

January, 2008
Volume 2, Issue 1

Police Legal News

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Police Legal News is a free monthly newsletter designed to provide police officials with the latest news and information regarding court and administrative agency decisions affecting the Massachusetts law enforcement community.

Topic areas will include: summaries of SJC & Appeals Court decisions, search & seizure, motor vehicle, and criminal law, labor relations law & highlights of recent decisions of the Mass. Labor Relations Commission, Civil Service Commission cases, police civil liability, etc...

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"Sergeant / Lieutenant for a Day" The Civil Service Commission Upholds Worcester PD's 1 Day Promotions

In the recent case of [Laliberte, et al. v. Worcester PD](#), the City promoted several individuals to the positions of sergeant and lieutenant for one day for the purpose of preserving their ability to be (re) promoted when the City's budget allowed for their vacancies to be filled. The City had originally planned to promote the individuals, but was unable to do so because of unforeseen cuts in local aid by the State in 2003. The one-day promotions were

made so that the appellants could be placed on re-employment lists for the promotional positions. In approving the City's actions, the Civil Service Commission ruled as follows: Considering the special financial circumstances that existed at the time the City took the disputed actions in this case, the City's actions were permissible. *See Silvia v. Dept. of Correction and DPA*, 9 MCSR 2, 5 (1996) (Commission approves one day appointments in special circumstances.)

The City took the action because, but for an unanticipated and unusual fiscal crisis, the promotions would have been permanent from the outset. The demoted officers were reinstated to sergeant permanently when funding became available, rather than filling the positions from the then current list. HRD ultimately reviewed and approved the City's actions after the City paid the affected Officers for the one-day difference in salary."

(continued on page 2)

“Sergeant / Lieutenant for a Day” The Civil Service Commission Upholds Worcester PD’s 1 day Promotions



[Chapter 31](#) does not appear to preclude an Appointing Authority from promoting an employee for a day and then demoting the employee and putting him on a reinstatement list under the circumstances involved in this case. Similarly, there does not appear to be a bar precluding an employee from accepting that demotion voluntarily.

While not enthusiastic about one-day appointments, the Commission has found them consistent with basic merit principles in certain circumstances.

The City took the disputed action to prevent four officers, who had earned the first four spots on the certification list for promotion to sergeant, from losing out because of an unusual local and statewide fiscal crisis, and took these actions only after HRD determined that they were consistent with the law. The four officers who received one day appointments did not get special treatment as the City did the same for others whose budgeted appointment to a civil service position could not go through because of the unanticipated and unusual local and statewide fiscal crisis. Two sergeants received one day appointments to lieutenant and were subsequently reinstated when funding became available. There was no evidence submitted of favoritism.

Additionally, Appellants’ reliance on Personnel Administration Rule (“PAR.”) 14 (3)” in requesting relief is not persuasive. This section reads in pertinent part:

“...no permanent employee shall be regarded as promoted within the requirements of these rules unless he is actually employed in the position to which he is promoted within thirty days from the date of receipt of notice by the administrator of promotion.”

HRD has interpreted the “actually employed” phrase to require nothing more than that the promoted officer be paid for a day at the rate for the position. PAR 14(3) states that the individual need only be “actually employed in the position.” Under this interpretation, the four patrol officers were “actually employed” as sergeants on March 20, 2003 as the City subsequently paid them for the day as sergeants.

Based on the above, there was reasonable justification for the City’s actions with regard to the one-day appointments

[Download the full text of the Decision.](#)

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New Initial Hire Medical Standards

As a result of a suit brought by Attorneys Timothy M. Burke & Brian E. Simoneau, on behalf of a police officer candidate who used an insulin pump, HRD has revised their [initial hire medical standards](#). Under the [new standards](#), the use of an insulin pump is no longer an automatic disqualification.



“The twenty-four hour shifts at issue are within the scope of arbitration under the act: shift schedules structure the hours of employment and therefore constitute a mandatory subject of bargaining under G. L. c. 150E, § 6.”

New Initial Hire Medical Standards



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From the Courts

Decisions of Interest to Massachusetts Police Officers



“The Joint Labor Management Committee (JLMC) consists of 15 members representing both labor and management interests. The committee is empowered to order police and fire fighter collective bargaining disputes to binding arbitration to avoid job actions in these critical public safety functions. There are limits, however, to the committee’s powers.”

St. 1973, c. 1078, § 4A(3)(a), as amended through St. 1987, c. 589, § 1, which delineates such limits, provides as follows:

“[T]he scope of arbitration in police matters shall be limited to wages, hours, and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign, and transfer employees; and . . . the scope of arbitration in firefighter matters shall not include the right to appoint and promote employees. Assignments shall not be within the scope of arbitration; provided, however, that the subject matters of initial station assignment upon appointment or promotion shall be within the scope of arbitration. . . .

Notwithstanding any other provisions of this act to the contrary, no municipal employer shall be required to negotiate over subjects of minimum manning of shift coverage, with an employee organization representing

municipal police officers and firefighters. Nothing in this section shall be construed to include within the scope of arbitration any matters not otherwise subject to collective bargaining under the provisions of [\[G. L. c. 150E\]](#).”

As a result of a contract dispute between the Town of Bellingham and IAFF Local 2071, the JLMC imposed a binding arbitration award which included the imposition of a controversial twenty-four hour shift schedule.

The Town disputed the validity of the award on the basis that the setting of shift schedules is a non-arbitrable issue as it is a “core management right.”

Superior Court Justice Peter Agnes affirmed the JLMC’s ruling and the Town appealed to the Appeals Court.

By a 3-2 decision, the Appeals Court affirmed the Superior Court judgment. In so doing, the Court ruled that “the twenty-four hour shifts at issue are within the scope of arbitration under the act: shift schedules structure the hours of employment and therefore constitute a mandatory subject of bargaining under [G. L. c. 150E, § 6](#). Moreover, as the twenty-four hour shifts proposed here do not determine who can be assigned to particular shifts or particular duties on shifts, they do not come within the act’s exclusion of “assignments” from the scope of arbitration. Finally, as the record before us establishes that twenty-four hour shifts are common in comparable fire departments, and the JLMC has consistently allowed the issue of twenty-four hour shifts to be arbitrated, it was reasonable for the JLMC to conclude that the decision to move to twenty-four hour shifts was not a public safety policy decision that must remain within management’s sole prerogative.

The SJC reviewed the case and affirmed the Appeals Court’s decision for the same reasons articulated in the lower court’s opinion.

View the Full text of the cases:

[Superior Court Decision](#)
(Agnes, J.)

[Appeals Court Decision](#)
(Regarding Judicial Review Procedure)

[Appeals Court Decision](#)
(Upholding the Superior Court Decision)

[SJC Decision](#)
(Upholding the Appeals Court Decision)

UPCOMING CPS SEMINARS

- **Constitutional & Criminal Law for Dispatchers & Call takers in Massachusetts** (Jan. 3, 2008)
- **Authority & Management Under G.L. c. 41 § 111F – Sick Leave issues** (Jan. 7, 2008)
- **2008 Police Polygraph** (Jan 8, 2008)
- **2 Day Advanced Prosecutor Clinic 2008** (Jan 10-11, 2008)
- **Annual Detective Clinic 2008** (February 6 & 7 and 13 & 14, 2008)

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[From the Legislature & Courts...](#)

Items of Interest to Massachusetts Law Enforcement Officers

[Chapter 145 of the Acts of 2007](#), which went into effect on November 15, 2007, merged the Labor Relations Commission, the Board of Conciliation and Arbitration and the Joint Labor Management Committee into one agency, known as the Division of Labor Relations (DLR).

According to Governor Patrick, “[t]his legislation calls for measures to increase accountability, efficiency and transparency within our labor-related agencies so that they perform as an effective 21st century business, not as a bureaucracy.”

According to John Cochran, a longtime authority on Massachusetts Labor Law, “[t]he proposed legislation offers a logical, thoughtful, well-crafted alternative to the inefficient system that is currently in place. Instead of three separate agencies that each deal with only aspect of public sector labor relations disputes, the legislation would create a single, comprehensive agency staffed by labor relations professionals who can perform more than a single function within the agency.”

He added, “In my view, the proposal, which relies on the structures and procedures of some of the most efficient and effective state labor relations agencies around the country, will provide a cost-effective way for the Commonwealth to foster a positive labor relations climate in Massachusetts by providing a unified agency that can better assist public employers and public employee unions to resolve disputes in a timely manner.”

[Download the DLR Newsletter, which further explains the role & structure of the new agency.](#)

POLICE SUPERVISORS “EXEMPT” FROM FLSA OVERTIME PROVISIONS: OBRIEN V. AGAWAM, 350 F.3D 279.



A group of Current and former Agawam Police Officers alleged that the Town, violated Fair Labor Standards Act (FLSA) by omitting certain wage augments from calculation of officers' overtime rate. It was eventually decided that the Town had, in fact, violated the FLSA's overtime provision by underpaying officers. However, the Court eventually decided that the Agawam Police Department's supervisory officers are employed “in a bona fide executive ... capacity,” [§ 213\(a\)\(1\)](#), and consequently are exempt from the overtime protections of the FLSA.

[Section 213\(a\)\(1\)](#) of the FLSA exempts from the overtime rules any employee who works in “a bona fide executive, administrative, or professional capacity.” In order to be considered “exempt,” the employee must be compensated for his services on a “salary basis.” The burden is on the employer to establish that the supervisory officers satisfy this test. An employee is paid on a salary basis “if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is *not subject to reduction because of variations in the quality or quantity of the work performed.*” [29 C.F.R. § 541.118](#)

The regulation also limits the executive exemption to employees with certain supervisory or managerial duties.

[MORE UPCOMING CPS SEMINARS](#)

- **Constitutional & Criminal Law for Dispatchers & Call takers in Massachusetts** (Jan. 3, 2008)
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- **2008 Police Polygraph** (Jan 8, 2008)
- **2 Day Advanced Prosecutor Clinic 2008** (Jan 10-11, 2008)
- **2 Day Advanced Detective Clinic 2008** (Jan 15-16, 2008)
- **Internet Sting Ops. Cracking Down on Pedophilia in Massachusetts** (Feb. 5, 2008)
- **Annual Detective Clinic 2008** (February 6 & 7 and 13 & 14, 2008)
- **2008 Firearms Law Updates** (Feb. 28, 2008)
- **2008 Massachusetts Educators 2 Day Clinic on School Law & Discipline** (March 12, 2008)
- **2008 Imposing Discipline in Police Agencies** (March 20, 2008)
- **Advanced Domestic Violence** (April 3, 2008)
- **Advanced Domestic Violence** (April 3, 2008)
- **Advanced 94C: Detective & Undercover Ops.** (April 29, 2008)

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Step out of the Car Please: Motor Vehicle Exit Orders in Massachusetts

Excerpts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 3)

Motor Vehicle Exit Orders (Continued from the [December issue of Police Legal News](#))

MVs—Articulable Grounds for Valid Exit Order: Manifestations of Nervousness Not Enough

In **Commonwealth v. Gonsalves**, 46 Mass Ct. App 186 (1999), a State Trooper observed during a motor vehicle stop that a passenger's hands were "trembling and moving from his lap to the seat and back to his lap." The court stated that these were manifestations of nervousness. Nothing was seen in those hands, so the trooper had nervousness only to go on. No gesture or conduct suggested that the defendant was carrying a weapon or had one nearby. A general statement that the suspect appeared to be "nervous" or even "very nervous" falls short of a specific articulable fact or reason for an exit order. **Commonwealth v. Williams**, 46 Mass. App. Ct. 181 (1999). Additionally, in **Commonwealth v. Williams**, 46 Mass. App. Ct. 181 (1999), the Court that general descriptions of "acting suspiciously," "moving around," and "appearing extremely nervous," all fall short of the "specific and articulable facts" required to demonstrate reasonableness.

FIDGETING NOT ENOUGH—NEED SPECIFICITY: In **Commonwealth v. Cardoso**, 46 Mass. App. Ct. 901 (1998), where a State Trooper stopped a motor vehicle for lack of an inspection sticker, the front seat passenger was "fidgeting quite a bit in his seat." His "head was moving side to side, his shoulders were moving, his feet were moving, he kept his hands tight to his body, and he wouldn't make eye contact with the trooper." These movements made the trooper fear for his safety because he "felt as if [the defendant] was hiding something." The defendant was then ordered from the vehicle. A frisk subsequently revealed the presence of a handgun from the defendant's waistband. The motion judge could reasonably conclude that there was not "a legally sufficient basis.... in terms of reasonable suspicion grounded in specific and articulable facts" to support the search of the defendant. The trooper may have been genuinely apprehensive, "[b]ut there was no legal basis for that apprehension to result in a search."

MVs—Where JTI Concerned a Criminal Matter—Permissible *After* License request

In **Commonwealth v. Watson**, 430 Mass. 725 (2000), police effected a stop of a motor vehicle where they had reasonable suspicion that the operator and his passenger were involved in drug trafficking. Police had also witnessed the suspects place suitcases in the backseat of the vehicle prior to initially driving off. Subsequent to the stop, the investigating officer initially asked the driver for his license and registration. The operator was then asked to exit and step to the rear of the vehicle. The officer then asked the operator about the suitcases in the rear seat. He stated that they belonged to the passenger. The passenger was then ordered out from the vehicle and asked about the suitcases. He denied ownership of them. One of the arguments made by the defendants was that once the police had obtained a valid license and registration from the operator, there was no basis for further investigation, and that their further detention was a seizure requiring probable cause.

NOTE: The Court stated that the purpose of the stop was to conduct a threshold inquiry about the suitcases. The inquiry did not end when the operator produced his license and registration. It was proper to order the operator out of the automobile before conducting the threshold inquiry about the suitcases. When he said that the suitcases belonged to the passenger, it was reasonable to order him out of the vehicle and ask him about the suitcases.

Where Safety Concern Arises During the JTI—Permissible to Order Occupants Out

In **Commonwealth v. Robles**, 48 Mass. App. Ct. 490 (2000), police observed a vehicle in which the defendant was a passenger fail to stop at a stop sign. As the officer approached the vehicle, he observed that there were four males in the vehicle, two in the front and two in the back. The officer requested the operator's license and registration. Upon receiving these items, the officer observed that the passenger in the left rear seat had his hands hidden from view and that the other passengers were moving about within the vehicle. Conscious that the location where the vehicle had stopped was a high crime area that had been the scene of several shootings, the officer instructed all of the occupants to show their hands, while he checked the driver's license and registration. A second officer arrived at the scene and recognized the vehicle as one he had previously seen in a location where police conducted a search of a number of persons on an unrelated incident. This officer had seen the vehicle drive away with its lights off, but was unable to follow it because of another dispatch received. As he approached the passenger side of the vehicle, the second officer noticed the front seat passenger (the defendant) appeared nervous and was leaning forward, reaching between his legs to the floor. Upon observing this activity the second officer told the defendant to keep his hands on the dashboard where they could be seen. Meanwhile a crowd began to gather around the car. The occupants of the car spoke to members of the crowd in a language which the officers did not understand. The officers then ordered all of the occupants out of the motor vehicle so they could be pat frisked. An empty holster was discovered on the defendant. Police subsequently discovered a semiautomatic firearm in the front passenger area.

EXIT ORDER PERMISSIBLE: The police had a reasonable basis to justify the exit order. The officers pointed to specific and articulable facts which demonstrated the reasonableness of their actions in ordering the defendant out of the vehicle. The following factors permitted the exit order:

- a) the police were aware that there had been several shootings in the area
- b) the defendant failed to obey the officer's instructions to keep his hands in sight
- c) the occupants of the vehicle were speaking in a language that the officers did not understand
- d) gathering of a crowd.

[...to be continued in the February, 2008 issue of Police Legal News]

Annual Detective Clinic

2008

presented by

*Commonwealth Police Service, Inc.
and the Law Office of Attorney Patrick Michael Rogers*

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The 14th AMD Due Process Clause	Skirting Around the 4th AMD	Plain view & plain feel
Seizure law under article 14	The inevitable discovery rule	Ordering arrests
Definition of "show of authority"	The separate & independent rule of p/c	The "un-arrest"
P/C to arrest & search based on CI	P/C to search & seize based on CI	Just what is probable cause?
Searching MV on less than p/c	The attenuation doctrine	School locker searches
Frisking containers possessed	Dissipation of the taint rule	Breathalyzer tests of students
What is possession in Massachusetts?	Physical & testimonial evidence	SWs as arrest warrants
Can you possess items in another city?	Legal use of force in obtaining evid.	
2008 updates on electronic surveillance		
Warrantless arrests at the threshold		

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COST: \$295.00 This fee will include all materials.

TIMES: Registration 8:00 AM, Seminar runs from 8:30 AM to 3:30 PM daily

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[Attorney Patrick M. Rogers](#), has lectured to thousands of police officers on various legal topics. He has over twenty years of police law enforcement experience and has authored a number of textbooks that are used state-wide by thousands of police officers everyday.

[Attorney Brian E. Simoneau](#) is an experienced police labor law practitioner with particular expertise in Massachusetts Civil Service matters.

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Required Management Texts

- Supervision of Police Personnel: Iannone, 6th ed. 2001
- Criminal Investigation—9th ed. 2006 by Swanson
- Police Administration: Swanson; 7th ed.; 2008
- Community Policing—Contemporary Perspectives, 4th ed. Kappeler, 2005
- Proactive Police Management—7th ed. 2007 by Thibault (the Proactive Text is ONLY for Chief & Deputy Chief)

Required Criminal Law & Criminal Procedure Documents

- Police Desk Reference: Criminal Investigation Procedures 2007 (MPI)
- Police Desk Reference to the Massachusetts Criminal Law 2007 (MPI)

NOTE: It is strongly suggested that each official attending have these pertinent textbooks. They will be used during each class. Every chapter will be dissected and broken down corresponding to rank by Attorney Rogers. In place of the firearm text, each official will receive all the information required to answer ANY question concerning firearms and dangerous weapons.

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Day 2 Tuesday, February 12—8:00 a.m. until 3:00 p.m.
Day 3 Sunday, February 24—8:00 a.m. until noon
Day 4 Monday, February 25—8:00 a.m. until 3:00p.m.
Day 5 Sunday, March 2—8:00 a.m. until noon

Day 6 Sunday, March 9—8:00 a.m. until noon
Day 7 Sunday, March 16—8:00 a.m. until noon
Day 8 Sunday, March 23—8:00 a.m. until noon
Day 9 Sunday, March 30—8:00 a.m. until noon
Day 10 Sunday, April 6—8:00 a.m. until noon

Day 11 Sunday, April 13—8:00 a.m. until noon
Day 12 Sunday, April 20—8:00 a.m. until noon
Day 13 Sunday, April 27—8:00 a.m. until noon
Day 14 Sunday, May 3—8:00 a.m. until noon
Day 15 Sunday, May 10—8:00 a.m. until noon

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