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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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Gibbons v. City of Woburn: Successful Promotional Bypass Appeal for the Position of Police Captain

In the case of Joseph M. Gibbons v. City of Woburn, the Civil Service Commission overturned the City's bypass of the Appellant for the position of Police Captain. Through effective cross-examination, Attorney Brian E. Simoneau convinced the Commission that the Appointing Authority, former Woburn Mayor Curran, was not credible. In contrast to this, both the Police Chief and Appellant were found to have testified truthfully. The Commission found that the City "overstated the importance of the Appointee's accomplishments" and overlooked the Appellant's supervisory experience. "The Appellant worked primarily as a Patrol Supervisor and Shift Commander in the largest and most visible division of the Department." In contrast to this, "the Appointee spent much of his career in the smallest and least visible division of the Department, supervised far fewer people than the Appellant and primarily engaged in office work and specialized support related tasks such as budgeting, computer operations, grant writing, and crime analysis." The Commission further held that "[t]he type of interview conducted by the Mayor, where the candidates' responses were rated by a single individual with little to no police education and experience is, in the Commission's experience, suggestive of a flawed selection process." It concluded that the city "failed to administer a selection process that gave candidates fair and equal treatment and consideration."

Download the full text of the case.

Paul Weinburgh v. Civil Service Commission

"Time in Grade" (Mass. Appeals Court)

Attorneys Timothy M. Burke & Jordan E. Burke of the Law Office of Timothy M. Burke Represented the Plaintiff.

MILLS, J. In this case, we consider the proper construction of G. L. c. 31, § 59, as appearing in St. 1989, c. 174, which governs the promotional examination process for municipal police officers and fire fighters, and states, in relevant part:

"An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force . . . provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification[(2)] in the lower title or titles to which the examination is open."

A Superior Court judge interpreted the statute to require that in order to be eligible to sit for the fire captain's examination, an individual must have been certified for and, thus, eligible to serve in, the lower position of fire lieutenant for at least one year, and not that the candidate actually must have served as fire lieutenant for one year. We agree.

In the summer of 2003, the plaintiff, Paul Weinburgh, was certified for the position of fire lieutenant in the city of Haverhill (city) and placed on the fire lieutenant promotion list. After officially being appointed to this position on December 21, 2003, the plaintiff filed a bypass appeal(3) with the Civil Service Commission (commission) claiming that another fire lieutenant appointee did not meet residency requirements. To ensure proper seniority, the plaintiff and the city submitted a joint stipulation requesting that the commission backdate the plaintiff's appointment date to October 21, 2003. The commission took no immediate action because the parties had not reached an agreement on back pay and benefits. However, on May 26, 2005, the commission approved a modified stipulation submitted by the plaintiff and the city requesting that the plaintiff's fire lieutenant appointment date be changed to November 19, 2003. The plaintiff waived any rights to back pay.

During these discussions, the plaintiff applied to sit for the fire captain promotional examination to be held on November 20, 2004, one year and one day after the plaintiff's retroactive appointment date eventually approved by the commission. The plaintiff was allowed to sit for the examination and, based on his score and work experience, subsequently was certified to the position of fire captain and placed on the promotion list.

On July 8, 2005, another fire fighter filed a bypass appeal with the commission claiming that the plaintiff should not have been allowed to sit for the fire captain's examination because he had not actually served as a fire lieutenant for one year. After hearing, the commission agreed that in order to sit for the fire captain's examination, G. L. c. 31, § 59, requires one year of actual service in the lower position of fire lieutenant. Because the plaintiff only served as a fire lieutenant for approximately eleven months, the commission ordered the plaintiff's name removed from the fire captain promotion list.

The plaintiff filed a petition for judicial review in the Superior Court pursuant to G. L. c. 31, § 44. A judge reversed the decision of the commission, concluding that it had misinterpreted the statute as matter of law. See Connolly v. Suffolk County Sheriff's Dept., 62 Mass. App. Ct. 187, 192 (2004) (court may modify or set aside decision of administrative agency when decision is based upon error of law). The judge reasoned **that if the Legislature intended to require one year of actual service in the lower position** (in this case, fire lieutenant), **the statute would have contained more definitive language requiring service.(**4) Instead, the judge explained, that by using the term "certification," "the legislature chose to separate the requirement of employment in the force (no rank) from that of a year's certification in the lower rank. **At the very least, this wording indicates that an administrative landmark, rather than a factual one, should be used to determine eligibility to sit for a civil service exam."**

Paul Weinburgh v. Civil Service Commission (Continued from previous page)

Therefore, the judge correctly concluded that G. L. c. 31, § 59, requires that an employee: **(1) be on the promotion list (and, thus, certified) for the immediate lower position one year prior to taking the exam for the higher position; and (2) actually serve in the force for one year after certification, but not necessarily in that lower position.** In this case, because the plaintiff was certified for the lower position of fire lieutenant in the summer of 2003 and had been employed "in such force," see G. L. c. 31, § 59, for one year after certification, he was qualified to sit for the fire captain's examination in November, 2004.(5), (6)

Judgment affirmed.

Footnotes

(1) City of Haverhill.

(2) "Certification" is defined in G. L. c. 31, § 1, as appearing in St. 1985, c. 527, § 1, as "the designation to an appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants' qualifications for appointment pursuant to the personnel administration rules."

(3) In deciding a bypass appeal, the Civil Service Commission determines "whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 261 (2001).

(4) For example, G. L. c. 31, § 61, inserted by St. 1978, c. 393, § 11, provides, in part, that "[f]ollowing his original appointment as a permanent full-time police officer or fire fighter in a city, or in a town where the civil service law and rules are applicable to such position, a person shall actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee" (emphasis supplied).

(5) As we conclude that the plaintiff met the statutory requirements to sit for the fire captain's examination, we need not comment on the commission's authority to render settlements in civil service disputes.

(6) The commission's concern that this reading will allow individuals to skip rank by sitting for the fire captain's examination without ever serving in the lower position of fire lieutenant is addressed by the restrictive language in G. L. c. 31, § 59, requiring that **"[a]n examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force." Therefore, while we conclude that an individual need only be certified in the lower position for one year to sit for the higher position's examination, actual service of some length in the lower is required to be appointed to the higher.**

OPERATING AFTER SUSPENSION FOR OUI

An individual found operating on a license which was suspended for a chemical test refusal should not be charged with Operating After Suspension for OUI. This crime of Operating after Suspension for OUI requires that the person be convicted of OUI. Someone found operating on a license suspended because of a breathalyzer refusal should be charged with straight operating after suspension. Operating After Suspension for OUI. The crime of Operating after Suspension for OUI carries a minimum mandatory sentence of 60 days imprisonment.

From the Courts:
Recent Labor & Employment Cases

In the case of Susan Becker v. Town of Newbury, the Appeals Court was called upon to define the term “pay” as it appears in G.L. c. 41 § 111F, the injured on duty statute.

Susan Becker, the plaintiff, worked as a reserve police officer in the town of Newbury (town) from 1995 until late January, 2001, when she struck her head on a cabinet while investigating a breaking and entering. She suffered a concussion and a cervical sprain and never returned to work. Instead, she began receiving disability payments from the town.

In July, 2002, Becker filed suit against the town claiming that it had inaccurately calculated the disability benefits she was entitled to receive under G. L. c. 41, § 111F, which governs paid leave for incapacitated employees.(1) She also claimed that the town had improperly refused to pay her the benefit to which she was entitled under G. L. c. 32, § 85H, which provides benefits to reserve police officers who are injured in the line of duty to the point where they no longer can perform the duties of their regular occupation.

On the parties' cross motions for summary judgment, a judge of the Superior Court, in a thoughtful memorandum of decision, agreed that the town had properly calculated Becker's benefits under § 111F to be $144.36 per week based on the average of her earnings during the twelve months preceding her injury, and had properly declined to pay her the benefits provided by § 85H. Becker timely appealed. We affirm.

Becker's first argument on appeal is that, although her average weekly earnings over the twelve months before her injury were in fact $144.36, she was entitled to benefits of $398.89, the amount she anticipated receiving during the week she was injured. She bases that claim on the language of § 111F, as appearing in St. 1964, c. 149, which provides that officers who are incapable of working because of duty-related injuries "shall be granted leave without loss of pay for the period of such incapacity." In Becker's view, the phrase, "leave without loss of pay" means leave with the weekly wage the employee was earning at the moment of the injury, regardless of what she had earned in the past or could anticipate earning in the future.

The problem, of course, centers on construction of the phrase "leave without loss of pay," because the Legislature has not specified how to determine the "pay" the injured employee should not lose on account of the injury. Theoretically, that "pay" could be the employee's earnings during the hour before the injury, the average hourly wages over the course of the employee's service with the employer or something in between.

In adopting this approach, the Court stated that “[w]e think that the Legislature could not have intended to create a scheme in which taxpayers, police officers, and fire fighters all were dependent on the vagaries of chance to determine the compensation due for work-related injuries. Absent other circumstances, basing compensation on historical annual averages is the best method for preserving the "pay" with which the Legislature was manifestly concerned when it enacted § 111F. Indeed, we think that, as Becker herself states, "[S]he should be paid benefits that most accurately reflect her projected lost earnings during her period of disability." In the absence of circumstances this case does not present, we think that that reflection is found in her earnings over the preceding twelve months.”

The court also discussed G.L. c. 32 § 85H, a statute which protects the income of special and reserve police officers received the officer’s his regular occupation.

In the case of Walter Fender v. Contributory Retirement Appeals Board, the Appeals Court recently upheld the denial of a disability retirement, where the DPW Director in the Town of Marshfield claimed a disability based on “stress.” The case was remanded for additional findings of fact.

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

Excepts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 9)

Motor Vehicle Exit Orders (Continued from the previous issue of Police Legal News)

MVs—Requesting Passengers For ID on CMVI

Routinely Asking Passengers to Produce ID—Unlawful Seizure

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the Massachusetts Court of Appeals held that where police effected a stop for merely speeding, the continued delay in order to request identification of the backseat passengers amounted to an unlawful seizure under the line of decisions culminating in **Commonwealth v. Torres**, 424 Mass. 153 (1997).

Standard Required in Massachusetts

The Massachusetts Court of Appeals stated that police, "may not interrogate passengers in [a lawfully stopped] car unless [they have] a 'reasonable suspicion, grounded in specific, articulable facts,' that a particular passenger in the car is involved in criminal activity or 'engaged in other suspicious conduct.'" citing **Commonwealth v. Torres**, 424 Mass. 153 (1997).

Protection From Dragnet Interrogation

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the investigating State Trooper testified that he asked for passengers identification as a matter of practice. Additionally, he testified that if the driver had seven passengers, he would have asked all seven of them for identification. The Court stated that, "[t]hat response illustrates the sort of dragnet interrogation about which the cases culminating in ***Torres*** express concern."

Constitutionality of c. 85 § 16 Strongly Called into Question

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the Court discussed the constitutionality of c. 85 § 16 which states: "Every person shall while driving or in charge of or occupying a vehicle during the period from one hour after sunset to one hour before sunrise, when requested by a police officer, give his or her true name and address."

IMPORTANT NOTE: The Court stated that if this statute were to permit "dragnet interrogation" of the sort in the instant case, "questions about the constitutionality would necessarily arise."

Simply Asking Name Compared to Produce Documentation

The Court did not reach the constitutionality question of c. 85 § 16 in the **Alvarez** case because the Trooper, when he asked for identification, i.e., documents, went significantly beyond simply asking an occupant of a vehicle to give her or his true name and address. The statute "does not authorize the more searching inquiry that a random request for identification papers constitutes..." stated the Court.

No LEAPS/NCIC Passenger Checks

A delayed detention to check on a MV passenger's status will trigger a 4th AMD violation once police have checked out the operator. Therefore, before police conduct a LEAPS/NCIC check of a passenger, they should be able to demonstrate specific and articulable facts concerning criminal activity committed by that passenger. See the case of **State v. Damm**, 246 Kan. 220, 224-225 (1990), cited with approval by **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998).

NOTE: Where police unnecessarily delay the vehicle while checking on the status of a passenger's I.D., any evidence discovered connected with the detention will be suppressed.

MVs—Requesting Passengers For ID—Asking Passengers to Produce ID—Non-Investigatory Reason (safety)

In **Commonwealth v. Alvarez**, 44 Mass. App. Ct. 531 (1998), the Massachusetts Court of Appeals held that a police officer cannot request passenger ID as a matter of routine practice. However, if there is a plausible, non-investigatory reason, the request will be permissible.

VALID EXIT ORDER: In **Commonwealth v. Vanderlinde**, 27 Mass. App. Ct. 1103 (1989), when a police officer has sufficient reason to order the passenger out from the MV, a request can be made concerning production of ID.

SOP SEIZURE: In **Commonwealth v. King**, 389 Mass. 233 (1983), the SJC treated as appropriate the request for licenses from both the occupant of the driver's seat and the occupant of the passenger's seat when the trooper approached a car sitting at a rest stop during the winter. The SJC noted that the purpose of the detention, to determine whether the occupants were in need of assistance or aid, was "entirely different" from the purpose for a vehicle use regulation stop.

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

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To All Massachusetts Law Enforcement Officials:

Please find attached, announcements for two upcoming seminars concerning firearms law and (advanced) internal affairs issues. Both will be held at the North Attleboro Police Department, which is a very comfortable facility.

There has been a great deal of controversy concerning the United State's Supreme Court decision in Heller v. District of Columbia. This decision will be thoroughly addressed along with the Massachusetts Firearm's Law (as well as c. 269). We will analyze the 2nd Amendment and see how the right to possess a firearm in one's home for protection is a right granted from other than the Constitution itself. I guarantee that you will enjoy this presentation to actually see and understand precisely how the Bill of Rights protects citizens of the United States as well as residents of the Commonwealth of Massachusetts. I will then offer some guidance on how law enforcement should proceed in light of this extraordinary decision.

Lastly, the IA seminar will contain a thorough breakdown of all the complicated matters that usually come up. We will also address sick leave abuse, how to prove it, medical records, the permissible disclosure of medical records, and the imposition of discipline.

If you are interested in any of these presentations, just complete the pdf form and fax it back to me at 508.644.2670.

Thank you,

Attorney Patrick M. Rogers

Commonwealth Police Service
Seminars November & December, 2008

- Firearms Law Struck Down by Supreme Court, Monday, November 3, 2008, North Attleboro Police Training Center
- Advanced Internal Affairs, 2-Day Internal Affairs Updated Legal Presentation Based on 2008 Massachusetts Law & Procedure, North Attleboro Police Training Center
- Command Staff Critical Training Issues Under Massachusetts Law & Procedure, Wednesday, November 12 & Thursday, November 13, 2008, Medford PD Training Center
- Bullying, Identifying & Regulating Bullying on and off School Property Under MA Law, Grafton PD, Nov. 14, 2008
- Constitutional & Criminal Law for Dispatchers & Call takers in Massachusetts 2008, Mashpee PD, Dec. 5, 2008

Registration & More Information

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.