



Municipal Client Advisory
June 2008

**SJC Decision Permits Lie Detector Tests for Police Officers
Suspected of Criminal Activities**

Last Wednesday, the Supreme Judicial Court (“SJC”) released a decision of manifest importance to any police department considering the use of lie detectors in connection with investigations of potentially criminal behavior by police officers. The decision in Furtado v. Town of Plymouth, ___ N.E.2d ___, 2008 WL 2170141 (Mass.), permits a police department to require an officer to submit to a lie detector test in an internal investigation when the conduct being investigated would be a crime. This holds true even if criminal prosecution for that conduct is not possible.

In 1999, Kevin Furtado, a Plymouth police officer, was accused of sexually abusing two minors. After investigating, the district attorney did not file criminal charges, but did refer the matter to the Plymouth police chief for administrative review. An internal investigation was conducted and the chief instructed Furtado to take a lie detector test, threatening discipline (up to and including termination) if he did not comply. Furtado invoked his right against self-incrimination, and would not submit to the test unless granted transactional immunity

Furtado was given immunity and took the test. The department chose not to take any disciplinary action. Furtado filed suit claiming a violation of his rights under General Laws Chapter 149, § 19B. General Laws Chapter 149, § 19B makes it illegal for any employer—including public ones—to require employees to take lie detectors tests in the course of their employment.

However, this law contains an exception, called the “criminal investigations” exception, for “lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations.” Furtado’s objection was that because there was no ongoing “criminal investigation” when he was compelled to take the lie detector test, he could not lawfully be forced to take it—especially since his immunity meant he could not be prosecuted for the conduct.

The lower courts found in favor of the town, a result which was affirmed when the case reached the SJC. The opinion issued last week is laden with public policy considerations, noting that police departments are particularly dependent on the integrity



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and credibility of the department and the officers who represent it in order to function properly.

The SJC found the lie detector test acceptable in Furtado's case, even though it was not done in the course of an actual criminal investigation, writing that it is not the nature of investigation, but the nature of the conduct that determines whether a polygraph is permissible. The fact that an investigation is internal to the department does not change the potentially criminal nature of the conduct.

Furtado argued that it was not precisely the nature of the conduct, but rather the consequences that could potentially follow. Since he had transactional immunity, he argued that the exception did not apply to him because no criminal penalties could be imposed. The SJC rejected that argument, holding that as long as the conduct under investigation would be criminal if found to be true, the officer may be required to submit to a lie detector test. This is true even if no criminal prosecution would be possible.

The SJC did highlight one potential remaining issue, having noted in the past that "criminal investigations" exception may require that the crime being investigated be in some way connected to the employee's job. However, since Furtado did not raise that issue on appeal, the SJC declined to address it in detail. Despite that fact, it leaves open the question of whether this requirement does exist under current Massachusetts law and, more importantly, how broadly or narrowly that requirement would be determined to be. It is unclear whether such a requirement would require that the conduct have occurred within the scope of the officer's employment with the department or whether merely any conduct that would negatively reflect on the integrity and credibility of the department would suffice. Clearly, these two requirements would have very different ramifications for the use of lie detectors in internal investigation of potential criminal activity by police officers.

Ultimately, the SJC's decision in Furtado is a narrow one. It authorizes police departments in Massachusetts to require a police officer to take a lie detector test when the officer is under investigation for conduct that would be criminal if proven true. Such tests are allowed even when the officer could not be criminally punished for the crime. The decision specifically authorizes lie detector tests for police officers. It is silent as to whether this might be extended to other employees of police departments or other public employees in other departments, but such an extension seems unlikely.

If you have any questions regarding this client advisory please contact Michael Lehane or the attorney assigned to your account at (617) 479-5000.