August, 2007
Volume 1, Issue 6

Police Legal News

CPS PUBLICATIONS AVAILABLE FOR PURCHASE

- Lawman Pocket Reference
- 2007 Police Dispatch
- 2007 Criminal Procedure
- 2007 Basic Elements
- Motor Vehicle Pocket Index
- Domestic Violence Textbook
- 2007 Internal Affairs
- Juvenile Issues & Procedure Textbook
- Command Presence Quarterly Criminal Law Bulletin

STUDY GUIDES

- Proactive Police Management, 7th Edition
- Police Administration (Study Guide)
- Criminal Investigation (Study Guide) **NEW EDITION!**
- Supervision of Police Personnel (Study Guide)
- Community Policing: A Contemporary Perspective **NEW EDITION!**
- Juvenile Law
- Criminal Law
- Criminal Procedure

CLICK HERE TO ORDER

Published by:

Commonwealth Police Service, Inc.
Attorney Patrick M. Rogers
Post Office Box 58
Assonet, MA 02702
Phone: 508-644-2116
Fax: 508-644-2670
www.commonwealthpolice.net

Attorney Brian E. Simoneau
161 Worcester Road, Suite 200
Framingham, MA 01701
Phone: 508-881-1119
Fax: 508-302-0212
www.policelaborlaw.com

Police Legal News is a free monthly newsletter designed to provide police officials with the latest news and information regarding court and administrative agency decisions affecting the Massachusetts law enforcement community.

Topic areas will include: summaries of SJC & Appeals Court decisions, search & seizure, motor vehicle, and criminal law, labor relations law & highlights of recent decisions of the Mass. Labor Relations Commission, Civil Service Commission cases, police civil liability, etc…

IMPORTANT NOTE: (IF YOU ARE NOT ALREADY A SUBSCRIBER) TO SUBSCRIBE TO POLICE LEGAL NEWS, SEND AN E-MAIL TO SUBSCRIBE@POLICELABORLAW.COM WITH THE WORD 'SUBSCRIBE' IN THE SUBJECT FIELD.

Keith Layne v. Town of Tewksbury – Civil Service Commission Upholds Police Officer's Termination

In Keith Layne v. Town of Tewksbury, the Civil Service Commission ruled that the Tewksbury Police Department established that just cause to discharge Officer Layne for mishandling a motor vehicle accident investigation and "repeatedly lying about the incident, interfering with an internal affairs/citizen's complaint, incompetence by using poor judgment, conduct unbecoming an officer and filing an inaccurate and incomplete report."

Specifically, the Commission found that evidence presented at the hearing demonstrated that Layne "lied in his two reports and two interviews with Donovan as indicated by contradictions to his account in [Officer] Mulvey's report. Lying and filing false reports are just cause for the termination of a police officer." Meaney v City of Woburn, 18 MCSR 129, 133 (2005).

CIVIL SERVICE SEMINAR ANNOUNCEMENT

Attorney Patrick M. Rogers of Commonwealth Police Service, Inc. will be holding an Updated Civil Service Law Seminar on November 6 & 7, 2007 at the Natick Police Department Training Facility. Register on-line or by phone, (508) 644-4216.

From the Courts…

Decisions of Interest to Massachusetts Police Officers

In Presby v. Commissioners of Bristol County, the Appeals Court held that a Bristol County Correctional Officer was entitled to assault pay, when he slipped on steps while responding to an inmate fight. Presby's employer claimed that he was not entitled to assault pay because his injury "was not the direct result of a prisoner's violent act." In ruling in the Presby's favor, the Court was persuaded by the holding in Conroy v. Boston, 392 Mass. 216 (1984), case where, a correction officer was awarded assault pay when he fell while chasing an escaping prisoner. In the previous case, no violence was directed at the officer and his injury did not occur while the inmate was in his custody. Nevertheless, the Court found that his injury was compensatable. The Appeals Court therefore concluded as folllows: "Presby is entitled to assault pay, as his injuries did result from an act of violence within the meaning of the statute as developed by the reasoning of the court in Conroy v. Boston, supra."

Comm. v. Lawrence
(School Zone)

Mitchell Lawrence sold marijuana to Berkshire County Drug Task Force Detective Felix Aguirre "426.5 feet from the First Congregational Church. The church housed the Great Barrington Cooperative Preschool, a licensed and accredited privately owned facility that serves children from two years and nine months to kindergarten age." Lawrence was charged with distribution of marijuana within 1000 feet of a school zone, in violation of G.L. c. 94C § 32J. He challenged his conviction on several grounds that "strict criminal liability only applies when the location where the offense is alleged to have occurred includes a qualifying school as originally set forth in the statute. He contends that with respect to the later enumerated locations, including preschools, the Commonwealth must prove an intent to commit the offense within that specific area." In support of his theory, he claimed that he did not know he was within a school zone when he conducted the transaction. G.L. c. 94C § 32J covers transactions conducted within 1000 feet of a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school whether or not in session. It further covers transactions conducted within 100 feet of a public park or playground.

"G.L. c. 94C § 32J covers transactions conducted within 1000 feet of a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school whether or not in session. It further covers transactions conducted within 100 feet of a public park or playground."

COMMISSIONER HENDERSON RETURNS TO THE CIVIL SERVICE COMMISSION

Attorney Dan Henderson has returned to his role as a Civil Service Commissioner, replacing Lydia Goldblatt, the former Chairman.

UPCOMING CPS SEMINARS

- **Annual Detective Clinic 2008** (February 6 & 7 and 13 &14, 2008)
- **Advanced MV Issues** (Sept. 27. 2007)
- **Constitutional & Criminal Law for Dispatchers & Call takers in Massachusetts** (October 24, 2007)
- **Harbor Master Legal Powers in Massachusetts** (October 29 & 30, 2007)
- **Advanced OUI Issues: Melanie's Law & 263 § 5A Decoded** (Nov. 2, 2007)
- **Updated Civil Service Law Seminar** (Nov. 6 & 7, 2007)
- **Arson Investigation Clinic** (Nov. 12, 2007)
- **Advanced Internal Affairs Clinic** (Nov. 13 & 14, 2007)
- **Advanced Criminal Law** (Dec. 10 & 11, 2007)
- **Police Towing** (Dec. 14, 2007)

CLICK FOR REGISTRATION & MORE INFORMATION

RECENT POLICE LABOR LAW DECISIONS

TOWN OF HUDSON V. LRC:

APPEALS COURT AFFIRMS RIGHT TO HAVE UNION ATTORNEY PRESENT DURING INVESTIGATORY INTERVIEW

In the case of Town of Hudson v. Labor Relations Commission, the Appeals Court upheld the Labor Relations Commission's ruling that a union attorney may serve as a Weingarten representative. A Hudson Police Officer was ordered to attend an investigatory interview to answer allegations that he made disparaging remarks to ranking officers. A union attorney was sent to represent the officer at the investigatory interview. The investigator, a sergeant, refused to allow the attorney to attend the interview because he was an attorney. The union challenged, at the Labor Relations Commission, the sergeant's refusal to allow the attorney to attend the interview.

Bargaining unit members have a right to have a union representative be present at investigatory interviews, where the employee reasonably believes that discipline may result. Here, there was no question that the interview was investigatory and that discipline could reasonably result. The rationale for barring an employee's personal attorney for attending Weingarten interviews is that the attorney is not furthering mutual aid and protection, consistent with Weingarten, but is acting exclusively in the interests of the individual employee. The Labor Relations Commission rejected this rationale. "Chaves did not request to be represented by his personal attorney or outside counsel uninvolved in the employer- employee relationship. Instead, Chaves requested to be represented in an investigatory interview by an attorney assigned from his own Union. Under these circumstances, therefore, Terry [the Union Attorney] cannot reasonably be characterized as an outside professional 'uninvolved in the employer-employee relationship."

The Appeals Court concluded that, "..the basis for the commission's decision is that, unlike an employee's personal attorney, a union attorney's role as a Weingarten representative is to protect the rights of the employee, the union, and its members. The determination that a union attorney may be a Weingarten representative is a permissible construction of G. L. c. 150E, § 2, and is consistent with the authorities and the purpose of the provision. Accordingly, we affirm the decision of the commission."

JORDAN V. CARTER

OFFICERS' SPEECH NOT PROTECTED BY 1ST AMENDMENT

MBTA Police Officers Ronald Jordan and Robert MacKay were terminated for violating the Massachusetts' Criminal Offender Records Information (CORI) statute, G. L. c. 6, § 172, and for making obscene and inappropriate comments over the Department's recorded telephone lines. They filed suit against MBTA Police Chief Joseph C. Carter alleging that they were terminated, in violation of the First Amendment of the U.S. Constitution, for criticizing on the recorded phone line, Chief Carter and his deputies.

"The First Amendment protects a public employee's right, in prescribed circumstances, to speak as a citizen addressing matters of public concern. *Connick v. Myers*, 461 U.S. 138, 147 (1983). A three-part test is utilized to determine whether a plaintiff has an actionable First Amendment claim. Plaintiffs must show: (1) that their expression involved matters of public concern; (2) that their interest [and the public's interest] in commenting upon those matters outweighed the Department's interest in promoting workplace efficiency; and (3) that their "protected speech" was a substantial or motivating factor in the Department's disciplinary decision. *Lewis v. City of Boston*, 321 F.3d 207, 218 (1st Cir. 2003)."

In allowing the defendants' motion for summary judgment, the court ruled as follows: "As for making general workplace complaints, "[s]uch conduct *itself* is not calculated to provide members of society with information necessary to make informed decisions about government operations, to disclose public misconduct, or to inspire public debate on a matter of significant public interest." *Meaney v. Dever*, 326 F.3d 283, 289 (1st Cir. 2003) (emphasis in original). Simply put, plaintiffs did not "seek to inform the public that [the Department] was not discharging its governmental responsibilities," nor did they "seek to bring to light actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148.

The court also ruled as follows: "[t]he First Amendment does not "require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. Nor is it necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id*. at 152. Clearly, the Department's interest in maintaining order and discipline among its officers was a strong interest that outweighed the plaintiffs' interest in complaining privately between themselves and to others about the perceived inadequacies of their superiors. This is not a case in which plaintiffs attempted to inform the public about serious safety issues, to blow the whistle on any observed wrongdoing, or to seek a forum with their superiors in order to air concerns about the morale or functioning of the workplace. "The limited First Amendment interest involved here did not require that [Chief Carter] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id*. at 154.

COMMONWEALTH POLICE SERVICE, INC.

Post Office Box 58
Assonet, MA 02702

PHONE:
(508) 644-2116

FAX:
(708) 555-0102

E-MAIL:
ROGERS.PATRICK@VERIZON.NET

WEBSITE:
COMMONWEALTHPOLICE.NET

ATTORNEY BRIAN E. SIMONEAU

The Meadows
161 Worcester Road
Framingham, MA 01701

PHONE:
(508) 881-1119

FAX:
(508) 302-0212

E-MAIL:
BRIAN@POLICELABORLAW.COM

WEBSITE:
WWW.POLICELABORLAW.COM

THE FAMILY MEDICAL LEAVE ACT (FMLA)

The Family Medical Leave Act of 1993 generally requires employers to grant covered employees (those who have worked for the employer for a year and have worked at least 1,250 hours) a total of 12 weeks of unpaid leave during any 12 month period for any of the following events:

1. for the birth, adoption, or foster placement of a child of the employee (leave must be taken within 12 months of birth, placement, or adoption);
2. to care for an immediate family member (spouse, child, or parent) who has a serious health condition; or
3. when the employee is unable to work because of a serious health condition.

A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

FMLA leave for either the employee's or a family member's serious health condition may be taken intermittently if it is medically necessary. Also, at the employer's discretion, it may be taken intermittently for the birth, place, or adoption of a child.

FMLA leave is unpaid. However, employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken, so that the employee is paid for his or her leave. The running of paid and FMLA leave concurrently prevents an employee from taking 12 weeks of FMLA leave in addition to his or her accrued paid time off. **The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave.** Therefore, an employee can use sick or family leave to receive pay during his or her FMLA leave to care for a sick family member only if the employer allows it either by policy, past practice, or collective bargaining agreement. For example, if a CBA only allows employees to use sick leave when the employee is sick, the employee cannot use sick leave to cover his or her FLMA absence to care for a family member.

For foreseeable FLMA leave, the employee must notify the employer within 30 days. For unforeseeable FMLA leave, the employee must notify the employer as soon as practicable. An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If requested, the employee must also provide written medical certification for the leave. Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.

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.