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Policy on public sex issued by Mass. state police

Gov. Cellucci seemingly not in agreement with what constitutes sex in a public area

by Fred Kuhr
staff

BOSTON — A new directive from the head of the Massachusetts State Police to uniformed officers regarding public sex may have put the agency at odds with Gov. Paul Cellucci. Or maybe not.

At issue is what constitutes a public place, sexual conduct, and just when such conduct is allowed, or not allowed, in so-called public places.

The story began last week when Colonel John DiFava released the order as part of the settlement of a

court action against the State Police involving a particular state trooper accused of improperly banning a gay man — known as “John Doe” in court papers — from Cape Cod highway rest stops.

The two-page “General Order” seeks to clarify the law on interactions between the public and police on the issue of sexual activity in public places. The order defines “sexual conduct” and “public place,” details state laws concerning public sex, and spells out the procedures for troopers faced with such situations.

Among other points, the order states, “Officers should not order

someone to leave a public area in the absence of unlawful conduct.”

Activists have often contended that gay men are unlawfully harassed by police when they gather in public places such as rest areas and parks. They have also complained that police treat gay couples more punitively than they do heterosexual couples.

Lawyers with Boston-based Gay & Lesbian Advocates & Defenders (GLAD), who represented “John Doe” in the case, praised the settlement and the directive as “an incredibly positive first step.”

“We commend the State Police for recognizing there are limits to their authority and for stating the rules of operation in plain English and in a General Order,” said GLAD attorney Mary Bonauto. “...This is a good start to what we envision to be a long term process.”

Doe, through GLAD, complained in writing to the State Police in June 1998 about what he perceived as a pattern of harassment at the hands

of one particular officer, including being forced to leave public areas. The State Police investigated and concluded the officer’s conduct in ejecting Doe was proper because he had “unlawful intent,” even though he was doing nothing illegal.

GLAD then filed suit on behalf of Doe. In October 1999, Superior Court Judge Wendy Gershengorn agreed to enjoin the accused trooper, as well as others acting in concert

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with him, to leave Doe alone as long as he was not violating any laws.

Although the State Police admitted no wrong doing, the agency agreed to train all new recruits on the issues in the General Order and ensure that in-service training for existing officers also addresses the issues.

In the order, "sexual conduct" is defined as: "The exposure or touching of the genitals, buttocks, or female breasts for purposes of sexual arousal, gratification or offense, or public solicitation to engage in such conduct in a public place. Sexual conduct does not include socializing and expressions of affection absent the particularized conduct described..."

"Public place" is defined as: "A place where the person engaged in sexual conduct knows or reasonably should know that there is substantial risk that his or her sexual conduct will be observed by a casual passerby. Sexual conduct does not occur in a 'public place' simply because it is observed by another. An area may be open to the public and not be considered a 'public place' if a reasonable person would not foresee such a substantial risk."

In essence, sex is not public, even though it is taking place in a public area, if it is taking place far out of view of the public. And therein

lies the rub.

Gov. Cellucci seemingly does not agree with this definition of "public place," stating that he does not want sex happening in any public area, be it witnessed by another person or not.

"We will absolutely not tolerate any sexual activity in public rest areas..." Cellucci said in *The Providence Journal*.

A Cellucci spokesman, John Birtwell, went further, saying that Cellucci does not distinguish between seen and unseen sex.

"I don't know how others may interpret the policy, but the governor's interpretation of the policy is the only one that matters," said Birtwell to the *Journal*. "If there's any confusion on that point, let's clear it right up. These forms of conduct will not be permitted."

Abner Mason, chief secretary to Gov. Cellucci, said that his boss agrees with the State Police order in that people should not be unlawfully harassed or discriminated against based upon sexual orientation.

"It's really pretty simple," Mason, who is openly gay, told in *newsweekly*. "People should not be engaging in public sex, gay or straight."

The State Police does not seem bothered by comments coming out of Cellucci's office. "I think [Cellucci]

said the same things we're saying," Capt. Robert Bird told the *Journal*, "but in a different way."

Gary Buseck, GLAD's executive director, while willing to give Cellucci the benefit of the doubt regarding his comments, said that he is still disappointed.

"What the governor said is troublesome," Buseck told in *newsweekly*. "He's adding a level of confusion to something that is not all that controversial. All the State Police are doing is clarifying that there will be equal enforcement of the law."

Buseck added that GLAD will be monitoring how well officers follow the order.

"There are two hotlines available for complaints," he said, "one answered by GLAD, 1-800-455-4523, the other answered by the State Police liaisons to the gay and lesbian community. People should feel free to call both numbers if they have been forced out of a public area simply because they are gay or are congregating with other people of the same sex. The State Police have a complaint procedure. We should use it to help them identify the minority of officers who are causing problems." ■

(To get a copy of the General Order issued by the State Police, connect to GLAD's web site at www.glad.org/generalorder.html.)