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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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Failure to Inform Candidate of Re-Examination Rights Results in Allowance of Bypass Appeal

In the recent case of William Vousboukis v. Town of Swampscott Fire Department, the Civil Service Commission ruled that because Vousboukis was not notified that he had a legal right to a re-examination by a physician approved by the Appointing Authority, his appeal must be allowed. G.L. c. 31, § 61A states, in relevant part, If such person fails to pass an initial medical or physical fitness examination, he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination." Also, § 05(1) of the HRD Medical Standards Examinations and Re-Examinations, requires that the physician conducting the re-examination be approved by the community. Here, the Fire Chief and approved physician only advised Vousboukis to get his own second opinion. He was not advised to seek a second opinion from a physician who was approved pursuant to the HRD Medical Standards, which provide as follows:

"In either case, [when a candidate fails the initial medical examination] the outcome of the subsequent re-examination will take precedence over the outcome of the initial examination in determining whether a candidate meets the initial-hire medical standards."

Accordingly, if Vousboukis had been re-examined by an approved physician and "passed" the second examination, he would not have been disqualified from employment.

There was no reason to exclude the evidence obtained from the search because the error in the warrant itself was cured "by its incorporation by reference of, and physical attachment to, a sufficiently detailed affidavit."

From the Courts…

Decisions of Interest to Massachusetts Police Officers

COMM. V. VALERIO
SEARCH WARRANT

The Massachusetts Supreme Judicial Court (SJC) recently examined whether an error in a search warrant leading to the omission of items to be searched for still allowed for a legal search.

On September 15, 2003, Hudson police detectives sought and obtained a search warrant for the defendant's apartment located at 165 Main St. In the portion of the standard search warrant application calling for a description of the property to be seized, a Hudson police detective erroneously entered a description of the place to be searched. The error was transcribed onto the face of the search warrant itself by means of the carbon backing. The warrant was issued as is by an assistant clerk-magistrate, who stamped nearly all eight pages of the supporting affidavit as well as "extensive" supporting documentation accompanying the affidavit. Within the supporting affidavit, the Hudson police requested permission to search for cocaine, drug paraphernalia, money, and documents relating to the sale and trafficking of narcotics. According to the SJC, "the warrant incorporated by reference the information contained in the affidavit. The warrant specifically authorized the search to be conducted at nighttime and commanded the search team to search any person present who might have, in his or her possession, any of the designated items to be seized. The warrant also authorized the search team to enter the defendant's apartment without announcing their presence." The affidavit and supporting documents were attached to the warrant at the time of submission and issuance by the district court.

On September 16, 2003 Hudson police officers executed the search warrant. The officers watched as the defendant and his brother separated in the parking lot of the address to be searched. Upon realizing that the defendant's brother appeared to notice the police and began to make a phone call, officers made entry into 165 High St. Officers observed defendant in a common hallway outside his apartment. Officers ordered defendant to the floor at gunpoint, made entry into the apartment with a battering ram, and secured the scene.

Defendant was instructed to sit in a chair in his kitchen. Defendant was handcuffed and advised of his Miranda rights. A Hudson police detective informed the defendant that the police were there to search for drugs and asked whether there were any drugs in the apartment. The defendant nodded in the direction of the bedroom and responded affirmatively. At this time, the Hudson detective held up a one page copy of the search warrant without attached copies of the affidavit or supporting documents. There is no evidence that the defendant requested to review the warrant.

After being indicted on charges of trafficking in cocaine, the defendant filed a motion to suppress the fruits of the search, based upon the faulty warrant.

The SJC reasoned that the warrant failed to meet the demands of particularity required by G. L. c. 276, § 2, art. 14, and the Fourth Amendment. However, the attachment of the eight-page affidavit, which was stamped on every page by the assistant clerk-magistrate, incorporated by reference into the warrant, and attached to the warrant at the time it was issued, was more than sufficiently detailed. **The affidavit remained attached to the warrant as it was brought to the premises and was available during the execution of the search to inform the defendant of the limits of the search.** The SJC concluded that the warrant, while technically defective, "met the substantive requirements of particularity under G. L. c. 276, § 2, art. 14, and the Fourth Amendment. Despite the technical violation, the search of the apartment was not an unlawful general search."

The SJC held that there was no reason to exclude the evidence obtained from the search because the error in the warrant itself was cured "by its incorporation by reference of, and physical attachment to, a sufficiently detailed affidavit. The police were meticulous in their preparation and organization prior to the execution of the search. The search, while perhaps not perfectly executed, was not unconstitutional. The officers did not exploit the mistake in the warrant, and the search was conducted in precisely the same manner as it would have been conducted had the warrant not been technically defective."

Detectives would be well advised to attach supporting affidavits to search warrants, have them stamped by the judge or clerk-magistrate issuing the warrant, and bring not only the search warrant but also the stamped supporting affidavit to the location to be searched.

Download the full decision

This summary was written by John MacLaughlin, a third year law student at the Massachusetts School of Law.

RECENT CIVIL SERVICE COMMISSION DECISIONS

SMITH V. TOWN OF FALMOUTH

CIVIL SERVICE COMMISSION UPHOLDS 3 DAY SUSPENSION FOR DISCOURTESY & NEGLECT OF DUTY

In the case of Richard M. Smith v. Town of Falmouth, Docket No.: D-04-530, a three day suspension was upheld for Discourtesy and Neglect of Duty.

After some cajoling from Sergeant Mountford, Smith agreed that he would come in to work overtime if he could have the west sector assignment. Sergeant Mountford told him that he "can't promise him the west" as "I'm not the supervisor that night" but "I will mention it to the guy who's going to be supervisor."

"On August 27, 2004 Smith reported for duty at the roll call at 15:50 hours. Sergeant Dunne began the roll call by reading off the sector assignments for the shift. When Sergeant Dunne read Smith's assignment as "near east," Smith responded "you're kidding." After Sergeant Dunne finished reading the assignments, Smith said, "I didn't take the overtime shift to work the near east and get hammered with calls. I am out of here." Smith then stood up, walked out of the police station, got into his personal vehicle and left."

"Sector assignments are made by the shift supervisors in the Falmouth Police Department. Assignments are not made by seniority but are in the discretion of the shift supervisor."

In finding just case for the suspension, the DALA Administrative Magistrate ruled as follows: "On the date in question the Appellant had agreed to work overtime and had reported for duty. His remarks to Sergeant Dunne during roll call and after it and then by getting up and leaving the police station without performing his shift violates the rules and regulations of the Appointing Authority."

Download the full decision

WILLIAMS V. BOSTON POLICE DEPARTMENT

CIVIL SERVICE COMMISSION OVERTURNS 3 DAY SUSPENSION FOR DISCOURTESY

Officer Williams was alleged to have verbally abused a female motorist who had stopped her vehicle in the Downtown Crossing Area. In the same incident, he was further charged with yelling at a lost pedestrian who approached him seeking directions.

Unsworn letters from the citizen complainants, who did not testify, were offered into evidence by the Police Department and objected to by the Appellant on hearsay grounds.

"This critical letter, allegedly from the female motorist, was not sworn to, was not notarized, and was not written while under oath. This letter was not verified by the Department, either by investigation or direct personal or telephonic contact with the alleged author, the reliability of the substantive contents and allegations were not tested by: interview, oral deposition under oath, written interrogatories under oath, subsequent testimony or any other reasonable means under oath and subject to cross-examination."

"The Department did not seek any form of discovery or verification from the female motorist or any other witness; despite having her address(s), her father's address and the address of another alleged percipient witness, the male pedestrian." The Department failed to seek or secure the testimony of any of the key witnesses for either the Department's disciplinary hearing or the Civil Service Commission hearing.

"By denying the Appellant the basic right to cross-examine witnesses, a right specifically provided to the Appellant under Boston Police Rule and Procedure 109, §60, the Department failed to afford the Appellant fundamental fairness and due process in its disciplinary process.

The Commission has determined that the Department's suspension of the Appellant was not justified, as it was based upon untested and unreliable hearsay evidence. For all of the above stated reasons, it is determined that The Department has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant committed the two acts of disrespectful treatment of two citizens, while on duty at Downtown Crossing, on June 23, 2003."

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RECENT POLICE LABOR LAW DECISIONS

MCCOUBREY V. STATE BD. OF RETIREMENT

Docket No: CR-06-443
Decided: July 12, 2007

McCoubrey was a Sergeant with the Massachusetts DOC. She was diagnosed with “acute plantar fasciitis and heel spurs directly related to [her] foot structure and the fact that she stands on hard concrete floors for 8 hours a day." Surgical intervention was unsuccessful and she eventually filed for a disability retirement.

The State Retirement Board denied McCoubrey’s claim and she appealed to the Division of Administrative Law Appeals (DALA).

In order to prevail, G. L. c. 32, § 7 (1) requires McCoubrey to prove that she is permanently unable to perform the essential duties of her job by reason of a personal injury sustained or hazard undergone, as a result of, and while in the performance of her duties, at some definite place and at some definite time.

She must prove one of two hypotheses: that her disability was caused by a single or series of work-related events, or that her employment exposed her to an "identifiable condition ... that is not common and necessary to all or a great many occupations" that resulted in disability through gradual deterioration. Blanchette v. CRAB, 20 Mass. App. Ct. 479, 481 (1985).

Aggravation of a pre-existing condition to the point of permanent disability satisfies the natural and proximate requirement. Baruffaldi v. CRAB, 337 Mass. 495 (1958).

Sgt. McCoubrey claimed that that repetitively walking, standing, running and stair-climbing on concrete floors caused her painful heel spur syndrome and plantar fasciitis, or aggravated to the point of permanent disability her pre-existing heel spurs.

DALA denied McCoubrey’s claim “because walking, standing, running and stair-climbing are too common among necessary human activities to constitute an "identifiable condition" of employment within the meaning of Blanchette.

The SJC has held that "job duties involving common movements done frequently by many humans both in and out of work will not be sufficient to establish an entitlement under G. L. c. 32 § 7(1), in order to preserve the policy behind the statute which differentiates between work-related personal injuries for which the Commonwealth should bear responsibility, and other injuries which should more properly be covered by personal health insurance." Adams v. CRAB, 414 Mass. 360 (1993).

McCoubrey claimed that her job did not entail merely walking, standing, running and stair-climbing, but required her to perform these function while wearing 30 pounds of equipment on her belt. She also argued that she had to push heavy carts up and down steep ramps.

Although McCoubrey believes that wearing heavy equipment and pushing heavy carts either caused or aggravated her painful heel spur syndrome and plantar fasciitis, the physician who supported her application makes no such claim. Dr. Lille believed that McCoubrey’s condition "evolved over many years due to her foot structure combined with years of ambulating on concrete while wearing heavy boots."

In view of the fact that McCoubrey has had to stand, walk and stair climb, not only while at work, but also while away from work, and in view of the fact that standing, walking and stair-climbing on concrete is a common activity of many people both in and out of work, DALA concluded that the Petitioner's injury falls on the side of "wear and tear" and is not compensable.

"Where work may be a contributing cause of injury, but only to the extent that many activities pursued in its place could have contributed, causation in fact is an inadequate test." Zerofski's Case, 385 Mass. 590, 594 (1982).

UPCOMING CPS SEMINARS

- **Annual Detective Clinic 2008** (February 6 & 7 and 13 &14, 2008)
- **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 Decode**d (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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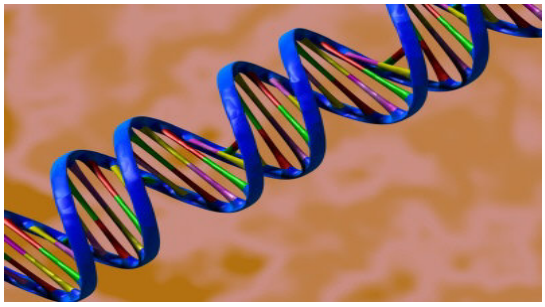
USA v. Leo Weikert – DNA Sample

The United States Court of Appeals for the First Circuit held recently that it is not a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures to require an individual on supervised release to provide a blood sample for purposes of creating a DNA profile and entering it into a centralized database.



The Court, however, refused to address the issue of whether it is also constitutional to retain the DNA profile in the database after the individual is no longer on supervised release. Relying on the principle that constitutional cases should be decided as narrowly as possible, and citing the quickly evolving pace of technological development in DNA technology, the Court stated that it would withhold judgment on that issue.

In 1990, appellant Leo Weikert pled guilty in the Western District of Texas to one count of conspiracy to possess cocaine with the intent to distribute and was sentenced to a term of 120 months. He escaped from prison in 1994, and was apprehended in Massachusetts in 1999. He then pled guilty in the District of Massachusetts to one count of escape from custody, and, in January 2000, was sentenced to eight months of imprisonment, to be served consecutively with his previous term. He also was sentenced to twenty-four months of supervised release to follow his incarceration.

Weikert will remain on supervised release until 2009 because he was sentenced to five years of supervised release for his previous conviction in Texas and is serving the two terms of supervised release concurrently.

Weikert was released from prison on December 10, 2004. The Probation Office notified him of its intent to take a blood sample in order to collect his DNA, and Weikert subsequently filed a motion for a preliminary injunction and requested a hearing. The government opposed the motion and filed a request to revoke Weikert's supervised release.

Under the DNA Analysis Backlog Elimination act of 2000, individuals who have been convicted of a "qualifying federal offense" and who are incarcerated or on parole, probation, or supervised release must provide federal law enforcement authorities with "a tissue, fluid, or other bodily sample" for purposes of extracting their DNA. Refusal to comply with the DNA collection procedure is a misdemeanor punishable by up to one year's imprisonment and a fine of $100,000. Therefore, failure to provide a DNA sample under this act is both a violation of supervised release and a new offense.

The First Circuit determined that the Fourth Amendment “totality of the circumstances” test was appropriate to analyze Weikert’s objection to the test. The court balanced Weikert’s expectation of privacy against the government’s interests in conducting the search.

The court concluded that the “government's important interests in monitoring and rehabilitating supervised releasees, solving crimes, and exonerating innocent individuals outweigh Weikert's privacy interests, given his status as a supervised releasee, the relatively minimal inconvenience occasioned by a blood draw, and the coding of genetic information that, by statute, may be used only for purposes of identification…After consideration of the totality of the circumstances present here, however, we conclude that neither the blood draw nor the subsequent creation of a DNA profile and the entry of that profile into CODIS constitutes an unreasonable search or seizure in violation of the Fourth Amendment.” The court limited its holding however, by expressing no opinion on whether the DNA seized could be held and examined after the terms of an individual’s conditional release had expired.