



Memorandum

TO: Honorable Mayor Reed and City Council

FROM: Barbara Attard
Independent Police Auditor

SUBJECT: Supplemental Report from IPA:
Citizen Complaints Concerning Drunk
in Public Arrests - Report and
Recommendation

DATE: November 10, 2008

Approved

Signature of Barbara Attard
Barbara Attard

Date

11/10/08

Recommendation

The Independent Police Auditor recommends that Council take action to direct the City Manager to direct the Police Department to institute a policy that an officer making an arrest for 647(f) must complete a chemical test on that person. If the arrestee is unwilling or unable to complete such a test, this should be documented in the police report. While requiring an objective test may be seen as a burden, the relative costs of imposing such action may be warranted given the current questions surrounding the propriety of such arrests.

Background

The Office of the Independent Police Auditor (IPA) was requested at the October 29, 2008 meeting of the Rules and Open Government Committee to prepare a report about complaints that allege issues regarding drunk in public (Penal Code 647(f)) arrests. This report documents complaints filed/audited, gives a historical overview of the issue, and outlines IPA recommendations regarding 647(f) arrests.

Recent news coverage has brought attention to SJPD arrests for drunk in public. The Mercury News reported that the San Jose Police Department made 4,661 drunk in public arrests last year and noted that this number is the highest in the state.¹ A Mercury News editorial commented that "San José police charge people for public drunkenness in suspiciously high rates. . . . They could indicate the selective enforcement of a broadly worded law."²

California Penal Code Section 647(f) requires the presence of certain factors for a drunk in public violation, a misdemeanor in the category of disorderly conduct. To be considered drunk in public, the person arrested must be:

¹ Sean Webby, *Drunkenness Arrests in San Jose Outpace Other California Cities*, Mercury News, Oct. 18, 2008.

² *Arrest Numbers Point to Over-Enforcement of Drunkenness Law*, Mercury News Editorial, Oct. 21, 2008.

- (1) In a public place,
- (2) under the influence of alcohol or any drug, and
- (3) either:
 - (a) in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others or
 - (b) by reason of his or her being under the influence of alcohol or drugs, interferes with or obstructs the use of the street or sidewalk.

2008 IPA Analysis of Drunk in Public Complaints in Years 2003-2008

In preparing this report, Independent Police Auditor Barbara Attard and IPA staff pulled and reviewed all citizen complaints from January 2003 through November 2008 in which the complainant was arrested for 647(f). Recommendations made by the IPA in the past regarding 647(f) arrest concerns were also reviewed; they are discussed at length below.

A total of 68 cases were pulled and examined for identifiable patterns. The number of complaints involving 647(f) arrests has increased from 5 in 2003 to 22 in 2007. The table on page three reflects the totals.

The following patterns were identified:

- In 32 of the 68 cases, the complainant denied being drunk or intoxicated to the level that he/she was unable to care for himself/herself.
- Eleven complainants indicated that they had requested a test.
- Of these 68 cases, 39 arrests were made in the downtown area.
- In 29 of the 68 cases, the officer documented his/her actions and those of the arrestee on a multi-page police report; in the remaining 39 cases, there was a single-page sheet or no documentation.³
- Nineteen arrests were made after police responded to a call for service.

Of the 68 cases, 33 appeared to contain some elements of an "attitude arrest." An attitude arrest occurs when a person is arrested because the officer does not like the arrestee's attitude and/or arrests of individuals who may be perceived as uncooperative.⁴ The IPA cannot state with certainty whether the arrest was made in response to the arrestee's attitude because there are too many subjective elements which are open to various interpretations or which are not adequately documented.

The study showed that in many cases the officer provided some description of symptoms that the arrestee had been drinking; most reports reflected a standard description: "red, watery or bloodshot eyes, an odor of alcohol on the arrestee's breath or person, speech impairment and gait impairment." Although the SJPD Duty Manual specifies that officers should conduct field tests under certain circumstances⁵, most of the cases did not indicate that these tests were performed.

³ Officers tended to use the one-page form when the arrest was based only on Penal Code 647(f); if the arrest was made on additional grounds, such as Penal Code 148 "resisting arrest," the multi-page form was used.

⁴ This definition of "attitude arrest" was taken from the IPA *1994 Third Quarterly Report*, page 26.

⁵ San Jose Police Department Duty Manual section L 6608.

And, in the majority of cases there was not an individualized description of how the arrestee was unable to care for self or others. The fact that a person has been drinking does not lead necessarily to the determination that the person is unable to care for self or others; additional facts must be articulated in order to reach that conclusion.

Audit Issues in Penal Code 647(f) Complaints 2003-2008*

Year	647(f) Complaints	Denied Drunk	Requested Test	Downtown	Full Report**	Call for Service
2003	5	0	0	2	5	2
2004	8	3	0	5	5	3
2005	7	3	0	3	5	3
2006	16	10	5	7	8	6
2007	22	10	5	17	3	4
2008	Closed 5 Open 5	6	1	5	3	1
Totals	68	32	11	39	29	19

Note: 15 complaints classified as inquiries from 2003—2008 included 647(f) arrest issues; they were not included in this evaluation because the files contained incomplete information.

** For the most part officers used a one-page form when the arrest was based only on Penal Code 647(f); if the arrest was made on additional grounds, such as Penal Code 148 "resisting arrest," the multi-page form was used.

Ethnicity of Penal Code 647(f) Complainants 2003-2008

Ethnicity of Complainants	Year						Total
	2003	2004	2005	2006	2007	2008	
African American	1			4	3	2	10
Asian/Pacific Islander			1	1	5	1	8
White	4	4	2	3	2	2	17
Filipino					1		1
Hispanic/Latino		2	4	8	9	1	24
Vietnamese					1		1
Other						2	2
Declined/Unknown		2			1	2	5
Total Complainants	5	8	7	16	22	10	68

Examples of Complaints with Issues of PC 647(f) Arrests

The IPA reviewed complaints and corresponding police reports that involved 647(f) arrests. In cases where standard language was used to describe the objective symptoms and/or indication that the individual was unable to care for him/herself or others, further review of the police reports suggested the complainant may have been arrested because they questioned the officer or were otherwise singled out.

In many cases the complainants stated they were not drinking at all, or were not drunk, some asked for a "breath test" to confirm their stories, yet no test was given and these individuals were arrested for PC 647(f). These cases often contain statements from the police report or the complainant implying the arrest was not based on the consumption of alcohol or objective symptoms that the complainant was unable to care for him/herself.

The following examples summarize allegations that raised 647(f) issues in complaints:

- 1) Police officers directed the complainant to move along, away from a disturbance up ahead. The complainant stated he was grabbed from behind and thrown to the ground after telling an officer he was "waiting for his boyfriend." A scuffle occurred and the complainant was arrested for PC 647(f). The only information in the police report about the contact with the complainant was the standard description⁶ of "alcohol intoxication." The officer went on to say "Based on my training and experience I determined that (the complainant) was under the influence of an alcoholic beverage in public. I took custody of the suspect for the violation and he was booked into jail for the offense." The complainant alleged unlawful arrest stating he was not intoxicated or unable to care for himself.
- 2) At 8 PM a 17-year-old young woman on a cell phone at Oakridge Mall was overheard by an officer saying "pigs are messing with people." The officer approached asking "What did you say? What did you call us?" She stated she began to walk away and the officer followed; she was thrown to the ground. The complainant stated she was arrested for resisting arrest and being drunk in public which she denied. She stated she requested a "breath test" and none was provided. The police report described that the complainant used a lot of profanity during the incident. The officer asked if she was part of the group that was being investigated; he reported that she ignored and continued to swear at him and walked away. He told her he had the right to determine whether she was intoxicated. He grabbed her arm to keep her from walking away, pushed her to the ground and she was arrested. Because she was a juvenile, she was later released to her father.
- 3) The complainant was leaving a Sharks game. He was crossing the street in front of two men having a verbal altercation with a passing driver. The complainant was not part of that group. An officer "grabbed" him and asked, "did you drink tonight?" – while calling out to the two other men to stop. The other two males ran off. The complainant told the officer he had one drink earlier. Without more explanation the officer arrested him for drunk in public. When the complainant asked why he was being arrested when it was the others who were involved in the incident, the officer responded, "You need to be more worried about not going to jail."

⁶ The standard description is red, watery or bloodshot eyes, an odor of alcohol on the arrestee's breath or person, speech impairment and gait impairment.

The complainant asked to take a test because he was not drunk and was told by the officer that they were not required to give a test. In his one page 647(f) report, the officer listed his observations as strong odor of alcohol, belligerent, stuttered, repeated speech, questions and poor balance. The officer arrested him because he "felt [the suspect] was unable to care for his safety."

- 4) The complainant was leaving a nightclub. Officers outside were telling the crowd to move along but a large crowd in front of him prevented his movement. The complainant said he observed officers arresting someone up ahead and the crowd was told they would be arrested if they did not leave the area. The complainant told the officer he couldn't move because of the crowd ahead of him. He was taken to the ground and arrested for being drunk in public. The police report states that the complainant was in a group of people that refused to disperse and ignored the officer's verbal commands. It reports that the complainant swore at an officer. A second officer stepped in and stated he observed the standard symptoms of alcohol influence: strong odor of alcohol, red, watery, glassy eyes, and swaying side to side. He was arrested for 647(f).

1994 IPA Analysis of Drunk in Public Arrests

The issue of arrests for drunk in public has been raised by the Office of the Independent Police Auditor in the past. In the IPA *1994 Third Quarterly Report*, IPA Teresa Guerrero-Daley stated that the issue revolved around the allegation that the police arrested people because of perceived bad attitudes under the auspices of drunk in public. The report noted that "because of the charging and court system, very few of these cases are ever reviewed by the court which makes this type of arrest vulnerable to officers who arrest a citizen without legal justification."⁷

In 1994, the IPA staff conducted a study of complaints which involved arrests for drunk in public. Staff reviewed 240 formal complaints received from 1991 to 1994, 23 of which indicated that the complainant had been charged with drunk in public. The report defined "attitude arrests" as those "arrests which are known to occur when a person is arrested because the officer does not like the arrestee's attitude. Attitude arrests are deemed to be of individuals who may be perceived as uncooperative."

The following observations were noted:

- In most cases,⁸ officers had been dispatched to the scene.
- Typical conduct that led to a so-called "attitude arrest" for drunk in public was where a person questioned and/or confronted the officers, not cooperating or obeying the officer's commands.
- In 10 of the 23 cases, the complainants were arrested for drunk in public after the officer responded to the complainant's home.

⁷ The 1994 Report noted that "[G]enerally, the person arrested is released after a period of time without the case ever going to the District Attorney for prosecution. Since there are no further proceedings, there is neither a means of appeal nor a routine review by the District Attorney to look into the propriety of the arrest. Even if the District Attorney decides to pursue the matter, the case is often dismissed in the interest of justice before there is a hearing to determine the validity of the arrest."

⁸ The report uses the word "most" but the report does not specify the actual number.

- In the police reports, there was “very little information” documenting substantiation of why the arrestees were deemed to be under the influence. Although the police reports sometimes included symptoms such as an odor of alcohol, slurred speech or bloodshot eyes which may be indicative that a person had been drinking, those symptoms are not conclusive evidence that a person is under the influence of alcohol.⁹
- Although the 23 complaints contained “some” information that the complainant had been drinking, only two cases had an explanation or documentation to substantiate why the officer concluded that the person may be so inebriated that he/she was unable to care for him/herself or others.

In sum, the audit could not determine whether officers were making drunk in public arrests based on attitude in the absence of the requisite elements of the crime. The 1994 audit did reveal that officers were failing to adequately document the required information in the police reports when making arrests for drunk in public.

In the *1994 Third Quarterly Report* the auditor made several recommendations:

- That SJPD provide additional training on the preparation of thorough and complete police reports; such reports should contain documentation of all of the required elements necessary to substantiate a drunk in public arrest.
- That the SJPD duty manual be reviewed and updated if necessary. The line supervisor should be responsible in ensuring that the police reports and/or booking sheets contain all the required information.
- That chemical testing should be an option for any person requesting one in a drunk in public arrest; the expense of such test would be incurred by the party requesting it. Without the benefit of a chemical test to prove that the person had consumed some alcohol, the only evidence is the officer’s subjective observations that the complainant was drunk.

The Chief of Police responded to the Auditor’s report¹⁰ and stated that the IPA’s recommendation regarding additional training would be forwarded to the SJPD Training Unit for review. In response to the recommendation regarding the availability of an optional chemical test, the police chief stated that the recommendation would be taken under review. He stated that the issue needed to be reviewed by the Research and Development Unit of the SJPD and by the City Attorney before implementation of such a program could be considered. “Legal, fiscal and practical considerations must be evaluated including the overall impact upon the patrol division who make the vast majority of the Drunk in Public arrests.”

Conclusion

Many of the 647(f) arrests contained in the IPA complaint files reviewed for this report show that the arrests may have been warranted. However, enough issues have been raised that it is imperative to ensure that these arrests are handled appropriately. The IPA is mindful that the

⁹ The report noted that these symptoms could be peculiar to that individual or they may be attributed to other reasons such as illness, injury or emotional condition.

¹⁰ October 27, 1997 memorandum from Police Chief Louis Cobarruviaz to Regina Williams, Acting City Manager.

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City needs to consider the costs to the community, to the City and to the county in evaluating this issue. In weighing those costs, consideration must be given to the consequences to the individual arrested, including emotional as well as short-term term and long-term costs. It is imperative that the Council take affirmative steps to assure the community that its police officers are applying this law in a fair and equitable manner.