



## COVID-19 FOR COPS **FACE MASK ENFORCEMENT — Part II**

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***The return of Johnny Contagion.*** Yesterday, our fictional Essex confrontation ended with Officer Patricia Police giving Johnny Contagion a \$300 ticket because he refused to wear a face covering in violation of a Board of Health (BOH) emergency regulation.<sup>1</sup> Nice job.

But naturally, I received this question today: “John, what if Johnny refuses to give Officer Police his ID or any information so she has no way to write the ticket? Or, more likely, what if Johnny tells the officer to go %\$#7&\* herself! Now what?”<sup>2</sup>

***Before we answer the question, we must remember:***

**THE VAST, VAST MAJORITY OF CITIZENS WILL UNDERSTAND —  
EVEN IF THEY BEGIN BY VENTING — THAT OUR COLLECTIVE PUBLIC  
HEALTH DEPENDS ON EVERYONE FOLLOWING HEALTH RULES.**

Your officers must go into every interaction about COVID-19 with this calm and confident mindset. By knowing the rules and intervening with patience and understanding, officers will make good things happen.

***At the same time — when met with sustained non-compliance — police have the power of arrest under 272, § 59.*** This longstanding statute is entitled, “Violations of Municipal Law — Arrest without a Warrant.”<sup>3</sup> It states in part: “Whoever remains in a street or elsewhere in a town in wilful [sic] violation of an ordinance or by-law of such town or of any rule or regulation for the government or use of any public reservation, parkway or boulevard made under authority of law by any department, officer or board in charge thereof, . . . may be arrested without a warrant by an officer . . . in the place where the offence is committed and kept in custody until he can be taken before a court having jurisdiction of the offence.” [emphasis added]<sup>4</sup>

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<sup>1</sup> If you did not get this important COVID-19 update, go to <https://www.ledimensions.com> and download it from our home page.

<sup>2</sup> This question, including the colorful language, came during a phone call with old friend and promotional warrior, Michael Gropman, Deputy Chief in Brookline. Since then, other emails with the same question have landed in my in-box.

<sup>3</sup>See 272, § 59 compiled in Massachusetts Criminal Law and Motor Vehicle Handbook (2019 Edition; Blue360 Media). This law was first enacted in 1878, and last amended in 1981.

<sup>4</sup> Most officers are familiar with 272, § 59 because it also gives them arrest authority for public drinking and public profanity in violation of a local ordinance or bylaw. This authority is not relevant to our discussion.

**Notice that 272, § 59 is not limited to criminal violations, it confers a right of warrantless arrest for the willful public violation of a municipal regulation.** Practically speaking, if Johnny Contagion is a willful violator (meaning he continues after being warned) of a municipal regulation (like the Board of Health face cover rule) while staying in a public location, Johnny may be arrested by an officer (in this case, Patricia Police). Before arresting under 272, § 59, remember:

**THE ISSUE IS THE CONTINUING VIOLATION,  
NOT THE FAILURE TO IDENTIFY**

- **Officers do not have a right of arrest for a violator who puts on a face cover or leaves the area — even though he refuses to identify himself.** After all, 272, 59 is not designed to identify a person so they can receive a civil ticket,<sup>5</sup> it is designed to allow the arrest of a blatant violator.

For example, if Johnny Contagion said to Officer Police: “Fine, I’ll put on a mask. [He does.] There, you happy? But screw you, I’m not giving you my ID.” The suggested response by Officer Police: “Ok, I appreciate that. I’m happy not to give you a ticket if you follow the health rule. That’s all we’re trying to do.”

Or, suppose Johnny said: “Listen, I’m not wearing a mask and I’m not telling you who I am. I don’t even want my friggin’ lobster roll. I’ll walk to my car and go home.” At that point, Johnny is no longer “remaining” in public (i.e., staying) in willful violation, so the right of arrest under 272, 59 evaporates. Officer Police can follow Johnny to his car and watch him drive away. [If she wants to run his plate and mail him a ticket, that certainly is an option! The fact that someone leaves, or even complies, does not legally prevent them from receiving a ticket for the initial violation.]

- **Officers may only arrest for a willful violation. A violation becomes willful when the offender continues after being clearly warned.** Suppose Johnny said: “I’m Johnny Contagion, everyone knows I live at 8 Seashore Drive. I’ll give my date of birth too. But I’m not wearing a mask. It’s against my rights. I’m gonna stay here and get my lobster roll whether you like it or not.” Officer Police has a choice to make. She can issue the \$300 ticket and walk away. Or, she can say to Johnny: “Look, you can’t stand here and violate an emergency health law of the town. If you don’t leave the public area or wear a mask, you are forcing me to arrest you. I don’t want to, but you leave me no choice.” That’s the point of 272, 59. Officers may arrest those who blatantly violate an ordinance, bylaw, or regulation in public — even if it normally draws a civil penalty.
- **Finally, if members of the public on scene experience annoyance, alarm, or inconvenience based on the violation of an emergency health regulation, this may constitute disorderly conduct.** After all, the suspect has, at that point, created a hazardous or physically offensive condition by an act that serves no legitimate purpose. *Comm. v. A Juvenile*, 368 Mass. 580 (1975) (defining disorderly with reference to the model penal code). Again, be patient and try to reason with the citizen before going with an arrest . . . as a last resort!

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<sup>5</sup> Compare with 272, § 60 which does allow officers to arrest a person who litters and refuses to identify himself so he can receive a ticket.