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Volume 1, Issue 4

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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Superior Court Judge Rules Firefighter Wrongly Bypassed for Promotion

A Superior Court Judge recently ruled that a Haverhill Fire Lieutenant was wrongly bypassed for promotion to the position of Captain.

Attorney Jordan E. Burke of the Law Office of Timothy M. Burke represented Lt. Paul Weinburgh, who was wrongly denied promotion. The ruling directs the Civil Service Commission to order Haverhill personnel officials to place Burke's client at the top of the current list of firefighters qualified for promotion to captain.

The difference in pay between the two positions is about $7,000 a year, with lieutenants at the top salary level earning about $55,000 in annual base pay and captains at the top salary level earning about $62,000.

The controversy arose when the Civil Service Commission refused to interpret an agreement from a previous bypass case between Weinburgh and the City, wherein the City agreed to give retroactive seniority, as giving him "time in grade," so that he would have had one year of Lieutenant's experience and therefore be eligible to take the Captain's examination. See G.L. c. 31 § 59.

The Civil Service Commission is appealing the Superior Court Ruling.

"Fraudulently obtaining consent to sexual intercourse does not constitute rape as defined in our statute."

From the Courts...

Decisions of Interest to Massachusetts Police Officers

In Commonwealth v. Steggemann, 68 Mass. App. Ct. 292 (2007), the Appeals Court ruled that, the fact that the defendant drove his car on one occasion away from the location of a controlled drug buy was not enough to establish a sufficient "nexus" to the defendant's apartment, for a search warrant, even though he had been observed at some point in the past "cooking" cocaine in that apartment.

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In Suliveres v. Commonwealth, the SJC reaffirmed that the crime of rape is not committed by virtue of obtaining consent to sexual intercourse through fraud or deceit.

On the night in question, the defendant had sexual intercourse with the complainant by impersonating her longtime boy friend, his brother. According to the complainant, while she was asleep alone in the bedroom she shared with her boy friend, the defendant entered the room, and she awoke. In the dark room, the complainant assumed that the defendant was her boy friend returning home from work, and addressed him by her boy friend's name. He got into the bed and had intercourse with her. The complainant was "not fully awake" at the time of penetration. During the intercourse, she believed that the man was her boy friend, and had she known it was the defendant, she "would have never consented."

The SJC concluded that "[f]raudulently obtaining consent to sexual intercourse does not constitute rape as defined in our statute."

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In Commonwealth v. Colon, the SJC ruled that a murder defendant did not have a reasonable expectation of privacy in his girlfriend's apartment and therefore, a search conducted there was not illegal.

Although the defendant might have resided at his girlfriend's apartment for a period of time, several years ago, at the time in question he was no longer living there. He only went there to baby sit his children, and occasionally to engage in an intimate relationship with his girlfriend. He did not stay overnight on the date in question and had not stayed overnight for some time.

"A search in the constitutional sense occurs only when police conduct has intruded on a constitutionally protected reasonable expectation of privacy."

"In evaluating the reasonableness of an individual's expectation of privacy, we look to a number of factors, including the character of the location involved" "Thus, we consider whether the defendant owned the place involved, whether the defendant controlled access to the area, and whether the area was freely accessible to others. We have stated that 'an individual can have only a very limited expectation of privacy with respect to an area used routinely by others.'" "Even where an individual is a long-term guest in a home, and lives in his own bedroom in the home, he has only a 'very limited expectation of privacy," that terminates when the individual abandons the room.'" Based on the aforementioned factors, the court found that Colon had no expectation of privacy in the premises.

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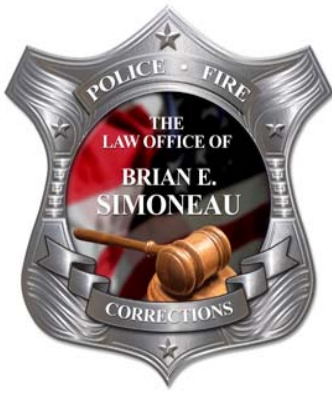

THE LABOR RELATIONS COMMISSION IS RELOCATING

Effective **June 19, 2007**, the Labor Relations Commission will be relocating its office and changing its telephone numbers. The new address and telephone numbers are listed below:

Labor Relations Comm.
Charles F. Hurley Building
19 Staniford Street, 1st Flr.
Boston, MA 02114

(617) 626-7132

Fax: (617) 626-7157

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- Police Assessment Centers
- 6 Day Promotional Seminar (Sgt, Lt. Capt).
- 5 Day Summer Jam 2007
- 6 Day Criminal Procedure *2007*
- 3 Day Crim. Law '07
- 6 Day Promotional Seminar 2007

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RECENT COURT CASES & CIVIL SERVICE COMMISSION DECISIONS

Town of Bedford v. AFSCME

BROWN, J. The town of Bedford (town) filed a complaint in Superior Court against AFSCME Council 93, Local 1703 (union) seeking a stay, under authority of G. L. c. 150C, § 2(b), of the arbitration of certain grievances filed by the union. The town asserted that the union's five grievances had not been timely submitted and therefore not subject to arbitration.

Initially, a Superior Court judge ordered a stay of arbitration, ruling that, based on the collective bargaining agreement (agreement), it was for the court, and not an arbitrator, to decide whether these particular grievances were arbitrable. At that time, rather than appealing the order to a panel of this court, the union filed a petition under G. L. c. 231, § 118, to a single justice of this court, who denied the union's petition.

The case then proceeded, on the basis of the parties' joint status conference memorandum, before another Superior Court judge, who held an evidentiary hearing on the issue whether the grievances had been timely received by the town.

The second judge determined that the grievances had not been timely received by the town, so as to render, based on the terms of the agreement, the challenged employee discharges as having been for just cause and not subject to the arbitration process. As a result, judgment entered in favor of the town. The union appealed. **We determine that, as matter of law, it was error to grant the town's application for a stay of arbitration.**

From the outset, the underlying case, litigated in Superior Court by a public employer against a union, went forward on the wrong footing. **The timely filing of a grievance is a "procedural" question.** See Massachusetts Highway Dept. v. Perini Corp., 444 Mass. 366, 377 (2005), quoting from Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (procedural questions include "'time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate' [emphasis omitted]"). **It is for an arbitrator, not a court, to resolve a procedural question that "grow[s] out of" and "bear[s] on [a] final disposition [of]," a labor dispute encompassed by the parties' agreement.** Massachusetts Highway Dept. v. Perini Corp., supra at 376, quoting from Howsam v. Dean Witter Reynolds, Inc., supra at 84. See John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964) ("Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator"). Courts must honor this fundamental principle so that the policies behind G. L. c. 150C shall be advanced.

Here, **the issue whether the grievances were timely received by the town is a procedural issue that the parties' agreement did not expressly exclude an arbitrator from deciding**. See Massachusetts Highway Dept. v. Perini Corp., supra at 376 n.11 ("Only those contracts with arbitration clauses that expressly preclude arbitrators from deciding . . . procedural disputes will support judicial intervention"). In addition, this procedural question grows out of and bears on the final disposition of the parties' labor dispute. Error was committed in not denying the stay of arbitration and not ordering the parties to proceed to arbitration. See School Comm. of Agawam v. Agawam Educ. Assn., 371 Mass. 845, 847 n.3 (1977).

Accordingly, we vacate the corrected judgment and remand the case to the Superior Court for entry of an order denying the application for stay of arbitration and directing the parties to proceed to arbitration.

Town of Duxbury v. Rossi

In Town of Duxbury v. Rossi, the Town of Duxbury attempted unsuccessfully to convince the Appeals Court to vacate an arbitration award wherein the arbitrator decided that the town had unlawfully denied Rossi's G. L. c. 41, § 111F claim. The arbitrator ordered the town to pay Rossi until he was deemed fit to return to duty under the provisions of an applicable collective bargaining agreement (CBA).

The town alleged *inter alia* that the arbitrator exceeded his authority and the award violated public policy. The Appeals Court rejected these arguments.

Download the Case

Richardo Alexandre v. Boston PD
(Civil Service Bypass)

In the case of Ricardo Alexandre v. Boston Police Department, the Civil Service Commission found that the Department was justified in bypassing Alexandre on the basis of two alleged violations of an Abuse Prevention Order. The Commission found that Alexandre's testimony regarding the alleged violations was not credible and was contradicted by at least one Boston Police Department Incident report.

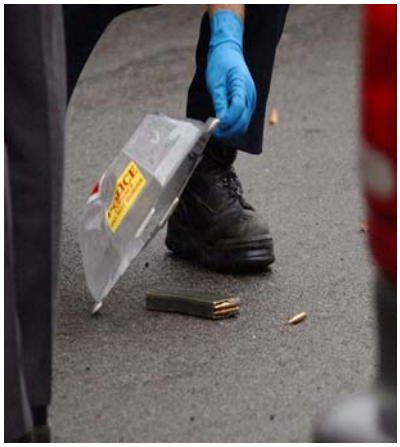
Ulrich T. Alfred v. Boston PD
(Civil Service Bypass)

The Civil Service Commission found that the Boston Police Department was justified in bypassing Ulrich Alfred for the position of police officer based on domestic abuse related issues. Specifically, "[t]he BPD presented, by a preponderance of the evidence, that the Appellant had pleaded to sufficient facts for a guilty finding for Domestic Assault and Battery, for which he was ordered to attend a Batterers' Treatment Program." "The Department also presented, by a preponderance of evidence, that the Appellant failed to attend the court-ordered Batterers' Program on certain occasions, resulting in the four (4) subsequent warrants issued to make him comply. In addition, the Department presented credible evidence of two (2) separate 209A Abuse Prevention Orders issued by the court against the Appellant." Based on the aforementioned, the Commission concluded that "[t]he Department's decision to bypass the Appellant was a valid exercise of discretion based on a policy to not hire persons with a history and pattern of perpetrating domestic violence and was well supported by a preponderance of the evidence.

Download the Case

Mark Zielinski v. City of Everett
(Civil Service Bypass – Tie Score)

This case serves as a reminder that where one individual with a tie score is hired over another with the same score, there is no bypass. "…When the Appointing Authority selects between or from among candidates whose scores are tied, it need not submit a statement of bypass reasons to HRD for those individuals in the tied-score subset who were not selected."



THE LAW OFFICES OF

TIMOTHY M. BURKE

NOT YOUR AVERAGE POLICE PROTECTION

Five shootings in six months, four of which were fatal; Attorney Timothy M. Burke has responded to each of them, but he is not an Assistant District Attorney on homicide response, and these are not your average shootings. These are unfortunate situations in which an officer is forced to draw and fire his or her weapon. A police shooting is not something any officer would like to think of as a common occurrence. It is a frightening reminder of the dangers of the job. The reality is that it is more common than recognized, particularly given the level of crime within the cities of the Commonwealth.

The first thoughts of those who know and respect law enforcement are with the officer. What is overlooked in the immediate chaos is whether the legal interests of that officer are protected. While most learn that should they be involved in a shooting, an investigation will follow, the majority are unaware that civil and criminal legal action could be initiated as a result of that investigation. That is why Attorney Burke provides the rare service of responding to those shootings, at any hour of any day, often in the middle of the night, on behalf of the officer. No officer can truly be trained on how to respond and react to such a shocking adn distressing event. Something like a fight with a suspect and its overall ramifications can be shaken off. A shooting cannot. To have even one person doing nothing but being concerned about you, offering and providing experienced guidance on every issue you face can be a tremendous support. So from the moment Attorney Burke arrives, which is as soon as he can get there following a phone call alerting him to the situation, assistance is provided every step of the way. Attorney Burke has done this on over 75 occasions.

It is critical that law enforcement officers know this service exists and is available to them should they encounter the unexpected situation of a shooting. Officers and their representatives must be proactive in seeking these services out. You have sworn to protect the cities of the Commonwealth. There are those who swear to protect you, and it is well deserved. DOWNLOAD A LEGAL DEFENSE FUND ENROLLMENT FORM.

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Insulin pump presents hurdle for aspiring officer

By Shelley Murphy, Boston Globe Staff | May 15, 2007

The insulin pump that controls Gregory Hennick's diabetes is the size of a pager and fits in his pocket. He said it hasn't stopped him from working as a police officer during the summer or from running laps, working out at the gym, or doing just about anything else.

Until now. The 22-year-old, who will graduate from Westfield State College this month with a degree in criminal justice, said the Northampton Police Department offered him a job as a police officer last month and then said it was forced to rescind the offer after learning that he wears the pump.

A state regulation bars anyone who wears an insulin pump from being hired as a full-time police officer in Massachusetts, although the same restriction doesn't apply to firefighter applicants. Yet, officers who start using pumps after they are hired may continue working.

"I didn't see this coming at all," Hennick, of Gloucester, said, adding that he has been preparing to be a police officer for a long time and thought that because his diabetes was manageable, he would get a job. "For them to say I can't do it, it was heartbreaking."

Hennick filed a complaint yesterday with the Massachusetts Commission Against Discrimination, accusing the City of Northampton and the state's Division of Human Resources of unlawful discrimination based on a perceived dis ability.

"I want them to know I'm fully capable of being a police officer," said Hennick, who worked the past two summers as an officer on Nantucket, then Provincetown.

Paul Dietl, acting chief human resources officer for the state, said yesterday that a panel of medical experts concluded in 1995 and again in 2002 that those who wear insulin pumps to monitor their blood glucose levels can't be hired as police officers. Candidates who take insulin injections may qualify, depending on the severity of their diabetes.

But Dietl said Hennick's case has raised questions about whether technological advances over the last few years have brought improve ments in the insulin pump that might warrant a revision of the state's regulation.

"We'll make sure we take a hard look at this," said Dietl, adding that the medical restrictions are meant to protect both the job applicants and the public. "The last thing we want to do is create an unfair barrier to employment."

Needham lawyer Timothy M. Burke, who filed the complaint on behalf of Hennick, said, "They simply have a perception of a handicap that doesn't exist."

Hennick, who was diagnosed with diabetes mellitus when he was 14, carries the pump, which contains insulin, in his pocket. A small tube connects the pump to a catheter inside the skin on his stomach. He said he could take insulin injections, but chose the pump because it is more effective and does not require him to carry vials of insulin and syringes and inject himself.

Neither Connecticut nor New Hampshire has restrictions on insulin pumps for officers. Although Hennick said he wants to stay in Massachusetts, he took the Connecticut State Police exam last week.

Attorneys Brian E. Simoneau & Timothy M. Burke Represent the Plaintiff in this case.

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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.

Town of Tyngsboro & IBPO Local 485

In the Town of Tyngsboro & IBPO case, the Union filed a prohibited practice charge with the Labor Relations Commission alleging that the Town violated G.L. c. 150E by by unilaterally changing how personal days would be handled. Specifically, the Union complained that officers were required to give four hours or more notice before using a personal day; and they could not use personal days if the requesting officer was working a shift-swap.

"A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes a condition of employment that involves a mandatory subject of bargaining. School Committee of Newton v. Labor Relations Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through custom and past practice as well as those conditions of employment that are established through a collective bargaining agreement. See, City of Boston, 16 MLC 1429, 1434 (1989); Town of Wilmington, 9 MLC 1694, 1696 (1983). To establish a violation, an employee organization must show that: (1) the employer altered an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and (3) the change was established without prior notice and an opportunity to bargain. Commonwealth of Massachusetts, 20 MLC 1545, 1552 (1994); City of Boston, 20 MLC 1603, 1607 (1997)."

To prove the new four hour notice requirement was a unilateral change, the Union introduced a single personal day request that was filed within the four hour period. The LRC ruled that one incident is insufficient to prove a past practice and therefore dismissed this element of the complaint. See, Town of Dedham School Committee, 5 MLC 1836, 1839 (1978) (a "past practice is a practice which is unequivocal, has existed substantially unvaried for a reasonable period of time and is known and accepted by both parties").

With respect to the alleged new "no personal days to cover swapped shifts rule," the Union failed to demonstrate that personal days could be used in the past to cover shift swaps. The complaint was therefore dismissed. Download the decision (full text).

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- 6 Day Criminal Procedure (September 11, 12, 14, 18, 19, 21, 2007 in Medford)
- 3 Day Criminal Law (September 25, 26, 28, 2007 in Medford)
- Boston PD Detective Examination (June 19, 20, 26, 27) Boston Police VFW Post #1018 off of American Legion Highway
- 5 Day Summer Jam 2007 (July 16,17,18, 19, & 20 – 2007) Natick PD Training Center
- 6 Day Criminal Procedure 2007 (Sept. 11,12,14,18,19 & 21 2007) Medford PD
- 3 Day Criminal Law for 2007 (Sept. 25, 26, & 28, 2007) Medford PD
- 6 Day Promotional Seminar 2007 (October, 1, 2, 8, 9, 10, & 11) Taunton Holiday Inn

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