


<b>MELROSE POLICE DEPARTMENT</b>		Department Manual: <b>Policy No. 5.15</b>
Subject: <b>Operating under the Influence (OUI):</b> <b>Drugs and Alcohol</b>		
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: <b>61.1.11</b>		GENERAL ORDER <b>N/A</b>
Effective Date: <b>February 29, 2024</b>	Issuing Authority <i>Kevin Faller</i> <b>Kevin Faller</b> <b>Chief of Police</b>	

## 1. Policy

The importance of OUI enforcement makes it critical that all officers perform their related duties in strict accordance with applicable law and to procedural guidelines that are acceptable to the courts. This means that officers who arrest for OUI must be certain that their actions in the field, while transporting, and at the station, are precise and proper, and that their reports are complete and accurate.

## 2. Procedure

- a. **Detecting the OUI Operator** – Detection is the first step in any OUI enforcement action. The officer's observations in this stage are crucial in establishing probable cause upon which the arrest decision is based. Officers should perform the following tasks:
  - i. Recognize and identify specific driving behaviors that have a high probability of signifying that the driver may be impaired by alcohol and/or drugs.
  - ii. Note all the observations leading to the suspicion that the driver may be impaired.
  - iii. Notify dispatchers of the location of the stop, giving a full description of vehicle (including Registration #); request back-up if deemed necessary.

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- iv. Do not allow the operator to move or drive the vehicle if there is reason to believe that he/she is impaired.
  - v. Conduct a brief interview with the operator and the passengers, while all are still inside the vehicle, if applicable.
  - vi. Recognize and identify specific characteristics, attitudes, and actions commonly manifested by impaired drivers including the odor of alcoholic beverages, slurred speech, bloodshot watery eyes, poor balance, inappropriate responses to questions, etc.
  - vii. Note all observations leading to the suspicion that the driver may be impaired. If reasonable cause exists to support your suspicion, request that the driver exit the vehicle for further investigation.
  - viii. If vehicle was not observed in motion, determine if probable cause exists to charge driver with actual physical control.
  - ix. Request the suspect exit the vehicle and move to a safe location to conduct field sobriety tests and a further interview.
  - x. Select and administer appropriate field sobriety tests (see Section 2c) to assess impairment.
  - xi. It is still advisable to use the Miranda Warning prior to asking questions of an accusatory nature.
  - xii. Formulate appropriate arrest decision based on the evidence accumulated during the above steps.
- b. **Use of Portable Breath Testing Devices (PBT)** - Portable breath testing devices may be used to assist officers in roadside evaluations of drivers, assist in determining an operator's ability to operate a motor vehicle safely, and to assist officers in establishing probable cause to prosecute for violations of M.G.L. c 90 §24. Whenever possible, officers should administer a preliminary breath test (PBT) as part of their roadside sobriety tests for suspected OUI; in doing so, the following applies:
- i. The officer must be trained in the use of the PBT, in accordance with the guidelines promulgated by the Office of Alcohol Testing (OAT) and/or the Massachusetts Municipal Police Training Committee (MPTC).
  - ii. The Officer in Charge of the PBT shall adhere to the maintenance and use guidelines as promulgated by OAT.
  - iii. The PBT is to be the last field sobriety test offered.
  - iv. The PBT can be administered only with the suspect's consent.
  - v. Officers shall note the use or refusal of the PBT and will include the results in their arrest report narrative.
  - vi. The PBT will be used only in the field and at no time shall the PBT be administered at the booking desk.
- c. **Standardized Field Sobriety Tests (SFST)** – There is no rule of law that requires a police officer to administer field sobriety tests. Police are permitted to arrest a person whenever their observations of that person - with or without field sobriety tests - provide them with probable cause to believe that person was operating under

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the influence of alcohol. (*See Commonwealth v. Ames, 410 Mass. 603 (1991) and Commonwealth v. Gilmore*)

- i. The officer should request that the operator perform certain field sobriety tests to assess the operator's ability to focus on both mental and physical tasks simultaneously.
- ii. Since field sobriety testing does not result in testimonial evidence, there is no 5th Amendment right to either remain silent or to an attorney which must be imparted to the operator. The operator has no right to refuse to perform field sobriety tests following a lawful stop.
- iii. However, the officer has no right to use force to make a person perform any field sobriety tests. Also, officers may never comment on a suspect's refusal to perform sobriety tests in court unless directed by the judge to do so. (*See Commonwealth v. Grenier 45 Mass. Appeals Court 58 (1998)*).
- iv. It is important that the officer inquire and make a determination of whether or not the operator has any physical disabilities that would disqualify him/her from performing any field sobriety test(s).
- v. The National Highway Traffic Safety Administration (NHTSA) has identified three tests for sobriety screening - the **One Leg Stand**, the **Walk and Turn**, and the **Horizontal Gaze Nystagmus (HNG)**. Strict compliance with the NHTSA standardized testing procedures is required for the results of the tests to serve as evidence of probable cause to arrest. (*See State v. Horman 89, Ohio St. 3rd 421 (2000)*). The officer should administer the NHTSA standardized field sobriety tests in addition to any other reasonable tests of speech, coordination, and coherency whenever possible, in an area that is well lit, free of distractions and with a clear, flat and defect free surface. Such tests should include, but not be limited to, the following:
  1. **One Leg Stand (OLS)**, while counting to thirty (30);
  2. **Walk and Turn (WAT)**, heel-to-toe, nine (9) steps, and return; and
  3. **Horizontal Gaze Nystagmus (HGN)** to be administered only by an officer trained and certified in such testing. In Massachusetts, the Supreme Judicial Court has concluded that since the HGN test relies on an underlying scientific proposition, expert testimony is required for its admissibility in court (*See Commonwealth v. Sands 424 Mass. 184 (1987) and Commonwealth v. Lanigan 419 Mass. 15 (1994)*).
- vi. To assess the possibility of drug intoxication, an appropriately trained Officer may administer additional Roadside Assessments, including:  
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  1. The Modified Romberg Test (MRB)
  2. Lack of Convergence (LOC)
  3. Vertical Gaze Nystagmus (VGN)
  4. Pupil Size
- vii. Certain problems may be encountered when trying to administer any field sobriety testing. Among these problems are communication difficulties with persons who speak a different language; persons with physical injuries, impairments, or affected by prescription medications; and a myriad of other unforeseen circumstances. The investigating officer shall conduct sobriety

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- screening to the best of his/her ability considering all the particular and relevant circumstances encountered. This may include not administering some field sobriety tests and/or administering others that are not listed.
- viii. All officers are expected to conduct a thorough and complete investigation obtaining as much evidence as possible concerning the person's impairment.
- d. **Arrest and Processing** – If all elements of the OUI violation (e.g., operation or actual physical control on a public way, or way in which the public has the right of access, while impaired) have been clearly established, then the officer has the right of arrest and may legally inform the suspect of this fact. Once the arrest has been made the officer should adhere to the following procedures:
- i. Handcuff and search the subject according to procedure and advise him/her of their Miranda Rights.
  - ii. The arresting officer shall arrange for a tow according to Department procedure (see Section 3: Melanie's Law).
  - iii. The subject shall immediately be transported to the station according to established Department procedures.
  - iv. Upon arrival at the station the subject shall be booked according to established OUI procedures.
  - v. With regards to chemical testing (Breathalyzer) and blood alcohol testing, all officers shall be aware of the rules contained in MGL C90 §24e and §24f. These statutes govern all aspects of the use of these procedures.
  - vi. If a blood alcohol test is administered according to the statute rules, the arresting officer shall witness and oversee the procedure to make certain it is conducted in accordance with acceptable rules of evidence.
  - vii. If the subject takes a Breathalyzer test and the results do not confirm impairment, the officer should try and ascertain if drugs were the cause of impairment before the subject is released from custody. **61.1.11**
  - viii. If the result of the test confirms impairment, or if the subject refuses the test the bail clerk will be called and informed of the situation. If the bail clerk bails an intoxicated person, that person must have a responsible adult take responsibility for the individual or else the person will be put into protective custody for their own safety.
- e. **Evidential Breath Testing**
- i. Evidential breath testing shall be offered by and performed by an Officer trained and certified in breath testing procedures.
  - ii. Breath testing shall be offered to and, if the prisoner consents to taking the test, performed for those prisoners under arrest for OUI/Liquor and brought to the police station for booking.
  - iii. All breath testing will be done in an atmosphere of dignity and decorum, free from the view of those without a verified interest.
  - iv. The prisoner will be present during the entire process and will be informed of the procedures, results, and their meanings.

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- v. The booking officer shall explain the “Statutory Rights and Consent Form”. When necessary, the booking officer shall use the prepared materials, available in the Booking Room, to communicate the Statutory Rights and Consent Form in the preferred language of the prisoner.
  - vi. The booking officer shall inform and ask the OUI/Liquor prisoner to submit to a breath test pursuant to M.G.L. Chapter 90, Section 24. The prisoner shall be asked to sign the “Statutory Rights and Consent Form” indicating whether he/she will submit to the breath test. The booking officer will also sign the form.
  - vii. The prisoner should be personally observed by the breath test operator for at least fifteen (15) minutes prior to the test being administered.
  - viii. The certified breath test operator shall perform the test on a certified device in the following sequence:
    - 1. One adequate breath sample (1 of 2).
    - 2. One simulator sample for instrument calibration verification.
    - 3. One adequate breath sample (2 of 2) for subject verification.
  - ix. A detailed user manual for the Breathalyzer equipment shall be kept in the booking area in hard copy.
- f. **Validity of Evidential Breath Tests** – For the breath test to be valid, the booking officer shall ensure that the test meets the following provisions:
- i. Performed by a trained and certified operator.
  - ii. Given on a certified instrument using a certified simulator.
  - iii. Be done following the operational procedure checklist.
  - iv. **A test is not considered valid if:**
    - 1. The subject fails, upon request, to supply two adequate breath samples (in effect, a refusal);
    - 2. The result of the simulator is anything other than .14%, .15%, or .16%; or
    - 3. The results of the subject’s two breath samples are +/- .02% different. (e.g. sample one is .15% and sample two is .18%)
- g. **Reports and Forms** – It shall be the responsibility of the arresting officer to ensure the completion of all required forms, which are pertinent to the particular case, and to file a complete written report, which fully explains the incident. Supplemental reports may also be filed by officers assisting in the arrest and by the Booking Supervisor. These reports shall detail all notes, observations of the officers, statements of witnesses, warnings and rights given to the arrestee, results of tests, and any other information, which would assist the prosecution in substantiating the charge(s). The Officer in Charge will review and approve all reports and documents.

### 3. Melanie’s Law

- a. **Failing a Breath Test when arrested for Operating Under the Influence:**

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- i. If a person is arrested for Operating Under the Influence of Alcohol, (s)he will be asked to consent to a Breathalyzer test to determine his/her Blood Alcohol Concentration (BAC). If they are 21 years or older and register a BAC of .08 or greater, or if they are under 21 and register a BAC of .02 or greater, his/her license or right to operate will be suspended for 30 days.
  - ii. Also, if (s)he is between the ages of 18 and 21, (s)he will be required to participate in a Youth Alcohol Program (YAP) and serve an additional 180-day suspension. There are enhanced penalties if a person is under 18 and is arrested for operating under the influence of alcohol. (S)he will be required to serve an additional one-year suspension and attend the YAP program.
- b. **Chemical Test Refusal when arrested for Operating Under the Influence:**
- i. On October 28, 2005, Melanie's Law was implemented. This greatly increased the penalties for Chemical Test Refusals. Melanie's Law also mandates that any penalties for OUI be served after the Chemical Test Refusal and/or Youth Alcohol Program (YAP) suspension has been served. Suspensions for both Breath Test Failures and Refusals start immediately on the offense date. There is no longer a 15-day grace period.
- c. **Chemical Test Refusal Penalties:**

Age of Driver	Number of Prior OUI's	Suspension Period
21+	None	180 Days
	One	Three Years
	Two	Five Years
	Three or More	LIFETIME
Under 21	None	Three Years
	One	Three Years
	Two	Five Years
	Three or More	LIFETIME
Any	Prior OUI Serious Bodily Injury	Ten Years
	Prior Vehicular Homicide	LIFETIME

- i. Operators are entitled to a Registry hearing for a Chemical Test Refusal (CTR), but they must appear within 15 days of the CTR. Chemical test refusal hearings are only conducted at the Boston (Haymarket) RMV Service Center by a Hearings Officer. There are only three issues that can be challenged during the hearing:
  1. The police officer did not have reasonable grounds for the OUI arrest.
  2. The operator was not placed under arrest.
  3. The operator did not refuse the Breathalyzer.

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If any of these can be effectively proven, the suspension will be rescinded.

- d. **Immediate Actions Upon Refusals** - when an operator fails to submit to a chemical test or analysis of his breath or blood, the agency will impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal. **61.1.11**

There are two (2) important points to remember under this circumstance:

1. It does not matter who the vehicle is owned by. The vehicle must be impounded if it was driven by the defendant.
2. The mandate only refers to vehicles being driven by operators who refuse the Breathalyzer.

*\* This is a problem since Officers normally impound vehicles before a defendant decides to submit to a BT. The DA recommends Officers be instructed to impound any vehicle operated by a defendant at the scene and adhere to the following guidelines. (Special Bulletin issued to all MPTC Instructors on 02/14/06 by the Massachusetts District Attorney's Association).*

- ii. **Any operator who refuses or fails a BT:** Hold the vehicle for a minimum of **twelve (12) hours**.
  - iii. **Any operator twenty-one (21) or older:** Release the vehicle if they submit and have a reading of **.05 or less**.
  - iv. **Motorists under twenty-one (21):** If they submit and have a reading of **.02 or above**, hold the vehicle for a minimum of **twelve (12) hours**.
- e. **Convictions of Operating Under the Influence of Alcohol or Drugs / Alcohol Program Assignments** – Effective November 28, 2002, Massachusetts enacted the Lifetime Look-Back Law. For the purpose of calculating OUI, Vehicular Homicide, and Chemical Test Refusal revocation periods, the RMV must consider your entire history. All OUIs and Alcohol Program assignments, including out-of-state convictions, no matter how old, will count when determining the number of incidents and the associated periods of revocation/suspension. Effective 2012 – Continue without a Finding (CWOFF) will count as convictions in determining what sanctions to bring against repeat drunk drivers.

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Description	Age of Driver	1 <sup>st</sup> Offense	2 <sup>nd</sup> Offense	3 <sup>rd</sup> Offense	4 <sup>th</sup> Offense	5 <sup>th</sup> Offense
90 24D Alcohol / Drug Program	21+	45-90 Days				
	Under 21	210 Days				
OUI Drugs	Any	One Year	Two Years	Eight Years	Ten Years	Lifetime
OUI Liquor	Any	One Year	Two Years	Eight Years	Ten Years	Lifetime
(Out of State) OUI Alcohol / Drugs	Any	One Year	Two Years	Eight Years	Ten Years	Lifetime