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# 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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## Worcester PD's Recent JLMC Award

When municipalities and their police officers and fire fighters are unable to agree on the terms of a collective bargaining agreement, the Massachusetts [Joint Labor-Management Committee](#) can intervene to assist the parties in reaching a voluntary settlement. If voluntary settlement efforts fail, the JLMC can engage in binding arbitration. The JLMC was created by [Chapter 589 of the Acts of 1987](#). The JLMC recently awarded the [Worcester Police Department's](#) Superior Officers agreements covering a

period of six-years, giving them pay raises totaling 17%. The JLMC's award also shifts some health insurance costs to the union. In addition to the four-year contract originally before the JLMC, the parties agreed on an additional two-year contract with 2% raises in the middle of each year. By Jan. 1, 2009, the new contract will increase the salaries of Sergeants, depending on their [Quinn](#) payments from \$69,857 to \$87,321; Lieutenants, \$77,642 to \$97,052; Captains, \$84,404 to \$105,505.

Health insurance premiums will increase from 10%-13% to 20% for those hired before Jan. 1, 2006, and 25% for those hired after that. Prescription drug co-payments will increase to between \$10 and \$35.

The union also got a \$250.00 defibrillator stipend, an increase in their court-time minimum from 3 to 4 hours, and increase in their detail rate.

[Download the Worcester Fire Department's JLMC award.](#)



***"[I]n appropriate circumstances a Terry type search may extend into the interior of an automobile." "Essentially, the question is whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger."***



### **THE LRC HAS A NEW CHAIRMAN**

Michael A. Byrnes has replaced John Jesensky as Chairman of the Massachusetts Labor Relations Commission. Former Chairman Jesensky will serve out his term as a Commissioner.

## **From the Courts...**

### **Decisions of Interest to Massachusetts Police Officers**

#### **Comm. v. Pena (Protective Search of Motor Vehicle)**

A judge erred in suppressing firearms found in a compartment under the rear seat of a Volkswagen in which the defendant was the front seat passenger, as the discovery was the result of a valid protective search based on the officers' concern for their safety.

"[I]n appropriate circumstances a Terry type search may extend into the interior of an automobile." "Essentially, the question is whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger."

The stop took place in Chinatown, a high-crime area, and the scene of drug deals and shootings, including a shooting of a Boston police officer.

The potential threat to the officers was not the driver, who was under arrest. Rather, the potential threat came from Roy, the passenger, whose initial willingness to raise his hands at Officer Holmes's request gave way to a refusal to sit still, erratic movement of his hands, and repeated insistence that Officer Reid "[c]heck the trunk." These actions, occurred at a time when the officers had not yet determined whether the vehicle was stolen. Roy was not under arrest, and might easily have gained access to the rear of the vehicle, with or without the officer's permission.

On the basis of the facts

known to him, the arresting officer was justified in conducting a search of the automobile for the limited purpose of ascertaining that it contained no weapons which the defendants might use to escape or retaliate against the officer.

[Download the case.](#)

#### **RETIREE NOT ENTITLED TO HEALTH INSURANCE BENEFITS**

In the case of [Cioch v. Treasurer of Ludlow](#), the SJC ruled that the retirement law, [G. L. c. 32B](#) does not prevent a municipality from barring initial enrollment of an employee into its municipal health insurance plans after retirement. The SJC concluded that "because the broad authority afforded to a municipality does not require it to enroll retirees who were not plan participants on retirement, a municipality may follow a policy precluding participation by retirees who, although eligible for "contributory insurance" on retirement, were not enrolled in one of the municipality's health insurance plans at that time."

When she retired and during her tenure as an active public employee, Cioch was covered by her husband's health insurance plan. Three years after she retired, when her husband retired, they couple was no longer eligible for coverage under his employer's insurance program, and they purchased private

health insurance. Cioch eventually attempted to get coverage under the Town's plan. She was denied coverage.

"Certainly, G. L. c. 32B does not preclude postretirement enrollment, see [McDonald v. Town Manager of Southbridge](#), 423 Mass. 1018 (1996), and it does permit the town's active employees to continue their health insurance coverage during retirement. But nothing in the record supports the notion that Cioch, as a retiree, is entitled to benefits available to active employees."

#### **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)

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## **RECENT POLICE LABOR LAW DECISIONS**

### **CITY OF WORCESTER V. IBPO LOCAL 378 & LINDA C. JACKSON**

Massachusetts Superior Court Justice Peter Agnes upheld an arbitrator's decision to award a retired Worcester police officer her sergeant's stripes nearly thirteen years after she was bypassed for promotion. In ruling that the City's attempted bypass of Jackson was improper, the arbitrator relied on the City's longstanding practice to appoint candidates strictly in the order of their rank on the eligibility list. Prior to Jackson's bypass, Worcester had not bypassed a candidate for sergeant in 15 years.

At issue in the case was whether the Management Rights clause of the collective bargaining agreement clearly preserves the right to bypass candidates on the eligibility list, whether the contract is ambiguous, and if there was a "past practice" requiring the City to promote strictly by the civil service list. The arbitrator found that "the conduct of parties over a long period of time resulted in the creation of a benefit for members of the union to be promoted based on their rank on the civil service eligibility list." While the City of Worcester argued that the "past practice" requirement that evolved from previous promotions was superseded by G.L. c. 31 § 27, which grants the City Manager the right to make promotions, the court relied on a previous decision which stated that the "means of implementing managerial decisions ... may be the subject of an enforceable provision in a collective bargaining agreement." *City of Worcester v. International Brotherhood of Police Officers, Local 504 et al.*

The City of Worcester argued that even if it was bound by longstanding practice to appoint candidates in the order of their rank on the eligibility list, it still retained the right to bypass a candidate due to previous discipline. In reversing the bypass, the arbitrator found that neither the police chief nor the city manager cited the discipline before the

grievance was filed. The city also promoted two individuals to the rank of sergeant who had had received a greater punishment for disciplinary infractions than Jackson who had received punishment days for discourtesy and for working a second job without permission. The court stated that "neither the police chief nor the city manager ever offered an explanation of how the disciplinary incidents in question affected defendant Jackson's qualifications, capacity or suitability for promotion." Sergeant Jackson was awarded her promotion retroactive to September 4, 1994 with all benefits and wages from that date to her retirement in 2000.

### **TOWN OF BROOKLINE & BROOKLINE POLICE ASSOCIATION**

The Massachusetts Labor Relations Commission (LRC) recently dismissed a charge of prohibited practice made by the Brookline Police Union (Union) alleging that the Town of Brookline (Town) violated Massachusetts law by "unilaterally implementing changes in the process, manner, and procedure for reviewing and deciding upon promotions."

A public employer violates G.L. c. 150E § 10(a)(5) and, derivatively, § 10 (a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). To establish a violation, the charging party must demonstrate 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 or an opportunity to bargain. City of Boston, 26 MLC 177, 181 (2000). The procedures and criteria for promotion are mandatory subjects of bargaining. City of Peabody, 29 MLC 115, 120 (2002).

The Unions' complaint stated that the Human Resources Division (HRD) planned on reporting promotional scores to the Town using whole numbers instead of exact scores down to the decimal point. The Union asked the Town to continue to promote individuals by obtaining the exact score from the Civil Service Commission or the individual officer. Brookline Police Chief Daniel O'Leary responded by stating that exam scores were not the sole criterion used to promote officers and that although he had always selected the highest scoring candidate on the promotional list, he had also always considered the candidates "overall performance" when making a decision. According to the Town, Chief O'Leary had met with each candidate in person to discuss the position before making a recommendation to the Board of Selectman.

The LRC ruled that the Union "failed to establish that the parties' past practice relied solely upon test scores and excluded consideration of a promotional candidate's work performance."

These cases were edited by John MacLaughlin, a law student at the [Massachusetts School of Law](#).

# Police Promotional Seminars *for* 2007

Presented by the Law Office of Attorney Patrick Michael Rogers  
 Designed for the October, 20 2007 Civil Service Examination for:



## Sergeant, Lieutenant, & Captain



<u>SEMINARS</u>	<u>LOCATION</u>	<u>DATES</u>	<u>TIMES</u>	<u>COST</u>
6 Day Criminal Procedure	Medford PD	Sept 11, 12, 14, 18, 19 & 21	8:30 a.m. to 3:30 p.m.	\$475.00
3 Day Criminal Law	Medford PD	Sept 25, 26, & 28	8:30 a.m. to 3:30 p.m.	\$325.00
6 Day Crash Course	Taunton Holiday Inn	October 1, 2, 8, 9, 10, & 11	8:30 a.m. to 3:30 p.m.	\$600.00

**REGISTRATION:** Registration will be at 8:00 a.m. on the first day of each presentation.

**TIMES:** The seminars will run from 8:30 a.m. to 3:30 p.m. each with the exception of the following: We will adjourn at 12:30 p.m. on the 14th, 21st and the 28th. We will be adjourning at 12:00 noon on Columbus Day, October 8th.

**REGISTER:** To register, simply complete the form below and fax this page to **508.644.2670** or call us at 508.644.2116.

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**SEATING LIMITATION:** Seating will be limited.

**WHAT YOU WILL RECEIVE:** Each official attending the criminal procedure seminar will receive our 2007 Criminal Procedure Textbook. Each official attending the criminal law seminar will receive our 2007 Criminal Law Textbook. No additional costs.

**Description:** During the six day criminal procedure seminar will will thoroughly discuss every conceivable area concerning case law and constitutional issues that may appear on the exam. The three day criminal law seminar will address hundreds of statutes that have been tested as well as a thorough overview of police powers of arrest, juvenile law, motor vehicle law, alcohol laws, firearms laws, crimes against the person, crimes against property and a number of *obscure areas* the examiners love to test on. *We will also thoroughly go through training and experience during the criminal law seminar.* Our 6 day crash course is an intense offering of ALL subject matter—a thorough and updated anazlysis of each of the the four management sources on the reading list as well as criminal law aned criminal procedure.

*I want to sign up for: (check boxes)*

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- 6 Day Criminal Procedure in Medford-----\$475.00
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- 6 Day Crash Course in Taunton (ALL subject matter)-----\$600.00

*I ALSO want to purchase: (check boxes)*

- Police Administration Study Guide-----\$30.00
- Criminal Investigation Study Guide-----\$30.00
- Supervision of Police Personnel Study Guide-----\$30.00
- Contemporary Perspectives Study Guide-----\$30.00
- Juvenile Law Study Guide-----\$30.00
- Criminal Law Study Guide-----\$30.00
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**NOTE: 10% will be added to ALL study guide orders for shipping and handling.**

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## [Comm. v. Pedro Costa](#) – Voluntariness of Consent / Suppression of Statements

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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.

In an attempt to locate a 15 year old female runaway, New Bedford Police Detective James Jose (Jose), went to the defendant's home in Fall River. "His knock on the door of the defendant's home was answered by the defendant's mother. Jose asked her if the defendant was home. In response, the defendant's mother pointed down the hall. When Jose asked the defendant's mother if the victim [runaway] was also present in the home, she nodded and pointed again down the hall. At that point, Jose asked her if he could "go and see [the defendant]." In response, the defendant's mother walked further into the house and "pointed into a bedroom."

Jose entered the home and went to the bedroom, where he observed that blankets were covering the bedroom windows and the victim was sitting on the defendant's bed, with the defendant standing near her. Upon seeing Jose, the defendant became belligerent, asking Jose, "[W]hat the fuck are you doing in my house?" When Jose asked the defendant what he was doing with a fifteen year old girl, the defendant responded "because I fucking like her" or "because I feel like it." Jose then removed the victim from the home in handcuffs and took her to the New Bedford police station. He did not place the defendant under arrest at that time.

The defendant claims alleges that the statements he made when Jose entered his bedroom and the observations Jose made while in the bedroom should have been suppressed because they were obtained as a result of an illegal entry and search of his home. "Warrantless entries into the home are prohibited by the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights absent either probable cause and exigent circumstances, or consent." In this case, the Commonwealth relies on the consent of the defendant's mother to justify Jose's entry into the defendant's home.

"When the police rely on consent to justify a warrantless entry, under both the 4<sup>th</sup> Amendment and art. 14, the prosecution has the burden of proving that the consent was, in fact, freely and voluntarily given." As entry based on consent is an exception to the constitutional warrant requirement, the Commonwealth must demonstrate "consent unfettered by coercion, express or implied, and also something more than mere 'acquiescence to a claim of lawful authority.'" Specifically, the SJC ruled that:

"The voluntariness of an individual's consent to a warrantless entry is an issue of fact, and must be examined in light of the totality of the circumstances of the case. Ordinarily, in cases involving consent to enter a defendant's home, entry is preceded by an exchange in which a police officer makes some type of inquiry of an occupant, and in response, the occupant verbally or physically reacts in a manner that is interpreted as 'consent.' Whether consent is voluntary depends on the nature of this interaction between the police and the occupant. In meeting its burden of establishing voluntary consent to enter, the Commonwealth must provide us with more than an ambiguous set of facts that leaves us guessing about the meaning of this interaction and, ultimately, the occupant's words or actions. If either the officer's request or the occupant's response is so ambiguous that we are unable to discern whether the occupant voluntarily consented to entry, our inquiry will be over and the entry must be deemed unlawful."

"Here, the motion judge concluded that the defendant's mother voluntarily allowed Jose to enter the home. The defendant's mother invited Jose into the home in a setting that was non-coercive, without influence by orders or threats. There are no findings that the defendant's mother appeared confused or unable to understand the officer's request. The evidence presented amply supports these findings. Jose testified that, after ascertaining that the defendant was at home and with the victim, he asked the defendant's mother if he could "go and see [the defendant]." The defendant's mother, who understands English, gave Jose permission to enter the house and directed him to the bedroom occupied by the defendant and the victim. We therefore conclude there was no error in the judge's determination that Jose entered the defendant's home with the consent of the defendant's mother. Accordingly, the judge did not err in denying the defendant's motion to suppress."

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

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