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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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## Brewington v. Boston Police Department- 2 Day Suspension Upheld by Civil Service Commission

Patrol Officer Cynthia Brewington is a 10 veteran of the Boston Police Department with an unblemished record. After being informed that she would be given an administrative assignment for a particular shift, she was assigned to accompany an inmate to a medical center with another officer. When a Lieutenant questioned Officer Brewington about her displeasure with the change in assignment, "in a loud tone of voice, visibly irritated, and said that if she had known about the change in assignment, she would have called in sick." At least two other police officers heard these comments. A Boston Police Sergeant, now retired, "testified that the way Officer Brewington addressed Lt. O'Malley was not a proper way for a patrol officer to speak to a lieutenant." The Administrative Magistrate who heard the case acknowledged that a 2 day suspension under the circumstances might appear too harsh. However, the Civil Service Commission is generally prohibited from substituting in cases where the Appointing Authority exhibited "a valid exercise of discretion based on merit or policy considerations as weighed by the Appointing Authority. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997).

### 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

***"The caller's reliability is established because he provided the police sufficient identifying information to be deemed identifiable. He "placed [his] anonymity sufficiently at risk such that [his] reliability should have been accorded greater weight than that of an anonymous informant."***

# From the Courts…

## Decisions of Interest to Massachusetts Police Officers

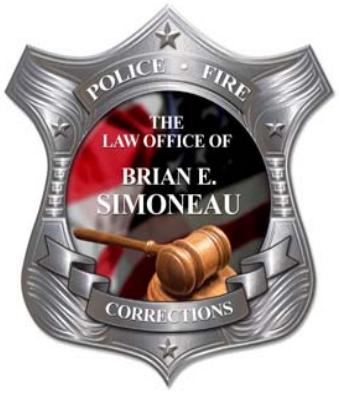
### Commonwealth v. Rodriguez – "Anonymous Caller" Defense Rejected


Salem Police Dispatcher Michael Ball, received a 911 telephone call from an individual who identified himself only as a driver for Community Taxi. He told Dispatcher Ball that someone had just struck his motor vehicle at the corner of Proctor Street and Highland Avenue. The taxi driver also provided the make, model, color, and license plate number of the striking vehicle. Before Ball could obtain the victim's, the victim hung up. Moments later, he called back and told Ball that the striking vehicle had pulled away outbound on Highland Avenue and that he was following it. Ball immediately relayed this information to Officer Erik Manninen, who was patrolling Highland Avenue. Within three to four minutes, Manninen observed the striking vehicle stopped in traffic on Highland Avenue near the Lynn city line. He made observations that led to the defendant's arrest for OUIL.

The defendant challenged the reasonable suspicion for the stop on the basis that the caller was anonymous. See Commonwealth v. Lyons, 409 Mass. 16, 18-19 (1990). The Commonwealth took the position that the caller was sufficiently identifiable so as to satisfy the "reliability prong" of the familiar two-pronged *Aguilar-Spinelli* test. See Commonwealth v. Costa, 448 Mass. 510, 515-517 (2007); See also Commonwealth v. Love, 56 Mass. App. Ct. 229, 232-235 (2002); Commonwealth v. McDevitt, 57 Mass. App. Ct. 733, 737-738 (2003).

The 911 calls established both the basis of the caller's knowledge and his reliability. The caller identified himself as a driver for Community Taxi; apprised police that his vehicle had just been struck by another vehicle at a defined location; described in detail the offending vehicle and the direction in which it had driven off; and indicated that he was in pursuit. Within a few minutes, Manninen observed the described vehicle stopped in traffic a short distance away. More was not required to render the caller reliable and provide Manninen with reasonable suspicion to stop the vehicle.

The caller's reliability is established because he provided the police sufficient identifying information to be deemed identifiable. He "placed [his] anonymity sufficiently at risk such that [his] reliability should have been accorded greater weight than that of an anonymous informant." Commonwealth v. Costa, 448 Mass. at 517. He reported an accident and told the 911 dispatcher the name of his employer (Community Taxi) and his location at the time of his call. See G. L. c. 269, § 13A (rendering criminal the knowing and intentional making of a false report of a crime to police). Armed with such information, little effort would later be required to contact Community Taxi and ascertain the identity of the driver who was working at that location in the city on that day and time.




## UPCOMING CPS SEMINARS

- **Updated Civil Service Law Seminar** (Nov. 6 & 7, 2007)
- **Arson Investigation Clinic** (Nov. 12, 2007)
- **Advanced Internal Affairs Clinic** (Nov. 13 & 14, 2007)
- **2007 Massachusetts School Law Clinic** (Nov. 16, 2007)
- Constitutional & Criminal Law for Dispatchers & Call takers in Massachusetts (Dec. 6, 2007)
- **Advanced Criminal Law** (Dec. 10 & 11, 2007)
- **Police Towing** (Dec. 14, 2007)
- **Authority & Management Under G.L. c. 41 § 111F – Sick Leave issues** (Jan. 7, 2008)
- **2008 Police Polygraph** (Jan 8, 2008)
- **2 Day Advanced Prosecutor Clinic 2008** (Jan 10-11, 2008)
- **Annual Detective Clinic 2008** (February 6 & 7 and 13 &14, 2008)

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# MORE ITEMS OF INTEREST TO MASSACHUSETTS POLICE OFFICERS

## POLICE OFFICER & FIREFIGHTER RESIDENCY REQUIREMENTS IN MASSACHUSETTS

There are several sources of residency requirements for police officers in Massachusetts. The least restrictive is G.L. c. 41 § 99A provides that, in the absence of a local ordinance or by-law or provision in a collective bargaining agreement, persons hired into a regular police department after August 1, 1978, *must reside within 15 miles* of the city or town. This statute applies to non-civil service departments and can be superseded by a more restrictive town bylaw, city ordinance, or provision of a collective barraging agreement. The purpose of this law is to insure availability of police or fire personnel in times of emergency. See *Doris v. Police Commissioner of Boston*, 374 Mass. 443 (1978). The Doris decision also states that the 10 mile restriction "refers to 'air' miles, as may be computed by measuring the straight line distance between two points on a map." To satisfy G.L. c. 41 § 99A, the physical location of the police officer's or firefighter's house "must be within ten miles of the nearest border of the city or town of employment."
G.L. c. 31 § 58 applies to civil service police and fire departments. It requires "any person who receives an appointment to the police force or fire force of a city or town shall within nine months after his appointment establish his residence within such city or town or at any other place in the commonwealth that is *within 10 miles* of the perimeter of such city or town." More restrictive town bylaws, city ordinances, or contractual provisions can supersede this law.

The words "reside" and "domicile" as used in statutes relating to residency requirements, have been interpreted to be synonymous. Domicile is "the place where a person dwells and which is the center of his or her domestic, social and civil life. Residence is determined not only by physical location, but also by the intended duration of residence. Thus, residence has been defined as, "the place of one's actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode." [This Paragraph was written by Attorney John M. Collins, General Counsel for the Massachusetts Chiefs of Police Association.]

## BARGAINING OBLIGATIONS

The Massachusetts Labor Relations Commission has consistently held that "[r]esidency within a municipality as a condition of continued employment [as opposed to a condition of hire] has long been considered a mandatory subject of bargaining, and an employer violates § 10(a)(5) and (1) of the Law if it unilaterally imposes a residency requirement upon its organized employees without bargaining in good faith with the labor organization which represents them." See *Essex County & Hathorne Teacher's Association, Local 1269*, MUP-2696 (1997); *City of Boston*, 8 MLC 1800 (1982); *City of Worcester*, 5 MLC 1414 (1978); Boston School Committee, 3 MLC 1603 (1977).

## COMMONWEALTH V. SANTIAGO

In the recent case of Comm. v. Santiago, the Appeals Court decided that, standing alone, the presence of a "pit bull" in a house to be searched did not provide Springfield police officers probable cause to issue a "no-knock" search warrant.

It has been previously decided that "a dog . . . used for the purpose of intimidation or attack falls within [the] definition of a dangerous weapon. Commonwealth v. Fettes, 64 Mass. App. Ct. 917, 918 (2005), quoting from Commonwealth v. Tarrant, 2 Mass. App. Ct. 483, 486 (1974).

In Santiago, the Appeals Court held that, "...a pit bull (or a mutt) may, under the appropriate circumstances, pose a serious enough threat to an officer's safety to justify a no-knock warrant, no such circumstances were present here. **There was no information in the affidavit that the defendant might actually use the pit bull as a weapon.**"

Basically, for the purpose of deciding whether to issue a "no-knock" search warrant, "[t]he relevant inquiry concerns the temperament and purpose of the particular dog, not the breed." If the Police information regarding the particular dog's violent temperament or its use as a guard dog or watchdog, the result would likely have been different.

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

## Excepts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 1)

**Automatic Exit Orders of Mimms Rejected in Massachusetts (Part 1)**

The Massachusetts SJC in *Commonwealth v. Gonsalves*, 429 Mass. 658 (1999) held that a Massachusetts police officer may not order the driver or the passengers out from the motor vehicle as a matter of course. Additionally, in *Commonwealth v. Williams,* 46 Mass. App. Ct. 181 (1999), the SJC stated that a Massachusetts police officer must have a reasonable belief that his or the public's safety was in danger before ordering an occupant out of a motor vehicle.

**Exit Orders in Massachusetts—Justification**

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." However, "[t]o justify either the search or the order to the occupants to exit the automobile, we ask 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."

**NOTE**: The reasonable justification language quoted immediately above requires Massachusetts police officers to have specific and articulable facts to issue an exit order—even if the order were issued at the outset of the stop.

**HEIGHTENED AWARENESS REQUIRED TO JUSTIFY EXIT ORDERS**

In **Commonwealth v. Stampley,** 437 Mass.323 (2002), the Court held that a police officer need point only to some fact or facts in the totality of the circumstances that would create in a police officer a ***heightened awareness of danger to justify an exit order.***

**SHOULDER OF THE ROADSIDE INQUIRY PERMISSIBLE IN MASSACHUSETTS?**

Recall that in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the USSC stated that "[t]he hazard of accidental injury from passing traffic to an officer standing on the driver's
side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both." The Massachusetts standard announced in *Santana* where a justified exit order would be permitted if "the safety of the police or that of other persons was in danger" should be considered where the location of the traffic stop presents a danger to either the stopped operator, the inquiring police officer, or the motoring public.

Remember: To validate an exit order directed to the driver or passengers, a Massachusetts police officer is required to have evidence based on specific and articulable facts that would warrant a police officer reasonably to be apprehensive about his safety.

**Taxi Passenger's Actions Not Permitting Frisk**

In **Commonwealth v. Hooker,** 52 Mass.App.Ct.683 (2001), a Boston police officers stopped a taxi for abruptly swerving. The officer could observe the rear seat passenger moving his shoulders back and forth. While the officer could not see the passenger's hands, he surmised that the defendant was putting something on the rear seat. As the officer approached, the passenger turned and looked back. The officer recognized him as a man he had twice arrested in the past for a 209A incident and for larceny of a motor vehicle. The officer new that the defendant had exhibited violent and threatening tendencies in the past and had been verbally abusive to the officer. When questioned about his erratic operation, the driver said that when turning down a certain street, the passenger directed him to go elsewhere. The officer then requested that the passenger exit the taxi. The officer then entered the rear seat of the taxi and discovered cocaine underneath the defendant's jacket. The Court held that the defendant had a reasonable expectation of privacy in the taxi, therefore, the police could not arbitrarily order him to exit the taxi to inspect the interior. The Court stated that "in a routine motor vehicle stop, the police may not order a driver or passenger from a lawfully stopped vehicle without reasonable apprehension of danger to an officer or others." Under these circumstances, the police did not have reasonable suspicion of criminal activity, or a reasonable apprehension of danger. The exit order and subsequent search of the interior were disproportionate to the circumstances at hand.

**CITIZEN NOT REQUIRED TO SIT MOTIONLESS:** Besides the motor vehicle violation, the police observed no other illegal activity as they followed the taxi and nothing occurred in the course of the stop, either individually or in combination with other facts, to create a reasonable suspicion that the defendant was engaging in criminal activity or posed a reasonable risk of harm to the officers or others. The defendant's looking back at the following vehicle before the stop is not remarkable. Considered objectively, his looking back after the stop should have appeared even less remarkable to the officer given that the vehicle was not a marked unit, the officer was in plain clothes, and the adjoining neighborhood was a high crime area. A citizen is not required to sit absolutely motionless in a stopped vehicle. Not every turn of the head is a furtive gesture. Moreover, a defendant's desire to avoid an interaction with police, without more, does not create reasonable suspicion, or reasonable apprehension of danger.

**MOVEMENTS NOT FURTIVE:** That the defendant moved his upper shoulders and appeared to place something on the seat is neither indicative of criminality nor a ground for reasonable apprehension. He did not duck out of sight, lean forward, or move back and forth in his seat. In the circumstances here, moving his shoulders did not amount to strange, furtive, or suspicious behavior. Nor does the fact that these events occurred in proximity to a high crime area, by itself, operate to justify the exit order.

[…to be continued in the December issue of Police Legal News]

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# THE FAIR LABOR STANDARDS ACT (FLSA)

The FLSA generally requires non-exempt employees to be paid at a rate not less than time and ½ the employees' "regular rate" for hours actually worked in excess of forty during a given week. 29 U.S.C. § 207(a)(1).

The employee's "regular rate" is calculated by adding most, if not all, applicable salary augments to the employee's base pay. For example, shift-differential pay, longevity pay, and career-incentive (Quinn Bill) pay, hazardous duty pay would be added to the employee's base rate to determine his or her "regular rate."

The employee would then be entitled to time and ½ his or her "regular rate" for actual hours worked above the threshold.

There is an exception to the "forty hour" rule which allows employers, subject to bargaining, to establish a work period longer than forty hours. 29 U.S.C. § 207(k). The "§ 207(k)" exception allows employers to establish a work period up to 27 days for police officers, so that the employer's overtime obligation is not triggered unless and until the police officer actually works in excess of 171 hours in the 28 day period. Generally, the longer the work period, the less FLSA liability there is for the employer, because the employee will have more opportunities to take time off. The purpose of the § 207(k) exemption is to soften the impact of the FLSA's overtime provisions on public employers by raising the average number of hours the employer can require police officers and firefighters to work without triggering the overtime requirement.

29 CFR 553.224, which defines the 207(k) work period, provides in relevant part, as follows: it "cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act."

It is important to note that the employer bears the burden of proving that it effectively declared a 207(k) qualifying work period. Absent an effective declaration, the overtime requirements of 29 U.S.C. § 207(a) will apply.

Under certain circumstances, so-called "town details" can be counted as "actual hours worked" in order to determine FLSA compensation.

The FLSA is likely to cover patrol officers and detectives. In most cases, sergeants, lieutenants, captains and other ranking officers will be exempt from the mandatory overtime provision.

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.