

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRUCE VERNON MAYBERRY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 98-2-P-C</i>
)	
TOWN OF WINDHAM, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

Bruce Vernon Mayberry, appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983 as the result of the impoundment and ultimate loss of a valued personal possession, his 1977 GMC pickup truck. First Amended Complaint (“Complaint”) (Docket No. 2) ¶¶ 1, 11-12, 20, 28, 30-31. Mayberry asserts that Windham police officer Rudolph Brooks wrongfully ordered his truck towed by a private garage, Cobb’s Collision Center, Inc. (“Cobb’s”). *Id.* ¶¶ 5-7, 12, 20, 25. The Town of Windham then, he complains, compounded this wrong by failing to provide him with a prompt post-deprivation hearing. *Id.* ¶ 24. Finally, he argues, the town declined to restore the truck when the charges upon which the tow was predicated were dropped. *Id.* ¶¶ 22, 31. Mayberry having failed to pay storage fees, Cobb’s obtained title to his vehicle. *Id.* This series of acts and omissions, Mayberry complains, violated his constitutional rights to freedom from unreasonable seizure of

property and to due process of law. *Id.* ¶¶ 8, 27. He seeks compensatory damages of \$500 per day for loss of income and \$100,000 for emotional distress, punitive damages of \$500,000 and declaratory and injunctive relief. *Id.* at 8, ¶ 9.

By order dated July 8, 1998 this court granted the motion of defendants Cobb's and Mark Cobb for summary judgment in their favor. *See* endorsement to Motion of Defendants Mark Cobb and Cobb's, Inc., for Summary Judgment, etc. (Docket No. 10). The remaining defendants, Brooks and the Town of Windham, now move for summary judgment as to the claims against them. Motion for Summary Judgment by the Town of Windham Defendants ("Motion") (Docket No. 14). For the reasons that follow, I recommend that the motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

The Local Rules of this court require a party seeking summary judgment to provide “a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried.” Loc. R. 56. Brooks and the Town of Windham have filed such a statement. *See* Statement of Material Fact in Support of Motion for Summary Judgment by the Town of Winham (sic) Defendants (Docket No. 15).

Local Rule 56 requires a non-moving party to file a corresponding statement, “supported by appropriate record citations, as to which it is contended that there exist[s] a genuine issue to be tried.” The rule warns that all properly supported material facts asserted in the moving party’s factual statement “will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party.” *See also* *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) (“The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.”)

In this district, the Local Rules are applied to *pro se* litigants in the same fashion as to parties represented by counsel. *Fournier v. Joyce*, 753 F. Supp. 989, 991 n.4 (D. Me. 1990); *Soiett v. Turnage*, 708 F. Supp. 429, 430 n.1 (D. Me. 1989). When a party opposing a summary judgment motion fails to meet the Local Rule 56 requirement to controvert in proper fashion factual assertions made by the moving party, summary judgment will be granted if the uncontroverted factual assertions justify such a result. *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984).

As part of his response to the summary judgment motion, the plaintiff incorporated a section titled “Statement of Facts.” Plaintiff’s Response to Defendants’ Town of Windham and Rudolph Brooks’ Combined Motion for Summary Judgment (“Plaintiff’s Response”) (Docket No. 18) at 1-2. This statement is deficient in that it is not “supported by appropriate record citations” as required by

the Local Rule. Beyond that, however, the statement merely outlines the progress of the case to date in this court, thus reciting “facts” that have no bearing on the material allegations in this case. Under these circumstances, I must accept as true all factual assertions made by the moving parties.¹

II. Factual Context

In light of the foregoing, the summary judgment record reveals the following:

On the evening of June 1, 1997 Rudolph Brooks, a full-time police officer for the Town of Windham, was patrolling Route 302. Answers to Plaintiff’s Interrogatories by Defendant Rudolph Brooks (contained in Docket No. 15) ¶¶ 2,7. In the course of that patrol, he observed a brown pickup truck with a snowplow attached to it parked next to the gasoline pumps at Mobil Mart. *Id.* ¶ 7. Brooks found it unusual for a snowplow to be attached to a vehicle at that time of year. *Id.* He therefore stopped to inspect the truck. *Id.* In so doing, he noticed that the truck’s inspection sticker had expired in 1995 and that the registration also appeared to have expired. *Id.* Brooks asked the Windham P.D. Dispatch to run a vehicle check on the truck through the Department of Motor Vehicles. *Id.* It confirmed the expiration of the registration and told him that the owner of the truck was Bruce Mayberry. *Id.*

Brooks spoke with a young man who was pumping gasoline into the truck, who told him that his father was the driver of the vehicle and that he was inside the store. *Id.* Brooks motioned for the father to come outside and speak with him. *Id.* The man identified himself as Bruce Mayberry. *Id.* Brooks asked Mayberry if he realized that his truck was unregistered, and Mayberry told him that he did. *Id.* Mayberry then explained to Brooks that he did not need a registration because he used

¹Were I to have credited the factual assertions made in the Complaint and the Plaintiff’s Response, however, the outcome would have been the same.

the truck only on his property. *Id.* When Brooks asked him how the truck got to Mobil Mart, Mayberry said that he had driven it there through the Windham Mall parking lot. *Id.* Brooks concluded that Mayberry would have had to have driven across Sandbar Road. *Id.* ¶ 12. Because the Town of Windham maintains Sandbar Road, Brooks believed that it qualified as a public way. *Id.* Brooks thereupon, at approximately 10:30 p.m., issued Mayberry a Uniform Summons and Complaint for operating an unregistered motor vehicle in violation of 29-A M.R.S.A. § 351. *Id.* ¶ 7. The summons and complaint bore Case Number 971145 and Complaint Number 896951. *Id.* Brooks expressed no preference as to who towed his vehicle. *Id.* Cobb’s Collision subsequently towed the truck. *Id.* Mayberry was not arrested. *Id.* ¶ 11.

In issuing the summons and complaint, Brooks relied upon his training, education and experience. *Id.* ¶ 15. His duties frequently require him to refer to Maine statutes and local ordinances. *Id.* Mayberry’s charge for operating an unregistered motor vehicle in violation of 29-A M.R.S.A. § 351 was dismissed by the District Court during the review process, and no complaint issued. *Id.* ¶ 7.

III. Discussion

A. Unreasonable Seizure

Mayberry complains in Counts II and V of his Complaint that Brooks’s impoundment of his truck constituted an unreasonable seizure in violation of the Fourth Amendment.² The defendants argue as a threshold matter that the towing of Mayberry’s truck was not a “seizure” for Fourth

²Count I of the Complaint asserts that Brooks also violated Mayberry’s due process rights in wrongly charging Mayberry with operating an unregistered vehicle. This presents the same probable-cause question, based on the same set of facts, as is discussed herein in the context of unreasonable seizure.

Amendment purposes because, *inter alia*, title to the truck did not transfer to the town. Motion at 2-3. This argument may be quickly dismissed. The Supreme Court has left no doubt that deprivation of access to a vehicle is a sufficiently “meaningful interference with an individual’s possessory interests in that property” to implicate the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56, 61, 64-65 (1992) (citation and internal quotation marks omitted).

This leaves the key question whether the seizure was unreasonable — or, simply stated, whether Brooks had “probable cause” to believe that Mayberry had committed the misdemeanor of operating an unregistered vehicle on a public way. Brooks’s on-the-spot determination is not to be judged in the light of hindsight, but rather, whether he possessed “reasonably trustworthy information [sufficient] to warrant a prudent [person] in believing” that the defendant “had committed or was committing a [criminal] offense.” *Hegarty v. Somerset County*, 53 F.3d 1367, 1374 (1st Cir. 1995) (citation and internal quotation marks omitted) (additions in original). “As the Supreme Court has explained, ‘[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Id.* (citation omitted).

The statute that Brooks believed Mayberry to have violated provides, in relevant part, that “[a] person commits a Class E crime if that person fails to register a vehicle that is operated or remains on a public way as provided by this Title.” 29-A M.R.S.A. § 351(1). A “public way,” in turn, is defined as “a way, owned and maintained by the State, a county or a municipality, over which the general public has a right to pass.” *Id.* § 101(59). Impoundment of a vehicle is authorized by 29-A M.R.S.A. 105(3) as follows:

When a motor vehicle is operated by a person not able to produce a certificate of registration, or by a person other than the person in whose name the vehicle is registered and the operator is unable to present reasonable evidence of authority to operate that vehicle, an officer may impound and hold that vehicle until that vehicle is claimed by the registered owner or until the registered owner verifies the authority of the operator. The registered owner must be notified immediately of the impoundment.

Mayberry decries Brooks's actions on the night of June 1, 1997 as unreasonable in that (i) Brooks never observed Mayberry "operating" the vehicle; (ii) Brooks ignored Mayberry's own statement that he had not driven over a public way to reach the Mobil Mart; (iii) Brooks merely inferred that Mayberry had driven over a public road; (iv) "[t]he contention that a snow plow blade attached to the truck was somehow suspicious, and would lead an officer to conclude that an investigation would be prudent, is absurd"; and (v) the seizure was invalid because effectuated from "private property" without consent. Plaintiff's Response at 2-4, 7-8.

Bearing in mind the Supreme Court's admonition that probable-cause analysis should be informed by "the practical considerations of everyday life," I conclude that Brooks possessed probable cause to believe that Mayberry was violating 29-A M.R.S.A. § 351(1) on the night of June 1, 1997. Brooks's suspicions were aroused by the appearance of a snowplow blade on a truck in June. Mayberry asserts, and one cannot deny, that "[t]here is no crime in having a snow plow blade attached to a vehicle, regardless of the time of year" Plaintiff's Response at 4. Nonetheless, the appearance of this article on Mayberry's truck invited further inquiry, for it suggested that the vehicle may not have been used in some time and, hence, may not have been properly inspected or registered. Indeed, as Brooks confirmed, the truck was unregistered.

Mayberry's son informed Brooks that his father was the driver of the vehicle. Thus, it was clear to Brooks that the truck had been "operated" over to the Mobil Mart and that Mayberry had

been the operator. Brooks then drew the inference that, to get to the Mobil Mart, Mayberry crossed Sandbar Road, which Brooks believed qualified as a “public way” because maintained by the Town of Windham.³ Brooks need not have directly observed Mayberry operating the vehicle over a public way, nor have accepted Mayberry’s version of events at face value. He could permissibly put two and two together.⁴ *See, e.g., United States v. Miller*, 589 F.2d 1117, 1128 (1st Cir. 1978) (“[a]n officer may draw reasonable inferences from the immediate observations of his senses”) (citation omitted).

Mayberry’s next contention, that Brooks had no authority to seize an automobile from private property absent the owner’s consent, is without merit. The law in this circuit is clear that an officer may effectuate a warrantless seizure of a vehicle from a publicly accessible locale such as the Mobil Mart if probable cause otherwise exists. *See, e.g., United States v. Moscatiello*, 771 F.2d 589, 599 (1st Cir. 1985) (seizure of vehicle from parking garage constitutionally permissible with probable cause), *vacated and remanded on other grounds*, 476 U.S. 1138 (1986); *United States v. Sawyer*, 630 F. Supp. 889, 890, 891 n.5 (D. Me. 1986) (seizure of truck from truck stop lawful with probable cause).

Nor do the terms of the controlling Maine statutes require another result. Section 351(1) merely proscribes failure to register a vehicle “that is operated . . . on a public way.” Section 105(3)

³There is no evidence, for purposes of this motion, that the Sandbar Road is not a public way or that there are means of access to the Mobil Mart via private roads.

⁴Even if, in adding two and two, Brooks came up with five, this would not necessarily undermine a finding that at the time he possessed probable cause. *Palhava de Varella-Cid v. Boston Five Cents Sav. Bank*, 787 F.2d 676, 679 (1st Cir. 1986) (“[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part”) (citation and internal quotation marks omitted).

authorizes impoundment “[w]hen a motor vehicle is operated by a person not able to produce a certificate of registration.” Neither statute mandates that an officer directly, contemporaneously observe a motorist operating the vehicle. And the impoundment statute does not circumscribe the nature of the locale from which a vehicle may be impounded.

The finding of probable cause disposes of the issue of both Brooks’s and the Town of Windham’s liability as to this element of Mayberry’s claims. Neither Brooks personally, nor the town, may be held liable as a result of the decision to seize the truck.

B. Due Process

Finally, Mayberry accuses the Town of Windham, in Counts III and IV of the Complaint, of violating his due process rights as the result of its failure to provide him with (i) a prompt post-deprivation hearing following the towing of his truck, (ii) adequate notice of his remedies, and (iii) restoration of the truck upon the dismissal of the charges upon which its seizure was predicated.⁵

The question of what process is due following the impoundment of a vehicle appears to present an issue of first impression in this court and this circuit. Nonetheless, there is a considerable body of caselaw from other jurisdictions. These cases hold as a general rule that a municipality must provide for at least an informal hearing before an impartial decisionmaker within 48 hours of impoundment to contest the validity of the tow. *See, e.g., Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) (seven-day delay in hearing “clearly excessive”); *Propert v. District of Columbia*, 948 F.2d 1327, 1332-33 (D.C. Cir. 1991) (“prompt” hearing required); *Scofield v. City of Hillsborough*, 862 F.2d 759, 764 (9th Cir. 1988) (hearing within 48 hours satisfied due process).

⁵Count III alleges that the town is liable for “continued unlawful seizure” of Mayberry’s truck. This claim sounds in due process and hence is addressed in this context.

There is also authority, however, for a small detour from this bedrock principle. If a motorist is afforded the opportunity to retrieve his or her vehicle promptly pending adjudication on the merits (usually upon posting of an appearance bond or payment of towing charges), this too has been held to satisfy the requirements of due process. *See, e.g., Goichman v. City of Aspen*, 859 F.2d 1466, 1467-69 (10th Cir. 1988) (fine plus towing fee); *Weinrauch v. Park City*, 751 F.2d 357, 359-60 (10th Cir. 1984) (towing charges); *Breath v. Cronvich*, 729 F.2d 1006, 1011 (5th Cir. 1984) (appearance bond); *Towers v. City of Chicago*, 979 F. Supp. 708, 715-16 (N.D. Ill. 1997) (appearance bond). To the extent that the underlying charges against the motorist are determined to have been unlawful or erroneous, the caselaw suggests, the municipality must make the motorist whole by refunding garage fees or fines previously paid. *See, e.g., Goichman*, 859 F.2d at 1468 n.4; *Weinrauch*, 751 F.2d at 360; *Gillam v. Landrieu*, 455 F. Supp. 1030, 1042 (E.D. La. 1978).

Regardless which type or combination of post-deprivation remedies a municipality chooses to afford the motorist, it must provide adequate notice of the availability of the same. *See, e.g., Propert*, 948 F.2d at 1333 (hearing notice inadequate because “a matter of the enforcing officer’s grace and not the owner’s entitlement”); *Gillam*, 455 F. Supp. at 1039-40 (notice should have included means of securing vehicle’s release, fact of accumulation of garage storage fees).

The Town of Windham relies upon the fact that Mayberry was given on-the-spot notice that his vehicle was being impounded; indeed, he was asked whether he had a preference as to garages. Motion at 8. Immediate notice of the impoundment, moreover, is all that 29-A M.R.S.A. § 105 requires.⁶ The question remains, however, whether Mayberry could have promptly retrieved his vehicle upon payment of accumulated storage and towing fees.

⁶Mayberry does not challenge the constitutionality of any of the controlling Maine statutes.

Section 105 provides that an impounded vehicle may be retrieved on demand, but only by “the registered owner” or someone verified by him as having authority to operate the vehicle. In effect, the statute prevented Mayberry from regaining prompt access to his vehicle without conceding the key fact in contention — that the vehicle required registration. In this respect, it differs materially from the type of vehicle-release procedure (such as posting an appearance bond) that has been held to satisfy due process.

Assuming *arguendo*, however, that under these circumstances the Town of Windham should have afforded Mayberry a prompt post-deprivation hearing, Mayberry encounters a formidable obstacle in the form of the necessity to establish a basis for municipal liability.

A municipality may be held liable in a section 1983 case only to the extent that its “policy or custom” inflicts the asserted harm. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Mayberry first attempts to base the Town of Windham’s liability not on the existence, but rather on the absence, of municipal policy. Specifically, Mayberry asserts that the town had no policies authorizing the imposition of towing and storage charges, affording a prompt post-impoundment hearing, or providing for notice of any of the foregoing. Plaintiff’s Response at 9-10. A municipality’s failure to act can form the basis for liability only upon a finding that the omission was tantamount to a conscious choice by its policymakers. *Canton*, 489 U.S. at 389. This Mayberry does not show inasmuch as he fails, as a threshold matter, to adduce any affirmative evidence that the town lacks such a policy.⁷ The nonexistence of a municipal policy cannot be inferred from one

⁷I directed the clerk’s office to ask counsel for the Town of Windham defendants to supply the court and Mayberry with any Windham municipal ordinances in effect as of June 1, 1997 and also as of now that address the impoundment of vehicles (including the circumstances under which they may be impounded, towing and storage charges and any hearing or appeals rights regarding the (continued...)

incident. *Fowles v. Stearns*, 886 F. Supp. 894, 899 (D. Me. 1995).

Mayberry seeks to overcome this deficiency by suggesting that “a single, unusually egregious incident can be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to gross negligence on the part of the official in charge.” Plaintiff’s Response at 13. The case upon which Mayberry relies, *Martini v. Russell*, 582 F. Supp. 136 (C.D. Cal. 1984), is clearly distinguishable from his own. In the *Martini* case, several minor children who had been passengers in a vehicle were incarcerated with their mother after she was unable to produce evidence of her license or registration. *Id.* at 140. The children, who were traumatized by the ordeal, had been under no suspicion and posed no danger whatsoever. *Id.* at 141-42. While excoriating this shocking abuse of police power, the court nonetheless was careful to reserve its outrage for the incarceration of the children, not that of the mother. *Id.* at 140. *See also Swain v. Spinney*, 117 F.3d 1, 9, 11 (1st Cir. 1997) (claim that strip-search constitutionally defective strong enough to survive summary judgment, but did not fall into “narrow range of circumstances” in which municipality can be held liable in failure-to-train case without showing of pattern of constitutional violations).

To the extent that Mayberry’s due-process claims against the Town of Windham are

⁷(...continued)

same). Counsel in response provided a certified copy of chapter 227 (vehicles and traffic), articles I (speeding) and II (traffic and parking) of the Windham ordinances. Nothing therein addresses impoundment under the circumstances faced by Mayberry. The absence of an ordinance nonetheless does not conclusively show that the town lacked any policies whatsoever addressing this issue. Mayberry suggests that he attempted unsuccessfully to obtain the Town of Windham’s policies. Plaintiff’s Response at 13. While the court will dig for law (such as ordinances) that the parties may have missed, it has no business hunting down evidence (such as policies). This was Mayberry’s burden. To the extent that the town was unresponsive, Mayberry could have availed himself of procedural remedies to compel discovery. *See, e.g., Fed. R. Civ. P. 37(a); Loc. R. 26(b).*

predicated upon the actions of Brooks, they too fall short of providing a basis for municipal liability. Municipalities may not be held liable for the acts of their employees on a *respondeat superior* theory. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). A municipality may be held liable for such isolated acts only if carried out or ratified by a final policymaker or someone to whom final policymaking authority clearly was delegated. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 126-27 (1988). The question whether an actor is a “final policymaker” is determined with reference to state law. *Id.* at 123.

Maine law vests “municipal officers” with final policymaking authority regarding the enactment of traffic ordinances in the municipality. 30-A M.R.S.A. § 3009(1). The term “municipal officers” is defined in relevant part to include “[t]he selectmen or councillors of a town.” *Id.* § 2001(10)(A). The summary-judgment record is devoid of evidence as to the role of these municipal officers or their delegees, if any, in embracing Brooks’s course of action with regard to the Mayberry vehicle.

Because Mayberry is unable to link the Town of Windham sufficiently to the procedural flaws of which he complains, his causes of action on this ground also founder.

C. Punitive Damages and Equitable Relief

Mayberry’s claims for punitive damages and equitable relief hinge upon his constitutional causes of action and provide no independent basis for relief. If my recommended decision to grant summary judgment as to those underlying causes of action is accepted, the dependent claims likewise fail.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' summary judgment motion be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2d day of October, 1998.

*David M. Cohen
United States Magistrate Judge*