

3.06 PROTECTIVE CUSTODY



PROTECTIVE CUSTODY

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<i>Kenneth M. Paulhus</i>		December 2, 2016	

POLICY

The Southborough Police Department shall comply with the requirements of Section 8 of Chapter 111B of the Massachusetts General Laws when taking an intoxicated person into protective custody.

The Southborough Police Department shall comply with the requirements of Section 9A of Chapter 111E of the Massachusetts General Laws when taking an incapacitated person into protective custody.

PROCEDURES

I. INCAPACITATED BY ALCOHOL

A. DEFINITIONS

1. **Facility:** Any public or private place, or portion thereof, providing services especially for the detoxification of intoxicated persons or alcoholics.
2. **Incapacitated:** The condition of an intoxicated person who, by reason of the consumption of intoxicating liquor, is (1) unconscious, (2) in need of medical

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attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly.

B. TAKING CUSTODY

1. In the absence of an accompanying crime, an officer shall not arrest an intoxicated person. If the situation does not warrant an arrest, but action is necessary, a police officer has the authority to assist an incapacitated person, with or without his/her consent, to his/her residence, to a treatment facility, or to the police station. While not required, officers are urged to obtain consent where possible.
2. 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 Section I of this Policy and Procedure.
3. 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 of such right, with said communication appropriately documented.

NOTE: The following notice will be provided.

NOTICE OF RIGHTS

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.

4. Breathalyzer test results shall be utilized as follows:
 - a. If the reading (which indicates the percentage of alcohol in a person's blood) is .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 facility.
 - b. If the reading is .05 or less, the person shall be presumed not to be intoxicated and shall be released from custody immediately.

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- c. If the reading is more than .05 and less than .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.
5. 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.
6. Any person presumed intoxicated who is assisted by a police officer to a 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).
7. 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 arrival at said station or as soon as possible thereafter. Upon the request of the parent or guardian, the juvenile or such person shall be released to the custody of the parent or guardian. [44.2.2 (b); 44.2.2 (e)]
8. Nothing in these procedures shall be construed to require or permit a police officer to hold a person in protective custody against his/her will unless suitable treatment at a facility is not available. If such treatment is not available, the person may be held in protective custody at the station for the following periods, whichever is shorter:
 - a. up to 12 hours;
 - b. until he/she is no longer incapacitated.
9. An officer may use such force as is reasonable and necessary to carry out the procedures herein.

C. SEARCH AND TRANSPORTATION

1. An officer is authorized to make a search of an incapacitated person and his/her immediate surroundings whenever the following conditions exist: [1.2.4 (g)]
 - a. the officer reasonably believes that the officer's safety or the safety of other persons present requires the search; [1.2.4 (e)]

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- b. the search is limited to the extent necessary to discover any dangerous weapons that on that occasion may be used against the officer or other persons present. [1.2.4 (b)]

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.¹ 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.²

- 2. 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, he/she shall immediately make arrangements for medical treatment in accordance with departmental procedures, as approved by the department's medical director. [72.6.1]
- 3. Officers shall extend the same considerations to an incapacitated person that they would offer to a person suffering from any other illness.

D. SAFEGUARDING AT POLICE STATION

- 1. An incapacitated person held in protective custody at the police station shall have the following property taken from him/her for safekeeping in accordance with departmental procedures: [1.2.4 (f)]
 - a. belts, shoe laces, drawstrings, neckties, neck chains, matches, and cigarette lighters;

¹ Commonwealth v. O'Connor, 406 Mass. 112, 546 N.E.2d 336 (1989).

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

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- b. all other articles which may pose a danger or harm to such person or to others;
- c. personal property and other valuables.

NOTE: Such property shall be kept in a secure place, and an inventory shall be maintained.

- 2. 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.
- 3. 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 carefully observing them at intervals of not more than thirty (30) minutes. A record shall be maintained of the time of such observations in accordance with departmental procedures. [72.5.4; 72.8.1]

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

E. REPORTING REQUIREMENTS

- 1. A report of protective custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the Officer-in-Charge, whether the person held in custody exercised his/her right to make a phone call, whether the person held in custody exercised his/her right to take a breathalyzer test, and the results of the breathalyzer test, if taken. Such record shall not be treated, for any purposes, as an arrest or criminal record.
- 2. Officer(s) 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.
- 3. 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 ninety (90) days to an in-patient public or private facility approved by the Department of Public Health.³ Where

³ G.L. c. 123, § 35.

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appropriate, police officers should advise the family and friends of a problem alcoholic of the procedures available under this law.

NOTE: Police officers are immune from civil suits for damages for restraining, transporting, applying for the admission or admitting any person to a facility if the officer acts pursuant to the provisions of Chapter 123.⁴

F. 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 & Turning: Have the subject walk, in a heel to toe manner, a straight line of about 20 feet. Just before the subject reaches the end of the line, direct him 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 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.

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

Indications of Alcohol Consumption: Only persons who are incapacitated by consumption of alcohol (not other drugs) may be taken into protective custody under this section. 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 he/she has been drinking or is drunk; any statements to the

⁴ G.L. c. 123, § 22.

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same effect by his/her companions and any other indications of alcohol use should be so noted.

II. INCAPACITATED BY DRUGS AND SUBSTANCES OTHER THAN ALCOHOL

A. DEFINITIONS

1. **Acute Care Hospital:** Any hospital licensed under G.L. c. 111, § 51, and the teaching hospital of the University of Massachusetts Medical School, which contains a majority of medical-surgical, pediatric, obstetric, and maternity beds, as defined by the department.⁵
2. **Incapacitated:** The condition of a person who, by reason of the consumption of a controlled substance or toxic vapor or other substance other than alcohol is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly. For the purposes of this Policy and consistent with the guidance issued by the Executive Office of Public Safety and Security along with the Municipal Police Training Committee, a person who has been administered nasal naloxone in connection with a drug overdose is still deemed to be "incapacitated" as a person "in need of medical attention".
3. **Satellite Emergency Facility:** A health care facility that operates on a 7 day per week, 24 hour per day basis, that is located off the premises of a hospital, but is listed on the license of the hospital, which is authorized to accept patients transported to the facility by ambulance.⁶

B. TAKING CUSTODY

1. In the absence of an accompanying crime, an officer shall not arrest an incapacitated person. If the situation does not warrant an arrest, but action is necessary, a police officer has the authority to place an incapacitated person into protective custody and transport the incapacitated person, with or without his/her consent, to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment.
2. In order to determine whether or not a person is incapacitated, 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 Section II of

⁵ Defined in G.L. c. 111, § 51½.

⁶ Defined in G.L. c. 111, § 51½.

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this Policy and Procedure. A police officer may place the person into protective custody when such tests or other information or observations indicate that the person is incapacitated.

3. A person taken into protective custody for incapacitation shall not be taken to the police station and must be immediately transported to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment.
4. Nothing in these procedures shall be construed to require or permit a police officer to hold a person in protective custody against his/her will beyond the time required to complete the person's immediate transport to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment.
5. An officer may use such force as is reasonable and necessary to carry out the procedures herein.

C. SEARCH AND SEIZURE

1. An officer is authorized to make a search of an incapacitated person and his/her immediate surroundings whenever the following conditions exist:
 - a. the officer reasonably believes that the officer's safety or the safety of other persons present requires the search; [1.2.4 (e)]
 - b. the search is limited to the extent necessary to discover any dangerous weapons that on that occasion may be used against the officer or other persons present. [1.2.4 (b)]
2. Any item taken shall be inventoried and secured, and, unless the item is contraband or otherwise unlawfully possessed, shall be returned to the person when the person is no longer incapacitated.
3. If the officer discovers contraband or items unlawfully possessed on the incapacitated person, the officer shall take the appropriate actions to charge the person with the possession of such items. The primary consideration of the officer, however, should remain on immediately transporting the individual to an acute care hospital or satellite emergency facility or otherwise to immediately obtain appropriate emergency medical treatment. Officers shall not, however, charge an individual with possession of a controlled substance under G.L. c. 94C, §§ 34 or 35, if that person in good faith, seeks medical assistance for themselves or another person who is experiencing a drug-related overdose.

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D. TRANSPORTATION

1. The officer shall immediately call emergency medical services upon making a determination that an individual is incapacitated. The officer shall direct that emergency medical services personnel transport the incapacitated person. If emergency medical services personnel transports the incapacitated person, the officer should accompany the incapacitated person in the emergency medical services vehicle, or in the alternative, otherwise escort the emergency medical services vehicle to the destination. [61.3.3]
2. Unless articulable exigent circumstances exist in which an incapacitated person cannot be transported by emergency medical services personnel, officers shall not transport an incapacitated person in police vehicles. If such circumstances exist as to require the transport of an incapacitated person in a police vehicle, the transporting officer shall adhere to the departmental policies and procedures relative to the transport of an individual in a police vehicle. [70.3.2; 70.5.1]
3. Before transporting an incapacitated person, the Officer-in-Charge shall be notified so that he/she may arrange for assistance, if available.
4. At the destination, the officer shall escort incapacitated person into the facility, request that the person be evaluated, and relinquish custody of the person to facility personnel. [71.6.6]
5. 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, he/she shall immediately make arrangements for medical treatment in accordance with departmental procedures.
6. Officers shall extend the same considerations to an incapacitated person that they would offer to a person suffering from any other illness.
7. Whenever an officer places into protective custody a person under the age of 18, the officer shall notify the parent or guardian of that person immediately.

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E. REPORTING REQUIREMENTS

1. Once the transport is complete, a report of protective custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the Officer-in-Charge, the nature of the incident which gave rise to any police involvement, the method of handling the problem, what the officer relied upon in determining that the person was incapacitated, what modes of transport were requested, what mode of transport was made, the location to which the person was transported, any exigent circumstances justifying a different mode of transport, and any injuries observed on the incapacitated person including their cause and medical treatment, if any, and the facility personnel to whom the officer relinquished custody of the incapacitated person. A sample REPORT OF SECTION 9A PROTECTIVE CUSTODY form is attached to this policy.
2. Such record shall not be treated, for any purposes, as an arrest or criminal record.
3. Police 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 a drug dependent person be committed for a period not to exceed fifteen days to an in-patient public or private facility approved by the Department of Public Health.⁷ Where appropriate, police officers should advise the family and friends of a problem alcoholic of the procedures available under this law.

NOTE: Police officers are immune from civil suits for damages for restraining, transporting, applying for the admission or admitting any person to a facility if the officer acts pursuant to the provisions of Chapter 123.⁸

F. 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 & Turning: Have the subject walk, in a heel to toe manner, a straight line of about 20 feet. Just before the subject reaches the end of the line, direct him to quickly turn and walk heel to toe back to the starting

⁷ G.L. c. 123, § 35.

⁸ G.L. c. 123, § 22.

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point. Note any deviations from the line by the subject as well as any difficulty or loss of balance experienced by him 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 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.

Alphabet:

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