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Police Legal News

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- 2006 Internal Affairs
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Published by:

Commonwealth Police Service, Inc.
[Attorney Patrick M. Rogers](#)
Post Office Box 58
Assonet, MA 02702

Phone: 508-644-2116
Fax: 508-644-2670

www.commonwealthpolice.net

[Attorney Brian E. Simoneau](#)
161 Worcester Road, Suite 200
Framingham, MA 01701

Phone: 508-881-1119
Fax: 508-302-0212

www.policelaborlaw.com

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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Town of Falmouth v. Civil Service Commission: The Commission's Power to Modify Punishments

The SJC recently affirmed the Appeals Court's decision that the Civil Service Commission lacked the authority to reduce a 180 day suspension to 60 days. In so ruling, the SJC noted that, although the Civil Service Commission has the power to modify penalties, there must be a sufficient basis for the modification.

In upholding the original suspension, the Court found as follows: "In these circumstances, where (1) there were no findings of

political considerations, other improper bias, or inequitable treatment; (2) the town's decision involved a discretionary disciplinary decision regarding the enforcement of important standards of conduct; and (3) the charges for which discipline had been imposed were still satisfied by the remainder of the inappropriate conduct, the different subsidiary fact findings did not justify modification of discipline by the commission." [Falmouth v.](#)

[Civil Serv. Comm'n, 447 Mass. 814, 825-26, quoting Falmouth, 61 Mass. App. Ct. 796, 802-803 \(2004\).](#)

The Court also affirmed the Commission's rule that disciplinary appeals must be postmarked within ten days after receiving the written notice of the appointing authority's decision. The Town attempted, unsuccessfully, to convince the court that the Commission must have actually received the appeal within 10 days.



Click here to download the [Northampton PD Identification Protocol](#), which is based upon NIJ Guidelines.

Federal Law Enforcement Training Center (FLETC) Legal Division Podcasts.

[Click here to Download](#)

The files are Mp3 format, easily downloaded, and can be played on your office or home desktop computer, portable Mp3 player, or laptop.

These are short briefs of basic legal concepts and new and important cases of interest to the criminal investigator, police officer & first responder.

Feature Story: One-on-One Identifications

According to the [Innocence Project](#), Mistaken eyewitness identifications played a role in the vast majority of the postconviction DNA exonerations in the United States. [Studies of eyewitness identification](#) over the past three decades have consistently shown the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures.

Because they are "inherently suggestive," one-on-one identifications (so-called "show-ups") are generally disfavored. However, they are generally permissible when conducted promptly after the crime or when there is another valid reason for conducting a show-up instead of a lineup or photographic array.

In the recent case of [Commonwealth v. Martinez, 67 Mass. App. Ct. 788 \(2006\)](#), the Appeals Court held that the practice of a detective showing a single photograph of the defendant to an undercover officer, who had just purchased drugs from the defendant, was not unduly suggestive, where the showing of the photo was done in effort to protect the integrity of the investigation and allow the police to promptly identify the correct person as the

seller.

"Whether an identification procedure is 'unnecessarily' or 'impermissibly' suggestive ... involves inquiry whether a good reason exists for the police to use a one-on-one identification procedure...and whether the police avoided any "special elements of unfairness, indicating a desire on the part of the police to 'stack the deck' against the defendant."

"Relevant to the good reason examination are [1] the nature of the crime involved and corresponding concerns for public safety; [2] the need for efficient police investigation in the immediate aftermath of a crime; and [3] the usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track."

The [Martinez](#) photograph was taken immediately after the crime, in an effort to capture the suspect's image while simultaneously preserving the anonymity of the undercover officer. Its use in the above-described manner was permissible.

In [Commonwealth v. Martin, 447 Mass. 274 \(2006\)](#), the SJC recently reversed the Appeals Court's decision that a

show-up, which was conducted four days after an attempted rape, was impermissibly suggestive. In reversing the Appeals Court's decision, the SJC held that even though four days had elapsed between the crime and the identification, the victim had been driving around with the police each day and was continuously asked to look at persons fitting the suspect's description. Since she viewed so many people over the four day period, it was the equivalent of a continuous non-suggestive lineup.

Every police department should have a policy covering Eyewitness Identifications and use forms to document identifications.

Please check with your local District Attorney's Office to see if they have particular form and/or policies approved for use in your county.



Cell Phone Left at B&E Scene: No Reasonable Expectation of Privacy



[Commonwealth v. Cahoon, Norfolk Superior Court, 20 Mass.L.Rptr. 626, 2006 WL 1084101](#)

Detective Sergeant Richard Keller of the [Weymouth Police Department](#) found a cell phone left at the scene of a house break. After replacing the phone's dead battery with his own, he found an entry labeled "Mom" in the phone's memory. He discovered that the number was listed to an apartment was some 20-30 from the scene of the B&E. Officers eventually located and arrested

the phone's owner, who claimed that Keller's use of the cell phone amounted to an unjustified warrantless search.

Whether a search occurred depends on "[w]hether the government's activity intruded on the defendant's reasonable expectation of privacy." For a search to have taken place, the defendant must have had a subjective expectation of privacy, and that expectation must have been one that society recognizes as objectively reasonable." Whether a defendant has a reasonable expectation of privacy depends on all of the circumstances, including the nature of the place where the government activity occurs, and whether the defendant owned or controlled access to that place. Also pertinent is whether the defendant had a possessory or ownership in the item taken or inspected, and whether the defendant has taken normal precautions to protect his privacy. (citations omitted).

Although Cahoon probably did not intend to discard the phone at the time he dropped it, and may have been unaware that he had done so, he voluntarily brought it to a place where he had no right to be, failed to take steps to prevent its loss, fled the scene without it, and did not promptly reclaim it. He thus abandoned any reasonable expectation of privacy in it, and the police examination of it did not constitute a search in the constitutional sense. Having identified as Cahoon the owner of the cell phone, police had at the very least reasonable suspicion, if not probable cause, to believe that he had committed the B&E.

The Appeals Court recently decided several important search warrant cases. Visit the 'search warrant' section of www.policelegal.com to view the decisions.

G. L. c. 90, § 13 – Impeded Operation

In the case of [Commonwealth v. Brazeau](#), the Appeals Court answered the question of whether two small wooden hearts, each about one and one-half inches wide and one inch tall, and a plastic diamond about three-quarters inch high and one-half inch wide which were hanging together from a narrow piece of string or fishing line from Brazeau's rear-view mirror constituted impeded operation.

[North Brookfield](#) police Officer Ryan Daly stopped Brazeau when observed the items hanging from her rear-view mirror. He later determined that she was

OUI and arrested her.

Brazeau challenged the stop on the grounds that the items hanging from the mirror did not constitute impeded operation. Judge Abdella agreed with the Commonwealth and ruled against Brazeau. However, the Appeals Court reversed the decision and declared that "The mere existence of two or three small items hanging from a rearview mirror does not suffice, we think, to constitute a violation of [G. L. c. 90, § 13](#), or warrant police investigation." The Appeals Court further noted, "we take judicial notice of the fact that objects such as air

fresheners, graduation tassels, and religious medals commonly are hung from the rearview mirrors of motor vehicles driven in the Commonwealth. We doubt that the Legislature intended this ordinary practice to be grounds, without more, for issuing a citation or for justifying a stop by police."

The Junior Operator's License (JOL) Statute has been significantly revised. [Click here to download the revised statute & new enforcement / penalties chart.](#)



"The mere existence of two or three small items hanging from a rearview mirror does not suffice, we think, to constitute a violation of [G. L. c. 90, § 13](#), or warrant police investigation."

Attorney Brian E. Simoneau specializes in Civil Service Appeals.

Visit his website at <http://www.policelaborlaw.com>.

Just cause means “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.”

Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983).
Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997).



Featured Civil Service Case: Rivers v. Williamstown

In the recent case of [Rivers v. Town of Williamstown](#), D-03-395, December 7, 2006 (Commissioner Taylor), the Civil Service Commission upheld the Town’s decision to discharge a police officer for the offenses of Conduct Unbecoming a Police Officer, Professional Image and Off Duty Use of Alcohol.

Officer Rivers had two prior alcohol related disciplinary matters on his record. He received a 5-uppaid suspension for becoming “extremely intoxicated” and being involved in verbal altercations at a private Fire Department function in Clarksburg, MA. Also, he was involved in an off-duty verbal altercation at a local bar, for which his probation was extended and he was ordered to undergo a fitness for duty examination.

The incident which resulted in his termination involved a ten minute “scuffle” at a local bar between Officer Rivers and another individual. Rivers, who was intoxicated, knocked the hat off the other individual’s head and a shoving match ensued wherein Rivers shoved the other person against a wall.

In upholding the officer’s discharge, the

Commission noted that the question to be decided was whether the Town of Williamstown had just cause to terminate Rivers.

Just cause means “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983).

Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). “For a police officer, a lack of public confidence in the officer and the department he serves can create this impairment. A police officer, by accepting appointment as such, implicitly agrees to not engage in conduct ‘which calls into question their ability and fitness to perform their original responsibilities.’” *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass. App. Ct. 364, 371 (1986). *Broderick v. Police Commissioner of Boston*, 368 Mass. 33, 39 (1975). “This agreement extends beyond the scope of conduct on duty to any matter that could call an officer’s fitness into question.” *Broderick* at 39.

The Commission was largely unsympathetic to the officer’s alcohol problems and noted, “[i]t is not the job of the Civil

Service Commission to assess if the Appellant has a problem with alcohol, because notwithstanding alcoholism, alcohol abuse, or alcohol use, an individual is obliged to conduct him- or herself in an appropriate manner that exhibits a clear understanding of the difference between right and wrong.” *McGuire v. Newton Police Department*, D-4745.

In affirming the termination, the Commission concluded that, based on the circumstances, the Town had “little choice” in the matter.

OFFICERS ENTITLED TO INTEREST ON DELAYED G.L. c 41 § 111F PAYMENTS

In the recent case of [Todino v. Town of Welfleet](#), the SJC declared that a city or town must pay interest on amounts due the employee where [G.L. c. 41 § 111F](#) (IOD) payments were delayed. In so ruling, the SJC recognized that “the purpose of [§ 111F](#) is to prevent any deprivation of pay, either in time or value, during the period of an officer’s incapacity.

“Direct Dealing,” a Violation of G.L. c. 150E

You will note that the parties to the collective bargaining relationship are (1) the employer and (2) the union. Where does this leave the employee? Answer: the union bargains on the employee's behalf.

The duty to bargain collectively with the employee's exclusive collective bargaining representative prohibits the employer from dealing directly with employees in the bargaining unit with regard to certain matters. Specifically, an employer may not deal directly with employees in a bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. An employer that bypasses a union to deal directly with individual employees violates the duty to bargain in good faith. An employer's direct dealing with employees in the bargaining unit violates the employee organization's statutory right to speak exclusively for the employees who have selected it to serve as their sole representative. Direct dealing also undermines the employees' belief that the union actually possesses the power of exclusive representation to which the statute entitles it. Furthermore, it creates the possibility of conflict between individually negotiated gains and the terms of the

contract. Basically, direct dealing undermines the effectiveness of the union's effectiveness as exclusive bargaining representative.

"The practice and philosophy of collective bargaining looks with suspicion on such individual advantages ... advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole."

For the above-stated reasons, an employer cannot bypass the union and deal directly with employees dealing directly with employees regarding matters which are properly the subject of negotiations with the union. The practice of an employer surveying bargaining unit members during contract negotiations constitutes direct dealing. To sustain a "direct dealing" charge, the union is not required to prove that an agreement was reached between the employer and the union member. The [G.L. c. 150E Sec. 10\(b\)\(1\) & \(2\)](#) prohibit not only the effects of direct dealing,

but the conduct itself. Such conduct normally results in interference, restraint, or coercion regardless of whether an agreement is reached.

This article was derived from a variety of Massachusetts Labor Relations Commission cases on direct dealing.

CLICK ON ANY OF THE BLUE UNDERLINED LINKS IN THIS DOCUMENT FOR MORE INFORMATION.

“The duty to bargain collectively with the employee's exclusive collective bargaining representative prohibits the employer from dealing directly with employees in the bargaining unit with regard to certain matters.

NEW INFORMATION REQUIRED FOR CRIMINAL COMPLAINT APPLICATIONS

The [Massachusetts Trial Court](#) will be implementing a new software package, on a statewide basis, for the generation of criminal complaints.

In addition to the normal descriptors such as: gender, race, height, weight, hair, eyes, criminal complaint applications must have as much of the following information about the defendant that may be available:

- Probation Central File (PCF) Number
- State Identification Number (SID)
- Social Security Number (SSN)
- License Number & State of Issue
- Defendant's Full Name
- Defendant's Date of Birth (DOB)
- Defendant's Address
- Defendant's Alias(es)
- Offense Based Tracking Number (OBTN)

You will note that much of this information is already included on the application for complaint. **This information is necessary in order to ensure that every defendant is properly identified and the case information is tied into the criminal history files of the correct defendant.**

Police Legal Defense Fund

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As you may know, I began my legal career in 1976 with the Suffolk County District Attorneys' Office. I tried over 80 jury trials there, including 25 homicide cases, with a conviction rate of over 90 percent. In 1985, I opened my private law practice, specializing in the area of police liability. During the past 21 years, I have been General Counsel to the Massachusetts State Police union. My office also represents clients in the areas of medical malpractice, personal injury claims, real estate, divorce and criminal defense.

My office is comprised of talented and experienced lawyers who specialize in the issues that confront law enforcement officers every day. As police officers, you face the potential for litigation that no other occupation is confronted with. There are very few other lawyers in the state that have the breadth of knowledge and experience in representing police that I possess. From the defense of civil rights cases to 24-hour, on call response to the scene of a critical incident, my office is prepared to meet your most urgent needs.

I am proud to say that my office has represented over 500 police officers in every form of civil rights litigation, and **not one officer has ever had to pay any judgment from his or her own personal funds.** I have also personally responded to over 75 shooting incidents, frequently in the middle of the night. It is my experience that police officers require immediate response in these critical moments.

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- **24-hour** on-call service with **personal response to the scene** of any critical incident while you are on duty.
- Defense in any civil rights suit brought against you, regardless of whether you are eligible for indemnification.
- Representation of you at any show cause hearing, judicial inquests, or Grand Jury proceedings resulting from your actions while on duty.
- Preparation for and appearance with you at any Internal Affairs interview.
- Representation at any disciplinary hearing and subsequent appeals to the Civil Service Commission.
- Representation at any injured on duty, disability, or retirement related hearings.
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These legal services meet or exceed those currently offered by many other labor organizations. They do not require union approval and are available to you upon the signing of an attorney-client fee agreement and payment of a flat fee of \$400 per year. **Note:** You must be a client in good standing **prior** to the occurrence of any event before representation is provided to you.

[Click here to download a Legal Defense Fund Enrollment Form.](#)

Timothy M. Burke, Esq.

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COMMONWEALTH POLICE SERVICE, INC.

Post Office Box 58
Assonet, MA 02702

PHONE:
(508) 644-2116

FAX:
(708) 555-0102

E-MAIL:
ROGERS.PATRICK@VERIZON.NET

WEBSITE:
COMMONWEALTHPOLICE.NET

ATTORNEY BRIAN E. SIMONEAU

161 Worcester Road
Framingham, MA 01701

PHONE:
(508) 881-1119

FAX:
(508) 302-0212

E-MAIL:
BRIAN@POLICELABORLAW.COM

WEBSITE:
WWW.POLICELABORLAW.COM

COURSE TITLE	Flyer	DATES	LOCATION
Search Warrant & Affidavit Writing		March 7, 2007	Leicester PD Training Center
Police Prosecutor 2007		March 9, 2007	Bridgewater State College <i>Heritage Room</i>
Internal Affairs Unit 2007 (2 Day Seminar)		Thursday & Friday March 22 and 23, 2007.	Natick Police Department Training Center
Updated CORI & Public Records Law For 2007		March 26, 2007	Natick Police Department Training Center
Domestic Violence in Massachusetts		June 5 & 6, 2007	Taunton Holiday Inn
Arson Investigation Clinic 2007		April 6, 2007	Natick Police Department Training Center
2007 Massachusetts School Law Clinic:		April 11, 2007	Leicester Police Training Center

UPCOMING CPS PROMOTIONAL SEMINARS

[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.

- [The 2007 Roundtable Study Group for Sergeant, Lieutenant & Captain](#)
Starts Sunday June 3, 2007 at the Medford Police Training Center
- [Assessment Centers - Presentation designed especially for police supervisory/superior officer promotion](#)
June 8, 2007 at the Medford Police Training Center
- [5 Day Summer Jam for 2007](#)
July 16,17,18, 19, & 20 2007 at the Natick Police Training Center

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