

June, 2008
Volume 2, Issue 5

Police Legal News

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Police Legal News is a free 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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Lacet v. Boston Police Department Police Officer's Termination for Perjury Upheld

In the case of [Jovan J. Lacet](#) v. Boston Police Department, the Civil Service Commission upheld Officer Lacet's termination, on summary judgment, for perjury in connection with his testimony at his brother Beshar's homicide trial.

Specifically, he testified before a Suffolk County Grand Jury that his brother was at the scene of the murder. At trial, he testified that his brother was not at the murder scene. He attempted to

claim that his Grand Jury testimony was coerced. The Commission found that the City had just cause to terminate Lacet for his undisputed action of testifying untruthfully while under oath.

The Commission noted that, "[a] high demand is placed on police officer's conduct and character, whereby any misconduct calls their fitness for duty into question that could engender public mistrust of law enforcement personnel." See Police

Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986) (discharge of officer engaged in sexual misconduct while on-duty affirmed). This conduct extends to conduct outside of employment."

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

Three Important SJC Cases Regarding Traffic Stops & “Racial Profiling”



First, in the case of [Commonwealth v. Lora](#), the Supreme Judicial Court has recently ruled that “racial profiling” traffic citation statistics can be used to rebut the presumption that an officer has not made a racially motivated traffic stop.

“Once a defendant has raised a reasonable inference of selective prosecution by presenting credible evidence that persons similarly situated to himself have been deliberately or consistently not prosecuted because of their race, the Commonwealth must rebut that inference or suffer dismissal of the underlying complaint.” The decision was based, in part, on the Court’s decision in Commonwealth Franklin, where the Court ruled that “[S]tatistical evidence demonstrating disparate treatment of persons based on their race may be offered to meet the defendant’s burden to present sufficient evidence of impermissible discrimination so as to shift the burden to the Commonwealth to provide a race neutral explanation for such a stop...”



However, in [Commonwealth v. Lora](#), the SJC reversed an order suppressing drugs found in the vehicle stopped by the police, because the statistics proffered were insufficiently reliable to raise an inference of profiling.

The traffic stop occurred on Route 290, a major highway, in the Town of Auburn. The defense relied on population demographics of the Town of Auburn instead of the demographics of those travelling on Route 290. Also, in a related case, [Commonwealth v. Betances](#), the SJC held that absent an initial showing of racial profiling, in the discovery process, defendants are not entitled to copies of citation books, audit sheets, and other similar reports regarding prior vehicle stops.

In another related case, [Commonwealth v. Thomas](#), 451 Mass. 451(2008), the SJC held that a defendant’s motion for discovery of an arresting officer’s citation books, audit sheets and “any other information” pertaining to whether the officer had engaged in “profiling, stereotypical thinking and hunches” was vague and overbroad.



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[Furtado v. Town of Plymouth:](#)

Polygraphs Permissible when Administered by Law Enforcement Agencies in Criminal Investigations

In 1999, the district attorney for the Plymouth district received a report from the Department of Social Services that included allegations that Kevin J. Furtado, a police officer in the town of Plymouth, had sexually abused two minor children. After investigation, the district attorney decided not to file criminal charges. Instead, the matter was referred to Robert Pomeroy, the town's police chief, for "whatever administrative action [he] deem[ed] appropriate." Pomeroy notified Furtado that the police department would be "conducting an internal investigation into allegations that [he] engaged in criminal activity." He also directed Furtado "to write a complete and full report responding to these allegations" and, subsequently, to take a lie detector examination, on threat of discipline up to and including termination for refusal.

Furtado requested and received transactional immunity, meaning that he could not be prosecuted for his alleged misconduct.

He then claimed that the polygraph order violated his rights under [G. L. c. 149, § 19B \(2\)](#), because he was ordered to take a lie detector test when there was no "ongoing criminal investigation."

[G. L. c. 149, § 19B](#) (2), reads, in relevant part, as follows:

"It shall be unlawful for any employer or his agent, with respect to any of his employees . . . to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. **This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations**"

"The "criminal investigations" exception applies where the conduct under investigation would constitute a crime **even though criminal prosecution was not possible at the time of the administration of the lie detector test**. Consequently, the decision granting summary judgment to the defendants is affirmed."

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

Attorney Leonard H. Kesten of [Brody, Hardoon, Perkins & Kesten, LLP](#) represented the Town of Plymouth & **Attorney John M. Collins**, General Counsel for the [Massachusetts Chiefs of Police Association](#) submitted an amicus brief in this case.

Commonwealth Police Service Seminars 2008

- 4 Day Detective for 2008, June 3 & 4, and June 10 & 11, 2008, Andover Police Training Center
- Police Towing, June 12, 2008, Natick Police Training Center
- Advanced Domestic Violence—2008, Thursday, June 19 & Friday, June 20, 2008, Springfield Police Training Center
- Duties of the Police Matron 2008 Legal & Practical Clinic, Thursday, June 26, 2008, Bridgewater Police Training Center
- Bullying Identifying & Regulating Bullying on and off School Property Under MA Law, Sept. 19, 2008, Andover Police Training Center
- 2 Day Advanced Detective for 2008, Wednesday & Thursday September 24 & 25, 2008, Leicester Police Department Training Center
- Criminal Offender Record Information The Public Records Law The Sex Offender Registry Law, Will be held in October, Springfield Police Training Center

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- | | |
|---|---------|
| ➤ Police Administration (Swanson) Study Guide | \$30.00 |
| ➤ Juvenile Law Study Guide | \$30.00 |
| ➤ Supervision of Police Personnel (Iannone) Study Guide | \$30.00 |

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From the Courts - Search & Seizure Cases



“The smell of burnt marijuana emanating from the clothes of passengers of a motor vehicle did not justify a search of the vehicle’s trunk”

In the case of [Commonwealth v. Garden](#), the SJC held that the smell of burnt marijuana emanating from the clothes of passengers of a motor vehicle did not justify a search of the vehicle’s trunk. In suppressing the discovery of three firearms and marijuana packaged for sale, the SJC ruled as follows:

reasonably have inferred that burning, recently burned, or even raw marijuana would be found in the trunk. Accordingly, the search of the trunk was beyond the scope permitted by art. 14 or the Fourth Amendment.



In the case of [Commonwealth v. Knowles](#), the SJC ruled that the police did not have reasonable suspicion to seized an individual in response to an anonymous report that the individual a man in a white shirt and jeans was "swinging a baseball bat." Also, the SJC held that the community caretaking doctrine did not apply, because there was no basis for believing that the defendant's well-being or the safety of the public was in immediate jeopardy. After arriving at the scene, the officer quickly seized Knowles, made no inquiry about his well-being, and as soon as other officers arrived and took charge of Knowles, he proceeded to examine the contents of the open trunk for evidence of criminal activity. The narcotics discovered in the trunk of the vehicle were ordered suppressed.

There is no question that in many cases involving searches of automobiles, probable cause to search extends to every area within the vehicle, including the trunk. The facts of this case, however, require a different conclusion because the odor detected by the officers was not the odor of raw marijuana, which might reasonably suggest the defendant was engaged in selling or transporting the drug, but rather the odor of burnt marijuana, suggesting that the defendant, or others in the car, had been smoking marijuana in the not too distant past. Simply from detecting the odor of burnt marijuana on the clothes of the car’s occupants -- most of whom he had seen enter the car a very short time before -- the officer could not

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The Roundtable—A Dedicated Study Group Session, 7/27/08 thru 9/28/08, 14 Day Sessions, Medford Police Training Center
- **Sgt., Lieut., & Capt. Exams for 2008**
The BOSTON Roundtable - A Dedicated Study Group Session
- **5 Day CRASH COURSE for 2008**, Monday, September 29 thru Friday October 3, 2008, Medford Police Training Center

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From the Courts: **Recent Labor & Employment Cases**

SJC VACATES ARBITRATION AWARD

In the case of [City of Somerville v. Somerville Municipal Employee's Association](#), a union member filed a grievance over the mayor's appointment of a non-union member to the position of director of veterans' services. An arbitrator determined that the appointment violated the collective bargaining agreement and directed the mayor to appoint the grievant to the position. The arbitrator also ordered the city to reimburse the grievant for lost wages and benefits, with interest compounded quarterly at twelve percent. The city attempted to vacate the arbitration award in the Superior Court. A judge in the Superior Court entered judgment on the pleadings for the union, affirming the award. The Appeals Court affirmed the judgment. [Somerville v. Somerville Municipal Employees Ass'n, 69 Mass. App. Ct. 583 \(2007\)](#). The SJC decided that the explicit language of [G. L. c. 115, § 10](#), that a city's director of veterans' services "shall be appointed . . . by the mayor, with the approval of the city council," precludes the challenged appointment from being a proper subject for collective bargaining or arbitration. Accordingly, the SJC reversed the judgment and order that the award be vacated. In vacating the arbitration award, the SJC reasoned as follows:

The Appeals Court has stated that, "while an underlying decision may be reserved to the exclusive prerogative of the public employer . . . the public employer may be required to arbitrate with respect to ancillary matters, such as procedures that the employer has agreed to follow prior to making the decision." *Lynn v. Labor Relations Comm'n*, 43 Mass. App. Ct. 172, 179 (1997). In question in the *Lynn* case was the authority of the city's fire chief to file an application for the retirement of a fire fighter, without first engaging in collective bargaining with the union, and while the fire fighter's application for an accidental disability pension was pending before the Contributory Retirement Appeal Board. The Appeals Court carefully differentiated between the broad category of cases involving challenges to an arbitration award, in which the public employer is operating under statutory authority granting general management powers, not listed in [§ 7 \(d\)](#),

and a narrow category in which the governmental employer acts under a specific authorizing statute, also not listed in [§ 7 \(d\)](#). The Appeals Court explained: "In the range of cases where the governmental employer acts pursuant to broad, general management powers, the danger is presented, as pointed out in *School Comm. of Newton v. Labor Relations Comm'n*, [supra] at 564-566, that to recognize the statutory authority as exclusive would substantially undermine the purpose of [G. L. c. 150E, § 6](#), to provide for meaningful collective bargaining as a general rule with respect to compensation and other terms and conditions of employment. That danger simply is not present when the governmental employer acts pursuant to a specific, narrow statutory mandate." The Appeals Court concluded that the fire chief's specific authority to act under [G. L. c. 32, § 16 \(1\) \(a\)](#), left "nothing to bargain about" and, therefore, was a matter of exclusive managerial prerogative not subject to collective bargaining. We agree with what was said in the *Lynn* case and, moreover, find the reasoning there fully applicable to the circumstances before us. The mayor's specific authority granted by [G. L. c. 115, § 10](#), leaves "nothing to bargain about" and, moreover, is undermined entirely should the mayor be bound to the procedures set forth in [the CBA]. We cannot view the challenged decision to hire Senesi an "ancillary matter" to the mayor's appointment power.

Download the full text of the decision [here](#).

Decision in "Take Home" Car Retirement Credit Case Surprisingly Reversed

In the case of [Pelonzi v. Retirement Board of Beverly](#), the SJC surprisingly reversed the ruling of the Appeals Court that the personal use of an employer-supplied automobile qualifies as "[r]egular compensation," as that term is defined by [G. L. c. 32, § 1](#), for purposes of calculating the retirement benefits.

THE LAW OFFICE OF TIMOTHY M. BURKE WELCOMES THE BARNSTABLE COUNTY CORRECTIONAL OFFICERS ASSOCIATION

The Law Office of Timothy M. Burke welcomes the Barnstable County Correctional Officers Association as its newest client.

On May 19, 2008, of the 171 employees who voted, 163 decided to have their independent association, which is represented by the Law Office of Timothy M. Burke, serve as their exclusive bargaining representative.

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Required Management Texts

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- Criminal Investigation—9th ed. 2006 by Swanson
- Police Administration: Swanson; 7th ed.; 2008
- Community Policing—Contemporary Perspectives, 4th ed. Kappeler, 2005

HIGHEST SCORES: Last year's class generated a great deal of interest. The scores were the highest in the state. Many officials attending that Roundtable scored in the mid 90s—We also had a few 96s, 97s, and a 98—the highest score in the state for the rank of Captain.

NOTE: It is strongly suggested that each official attending have ALL four of these management textbooks. *They will be used during each class.*

Every chapter will be dissected and broken down corresponding to rank by Attorney Rogers.

In place of the law texts on the reading list each official attending will receive our 2008 Criminal Law Textbook and our 2008 Criminal Procedure Textbook.

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Day 2 July 30, 2008 8:00 a.m. to noon
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Day 5 Aug 10, 2008 8:00 a.m. to noon

Day 6 Aug 13, 2008 8:00 a.m. to noon
Day 7 Aug 17, 2008 8:00 a.m. to noon
Day 8 Aug 20, 2008 8:00 a.m. to noon
Day 9 Sept 7, 2008 8:00 a.m. to noon
Day 10 Sept 10, 2008 8:00 a.m. to noon

Day 11 Sept 14, 2008 8:00 a.m. to noon
Day 12 Sept 17, 2008 8:00 a.m. to noon
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QUESTIONS?: If you have any questions, please email Liz at: liz@commonwealthpolice.net

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

Excerpts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 8)

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

MVs—Refusing to Obey Lawful Exit Order

Refusing to Vacate Passenger Compartment Upon Police Order

In **Pennsylvania v. Mimms**, 434 U.S. 106 (1977), the USSC stated that a police officer may order the operator out from the passenger compartment of a lawfully stopped vehicle, as long as it takes place at the outset of the stop. Additionally, in **Commonwealth v. Santana**, 420 Mass. 205 (1995), the SJC stated that “[w]hen police are justified in stopping an automobile, they may, for their safety and the safety of the public, order the occupants to exit the automobile.”

REFUSAL ISSUE: What if the operator refuses to alight from the lawfully stopped motor vehicle in disregard of the officer’s express order?

Disorderly for Operator to Refuse to Re-enter MV

In **Commonwealth v. Bosk**, 29 Mass. App. Ct. 901 (1991), a motorist stopped for a motor vehicle infraction refused an officer’s order to reenter his motor vehicle and demanded that he be able to look at the police radar in the police cruiser. The Court upheld his arrest as a disorderly person because there was no legitimate purpose involved in his actions. The evidence demonstrated that by his conduct he was risking not only his own safety but that of others.

EDITOR’S NOTE: What legitimate purpose can be served by the operator refusing to comply with a police officer’s order to exit a lawfully stopped motor vehicle? Remember that the **Santana** and **Williams** cases [Massachusetts decisions] entitles the investigating officer to *order* the operator out of the vehicle. The officer is entitled to do this for his own protection because it reduces the opportunity for unobserved movements on the part of the operator and it also allows the investigating officer to move off the street and out of the way of traffic.

EDITOR’S NOTE: A police officer that has a reasonable belief that his safety is in danger by either an operator or an occupant of a motor vehicle may use reasonable force to extract that person from the passenger compartment if they refuse to comply with the officer’s valid exit order.

POSSIBLE OPTIONS: Such conduct may be either violative [of c. 272 § 53](#) (disorderly) or [c. 90 § 25](#) (refusal to show license or registration, etc., etc.) or the common law crime of interfering with a police officer.

MVs—Arrest of Operator For [C. 90 § 21](#)—Arrest Where Operator Simply States That License Is Suspended

In **Commonwealth v. Riche**, 50 Mass. App. Ct. 830 (2001), subsequent to a CMVI stop for speeding, the operator alighted and stated that his “driver’s license was suspended because of a drug offense.” The Court stated that the defendant’s “avowal that his right to drive had been suspended would justify arresting him on the spot.” See [C. 90 § 21](#) and 540 Code Mass. Regs §§ 20.00 thru 20.04.

Failing to Produce License on Demand

In **Commonwealth v. Stack**, 49 Mass. App. Ct. 227 (2000), where a driver failed to produce a license on demand, in violation of [C. 90 § 11](#), the Court stated that “this created reason to suspect a violation of [G.L. c. 90 § 10](#) or [§ 23](#), [so] the police had probable cause to arrest him” pursuant to [C. 90 § 21](#). See *id.* @ page 234.

BURDEN TO PROVE LICENSE ON OPERATOR: Chapter [278 § 7](#) states that “a defendant in a criminal prosecution, relying for his justification upon a license..[]..shall prove the same; and, until so proved, the presumption shall be that he is not so authorized.”

EDITOR’S NOTE: It is suggested that police do not automatically arrest under these circumstances, but first inquire just why it is that the operator cannot produce a license. If it is discovered that the operator is a Massachusetts resident who actually does have a license, but has merely failed to have it with him, the violation would be simply [C. 90 § 11](#)— a CMVI.

[...to be continued in the next 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
Definition of "show of authority"	The separate & independent rule of p/c	The "un-arrest"
P/C to arrest & search based on CI	P/C to search & seize based on CI	Just what is probable cause?
Searching MV on less than p/c	The attenuation doctrine	School locker searches
Frisking containers possessed	Dissipation of the taint rule	Breathalyzer tests of students
What is possession in Massachusetts?	Physical & testimonial evidence	SWs as arrest warrants
Can you possess items in another city?	Legal use of force in obtaining evid.	
2008 updates on electronic surveillance		
Warrantless arrests at the threshold		

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LOCATION: Andover Police Department Training Center

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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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