

March, 2008
Volume 2, Issue 3

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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[Lake v. Town of Dartmouth](#): Demotion from Sergeant to Patrolman for Tardiness Upheld

In the case of [Lake v. Town of Dartmouth](#), the Civil Service Commission upheld a six month demotion from the position of Sergeant to the position of Patrolman.

Sgt. Lake had been employed by the Town for approximately 22.5 years at the time of the demotion. In Sgt. Lake's work history, there were six examples of tardiness or failure to report for duty, for which he had been reprimanded and suspended. There were also other incidents

of tardiness and failure to report to duty, which apparently did not result in discipline.

Dartmouth Police Chief Mark Pacheco recommended to the Board of Selectmen that Sgt. Lake be demoted for 90 days. The Board of Selectmen agreed with the Chief's recommendation and voted to demote Sgt. Lake from Sergeant to Patrolman for a period of 90 days, and to reduce his compensation during that period by 15 percent.

Chief Pacheco testified that

he felt a 5 day suspension would be in keeping with the progression of Lake's previous discipline but that he did not want him to be "inconvenienced financially" nor adversely impacted in terms of discipline. The Chief stated that he would place the Appellant on the 4 P.M. to 12 Midnight shift so that the 3% salary differential for working that shift would mitigate the financial impact of the demotion. The Civil Service Commission Upheld the Demotion.

City of Marlborough: Direct Dealing, Surface Bargaining, & Refusal to Provide Information

In response to a substantial budgetary shortfall, the City of Marlborough reduced its Police Department's budget by \$300,000.00. This resulted in an elimination of certain police services and the layoff of several officers.

In response to the impending layoffs the parties commenced bargaining and the union filed a request for information.

The Union claimed that the City engaged in surface bargaining over the decision not to fund 6 patrol officer positions and the impact of that decision. Specifically, the Union claimed that the statement: "there's nothing you can propose that will avert these layoffs" demonstrates that the City never deviated from its initial layoff proposal. As further evidence of the City's unlawful intransigence, the Union cites the City's failure to offer alternative cost-saving counterproposals and the City's failure to address the Union's efforts to retain at least one position.

The duty to bargain in good faith requires parties to enter into negotiations with a sincere desire to reach agreement and to make reasonable efforts to compromise their differences. See, Bristol County Sheriff's Department, 32 MLC 159, 160 (2003), citing, Board of Trustees of University of Massachusetts, 26 MLC 143,144 (2000). The Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. M.G.L. c. 150E, Section 6; Town of Braintree, 8 MLC 1193 (1981). However, the obligation to bargain in good faith requires parties to allow discussion on all proposals, to listen to each other's arguments, and to show a willingness to consider compromise. Where a party is determined to maintain a set position, it must approach the subject with an open mind by allowing the other side to explain the reasons for a proposal and by fully articulating its own reasons for rejecting the proposal. Id. at 1197.

A party engages in surface bargaining if, upon examination of the entire course of bargaining, various elements of bad faith bargaining are found which, considered together, tend to show that the dilatory party did not seriously try to reach a mutually satisfactory basis for agreement, but intended merely to shadow box to an impasse. Bristol County Sheriff's Department, 32 MLC at 160-161, citing, Newton School Committee, 4 MLC 1334 (H.O. 1977), aff'd, 5 MLC 1016 (1978), aff'd sub nom., School Committee of Newton v. Labor Relations Commission, 338 Mass. 557 (1983). Failing to make any counterproposals in the course of negotiations may be indicative of surface bargaining, particularly where an employer rejects a union's proposal, tenders its own, and does not attempt to reconcile the differences. Bristol County, 32 MLC at 161.

The DLR concluded that City engaged in good faith, hard bargaining rather than surface bargaining. Although it maintained its layoff proposal throughout the negotiations, the City explained the financial context for the proposal early in the negotiations, considered the Union's alternative cost-saving proposal, detailed the rationale for rejecting each part of the Union's package proposal, and notified the affected officers of their layoffs after concluding the negotiations.

The City's failure to make a counterproposal did not violate the Law. Compare, Revere School Committee, 10 MLC 1245, 1249 (1983) (employer's categorical rejection of a union's proposal with little discussion or comment does not comport with the duty to bargain in good faith). Further, the statement that there was nothing that the Union could do to avoid the layoffs did not evince a complete refusal to negotiate alternatives.

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City of Marlborough DLR Case, Continued from Page 2

DIRECT DEALING

In light of the impending layoffs, Chief Mark Leonard solicited the officers' preferences for new shift assignments. The Union claimed that this solicitation constituted "direct dealing."

The duty to bargain collectively with the employees' exclusive collective bargaining representative prohibits employers from bypassing the union and dealing directly with bargaining unit members regarding mandatory subjects of bargaining. Town of Ludlow, 28 MLC 365, 367 (2002), citing, Service Employees International Union, AFL-CIO, Local 509 v. Labor Relations Commission, 431 Mass. 710 (2000).

Direct dealing is impermissible, because it violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative, and because it undermines the employees' belief that the union actually possesses the power of exclusive representation that the statute prescribes. Suffolk County Sheriff's Department, 28 MLC 253, 259 (2002).

It is well-settled that employee work hours and shift assignments are mandatory subjects of bargaining, City of Boston, 10 MLC 1189, 1193 (1983), and it is undisputed that Chief Leonard contacted each officer directly to request new shift preferences. However, Chief Leonard's actions did not constitute unlawful direct dealing, because the parties' collective bargaining agreement states that the City "reserves the right to assign each Police Officer to different work schedules during the term of this Agreement." This language expressly and unequivocally permits the City to determine work schedules without bargaining with the Union. See, Boston School Committee, 27 MLC 121, 123 (2001); Commonwealth of Massachusetts, 19 MLC 1454, 1456 (1992). Accordingly, the City did not violate the Law on June 17, 2003, when Chief Leonard solicited the officers' preferences for new shift assignments.

DUTY TO FURNISH INFORMATION

The Union requested certain information from the City, so that it could formulate proposals regarding how to deal with the impending layoffs. The City provided much of the requested information. However, it failed to provide "cherry sheets" for FY04 and other information.

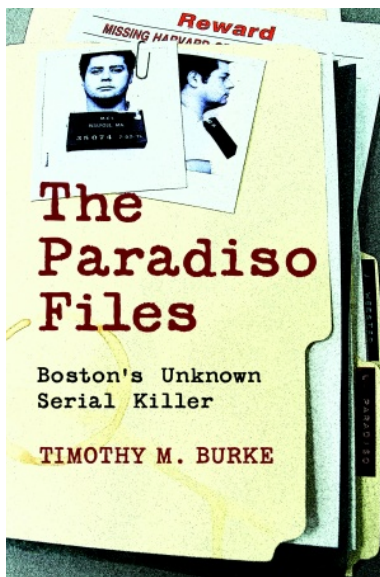
An employer's duty to bargain in good faith includes a duty to supply the union, upon request, with information that is relevant and reasonably necessary to the union's task of performing its responsibilities as the exclusive collective bargaining representative. Board of Trustees, University of Massachusetts (Amherst), 8 MLC 1139 (1981). An employer's obligation to supply information to the exclusive collective bargaining representative of its employees arises in the context of contract negotiations and administration. Boston School Committee, 10 MLC 1501, 1513 (1984).

The City does not argue that it provided the staffing and service information that the Union had requested. Rather, the City argues that it was not required to provide information beyond what Chief Leonard had disclosed on June 27, 2003, because the City had no duty to provide information on a permissive subject of bargaining.

In Boston School Committee, 22 MLC 1365 (1996), the union asked the school committee to provide information concerning the effect of a hiring freeze on negotiated staffing levels. Although the Board found that the school committee had not violated the Law because it did not possess the requested information, the Board noted that the information was relevant and reasonably necessary to the union's duty as the exclusive bargaining representative. Boston School Committee, 22 MLC at 1379. Similarly, the Board required an employer to provide information concerning non-unit employee service contracts in Commonwealth of Massachusetts, 18 MLC 1220, 1228 (1991), reasoning that a union facing a proposed reduction in bargaining unit staffing levels had a legitimate and continuing interest in monitoring the retention of bargaining unit work.

The Union requested the information at issue to inform its proposals and the negotiations over employee layoffs. Here, as in Boston School Committee and Commonwealth of Massachusetts, the Union faced a loss of bargaining unit positions and had an interest in monitoring the retention of bargaining unit positions and work. Moreover, Chief Leonard's June 26, 2003 letter indicated that the City's minimum staffing levels would affect the City's reassignment decisions, an issue that the parties were addressing in the negotiations. Although the City had no obligation to bargain over decisions to set minimum staffing levels and to determine the services that it intended to provide to the community, see, Town of Dennis, 12 MLC 1027 (1985); Town of Danvers, 3 MLC 1559, 1573 (1977), the information that the Union requested regarding these subjects was relevant and reasonably necessary to the Union's ability to understand and negotiate the impacts of the City's decision to reduce its workforce. See, City of Boston, 29 MLC 165, 167 (2003) (employer required to provide information regarding temporary appointments under Civil Service Law due, in part, to its impact bargaining obligation). Accordingly, the City violated the Law by failing to provide the requested information.

[Download the Full Text of the Case Here](#)



“In a suspenseful account offered by the former prosecutor who sent Paradiso to prison for the 1979 slaying of Marie Iannuzzi, Burke builds a convincing case that the Revere fish peddler was a cunning sexual predator who got away with many more slayings.”

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[Book Review: The Paradiso Files](#) The Suspenseful Hunt for a Serial Killer in Boston

By Shelley Murphy, Globe Staff | March 1, 2008

The Paradiso Files: Boston's Unknown Serial Killer

By Timothy M. Burke
Steerforth Press, 346 pp., \$24.95

The criminal exploits of Boston's most notorious psychopath, fugitive gangster James "Whitey" Bulger, have been well chronicled. Now, in a new book, Needham attorney-turned-author Timothy M. Burke exposes another sadistic figure who prowled Boston's streets for unsuspecting victims back when Whitey was still the man: Leonard "The Quahog" Paradiso.

"The Paradiso Files: Boston's Unknown Serial Killer" provides a startling close-up of Paradiso, who died at age 65 shortly after this book went to press. Paradiso made headlines in the 1980s, when he was convicted of killing a 20-year-old East Boston woman and linked to the disappearance of a Harvard University graduate student, and then he slipped into anonymity - until this book and his death.

In a suspenseful account offered by the former prosecutor who sent Paradiso to prison for the 1979 slaying of Marie Iannuzzi, Burke builds a convincing case that the Revere fish peddler was a cunning sexual predator who got away with many more slayings. The account details the

evidence against Paradiso, raising serious questions about how the criminal justice system put a man with such a violent history back on the streets to inflict more harm.

The story unfolds through the eyes of Burke, then a young homicide prosecutor in the Suffolk County District Attorney's office who is obsessed with solving several high-profile cases. The investigation of Iannuzzi's death has grown cold in 1982, when the victim's sister pleads with Burke to find the killer.

The trail immediately leads to Paradiso, who was spotted talking with her at a wedding reception and later at a local bar the night before her body was discovered in a Saugus marsh. Then comes the discovery of other victims, who survived after being lured into a car by Paradiso, then beaten, and sexually assaulted by him.

Still, the Iannuzzi case is no slam-dunk because he has an alibi, a girlfriend who vouches for him, and there's another suspect.

A big break in the case comes when an inmate reveals that Paradiso confessed to killing both Iannuzzi and Joan Webster, the Harvard student who arrived at Logan International Airport on a flight from New York on Thanksgiving weekend of 1981, then vanished.

The book follows the prosecutor's frustrating journey to prove Paradiso is guilty of both slayings, even going so far as to dredge Boston Harbor and bring up

Paradiso's sunken boat, "Malafemmina," Italian for evil woman, in the hunt for Webster's body.

Burke tells a compelling story, with chilling accounts of Paradiso's crimes gleaned from victims' accounts and evidence that never made it to court. He writes with the frustration and suspicion of a prosecutor as he recounts how four young women were murdered in rural Florida, Mass., in the 1970s, while Paradiso was on a hunting trip in the area. The unsolved killings occurred after Paradiso had been convicted of the kidnap and attempted rape of a teenager, but was released on bail by a judge pending an appeal.

Like a true prosecutor, Burke pokes fun at Paradiso's lawyer, referring to him as "The Schmooser." But, he also offers grudging respect for his courtroom adversary, revealing the angst and panic he feels when he fears the jury might not see it his way.

There are plenty of references to Boston landmarks, as Burke and his sidekick, State Police detective Andrew Palombo, build their case over meetings at the Durgin Park restaurant, the Steaming Kettle coffee shop, and trips to the waterfront. But, the story transcends Boston with an insider's view of the criminal justice system.

It's a good read. And Burke, who led a State Police investigation into Bulger during the early 1980s, even manages to slip in a few observations about him.

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<p>6 Day Flying Start for 2008 Complete Exam Preparation Multi-Disciplinary Approach in Promo Exam Preparation</p> <hr/>		\$550.00	Monday, April 21, Tuesday, April 22, Monday, April 28, Tuesday, April 29, Thursday, May 1, Friday, May 2, 2008	Medford Police Training Center
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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 6)

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

MVs—Seizure MUST Be Proportionate to Purpose of Stop—Unlawful Detention

In **Commonwealth v. Torres**, 424 Mass.153 (1997), the State Police effected a motor vehicle stop for speeding. Besides the operator there was one front seat passenger. The trooper approached the vehicle on the passenger side and observed the passenger who had his back toward the passenger window conversing with the operator. After waiting about 20 seconds, the trooper knocked on the passenger's window. The passenger, turned, looked at the trooper and alighted from the vehicle. The trooper, concerned about the passengers delayed response, directed him to the rear of the vehicle. The trooper then asked the operator for his license and registration. Although he seems nervous, he produced the documents. They both appeared valid. The trooper then asked the passenger for some identification by motioning for his wallet. The passenger produced his wallet for the trooper. While conversing with the passenger, the trooper, by looking through the rear window of the stopped vehicle, observed the operator move his right hand to his jacket which was located in the passenger compartment. Concerned for his safety, the trooper pat-frisked the jacket and felt a hard object which turned out to be a telephone pager. The trooper then asked the operator if there were any drugs in the vehicle. The operator stated that there were none and consented to a search. In a hidden panel inside the passenger compartment, the trooper discovered cocaine. The SJC suppressed the cocaine because it was a product of observations made by the trooper during an impermissible delayed detention of the occupants of the motor vehicle.

IMPORTANT NOTE: The SJC stated that after the passenger was removed from the passenger compartment to the rear of the vehicle, and after the operator produced a valid license and registration, any continued delay for other than the civil motor vehicle infraction which prompted the initial seizure will require additional reasonable justification under the 4th AMD.

STOP BEGAN TO CHANGE CHARACTER: Although the trooper's initial concern justified his removal of the passenger to the rear of the automobile for safety purposes, the passenger's actions and conduct did not otherwise justify any greater suspicions. The SJC stated that "[t]he stop [] began to *change character* when the trooper decided to go to the back of the automobile to interrogate the [passenger]." The passenger, stated that SJC, "could harbor a higher expectation of privacy." Additionally, the SJC stated that once the passenger here was placed at the rear of the vehicle, any continued investigation toward him would require added justification. The motor vehicle infraction had been committed by the operator, not the passenger. The passenger, therefore, stated the SJC, "...in the absence of his own individual misbehavior or suspicious conduct, could expect the formalities involved in a traffic stop would take place solely between the driver and the trooper."

IMPORTANT NOTE: In other words, once the officer had the passenger out at the rear of the motor vehicle, the investigation could only center on the driver—not the passenger. Shifting the investigation to the passenger, simply by asking questions concerning his identity, created a 4th AMD violation. It was during this 4th AMD violation that the trooper made his observations of the operator's hand. As already stated, it was the delayed detention which produced the incriminating evidence.

MVs—Where Driver is Ordered Not to Exit Vehicle—Order Not To Exit After CMVI May Be Entirely Reasonable

In **Commonwealth v. Riche**, 50 Mass.App.Ct.830 (2001), police effected a motor vehicle stop for a non-illuminated rear plate light and for speeding. The time was approximately 2:30 a.m. in a high crime area. There were three people inside the stopped vehicle. As the officer walked up to the vehicle, the driver "abruptly opened the door and thrust forth his foot, evidently intending to exit the vehicle." The officer immediately ordered the driver not to exit the car. The officer approached nearer and then asked the driver to step out. As the driver did so, he stated that his driver's license was suspended because of a drug offense. The officer quickly patted him down, finding no weapon. The driver then passed a registration to the officer and said that the car was "the girl's mother's car," referring to a young woman, Rizzotto, in the front passenger seat. The operator then started to repeatedly ask whether he was going to be arrested. The officer then ordered the passengers to place their hands in the air. The officer then ordered the back-seat passenger, the defendant Riche, out from the vehicle, pat frisked him, and found nothing. The officer then asked Rizzotto whether she had a license. She stated "yes", but could not proffer one. She was then asked to step from the vehicle. As she was exiting, a large plastic bag containing cocaine fell to her feet. All three were placed under arrest. During booking, Rizzotto told police that as the vehicle was being stopped, Riche slipped the bag of drugs he had on him to her for hiding. Riche was then charged with trafficking.

LAWFULNESS OF THE EXIT ORDER UNDER THESE CIRCUMSTANCES: The defendant-Riche argued that the order for him to exit the vehicle was unlawful. Although the initial stop was based on the rear plate light violation, pursuant to C. 90 § 7 and 540 Code Mass. Regs. § 4.04(8)(a)(1994), and for speeding, the Court found that "[t]he situation [] developed as much more than a routine traffic stop for traffic violations." The Court stated that "[t]he unusual, precipitous move of the driver [] to get out of the car would suggest [] a hostile confrontation or the possibility that the man intended to run for it." Additionally, "[t]he nearly simultaneous mention of a drug offense implicated the possibility of guns. [The operator's] avowal that his right to drive had been suspended was serious in itself, as it would justify arresting him on the spot. His insistent questions about what the officer intended to do suggested a wish to get himself arrested and thus nominally clear of shady activity by the others in the car." The Court held that "[t]he conjunction of these factors—and the time being early morning and the location a high crime area—created a 'reasonable suspicion' [] of a threat of the officer's safety that supported an order to the driver to exit the car (after he pulled back into it) and equally supported such an order to each passenger." The Court stated that "Rizzotto might have had a weapon or be within reach of one."

[...to be continued in the April, 2008 issue of [Police Legal News](#)]

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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
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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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What is possession in Massachusetts?	Physical & testimonial evidence	Search warrants as arrest warrants
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