starting their vehicles, as well as a provision for the forfeiture of vehicles owned by persons committing a fourth or subsequent offense.

## II. POLICY

It is the policy of this department to identify, arrest, and prosecute persons operating motor vehicles, boats, and recreational vehicles while under the influence of alcohol or drugs. [1.2.7]

## III. DEFINITIONS

- A. *BAC*: Blood Alcohol Content.
- B. *BATS*: Breath Alcohol Testing System.
- C. *CDL*: Commercial Driver's License.

## IV. PROCEDURES

### **A. Operating Under the Influence of Alcohol [61.1.11]**

1. OFFICER AWARENESS: Many traffic accidents, particularly those involving a fatality or personal injury, are directly attributable to persons driving under the influence of alcohol and/or drugs. In all contacts with violators, the officer should be aware of the possibility that the driver may be under the influence of alcohol or drugs.
2. APPLICABILITY: These procedures apply to operators charged for operating under the influence of alcohol or drugs under M.G.L. c. 90 (motor vehicles), §24 or M.G. L. c 90B, §8 (boats and recreational vehicles).
3. ENFORCEMENT OPTIONS
  - a. If the officer determines that the operator is under the influence of alcohol or drugs, appropriate enforcement action shall be taken:
  - b. Immediate arrest is the preferred method.
  - c. A criminal citation may be issued if circumstances do not allow for an arrest (for example, if an operator is admitted to a hospital and the officer has no means to effect an arrest). Refer to the department policy on **Detainee Processing** for procedures when handling persons charged with operating under the influence. **(61.1.11)**
4. TRAINING: The department will ensure that sworn officers are trained in dealing with offenders suspected of driving under the influence of alcohol or drugs and in enforcement procedures, and will cooperate fully with other agencies and community groups to reduce and control this problem. This will include familiarity with the Standard Field Sobriety Test (SFST) developed by the National Highway and Traffic Safety Administration (NHTSA.)
5. PROCESSING ARRESTS: The following conditions shall apply to those arrested for driving under the influence of alcohol. For further information, see department policy on **Detainee Processing**.

### **B. Identifying Impaired Operators**

1. DRIVING BEHAVIOR: Officers should be observant of driver behavior that may be indicative of drug or alcohol impairment, including:<sup>1</sup>
  - a. Turning with wide radius;
  - b. Straddling center or lane marker;
  - c. Appearing to be drunk;
  - d. Almost striking another vehicle or object;

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- e. Weaving;
  - f. Drifting from side to side;
  - g. Rapid acceleration, deceleration;
  - h. Driving more than ten miles per hour under speed limit;
  - i. Tires on center or lane marker; and/or
  - j. Erratic braking.
2. DRIVER CONTACTS: Officers should be observant during vehicle stops for indications of impairment, such as:
    - a. Odor of alcoholic beverage on operator's breath;
    - b. Eyes glassy or blood shot, pupils excessively constricted or open;
    - c. Poor coordination;
    - d. Slurred speech; and
    - e. Empty alcoholic beverage containers.
  3. FIELD SOBRIETY TESTING involves:
    - a. Reasonable suspicion;
    - b. Reasonable suspicion, not probable cause is necessary to administer field sobriety tests;<sup>2</sup> and
    - c. Testing: Officers may conduct field sobriety tests to make further observations of sobriety. Operators may not be compelled to perform such tests.
    - d. Some standard field sobriety tests include:
      - 1) HGN Testing;
      - 2) Walk and Turn;
      - 3) One Leg Stand; and
      - 4) Alphabet Test.
  4. ARRESTS: An operator arrested for OUI shall be processed according to department booking procedures. See department policy on ***Processing Detainees***.
  5. MEDICAL CONDITIONS
    - a. Officers should be aware that some medical conditions may involve symptoms similar to alcohol intoxication. Such conditions include:
      - 1) Diabetes: if a diabetic condition is suspected, the officer must seek prompt medical attention for the operator;
      - 2) Seizure disorders;
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- 3) Psychiatric disorders; and
  - 4) Alzheimer's disease.
- b. Operators who may create a hazard to others due to a medical condition may need to be evaluated for suitability to operate a motor vehicle. See the department policy on **Traffic Safety**.

### **C. Chemical Tests Generally:**

1. CONSENT: If a detainee consents to a breath test, there is no need for a new consent for the second test, any subsequent tests due to a failure in the testing process, or if taken to another facility for testing.
2. STATUTORY RIGHTS
  - a. RIGHT TO A POLICE ADMINISTERED BREATH TESTS: A defendant has no statutory or constitutional right to a police administered breath test.<sup>3</sup>
  - b. RIGHT TO AN ATTORNEY: A defendant does not have the right to have an attorney present while deciding whether or not to take a breath test.<sup>4</sup>
  - c. STATUTORY RIGHTS AND CONSENT FORM: (This was formerly known as "Form A). An officer must read each section of the form to the defendant.
    - 1) RIGHT TO BE EXAMINED BY A PHYSICIAN: A person held at a police station or place of detention and arrested for OUI alcohol has the right to be examined by a physician of his or her choice at the person's expense. The police official in charge of such station or place of detention, or his designee, must inform such person of that right immediately upon being booked, and shall afford the individual a reasonable opportunity to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place to which such person has access. An opportunity to call a physician is usually sufficient.<sup>5</sup>
    - 2) RIGHT TO A TELEPHONE: A defendant has the right to make a phone call at his or her own expense within one hour of arrival at the police station.<sup>6</sup>
    - 3) REQUEST TO SUBMIT TO A CHEMICAL TEST: <sup>7</sup>
      - a) A defendant may take a chemical test if offered.
      - b) A defendant who takes a chemical test may obtain a comparison test at his or her own expense and may use the results of such test at a court hearing within ten days, to reinstate his/her license.<sup>8</sup>

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- 4) VEHICLE REQUIRING A CDL LICENSE TO OPERATE: This portion of the form explains the consequences for refusing a chemical test.
  - d. LOSS OF LICENSE:
    - 1) There is no obligation for an officer to explain to a defendant the length of loss of license, other than that it could be at least 180 days and up to a lifetime loss for a refusal.<sup>9</sup>
    - 2) No explanation is required to be given about suspensions or hearings.<sup>10</sup>
  3. LICENSE SUSPENSIONS: Immediate license suspensions take place when OUI arrests are processed through the BATS system. (There is no fifteen day temporary license issued as was formally the case). Such suspensions are for:
    - a. Refusal to take a breath or blood test;<sup>11</sup>
    - b. A person over the age of 21 who obtains a reading of 0.08% or higher;<sup>12</sup>
    - c. A person under the age of 21 who obtains a reading of 0.02 or higher; and<sup>13</sup>
    - d. CDL: .04% or higher.<sup>14</sup>
  4. VEHICLE FORFEITURES: Prosecutors may seek forfeiture of a vehicle after the 4<sup>th</sup> or subsequent offense.<sup>15</sup>

### ***D. Breath Test Operation***

1. OPERATOR QUALIFICATION
  - a. CERTIFICATION: A breath test shall be administered by a trained and certified operator.
  - b. EXPIRATIONS: No breath test can be given once an operator's certificate has expired.
  - c. CERTIFICATE OF RECERTIFICATION: Effective January 1, 2006, no letter of recertification is issued. The officer's certification to administer breath tests is printed on the implied consent form.
  - d. MILITARY LEAVE: If an officer is called to active duty, upon return the officer must contact the Highway Safety Coordinator at the MPTC (617-727-3945) to arrange to complete the re-certification process. Such re-certification must be completed within sixty (60) days of the officer's return.
2. MEDICAL EXCEPTIONS: There are no medical exceptions for breath testing. If an asthmatic uses an inhaler, observe for fifteen minutes prior to testing.

### 3. TEST OPERATION

- a. **TESTING PROCEDURES:** Breath testing shall be administered according to the methods approved by the Secretary of Public Safety and security.<sup>16</sup>
- b. **DETAINEE OBSERVATION:** A detainee must be observed for at least fifteen minutes.
  - 1) If a person consents to a breath test, the observation period shall begin at the time of consent. This time shall correspond to the time entered on:<sup>17</sup>
    - a) The Statutory Rights and Consent Form; and
    - b) "First Time Observed" in BTS.
  - 2) If the detainee hiccups or burps, the observation time shall begin again.
  - 3) If the officer believes that multiple hiccups or burps are intentional, it may be considered a refusal.<sup>18</sup>
- c. **DATA ENTRY:** Some issues encountered while processing the defendant's identification are:
  - 1) **ADDRESS CHANGE:** During the breath test, do not edit the address obtained by the license scan. This will cause a data error at the RMV.
  - 2) **HYPHENATED NAMES:** If a name is hyphenated, the name must be edited to remove the hyphen (for example Smith-Jones should be edited to read Smithjones).
  - 3) **NEVER LICENSED:** If the defendant has never been licensed, enter nine 0's for the license number (000000000) and the present date as the date of expiration.
- d. **SIMULATOR:**
  - 1) **SIMULATOR TEMPERATURE:** Simulator temperature at the time of testing must be 33.8 to 34.2 C.
  - 2) **SIMULATOR READING:** The instrument must obtain a simulator reading of .14, .15, or .16 for the test to be valid.
  - 3) **SIMULATOR SOLUTION:** Simulator solution must not be "expired" for a valid test. Only the officer in charge of breath testing may change the solution. If the solution is expired, the equipment is out of service.
- e. **DEFENDANT BREATH SAMPLES:**
  - 1) **NUMBER OF SAMPLES:** The breath test will normally consist of two samples.

- 2) TEST RESULTS: Test results must be within +/- .02 of each other. If the samples are outside the +/- .02 range, a third test will be initiated.
  - 3) MAXIMUM RANGE: The range of measure for breath testing is 0.00 to 0.63. If the breath test reading is higher than the maximum, officers should provide the detainee with medical care immediately!
4. BREATH TESTS FOR PERSONS OVER AGE 21
    - a. BAC .05% OR BELOW: The arrestee shall be released from custody forthwith.
    - b. .06% or .07% BAC: There shall be no presumption of intoxication. The arrest and booking process shall continue.
    - c. For a blood alcohol reading of .08% or above, there shall be a presumption that the person is under the influence of intoxicating liquor.
  5. BREATH TESTS FOR PERSONS UNDER 21:
    - a. The blood alcohol content threshold remains the same as for an adult, and the detainee must be released.
    - b. For detainees under age seventeen (17), see the department policy on **Handling Juveniles**.
    - c. For a blood alcohol reading of .02% to .04%, the officer shall seize the detainee's operator's license. The detainee is subject to an administrative suspension by the Registry. No criminal charges are forwarded to the court, and the defendant shall be released.<sup>19</sup>
  6. BREATH TESTS FOR CDL:
    - a. .01 to .03 (any detectable amount): Out of service order for 24 hours. Operator is released forthwith.<sup>20</sup>
    - b. .04 TO .05: Out of service order for 24 hours. Operator is released forthwith.<sup>21</sup>
    - c. .05 OR HIGHER: Operator shall be processed as an arrest.<sup>22</sup>
  7. LICENSE SEIZURES
    - a. The police officer administering a valid breath test shall seize the defendant's operators license provided that the license was issued by the Commonwealth of Massachusetts and:<sup>23</sup>
      - 1) The defendant is age 21 or older and obtains a BAC reading of .08% or higher; or
      - 2) The defendant has not reached his/her twenty-first birthday and obtains a BAC reading of .02% or higher.

8. EQUIPMENT PROBLEMS: If a detainee consents to a breath test and the equipment malfunctions, the department has an obligation to provide the detainee with the opportunity to take another test, including bringing the detainee to another department for testing. If the detainee refuses to go to another department, it shall be deemed a refusal.<sup>24</sup>

### **E. Blood Testing**

1. BLOOD TAKEN FOR MEDICAL TREATMENT: The record of a blood test taken for medical treatment is admissible as evidence and may be summonsed by the prosecutor.<sup>25</sup>
2. BLOOD UNDER IMPLIED CONSENT:
  - a. Defendant must be taken to a licensed medical facility for treatment.
  - b. Defendant must consent to the blood test.
3. MEDICAL EXCEPTIONS: Persons having a condition requiring anticoagulants SHALL NOT BE DEEMED TO HAVE CONSENTED TO A BLOOD TEST. <sup>26</sup>
  - a. Hemophiliacs
  - b. Diabetics
4. PROCESS FOR DRAWING BLOOD: The following procedures are recommended while medical staff are drawing the blood:
  - a. The area of the draw should be sterilized using a non-alcoholic solution.
  - b. Two tubes of blood containing a powdered anticoagulant should be submitted. No red stoppered test tubes for alcohol and drugs; no green stoppered test tubes for drugs.
  - c. Shake both tubes once received to activate the anticoagulant.
  - d. Mark the samples.
  - e. Refrigerate until they can be delivered to the State Police Crime Lab.

### **F. Refusals**

1. The officer before whom the refusal was made must fill out the Statutory Rights and Consent Form, indicating the defendant's refusal. The officer must sign the form.
2. Seize the defendant's operator's license if available. Do not issue a temporary license.<sup>27</sup>
3. Provide the defendant with a written notice of suspension.<sup>28</sup>



4. Impound the vehicle driven by the operator, regardless of to whom the vehicle belongs. The operator shall be responsible for towing and storage. The vehicle must be held for twelve hours following a refusal.<sup>29</sup>
5. A test refusal shall be processed using the BATS system. The entry may be done by a certified operator using his or her operator's card or by a non-certified operator using a "Refuse Card," which allows an operator to only input an Implied Consent refusal.

### **G. Operating Under the Influence of Drugs**

1. NO IMPLIED CONSENT: Massachusetts law does not provide an implied consent statute for operating under the influence of drugs, and officers have no statutory authority to request any type of drug testing.
2. OFFICERS' OBSERVATIONS:
  - a. An officer's observations are critical in prosecuting cases for operating under the influence of drugs. Impairment with a low breath test may be indicative of drug impairment.
  - b. If a blood sample is obtained, it will be screened for the class of drug requested by the officer. The officer's observations of the defendant, such as lethargy v. excitement, confusion, situational awareness, or pupil size and reaction, may be helpful for the chemist.
3. DRUG TESTING:
  - a. A urine test may indicate use; a blood test indicates impairment.
  - b. An officer may request a blood sample. The operator may consent or refuse.
4. REFUSALS: There are no license suspensions for refusing to submit to a blood test for drugs.

### **H. Reports**

1. Accurate, timely, and complete reports are fundamental to the department's efficient and effective operation, as these reports form the basis for prosecution and ultimate adjudication of traffic offenses.
2. Officers shall complete all traffic citations and reports and submit them in a timely manner. See the department policy on **Incident Reporting**.

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<sup>1</sup> Harris, D. H., Howlett, J. B., and Ridgeway, R. G. The Visual Detection of Driving While Intoxicated.

<sup>2</sup> Com. v. Eckert, 413 Mass 519 (2000).

<sup>3</sup> Com. v. Alano, 388 Mass 871 (1983).

<sup>4</sup> Com. v. Brazelton, 404 Mass 784 (1989).

<sup>5</sup> M.G.L. c. 263, §5A

<sup>6</sup> M.G.L. c. 276, §33A.

<sup>7</sup> M.G.L. c. 90, §24(4)(e).

<sup>8</sup> M.G.L. c. 90, §24(4)(e).

<sup>9</sup> *2006 Breath Test Operator Recertification Manual*, Page 8, Prepared by the Massachusetts Office of Alcohol Testing (2006).

<sup>10</sup> *2006 Breath Test Operator Recertification Manual*, Page 8, Prepared by the Massachusetts Office of Alcohol Testing (2006).

<sup>11</sup> M.G.L. c. 90, §24(4)(f)(1); M.G.L. c. 90F, §11(D); (E).

<sup>12</sup> M.G.L. c. 90, §24(4)(f)(2).

<sup>13</sup> M.G.L. c. 90, §24(4)(f)(2).

<sup>14</sup> M.G.L. c. 90F, §11(D); (E).

<sup>15</sup> M.G.L. c. 90, §24W.

<sup>16</sup> M.G.L. c. 90, §24K.

<sup>17</sup> 501 CMR 2.55; *2006 Breath Test Operator Recertification Manual*, Page 9, Prepared by the Massachusetts Office of Alcohol Testing (2006).

<sup>18</sup> 501 CMR 2.55; *2006 Breath Test Operator Recertification Manual*, Page 24, Prepared by the Massachusetts Office of Alcohol Testing (2006).

<sup>19</sup> M.G.L. c. 90, §24(1)(f)(1)(i).

<sup>20</sup> M.G.L. c. 90F, §10.

<sup>21</sup> M.G.L. c. 90F, §10; M.G.L. c. 90F, §11(D).

<sup>22</sup> M.G.L. c. 90F, §11(D).

<sup>23</sup> M.G.L. c. 90, §24(1)(f)(2)(i).

<sup>24</sup> 501 CMR 2.56(2).

<sup>25</sup> Com. V. McCreedy, 50 Mass App. Ct. 521 (2000).

<sup>26</sup> M.G.L. c. 90, §24(4)(f)(1).

<sup>27</sup> M.G.L. c. 90, §24(1)(f)(1)(i).

<sup>28</sup> M.G.L. c. 90, §24(1)(f)(1)(ii)

<sup>29</sup> M.G.L. c. 90, §24(1)(f)(1)(iii).