

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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[Horte v. Hingham](#) Police Dept: An example of Bypass Reasons Upheld by Civil Service

In the case of [David Horte v. the Hingham Police Department](#), Case No. G2-04-412 (March 15, 2007), the Civil Service Commission ruled that the following reasons were sufficient to support a bypass for the position of sergeant:

- As compared to the successful candidate, the Appellant had limited "community policing" and community service experience.
- Although the Appellant had a Bachelor's Degree in Criminal Justice, he failed to further pursue

continuing education. (The Appointee had a Master's in CJ.).

Finally, the Appellant had a "somewhat lackluster interview (wherein he exhibited a lack of career planning/motivation, as well as a lesser degree of composure, particularly when compared to the other candidates)."

The Appointing Authority was able to convince the Commission that commitment to community policing was an important consideration for promotion. "All [Hingham]

officers are encouraged to get involved with the community by interacting with the people...outside of the traditional environments in which people normally encounter police officers. Such community policing activities include, but are not limited to: speaking at civic organizations, volunteering within Hingham with citizen police academies, boy scouts, police explorer posts and similar activities."

In summary, the Appointee had a better interview, more community policing experience, and more education than the Appellant.

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- Civil Service Law & Procedure Textbook
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- Command Presence Quarterly Criminal Law Bulletin

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[Comm. v. Manzelli : Secret Recording of Police Officers](#)



Despite the lack of a tape, there was ample circumstantial evidence that the defendant made an unlawful secret recording, including (1) his possession of a device, together with the microphone secreted in his jacket, (2) the fact that the microphone was pointed in the direction of the officers during their conversation with the defendant, (3) the odd manner in which the defendant put his questions to police, and (4) the tapes he discarded into the crowd.



During a political rally, Manzelli approached and photographed MBTA police officers Brian Harer & Victoria Riel. Harer asked him to stop taking their pictures, but Manzelli continued to do so. After a few minutes, he walked away.

Shortly thereafter, he returned and asked Kenneally whether it was true that "officer badge number 46 of the MBTA police department said that I can't take his picture and use it." Kenneally asked Harer whether he had told Manzelli not to take his picture. As Harer turned to answer, he noticed that Manzelli had a microphone tucked into the zippered front of his jacket. Harer asked Manzelli if he was tape recording their conversation.

Manzelli immediately took the microphone, along with a black bag containing a tape recorder and cassette tapes, and threw them among a nearby group of protestors. He shouted for people to take the tapes. Riel attempted to retrieve the recorder and tapes, but was thwarted by the crowd, which began to throng Riel. Harer came to Riel's aid,

and the two of them managed to recover an empty bag, the microphone, and a few tapes. Riel was punched in the eye by a protestor as she attempted to collect the items.

Harer then attempted to arrest Manzelli, who, by that time, had fled into a nearby subway station. After a brief chase, Harer took Manzelli into custody. As Harer placed him under arrest, he threw an audio tape into the crowd inside the station, striking a passerby in the head and causing her to fall down.

Manzelli was charged with, inter alia, unlawful electronic interception of an oral communication, [G. L. c. 272, § 99](#). Specifically, the government alleged that he had made a secret recording of his conversations with Kenneally, Riel, and Harer as they conversed him defendant outside the subway station. On appeal, Manzelli argues that the government's proof was fatally deficient insofar as no actual recording was introduced at trial. Despite the lack of a tape, there was ample circumstantial evidence that he made an unlawful

secret recording, including (1) his possession of a device, together with the microphone secreted in his jacket, (2) the fact that the microphone was pointed in the direction of the officers during their conversation with him, (3) the odd manner in which the he put his questions to police, and (4) the tapes he discarded into the crowd. The evidence properly before the jury in this case, was legally sufficient to sustain a conviction.

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

[UPCOMING CPS SEMINARS](#)

- [Domestic Violence](#)
- [Police Assessment Centers](#)
- [5 Day Summer Jam 2007](#)
- [6 Day Criminal Procedure 2007](#)
- [3 Day Crim. Law '07](#)
- [6 Day Promotional Seminar 2007](#)

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Commonwealth Police Service, Inc.

Attorney Patrick Michael Rogers

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April 30, 2007

To: All Massachusetts Chiefs of Police & Massachusetts Training Officials

Re: 2-Day Domestic Violence Training; Police Civil Liability; Supervisory Liability

Dear Sir,

This is to personally notify you of my upcoming 2007 Domestic Violence seminar, June 5 and 6, 2007 at the Taunton Holiday Inn. This two day presentation is specifically designed for all officials assigned to DV units and all police field supervisors. Each official attending will receive our updated 2007 Domestic Violence Textbook. There will be a special component focusing in on the precise liability issues which exist in a domestic investigation. Negligent supervision, negligent retention, and the Massachusetts Tort Claims Act will be addressed. Some of the other areas that will be addressed include:

- ALL 2007 Updates
- How far down the relative chain does the 209A statute extend? We will address the relationships of C. 209A § 1.
- What violations are arrestable under a 209A order? 208? What is custodial kidnapping?
- When can police effect the arrest of the 209A defendant when there is no battery or no RO in effect?
- What violations are NOT arrestable under a 209A order? 208?
- Close encounters of the 3rd and 4th kind: accidental encounters
- What happens when consent is conflicting? (NEW 2006/2007 changes)
- When can police testify to what the victim said at the scene?
- How can the 6th AMD Right to Confront Witnesses impact your case?
- Massachusetts 's jurisdictional puzzle on DV will be thoroughly discussed.
- Why is it more difficult to effect a warrantless arrest in the home or at the threshold?
- Probable Cause: We will address how the investigating PO can establish PC after asking a few basic questions.
- Service: Is in-hand service required? What about service over the telephone? Can this lead to a conviction?
- Protective Zones: Stay away zone—what police need to know to legally enforce a 209A order?
- Firearms issues. Is it possible to receive an LTC if you have been arrested for a 209A?
- The Massachusetts Tort Claims Act and how it can protect a police officer if he or she fails to effect a DV arrest.
- The police officer as the 209D defendant—what police and police supervisors need to know.

If you are interested, simply go to www.commonwealthpolice.net and register directly on the web or complete the next page and fax it back to 508.644.2670.

Sincerely,

Attorney Patrick M. Rogers

DIRECT DEPARTMENT BILLING—CALL FOR MORE INFO!!

Domestic Violence—2007

2 Day ADVANCED Seminar On The Legal Complexities Surrounding DV in Massachusetts
presented by the Law Office of Attorney Patrick Michael Rogers

Tuesday & Wednesday, June 5, & 6, 2007 at the Taunton Holiday Inn

Specifically designed for ALL Officials Assigned to DV, Officers Assigned to Street Duties, and ALL Victim Advocates

Registration will be at 8:30 a.m. and the seminar will run from 9:00 a.m. to 3:00 p.m. on the first day. The second day will adjourn at 1:00 p.m. The cost of the seminar will be \$200.00 per person. **This fee will include our updated 2007 Domestic Textbook.** To register, simply complete the form below and fax this page to **508.644.2670** or call **508.644.2116**.

For **FASTER** service sign up immediately on the web—www.commonwealthpolice.net

This seminar will be presented by Attorney Patrick M. Rogers—author of the Massachusetts Criminal Procedure Textbook

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The following are just a few of the topics which will be included in the presentation:

- How far down the chain does the 209A statute extend?
- What violations are arrestable under a 209A order? 208?
- What violations are NOT arrestable under a 209A order? 208?
- Close encounters of the 3rd and 4th kind: accidental encounters
- What happens when consent is conflicting? (NEW changes)
- When can police testify to what the victim said at the scene?
- How can the 6th AMD Right to Confront Witnesses impact your case?
- Massachusetts's jurisdictional puzzle on DV will be thoroughly discussed
- Why is it more difficult to effect a warrantless arrest in the home or at the threshold?
- Probable Cause: We will address how the investigating PO can establish PC after asking a few basic questions.
- Service: Is in-hand service required? What about service over the telephone? Can this lead to a conviction?
- Civil Liability Issues: An overview of the Massachusetts Tort Claims Act will occur during the second day of the seminar.
- Relationships Within the Statute: We will address the relationships of C. 209A § 1.
- Protective Zones: Stay away zone—what police need to know to legally enforce a 209A order?

Every major area will be addressed during these two days. Please sign up now to secure your seat. Call us at 508.644.2116 or check us out on the web by going to: www.commonwealthpolice.net

register immediately by going to our website: www.commonwealthpolice.net

DIRECT DEPARTMENT BILLING FOR 2007 2 DAY DOMESTIC VIOLENCE SEMINAR (TAUNTON HOLIDAY INN)

Department _____
Complete Billing Address _____
Phone With Area Code _____
Dept Email Address _____
Names of Officials Attending Seminar (include rank if applicable)
1) _____ 2) _____
3) _____ 4) _____

PERSONAL BILLING FOR 2007 2 DAY DOMESTIC VIOLENCE SEMINAR (TAUNTON HOLIDAY INN)

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Home Address _____ City _____ ZIP _____
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Email Address _____
Credit Card (bullet) **VISA** **M/C** **DIS** **AMEX**
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[Comm. v. Dillon D.](#) – Miranda Warnings & the “Emergency Exception”

On September 22, 2004, an administrator of a Boston middle school saw the **13 year old juvenile carrying and showing students a clear plastic bag containing over 50 bullets near the school's lunchroom.** This information was conveyed to Boston school police Officer Steven Partello. The school administrator confiscated the bullets, and the juvenile was then told to go directly to the main office. On his arrival at the main office, Partello conducted a pat-down of the juvenile for weapons and found none.



After reciting the *Miranda* warnings to the juvenile in front of an administrator, Partello asked the juvenile to disclose the location of the gun, and he responded that he did not have a gun. The juvenile's mother and grandmother arrived approximately 25 – 35 minutes later. Although the mother was neither provided an opportunity to be alone with the juvenile nor informed of the juvenile's *Miranda* rights, Partello continued questioning the juvenile. The juvenile's mother also asked the juvenile questions in Partello's presence. The same day, school officials held a hearing resulting in the juvenile's expulsion. After the hearing, the juvenile agreed to lead Partello to the gun, which was located in an outdoor electrical box in a residential area approximately 25 yards from the school and approximately 2 feet from a residence.

Here, the juvenile argues that the judge correctly concluded that his *Miranda* rights were violated because *Miranda* warnings were not properly given to the juvenile in the presence of an interested

adult and the limited public safety exception to *Miranda v. Arizona* was not applicable. The juvenile points out that Partello initially questioned him outside the presence of a parent or guardian, despite the fact that he was only 13 years old. The juvenile further notes that after the arrival of his mother, questioning continued even though Partello never recited *Miranda* warnings to him in his mother's presence and failed to give the mother an opportunity to consult privately with him prior to answering Partello's questions. Thus, the juvenile claims that the judge's order allowing the motion to suppress should be affirmed.

Generally, "*Miranda* warnings must precede police questioning whenever [a] person is 'deprived of his freedom of action in any significant way.'"

When a suspect is a juvenile under the age of fourteen years, we have held that, in order to establish that the juvenile waived his *Miranda* rights, the Commonwealth bears the burden to prove that "a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights." Additionally, in order to waive their *Miranda* rights validly, juveniles under fourteen years old must "actually consult" with an interested adult. This is based on the assumption that an informed parent is in a better position to understand the juvenile's rights than the juvenile, who may be unable to comprehend fully these rights without such assistance.

However, a **public safety exception to the general rule applies if there are circumstances in which "concern for public safety [is] paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."** Statements made by a suspect are admissible in court if the questions posed by the police were

based on a "concern for public safety," even if a suspect has not been given *Miranda* warnings.

Here, Partello was faced with an emergency situation that required protecting approximately 890 children at the middle school and residents of the neighborhood. In these circumstances, where the juvenile possessed a clear plastic bag containing over fifty bullets and was observed showing the bag to other students, Partello reasonably concluded that there was an immediate need to question the juvenile about the presence of a firearm because the obligation of protecting other students and community members outweighed the administration of *Miranda* warnings to the juvenile in the presence of an interested adult. The juvenile's possession of over fifty bullets alone was enough to support the inference that a gun was in close proximity and to invoke the public safety exception to the requisite *Miranda* warnings.

Note: The Boston School Police are currently trying to obtain body armor, OC spray, and batons. [Click here for a recent Boston Globe article on the subject.](#)

School Police Chief John Sisco claimed that if school police officers had body armor, it would "send the wrong message." He further claims that the refusal to authorize body armor is not a cost issue but has to do with "issues of culture and perception."

Officers have been injured, with some having sustained serious injuries. School Police confiscate an average of 3 weapons in Boston Public Schools every school day. However, the School Department refuses to give its officers the basic tools that they need to protect themselves.



The Use of Sealed Records in Massachusetts Firearms Licensing

By Attorney Brian E. Simoneau

The use of sealed records in firearms licensing has been the source of considerable controversy. Certain licensing authorities take the position that the use of such records is completely permissible, while some advocates for gun owners claim that sealed records, or even unsealed records containing the same information as sealed records, can never be used in firearms licensing. Both positions are incorrect. A careful analysis of the facts and circumstances of each case is the first step in arriving at the correct result. Such an analysis is necessary because not all sealed records enjoy the same protections. As outlined below, there are generally 4 types of sealed records in Massachusetts.

1. Adult records, sealed pursuant to [G.L. c. 276 § 100A](#) & [G.L. c. 276 § 100C](#)
2. Juvenile records sealed pursuant to [G.L. c. 276 § 100B](#)
3. Records of drug related convictions sealed pursuant to [G.L. c. 94C § 34](#)
4. Records of relating to offense(s) for which the person received a Governor's Pardon, which are automatically sealed pursuant to [G.L. c. 127 § 152](#)

Questions regarding role of sealed records in firearms licensing arise, in part, because [G.L. c. 140 § 131\(d\)\(i\)](#) disqualifies for life an applicant who "(i) has, in any state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (a) a felony; (b) a misdemeanor punishable by imprisonment for more than two years; (c) a violent crime as defined in [§ 121](#); (d) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; or (e) a violation of any law regulating the use, possession or sale of controlled substances as defined in [G.L. c. 94C § 1](#)." The broad sweep of this provision renders a large number of individuals permanently ineligible from holding a License to Carry Firearms. See e.g. [Commonwealth v. Wheeler](#), 52 Mass. App. Ct., 631, 632-633 (2001) (Grasso, J.) (Veteran police officer prevented from renewing his LTC because of a single and long past incident of juvenile delinquency; "Neither trial judges nor appellate justices are, like Merlin, able to do away with harsh and unforeseen collateral or contingent consequences of criminal proceedings with a wave of the judicial wand.") In determining whether an applicant is statutorily disqualified from holding a LTC, [G.L. c. 140 § 131\(e\)](#) requires the licensing authority to check "files maintained by the department of probation [BOP] and statewide and nationwide criminal justice, warrant and protection order information systems and files including, but not limited to, the National Instant Criminal Background Check System." This mandate has been interpreted to require licensing authorities to at least run a BOP, III, and QNP check on the applicant. The source of information containing disqualifiers is an important consideration because, depending on the applicable sealing statute, certain record holders are ordered to seal their records while others are not. Likewise, [§ 100B](#) commands only the Commissioner of Probation, court clerks, and the Department of Youth Services to seal their records. It has no effect on other records, such as those maintained by local police departments or those appearing in the Interstate Identification Index (III). Certainly, if a licensing authority discovered disqualifying offenses by consulting unsealed records, such as those contained in databases enumerated in [G.L. c. 140 § 131\(e\)](#), the licensing authority could not lawfully issue the applicant a LTC. The fact that a separate sealed record maintained by another agency might contain the same offenses as the unsealed record obtained from an independent source is of no consequence.

The Use of Sealed Records in Massachusetts Firearms Licensing

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If the unsealed record contains disqualifying offenses, the licensing authority cannot lawfully issue the license. Therefore, the nature of the record being used is as important as its contents.

Adult Sealed Records

Useable for Suitability & Disqualification

In the case of [Rezeznik v. Chief of Police of South Hampton](#), 374 Mass. 475 (1978), our Supreme Judicial Court ruled that **adult records sealed pursuant to [G.L. c. 276 § 100A](#) could lawfully be used in firearms licensing**. The Court based this ruling on the language of the adult sealing statute itself. Specifically, the provision which stated that “in response to inquiries by authorized persons **other than any law enforcement agency**, any court, or any appointing authority, [the Commissioner of Probation] shall in the case of a sealed record . . . report that no record exists.” “This provision must be read to imply that law enforcement agencies, courts, and appointing authorities do have access to criminal records which have been sealed.” As discussed in more detail below, it is important to note that no such provision exists in [G.L. c. 276 § 100B](#), the statute governing juvenile sealed records.

Juvenile Sealed Records

Not Useable for Suitability or Disqualification

(unless unsealed record obtained from an independent source)

[G.L. c 276, § 100B](#), the juvenile sealed records statute, requires such records to be sealed upon request if the following three conditions are met: “(1) the ‘court appearance’ or any disposition resulting from the delinquency proceeding terminated at least three years earlier, (2) the person has not been adjudicated delinquent or convicted of a criminal offense within the Commonwealth during the preceding three years, and (3) the person states that he or she has not been adjudicated delinquent or convicted of a criminal offense in any other jurisdiction during the preceding three years.” [Commonwealth v. Gavin G.](#), 437 Mass. 470, 473 (2002). The statute further provides that the police can know only that a “sealed delinquency record over three years old” exists. See [G.L. c. 276 §100B](#). **“Once it has been sealed, the police are no longer allowed to see the record itself.”** [Commonwealth v. Gavin G.](#), 437 Mass. 470, 475 (2002). Sealed juvenile records may only be used by a judge or probation officer for sentencing purposes, if a juvenile re-offends. *Id.* “All others making inquiry pertaining to a sealed juvenile record (including inquiries from an ‘appointing authority’ that would normally have access under § [100A](#)) must be told that there is “no record.”

There are no published superior or appellate court decisions on use of sealed juvenile records in firearms licensing. However, in the case of [Booker v. Evans](#), Dorchester District Court, 0107CV1203 (2003) (Nasif, J.), the refusal to issue a LTC because of a sealed juvenile record was overturned. Although [Booker](#) is only a district court decision, it was well reasoned and likely to be followed by other courts. In [Booker](#), Judge Kenneth Nasif, a former Juvenile Court Judge, ruled that, “[t]he juvenile sealing statute ([§ 100B](#)) clearly goes further than its adult counterpart ([§ 100A](#)) and strictly limits access to sealed juvenile records to a judge or probation officer and then only under limited conditions.” *Id.* Accordingly, Judge Nasif ruled that, **“[t]he unsealing of Mr. Booker’s fifty-five year old sealed delinquent record by the commissioner of probation and referring to its contents with the Boston Police Commissioner was clearly a violation of [G.L. c. 276 § 100B](#)...Information in a sealed juvenile record still can only be unsealed and made available either to a judge or a probation officer and then only if the individual involved has been convicted or a subsequent crime...”**

Records Sealed Pursuant to G.L. c. 127 § 152

Prior to July, 1983 Useable for Suitability

After July 1983, not Useable - Unless Unsealed Record Obtained

(Note: “all proper officers” required to seal records)

Not Useable for Disqualification

The leading case on the use of records sealed under the [G.L. c. 127 § 152](#), the pardon statute, is [DeLuca v. Chief of Police of Newton](#), 415 Mass. 155 (1993). DeLuca was sentenced to ten years in state prison for shooting and killing a nineteen year old. On April 6, 1983, he received a pardon for manslaughter and other less serious offenses. In 1998 he applied for a License to Carry Firearms. In denying DeLuca’s application, the Newton Police Chief wrote, correctly, “...[t]his pardon had the effect of erasing the direct legal consequences of any past convictions. It is important for you to realize my denial of your application is not based upon your convictions of these various offenses. While you are legally eligible to apply to obtain a license, I feel that the circumstances surrounding your past conduct make you unsuitable to carry a firearm...”

DeLuca appealed the denial of his application on the grounds that it was unlawful to rely on the pardoned offenses to deny him a LTC. In ruling on the case, the SJC noted that DeLuca was pardoned four months before [G.L. c. 127 § 152](#), the law mandating that mandated the sealing of records of pardoned offenses, went into effect. Because DeLuca was pardoned before his records were required to have been sealed, it was legal for the Chief to use them not to determine whether DeLuca was statutorily disqualified, but to decide whether he was suitable. As explained above, DeLuca’s records were not sealed because his pardon pre-dated the applicable sealing statute by four months. Nevertheless, the SJC held that the licensing authority could not use the convictions for which DeLuca was pardoned to deny his application. However, when deciding whether DeLuca was a suitable person to hold a LTC, since DeLuca’s records were not sealed, the licensing authority could properly consider the underlying criminal acts when deciding whether DeLuca was a “suitable person.” In reaching this conclusion, the SJC found controlling from [Commissioner of the Metro. Dist. Comm’n v. Director of Civil Serv.](#), 348 Mass. 184 (1964), the following principle: “[t]he pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.” [DeLuca](#), quoting [Commissioner of the Metro. Dist. Comm’n](#) at 203, quoting Williston, [Does a Pardon Blot out Guilt](#), 28 Harv.L.Rev. 647, 653 (1915).

Many licensing authorities erroneously interpret [DeLuca](#) to allow for the use of sealed records of pardoned offenses as a basis for denial. This is plainly wrong. In [DeLuca](#), the SJC held that “[i]t is clear that records required to have been sealed pursuant to [G.L. c. 127 § 152](#), could not lawfully have been used by the defendant as part of his investigation of the plaintiff.” This means that a licensing authority cannot use records sealed pursuant to [G.L. c. 127 § 152](#) for ANY purpose, either to determine whether an applicant is suitable, qualified, or disqualified. The phrase “...could not lawfully have been used by the defendant as part of his investigation...” strongly supports this conclusion. As explained above, the Chief was allowed to consider his record only because the pardon pre-dated the sealing statute. If a pardon is issued after [G.L. c. 127 § 152](#) went into effect, (on or about July of 1983), the records relating to the pardoned offense are protected by the aforementioned statute and cannot be used in any aspect of firearms licensing. Furthermore, records of pardoned offenses are, like other sealed records, inadmissible in any court proceeding. See [G.L. c. 127 § 152](#) (“...Such sealed records shall not disqualify a person in any ...application for employment or other benefit ... including ...licenses ... nor shall such sealed record be admissible in evidence or used in any way in any court proceeding or hearing before any board, commission or other agency....”) Therefore, even if a licensing authority were to rely in such sealed records in firearms licensing, the licensing authority could not

expect to prevail in court. Without the sealed records as evidence, absent other sufficient reasons, the licensing authority would not be able to justify the denial.

The above-mentioned bright line prohibition on the use of records sealed pursuant to [G.L. c. 127 § 152](#) in firearms licensing raises the question of exactly what records must be sealed. Unlike G.L. c. 276 § [100A-C](#), which specifically command certain probation and court officials to seal their records, [G.L. c. 127 § 152](#) provides, in relevant part that "[u]pon approval of a petition for pardon, the governor shall direct all proper officers to seal all records relating to the offense for which the person received the pardon. Such sealed records shall not disqualify a person in any ...application for employment or other benefit ... including ...licenses ... nor shall such sealed record be admissible in evidence or used in any way in any court proceeding or hearing before any board, commission or other agency...." The phrase "all proper officers" appears to suggest that law enforcement agencies are also required to seal their records. The records at issue in [DeLuca](#) were Waltham Police Department reports. Without explicitly ruling on the issue of whether such reports were records maintained by "all proper officers," and therefore fell within the scope of § [152](#), the Court treated them as such.

In summary, a licensing authority can lawfully declare an applicant unsuitable to hold a LTC based not on the pardoned offenses, but based on the underlying acts themselves. However, where the pardon was issued after approximately April, 1983, the licensing authority must have knowledge of the acts from some source other than a record maintained by "all proper officers," and therefore sealed pursuant to [G.L. c. 127 § 152](#).

Records Sealed Pursuant to G.L. c. 94C § 34

Not useable for Disqualification

Police Department or Independent Unsealed Records Useable for Suitability

[G.L. c. 94C § 34](#) generally allows for the dismissal of the charge and the sealing of court records related to the first offense of unlawful possession of certain controlled substances if the case has been continued without a finding to a certain date, or the defendant has been placed on probation, and he or she observes the terms & conditions thereof. In such cases, the Court "may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge....provided, however, that **departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed...**" [G.L. c. 94C § 34](#). The statute further provides that "[a]ny conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose."

In [Chief of Police of Shelburne v. Moyer](#), 16 Mass. App. Ct. 543 (1983), the Appeals Court ruled on the effect of the aforementioned statute on firearms licensing. The Court acknowledged that records sealed pursuant to [G.L. c. 94C § 34](#) could not be used to disqualify an applicant for a License to Carry Firearms. See [G.L. c. 94C § 34](#) ("Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of disqualification or for any other purpose.")

However, determining whether an applicant is statutorily disqualified is only the first step in the licensing process. The second step requires the licensing authority to determine whether the applicant is "suitable" and has a "proper purpose" for requesting the license. Because [G.L. c. 94C § 34](#) specifically provides that records maintained by police and other law enforcement agencies are exempt from the statute's sealing provision, such records are admissible in Court and can be considered when determining not whether an applicant is disqualified, but whether he is suitable to hold a LTC. "...[D]epartmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed." [Moyer](#) at 464, quoting [G.L. c. 94C § 34](#). "Evidence concerning these records could properly have

been used by the chief of police in making his determination as to the defendant's fitness...Moreover, [§ 34](#) does not preclude the chief of police from testifying to whatever information he had from any other source which he relied upon in determining an applicant's fitness to be issued a license to carry firearms.”

Note: Question 10 on the Massachusetts License to Carry Firearms Application asks the applicant, “[h]ave you ever appeared in court as a defendant for any criminal offense (excluding non-criminal traffic offenses?).” With respect to court appearances which resulted in sealed records pursuant to [§ 34](#), applicants can legally answer this question in the negative. See [G.L. c. 94C § 34](#) (“[n]o person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.”)

ADMISSIBILITY OF SEALED RECORDS

As mentioned above, the use of a sealed record to deny a LTC applicant can present an interesting logistical problem if the aggrieved applicant files a Petition for Judicial Review of the denial. Specifically, all of the sealing statutes have provisions which render the sealed record inadmissible in court. Therefore, without use of the sealed record, the licensing authority may be unable to support its decision. For example, even adult sealed records, which are useable in firearms licensing and afforded the least protection, shall not “...be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings.” Similar provisions are found in [G.L. c. 119 § 60](#); [G.L. c. 276 § 100B](#), [§ 100C](#), [G.L. c. 127 § 152](#), and [G.L. c. 94C § 34](#). If a licensing authority denied an applicant on the basis of a sealed adult record, such use would be proper under [Rezeznik v. Chief of Police of South Hampton](#), 374 Mass. 475 (1978). However, if the aggrieved applicant sought judicial review, the Court might declare the contents of the sealed record inadmissible. As is sometimes the case, because the applicant “let the cat out of the bag,” by voluntarily disclosing his felony convictions, this issue was recognized but not decided in [Rezeznik](#).

PERMITTED USES FOR SEALED RECORDS IN FIREARMS LICENSING

Sealed Record Type	Applicable Sealing Statute	Permitted Use in Firearms Licensing	Unsealed Records obtained from Independent Source
Adult Records	G.L. c. 276 § 100A & 100C	Suitability & Disqualification	Suitability & Disqualification
Juvenile Records	G.L. c. 276 § 100B	None	Suitability & Disqualification
94C Convictions	G.L. c. 94C § 34	None	Suitability
Pardon (before July, 1983)	G.L. c. 127 § 152	Suitability (records not sealed)	Suitability
Pardon (after July, 1983)	G.L. c. 127 § 152	None (records sealed)	? “all proper officers” required to seal

LAW OFFICES OF TIMOTHY M. BURKE

NEEDHAM CORPORATE CENTER

160 Gould Street, Suite 111

Needham, Massachusetts 02494-23 00

(781) 455-0707

Facsimile (781) 455-8879

Police Legal Defense Fund

Offered by the Law Offices of Timothy M. Burke

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.

If you choose to retain me, my office's representation of you will include the following services:

- **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.
- Available review of any "To/From" or arrest reports prior to submission.
- Legal advice provided for your home, automobile and umbrella insurance coverage needs.
- Discounted hourly rates for the defense of you or members of your immediate family in any off duty matter not covered by the terms of this agreement.
- Discounted contingency fees for representation of you or members of your immediate family in a personal injury claim.

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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[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.

[Comm. v. Colturi \(Retrograde Extrapolation\)](#)

"Retrograde extrapolation is a mathematical calculation used to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood alcohol level was tested and factoring in rates of absorption and excretion." So long as the BAC test is conducted within a reasonable period of time after the driver's last operation of the vehicle, expert testimony on the subject of retrograde extrapolation is not required. [Download the decision \(full text\).](#)

THE LRC's 6 MONTH STATUTE OF LIMITATIONS

456 CMR 15.03 provides that "except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than 6 months prior to the filing of a charge with the Commission." This means that prohibited practice charges must generally be filed with the Labor Relations Commission within 6 months of the violation. The 6 month "statute of limitations" period begins to run when the adversely affected party receives actual or constructive notice of the unfair labor practice. The actual or constructive notice requirement has been interpreted to mean when the party "knows or should have known" about it. Note: The proper way to assert the statute of limitations issue as an affirmative defense is to file a motion to dismiss before the Commission holds a hearing on the complaint.

Where the conduct at issue gives rise to both a grievance and a prohibited practice charge, the charging party cannot wait until the grievance has run its course before filing a charge with the Commission, if doing so would delay filing beyond the statute of limitations. See [Wakefield School Committee](#), MUP-2411 (2000).

The Labor Relations Commission has recognized the "continuing violation doctrine" as a way to save an otherwise untimely unfair labor practice complaint. This "exception" to the 6 month rule was used successfully where the Suffolk County Sheriff's Office retaliated against a Sheriff's K-9 handler for engaging in protected and concerted activity. The employer removed the correction officer from the Sheriff's Emergency Response Team (SERT), because of his union activities. See [Suffolk County Sheriff's Department](#), 27 MLC 155 (2001). The Commission ruled that the unlawful activity occurred each day that the union official was not assigned to the SERT and it was therefore a "continuing violation." [Contact Attorney Simoneau](#) if you have questions regarding labor relations matters.

WE'RE CELEBRATING OUR 20TH YEAR IN BUSINESS!



Thank you for making CPS, Inc. the premier provider of hands-on seminars and practical reference materials and textbooks for the law enforcement community in Massachusetts for over 20 years.

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Roundtable Study Group

The Roundtable

A Dedicated Study Group Session

Strictly Limited to 55 Applicants
ALL SUBJECT MATTER IN ONE

especially for 2007

Sergeant, Lieutenant & Captain

THE PROFESSIONAL METHOD TO PREPARE FOR:

Sergeant, Lieutenant & Captain

2007 Civil Service Examination Preparation

**Comprehensive 20 Week
Promotional Study Group Session
*for 2007***

**BASED EXCLUSIVELY ON THE COMPLETE AND PRIMARY
SOURCES OF THE READING LIST**

Instructor: Attorney Patrick Michael Rogers

**Specially Designed for the
2007 Civil Service police promotional examination for
Sergeant, Lieutenant & Captain on October 20, 2007**

A new approach in preparing for your examination. The study group technique is designed for each applicant to achieve a top score in the upcoming October promotional examination. With this as our only goal, we will meet according to schedule and *slowly go over the precise information that you will be tested on*. The class will be given assignments each week in management, supervision and criminal law. You will also be tested each week to measure your confidence level in the learning process. *An absolute must if you want to be promoted from this examination!*

This entire presentation is designed *only for the handful of dedicated officers* who want to professionally prepare for the entire promotional process. Rank does not come easy—you must devote serious effort and energy toward that goal—it is indeed a struggle—let us help you with this important endeavor.

Call 508.644.2116 for more information. This course will be strictly limited to 55 applicants—*Call us as soon as possible to register.*

**Comprehensive 20 Week
Promotional Study Group Session
for 2007
Meeting Every Sunday Until The Exam!**

This Course Will Be Based on the Following 2007 Reading List Materials

Required Management Texts

- ☐ Supervision of Police Personnel: Iannone, 6th ed. 2001
- ☐ Police Administration: Swanson; 6th ed.; 2005
- ☐ Community Policing—Contemporary Perspectives, 4th ed. Kappeler, 2005
- ☐ Criminal Investigation—9th ed. 2006 by Swanson

The Syllabus & Course Content—The Sessions

Week 1 June 3

Session One: Introduction of the Examination Process Under Civil Service

Session Two: Police Administration: Chapters 1 through 3

Session Three: Contemporary Perspectives: Chapters 1 through 3

Week 2 June 10

Session One: Criminal Investigation: Chapter 1 through 5

Session Two: Criminal Procedure & Criminal Law—*Basic Exam Issues*

Week 3 June 17

Session One: Supervision of Police Personnel: Chapters 1 through 3

Session Two: Criminal Investigation: Chapter 6 through 10

Session Three: Criminal Procedure & Criminal Law—*Basic Exam Issues*

Week 4 June 24

Session One: Criminal Procedure—*Advanced Exam Issues*

Session Two: Criminal Law—*Advanced Exam Issues*

Session Three: Powers of Arrest & How These Questions Appear on the Exam

Week 5 July 1

Internet Session: Questions based on ALL Management Sources

Internet Session: Questions Based on ALL Criminal Law & Procedure Sources

Week 6 July 8

Internet Session: Questions based on ALL Management Sources

Internet Session: Questions Based on ALL Criminal Law & Procedure Sources

Week 7 July 15

Session One: Police Administration: Chapters 4 through 6

Session Two: Contemporary Perspectives: Chapters 4 through 6

Week 8 July 22

Session One: Supervision of Police Personnel: Chapters 4 through 8

Session Two: Criminal Procedure—*Advanced Exam Issues*

Session Three: Criminal Law—*Advanced Exam Issues*

Session Four: Cross-Over Questions—*And How To Answer Them*

Week 9 July 29

Internet Session: Questions based on ALL Management Sources

Internet Session: Questions Based on ALL Criminal Law & Procedure Sources

Week 10 August 5

Session One: Police Administration: Chapters 7 through 11

Session Two: Required Juvenile Laws

Session Three: Required Motor Vehicle Laws

Session Four: Powers of Arrest Pertaining to Juveniles & MVs

Week 11 August 12

Session One: Supervision of Police Personnel: Chapters 9 through 12

Session Two: Criminal Procedure—*Advanced Exam Issues*

Session Three: Criminal Law—*Advanced Exam Issues*

Week 12 August 19

Session One: Contemporary Perspectives: Chapters 7 through 8

Session Two: ALL Charts & Graphs from ALL Management Texts—*part one*

Week 13 August 26

Internet Session: Questions based on ALL Management Sources

Internet Session: Questions Based on ALL Criminal Law & Procedure Sources

Week 14 September 2

Internet Session: Questions based on ALL Management Sources

Internet Session: Questions Based on ALL Criminal Law & Procedure Sources

Week 15 September 9

Session One: Criminal Investigation: Chapter 11 through 15

Session Two: ALL Charts & Graphs from ALL Management Texts—*part two*

Week 16 September 16

Session One: Contemporary Perspectives: Chapters 9 through 12

Session One: Criminal Investigation: Chapter 16 through 21 (omit 17)

ROUNDTABLE FOR SGT., LIEUT, & CAPT
DETACH & FAX THIS PAGE ONLY BACK TO US AT:

508.644.2670

THE PREFERRED METHOD: Sign Up Immediately Via The Web—go to:

www.commonwealthpolice.net

To Sign Up Via Phone—Call as at 508.644.2116

Registration Form for 2007 Roundtable Study Group (55 LIMIT)

CREDIT CARD BILLING FOR 2007 20 WEEK PROMOTIONAL SEMINAR AT THE
MEDFORD POLICE TRAINING CENTER

Name _____

Home Address _____ City _____ ZIP _____

Sign-Up Right Here Right Now

Police Department _____

Taking Examination for (bullet):

Sergeant

Lieutenant

Captain

Phone With Area Code(_____) _____

FAX With Area Code(_____) _____

IMPORTANT: Your Email Address _____

Credit Card (bullet)

VISA

M/C

DIS

AMEX

Credit Card Number _____

Credit Card Expiration Date _____

YOUR SIGNATURE _____

QUESTIONS?: If you have any questions, please call or email Liz at:
liz@commonwealthpolice.net

Chevrons, Half & Double Railroad
Tracks Available Here

The Syllabus & Course Content—The Sessions Continued

Week 17 September 23

Session One: Police Administration: Chapters 12 through 15

Session Two: Criminal Procedure—*Advanced Exam Issues*

Session Three: Criminal Law—*Advanced Exam Issues*

Session Four: Required Juvenile Laws

Session Five: Required Motor Vehicle Laws

Week 18 September 30

Session One: Supervision of Police Personnel: Chapters 13 through 17

Session Two: Criminal Procedure—*Advanced Exam Issues*

Session Three: Criminal Law—*Advanced Exam Issues*

Week 19 October 7

Session One: Recapitulation—*a concise summary of each management text (part 1).*

Session Two: Criminal Procedure—*Advanced Exam Issues*

Session Three: Criminal Law—*Advanced Exam Issues*

LAST Week 20 October 14

Session One: Recapitulation—*a concise summary of each management text (part 2).*

Session Two: Criminal Procedure—*Advanced Exam Issues*

Session Three: Criminal Law—*Advanced Exam Issues*

Session Four: MOCK Exam on ALL Subject Matter.

The Breakdown of the Sessions

Each session will run between 1 and 2 hours in length. Depending upon the subject matter, course content and class makeup, multiple session days could run for the full eight hours. Most sessions will adjourn at 12:00 noon.

Since many police officials and their families have take annual vacations in July and August all weeks designated as internet sessions will not physically meet. Instead, all officials registered in the program will receive difficult questions on the subject matter directly through email in pdf format. This will be addressed more completely as the sessions progress.

Special Concentrations— What Do You Need To Know?

We will specifically address what chapters are more likely to appear on **your** examination. We will address literally hundreds of areas that have been subject to examination. We will also specifically discuss areas that you **NEED TO KNOW** concerning criminal law, motor vehicle law, juvenile law, criminal procedure, and police powers of arrest.

*The keynote in successfully preparing is to know what you should not be studying—the cornerstone that other companies completely fail to achieve. Whatever examination you are preparing for, we will zero in on what you **NEED TO KNOW!***

Last Year's 2006 Examination

All police officials registered for this program will receive an extensive overview of the 2006 Civil Service examination administered on October 21, 2006.

The Dissection of Each Source

We will slowly go over each and every page and paragraph of each chapter in each of the management texts. Hundreds of areas of past questions will be addressed and analyzed. Have you ever heard Attorney Rogers say "How many times has someone been promoted because he or she answered one more question than the next guy?" This study group session is designed that you are not that "next guy."

Mock Examinations & Difficult Questions

Mock examinations on covered materials will be disseminated through out the sessions as indicated. This will assist you in measuring your understanding and comprehension of the materials in selected intervals. It is essential that you have a complete understanding of the target areas to do well on this examination. Mock examinations will reflect the difficulty and subject matter actually appearing on the examination. *Each official registered will receive hundreds and hundreds of difficult questions based on the precise content of the reading list to assist in preparation.*

ALL Your Questions WILL Be Answers

All your questions will be answered. Any conceivable area concerning promotion that you may have an issue with can be addressed to the attorney.

2007 Training And Experience

Each official attending will have his or her training and experience sheet filled out *privately and confidentially* by Attorney Rogers.

2007 Civil Service Law & Procedure—Important

There will be a thorough discussion on Civil Service Law of Chapter 31 concerning the legalities of police promotional examinations, the establishment of promotional lists, bypassing, and what you need to know about the appellate process.

A Centralized Location—in Medford

All sessions will be held at the Medford Police Training Center located at 100 Main Street in Medford, Massachusetts 02155. However, *we reserve the right to change locations at any time.* This may occur due to the size or geographically makeup of the class. Call or email us for more information.

Assessment Center Presentation

This course will also offer a detailed analysis of how the assessment center works, how it is scored, how it is validated, and in what exercises you will be required to participate.

Particulars About the Course

Registration: 8:00 a.m. on the first day.

Start Times: Each session will start at 8:00 a.m.

End Times: Most days will adjourn at 12:00 noon

Location: All sessions will be held at the Medford Police Training Center.

Location Change: Changes in location may occur due to makeup of class.

**OUTSTANDING
PRICE!!!!**

Materials: All officials registered for this program *will be expected to have the actual textbooks on the published reading list—unless otherwise noted.* These will be used in class at each session. All preparation will be based specially on these textbooks. *No shortcuts here! There is only one way to prepare—the correct way!*

Cost: \$1250.00

Value When Promoted

Once you are promoted, you will recoup your preparation investment in the very first month! Do the math!

Discounts for 2007

All officers attending this seminar will be able to receive repeater discounts for any other promotional seminar sponsored by CPS, Inc. for the rest of 2007. **ALL** questions concerning police discounts must be directed to Ms. Elizabeth Sullivan by emailing her at liz@commonwealthpolice.net.

CALL US ASAP @508.644.2116 All major credit cards accepted.

Changes

We reserve the right to change dates and locations without notice.

Cancellations—No Cancellations—No Refunds—No Credits

There will be absolutely **no refunds or credits for any reason**—including cancelled examinations, the Chief not calling for an examination, ineligibility, missed deadlines in applying for the examination itself, weather conditions, or any other reason.