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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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Burton v. City of Lynn: Appeal Dismissed Because No "Bypass" Occurred

Craig Burton, appealed the decision of the City of Lynn claiming that he was bypassed for original appointment to the position of police officer in the Lynn Police Department.

A bypass occurs when the appointing authority hires or promotes, from a certification, "any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment." See [G.L. c. 31 § 27](#). In such cases, the appointing authority is required to "immediately file

with the administrator a written statement of his reasons for appointing the person whose name was not highest."

In Burton's case, it was undisputed that "the last appointment from this certification was made from a tie group containing the Appellant's name. No applicant lower on the eligibility list than the Appellant was appointed from this certification." Prior Commission decisions have well established that selection from a group of tied candidates is not a bypass. *Baptista v. Department of*

Public Welfare, 6 MCSR 21 (1993). In *Kallas v. Franklin School Department*, 11 MCSR 73 (1996), the Commission held that "[i]t is well settled civil service law that a tie score on a certification list is not a bypass for civil service appeals..."

The Commission held that "the evidence demonstrated that only candidates ranked higher and other candidates that were tied with the Appellant were selected. Choosing from among tied candidates does not constitute a bypass that can be appealed to the Commission." [Download the full text of the Decision.](#)



Where GPS is used as a more efficient and accurate way to determine whether employees are complying with existing workplace rules, bargaining will generally not be required. However, the implementation of more stringent rules and/or performance standards requires bargaining.



DOWNLOAD THE FULL TEXT OF THE WORCESTER GPS DECISION

From the Mass. Division of Labor Relations **GPS / AVL NOT A PER SE “CHANGE IN WORKING CONDITIONS”**



The Division of Labor Relation (formerly the LRC) recently dismissed a complaint alleging that the City of Worcester violated [G.L. c. 150E § 10\(a\)\(5\)](#) and, derivatively, [§ 10\(a\)\(1\)](#) by unilaterally requiring operators of sanders to use Global Positioning System (GPS) phones while on duty. Prior to the implementation of the GPS phones, the City utilized a radio system and snow/sanding inspectors to track the location of DPW sanders. The GPS phones have enhanced the City's ability to efficiently utilize and monitor sanders during sanding operations and the Union failed to specify how the GPS phones have altered the wages, hours, and other terms and conditions of employment.

“A public employer violates [§ 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). **However, a public employer may alter procedural mechanisms for enforcing existing work rules without bargaining, provided that the employer's action does not change underlying conditions of employment.** Duxbury School Committee, 25 MLC 22 (1998); Town of Wilmington, 9 MLC 1694 (1983); Board of Trustees, University of Massachusetts, 7 MLC 1577 (1980); Brookline School Committee, 7 MLC 1185 (1980).”

“...the City began to require operators of sanders to use GPS phones when on duty. The Union argues that this requirement relates to standards of productivity and performance over which the City is obligated to bargain. **The Union, however, fails to demonstrate how standards of productivity and performance have changed with the introduction of GPS phones. Furthermore, the Union does not show how this requirement is anything more than an effort to make the City's use and monitoring of its sanding operations more efficient.** As a result, the City's decision does not constitute a change in terms and conditions of employment. Cf. Massachusetts Turnpike Authority, Case No. UP-04-2671 (March 31, 2006 dismissal letter and June 23, 2006 affirmation of dismissal) (**employer had no obligation to bargain over installation of GPS device that led to dismissal of unit member, because GPS device was merely a more efficient and accurate way to determine whether bargaining unit members were complying with existing workplace rules**); Duxbury School Committee, 25 MLC at 24 (installation of video cameras

in workplace constituted nothing more than an alternative mechanism for enforcing existing work rules). Consequently, the Commission does not find probable cause to believe that there has been a violation of [§ 10\(a\)\(5\)](#) and, derivatively, [§ 10\(a\)\(1\)](#) of the Law, and the Union's charge is dismissed.”

Both the City of Worcester and Massachusetts Turnpike Authority cases suggest that bargaining is not required for the implementation of GPS or AVL technology. However, nothing would prohibit including in a collective bargaining agreement, a provision governing the implementation of AVL / GPS. **Also, where the employer uses this technology to implement more stringent rules and performance standards, bargaining in advance will generally be required.** City of Boston, MUP-6545 (1988); Commonwealth of Massachusetts, SUP-3829 (1993).

UPCOMING CPS SEMINARS

- **Advanced Criminal Law** (Dec. 10 & 11, 2007)
- **Police Towing** (Dec. 14, 2007)
- **Constitutional & Criminal Law for Dispatchers & Call takers in Massachusetts** (Jan. 3, 2008)
- **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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From the Courts...

Items of Interest to Massachusetts Law Enforcement Officers

In [Commonwealth v. Cabrera, 449 Mass. 825 \(2007\)](#), the SJC decided that it is permissible to charge and convict a defendant of both breaking and entering and receiving stolen property (or larceny). There is no "double jeopardy" because each offense requires an element which the other does not.

In [Commonwealth v. Washington, 449 Mass. 476 \(2007\)](#), the SJC upheld a warrantless search of an individual, who sold cocaine to an undercover officer, as a search made on probable cause with exigent circumstances.

After Kyle Washington sold cocaine to an undercover officer, Crystal Sloan, a uniformed Massachusetts State Trooper operating a marked cruiser, stopped him for speeding. The purpose of the stop was to learn the identity of Washington and his passenger. Troopers ordered Washington and his passenger out of the vehicle, frisked them, and found the marked "buy money" in Washington's pocket. During the course of the stop, Trooper Sloan observed in plain view, a few small "twist-tied" baggies containing a white substance on the floor of Washington's vehicle. She also saw three similar items on the pavement outside the passenger's side door.

The defendants were charged with trafficking in more than twenty-eight grams of cocaine, [G. L. c. 94C, § 32E \(b\) \(2\)](#). They each moved to suppress all evidence of the money observed in the defendant's possession as a result of the patfrisk, as well as the baggies recovered from the street and testimony concerning the baggies seen in the car. While conceding that the police were justified in stopping them to ascertain their identities, the defendants argued that the exit order and subsequent patfrisk violated their rights under the Fourth and Fourteenth Amendments to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights.

In general, a police search or seizure must be supported by a valid warrant. See *Commonwealth v. Tarver*, 369 Mass. 302, 306 (1975). However, it is well settled that, in certain "exigent circumstances" that make obtaining a warrant impracticable, *Commonwealth v. Cast*, 407 Mass. 891, 904 (1990), a search or seizure may be justified by probable cause. *Commonwealth v. Haefeli*, 361 Mass. 271, 277, 280-281 (1972). One such exigent circumstance is the threat of imminent loss of evidence. See

generally *Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Commonwealth v. Skea*, 18 Mass. App. Ct. 685, 697 (1984). **Here, because there was probable cause to arrest the defendants for participating in an illegal drug transaction, and crucial evidence of that transaction would have been lost if the police had not searched immediately, the search of the defendants was justified.**



FROM THE STATEHOUSE: **COUNTY CORRECTIONS OFFICERS NOW ELIGIBLE FOR "HEART BILL"**

Governor Patrick recently signed [H.B. 2578](#) into law. This bill amended the "heart law" to include employees of county correctional facilities whose regular or incidental duties require the care, supervision or custody of prisoners, criminally insane persons or defective delinquents. Like Massachusetts firefighters and police officers, these county corrections employees now have a rebuttable presumption that any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death was suffered in the line of duty. See [G.L. c. 32 § 94](#).

MORE UPCOMING CPS SEMINARS

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- **2008 Firearms Law Updates** (Feb. 28, 2008)
- **2008 Massachusetts Educators 2 Day Clinic on School Law & Discipline** (March 12, 2008)
- **2008 Imposing Discipline in Police Agencies** (March 20, 2008)
- **Advanced Domestic Violence** (April 3, 2008)
- **Advanced Domestic Violence** (April 3, 2008)
- **Advanced 94C: Detective & Undercover Ops.** (April 29, 2008)

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

Excerpts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 2)

Motor Vehicle Exit Orders (Continued from the [November issue of Police Legal News](#))

TYPE OF CRIMINAL RECORD NOT JUSTIFYING EXIT ORDER: Adding to the assessment the officer's knowledge that the defendant had been arrested on two prior occasions, once for domestic violence, does not create a reasonable apprehension of danger, even when combined with the observations of the defendant. The officer's experiences with the defendant had never involved a firearm or other weapons. The defendant was not threatening or verbally abusive to the officer when he opened the taxi door and engaged the defendant in conversation. Moreover, that the defendant was nervous was not unusual in such an encounter with the police, and provided no reason to believe the defendant would erupt into violence.

MVs—Valid Exit Order Must Precede Justifiable Threshold Inquiry (JTI)

The Order of Events is Critical—Prior to Justifiable Threshold Inquiry (JTI)

In **Commonwealth v. Loughlin**, 385 Mass. 60 (1982), the SJC stated that the lawfulness of an exit order does not turn on the degree of suspiciousness surrounding the situation. It is the "order of events" that is critical. For an exit order to be permissible, it must be given **before** the justifiable threshold inquiry. Additionally, where the exit order is given prior to the justifiable threshold inquiry, the Court will look to the officer's initial suspicions as well as his or her need for precautions. See **Commonwealth v. Loughlin**, 385 Mass. 60 n. 3 (1982). To validate an exit order directed to the driver or passengers during a CMVI, 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.

Commonwealth v. Gonsalves, 429 Mass. 658, 663 (1999). An exit order will also be permissible where the police has reasonable suspicion that the occupants are involved in criminal activity. See **Commonwealth v. Watson**, 430 Mass. 725 (2000).

EXAMPLE—STOP FOR CMVI: After effecting a MV stop for a CMVI, and while the officer is approaching the driver's side of the vehicle, the driver is seen to be leaning forward as if he is picking up something from under the seat. If the officer were to engage in the justifiable threshold inquiry (i.e., license and registration request) at that point instead of ordering the driver to exit, a subsequent exit order after the justifiable threshold inquiry will be unlawful.

SAFETY FIRST: Therefore, where a police officer effects a stop for a CMVI and observes either the operator or the passenger making furtive movements such that the officer has a reason to be fearful, the exit order **MUST** precede the justifiable threshold inquiry, in this case, a request for license and registration.

LEGAL COMMENT: In **Commonwealth v. Williams**, 46 Mass. App. Ct. 181 (1999), the Court of Appeals stated that "[w]hen an officer stops a car for an apparent traffic violation and receives a license and registration that are in order, that is the end of the inquiry unless the officer has a reasonable suspicion grounded in articulable facts, that the driver or passengers are engaged in the commission of a crime or are about to commit one."

WHAT IS THE PURPOSE OF THE INITIAL STOP?: In **Commonwealth v. Bartlett**, 41 Mass. App. Ct. 468 (1996), the Court stated that "[t]he nature of the stop, i.e., for a traffic offense, defines the scope of the initial inquiry by a police officer. It should pertain to the operation of a motor vehicle: inquiry into the status of the driver as a licensed operator and the registration of the automobile. Put more simply, the officer [], asks the driver for license and registration. If the driver produces a valid license and registration, there is ordinarily no reason for an officer to probe further. The officer should give the driver a citation for the traffic offense and then permit the vehicle to proceed on its way."

REASONABLE STIMULUS FOR FURTHER INVESTIGATION OR INQUIRY: This does not require that an officer making a stop for a traffic violation ignore what he sees, smells or hears. The sight of a half empty bottle of gin, of a firearm, or of a furtive movement, the smell of liquor, or the sound of slurred speech, of course, invites further inquiry.

BONG: In **Commonwealth v. Dolby**, 50 Mass.545 (2000), State Police stopped a motor vehicle for speeding. While obtaining the operator's license and registration, the Trooper observed a bong on the passenger floor which had extensive residue in the chamber which was made of clear plastic. An exit order then followed. In **Dolby**, a full blown warrantless search of the vehicle turned up a silver box which contained marijuana plant seeds. The search was upheld. *Question:* Is it permissible to seize a bong without residue? The Court did not express any opinion of that matter, but they did state that "[p]ossession of a bong, and no more, is not a crime in Massachusetts."

Order to Vacate Will Include Cursory Pat Down of Driver or Occupants

In **Commonwealth v. Williams**, 46 Mass. App. Ct. 181 (1999), the Massachusetts Court of Appeals 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 [or the driver] out of a motor vehicle." Therefore, once this reasonable belief exits, it should also empower police to effect a cursory patfrisk of the persons ordered to exit. Therefore, if the officer has a reasonable belief that the occupant is either armed or dangerous, it will validate the exit order as well as the cursory patfrisk.

[...to be continued in the January, 2008 issue of Police Legal News]

Annual Detective Clinic

2008

presented by

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