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*In cc
jackets 2/6/09
butler*

February 6, 2009

City Manager Bernard F. Lynch
Mayor Edward C. Caulfield
Members of the City Council

Re: Proposed Knife Ordinance - *Council Motion by C. Broderick 12/9/08*

Dear Mr. Manager, Mayor Caulfield and Members of the City Council:

In December 2008, a motion was made for the City Council to review safety ordinances and the possibility of a knife ordinance. The issue pertaining to a knife ordinance was forwarded to the Law Department for comment. Please accept this memorandum as the Law Department's response to date.

Proposed Knife Ordinance

The Law Department is currently reviewing the feasibility of such an ordinance where the penalty would be a fine and whether it would be preempted (in part or in whole) by a state statute that criminalizes the possession of numerous types of knives as well as most knives during an arrest. There is a state statute that pertains to the possession of knives and imposes criminal sanctions.

In pertinent part G.L.c.260, §10(b) reads:

Whoever, except as provided by law, carries on his person...or under his control in a vehicle, any **stiletto, dagger**, or a device or case which enables a **knife** with a locking blade to be drawn at a **locked position**, any **ballistic knife**, or any **knife with a detachable blade capable of being propelled by any mechanism**, **dirk knife**, or any knife with a **double-edged blade**, or a **switch knife**, or any **knife having an automatic spring release from the handle, having a blade of over one and one-half inches....**

or whoever, when *arrested upon a warrant* for an alleged crime or when *arrested while committing a breach or disturbance of the public peace*, is armed with or has on his person...or under his control in a vehicle, a *billy* or *other dangerous weapon* other than those herein mentioned...shall be punished...

Proposed Knife Ordinance

February 6, 2009

Page Two

The potential penalty for such possession includes:

1. Up to 2 ½ years in a house of correction (HOC) for a person who hasn't previously been convicted of a felony
2. Up to 5 years in state prison with a minimum sentence of 2 ½ years or up to 2 ½ years in the HOC with a minimum sentence of 6 months for a person previously convicted of a felony.

Discussion

The purpose of the statute is “to outlaw the carrying of those knives which are primarily designed for stabbing human beings or for other unlawful objectives.” Commonwealth v. Miller, 22 Mass. App. Ct. 694, 696 (1986). As noted in **Bold** on the preceding page, the following knives are illegal to carry on a person or have in a vehicle by state statute:

1. stiletto,
2. dagger,
3. knife with a locking blade capable of being drawn in a locked position,
4. ballistic knife,
5. knife with a detachable blade capable of being propelled by any mechanism,
6. dirk knife,
7. knife with a double-edged blade,
8. switch knife, or
9. any knife having an automatic spring release from the handle, having a blade of over one and one-half inches.

An individual who simply carries or has under his/her control in a vehicle any knife that falls into one of these categories is subject to arrest under G.L.c.269, §10(b) for which a period of length incarceration is a potential penalty. It does not matter if such knives are open, folded, displayed, shown, held, hidden or simply on the person or in a vehicle.

In addition to the prohibition of certain knife classifications, the other part of Section 10(b) expands what knives (noted in *italic*) are classified as weapons determined to be either “dangerous per se” or “dangerous as used” during a warrant or public peace arrest that violate G.L.c.269, §10(b). Commonwealth v. Turner, 59 Mass. App. Ct. 825, 828 (2003).

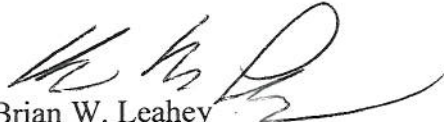
The purpose of the “dangerous as used” provision (involving a warrant or public peace arrest) is designed to discourage the carrying of dangerous weapons that can be used against arresting officers. Commonwealth v. Thompson, 15 Mass. App. Ct. 974 (1983) and Commonwealth v. Turner, 59 Mass. App. Ct. 825, 827 (2003). During a warrant or public peace arrest, in addition to the specific banned knives, any straight knife (such a steak knife) is dangerous per se and is a violation of G.L.c.269, §10(b) regardless if the knife is open, folded, displayed, shown, held, hidden or simply on a person or in his/her vehicle. Commonwealth v. Mollogi, 70 Mass. App. Ct. 108 (2007) (steak knife with four inch blade is “dangerous per se”). If a person is arrested on a warrant or any crime involving the breach of the public peace (i.e., disorderly conduct), merely having a steak knife in a pocket or purse is a violation of the state law.

Other types of knives, though, are only violations of G.L.c.269, §10(b) if the knife is “dangerous as used” during a warrant or public peace arrest. Generally speaking, a non-locking folded knife in a person’s pocket is not considered “dangerous per se” and is not a violation of the state statute. Turner, supra at 828. However, if such a knife was opened and not folded, it would constitute “dangerous as used” and be a violation. See generally, Commonwealth v. Miller, 22 Mass. App. Ct. 694, 696-697 (1986).¹ The question is whether the knife as used “is capable of producing serious bodily harm.” Turner, supra at 828. Factors included in determining whether “dangerous as used” include: whether the knife is open, whether the carrying occurs in public and whether it is shown to or seen by other persons. See generally, Commonwealth v. Mollogi, 70 Mass. App. Ct. 108, 113 (2007). In that case, a Lowell police officer was alerted to suspicious activity by a citizen at approximately 2:30am. Officer Fenlon saw the man with a steak knife in hand. The individual failed to respond to the officer’s commands, fled, and hid the knife on his person. The LPD officer arrested him for disturbing the peace and carrying a dangerous weapon. He was convicted on both charges. The Massachusetts Appeals Court upheld both convictions noting that the defendant’s conduct (“openly carrying a knife on a public street with pedestrian traffic, refusing Officer Fenlon’s order, and fleeing across a public street and down a side street”) was disorderly. Id. at 111.

CONCLUSION

It is a violation of state law to carry on the person or have under his/her control in a vehicle any type of knife specifically classified in G.L.c.269, §10(b), for which violators are subject to arrest, prosecution and incarceration. When the police arrest an individual on either a warrant or for a public peace arrest, the list of prohibited knives includes all straight knives and any knife if it “dangerous as used.” The Law Department is currently reviewing whether the state statute preemptions, in whole or in part, the City from enacting a proposed knife ordinance. Any such ordinance may not be inconsistent with state law. Given the City could only impose a penalty of a fine for any ordinance violation, another option may include requesting Lowell’s state delegation to amend the current law to address any type of knife that the City Council has concerns about that the existing statute does not currently address.

Very truly yours,


Brian W. Leahey
Assistant City Solicitor

Verb/req/09

¹ After the court declared the knife in Miller (5 in. long by 1 ½ in. wide folded locking knife in pocket not easily opened was not illegal, the Legislature expanded the list of specifically banned knives to include (“a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism.”) Acts of 1986, Chapter 581.