STATE OF NEW JERSEY

In the Matter of Michael Kubert, *et al.*, Police Lieutenant, various jurisdictions	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2018-1263, *et al.*	:	Examination Appeal

ISSUED: APRIL 2, 2018 (JH)

Michael Kubert and Andrew Quinn (PM0692V), Bayonne; William Cullen (PM0695V), Berkeley; Foster Vaness (PM0709V), Hamilton; Mohammad Riaz (PM0712V), Jersey City; Brian Wisely (PM0714V), Kearny; Antonia Gonzalez (PM0720V), Long Branch; Michael Cresong and Ryan Orange (PM0731V), Mount Laurel; Daniel Conte (PM0734V), Parsippany; Joseph Vulcano (PM0741V), Rockaway; Daniele Grasso (PM0747V), South Orange; and William Mango and Patrick Matullo (PM0754V), West Orange; appeal the examination for Police Lieutenant (various jurisdictions). These appeals have been consolidated due to common issues presented by the appellants.

The subject examination was administered on October 5, 2017 and consisted of 80 multiple choice questions.

Conte, Cullen, Matullo, Vulcano and Wisely present that they were only provided with 30 minutes for review and they were not permitted to review their test booklets, answer sheets and the correct answer key. In addition, they argue that their ability to take notes on exam items was severely curtailed. As such, they request that any appealed item in which they selected the correct response be disregarded and that if they misidentified an item number in their appeals, their arguments be addressed.[1]

[1] Kubert, who indicates that he was unable to attend review, makes the same request.

Regarding review, it is noted that the time allotted for candidates to review is a percentage of the time allotted to take the examination. The review procedure is not designed to allow candidates to retake the examination, but rather to allow candidates to recognize flawed questions. First, it is presumed that most of the questions are not flawed and would not require more than a cursory reading. Second, the review procedure is not designed to facilitate perfection of a candidate's test score, but rather to facilitate perfection of the scoring key. To that end, knowledge of what choice a particular appellant made is not required to properly evaluate the correctness of the official scoring key. Appeals of questions for which the appellant selected the correct answer are not improvident if the question or keyed answer is flawed.

With respect to misidentified items, to the extent that it is possible to identify the items in question, they are reviewed. It is noted that it is the responsibility of the appellant to accurately describe appealed items.

An independent review of the issues presented under appeal has resulted in the following findings:

Question 4 indicates that two of your officers respond to a residence in your town based on a report of a likely heroin overdose. Upon their arrival, one of the officers immediately begins providing lifesaving efforts to revive the homeowner, who is alone in the residence. Soon after, the other officer observes a white powdery substance and drug paraphernalia laying on a table near the homeowner. She also observes a semi-automatic handgun on the floor next to the table. Upon further investigation, the handgun is found to have been reported stolen. The officers ask for your guidance on how to proceed regarding charges related to the suspected narcotics, drug paraphernalia, and stolen handgun. The question requires candidates to complete the following sentence, "Based on the N.J. Attorney General's Directive to Ensure Uniform Statewide Enforcement of the Overdose Prevention Act, the homeowner should . . ." The keyed response is option b, "only be charged in relation to the stolen handgun, since firearms are not included in the list of offenses that are subject to statutory immunity." Grasso argues that option a, "not be charged with any criminal offenses related to the suspected narcotics, drug paraphernalia, or stolen handgun, since they were discovered as a result of seeking medical assistance for a drug overdose," is the best response. In this regard, he contends that "a gun inside of a private residence is NOT a violation of any law. There would be no reason to seize the gun unless it was intrinsically illegal. For example, a defaced gun with serial numbers removed or that the form of the gun, such as an automatic handgun, was an illegal weapon in accordance with [T]i[t]le 2C. This is not the case, the gun inside a private home alone is not illegal, per se, and would only be seized for safe keeping. In that case, even if it was determined to be stolen, no charge would be appropriate and the gun would simply not be returned." It is noted that the Division of Test Development and Analytics

contacted Subject Matter Experts (SMEs) on this matter who indicated that the Attorney General's Directive to Ensure Uniform Enforcement of the Overdose Protection Act (June 25, 2013) (Directive) provides:

> It is important to note that the immunity from arrest, prosecution, and conviction afforded under the statute applies only to those crimes and offenses that specifically are enumerated in *N.J.S.A.* 2C:35-30(a)(l-6) and 2C:35-31 (a) (1-6), and that are comprehensively set forth in Section 2 of this Directive . . . The legislative findings set forth in the statute make clear in this regard that, '[i]t is not the intent of the Legislature to protect individuals from arrest, prosecution or conviction for other criminal offenses, including engaging in drug trafficking . . .' *N.J.S.A.* 24:6J-2.

Furthermore, the SMEs indicated that the Directive specifically provides, under the heading, "Authority to Seize Contraband Even When Immunity Feature Applies," "The statute makes clear that it in no way limits the authority of law enforcement officers to seize evidence or contraband, even if the person from whom the evidence was seized is immune from arrest or prosecution for possession of that evidence or contraband. *See N.J.S.A.* 2C:35-30(c) and 2C:35-3 l(c)." As such, the SMEs determined that the officer would be negligent if she did not, under the circumstances presented in the scenario, secure the firearm. The SMEs also noted that the officers were summoned to the location to provide medical assistance and the officer did not unlawfully expand her search of the premises but rather, the firearm was in plain view. The SMEs indicated that the officer merely retrieved a firearm off of the floor, in close proximity to the victim and others that may be responding to the scene to provide aid to the victim. The SMEs further indicated that once the firearm was taken to headquarters for safekeeping, it would be proper to determine the lawful owner of the firearm before returning it. The SMEs stated that based on the fact that the victim was the homeowner and the firearm was in his home in close proximity to him, it would have been proper to charge him with possession of stolen property, as this charge is not included in the list of offenses that are subject to statutory immunity. As such, the question is correct as keyed.

Question 5 indicates that John Gray has been arrested for aggravated assault and brought to police headquarters for processing. Gray would like to file an immediate internal affairs complaint against one of the officers who arrested him. Candidates are presented with four statements and required to determine, according to the Attorney General's Internal Affairs Policy and Procedures, which agency staff members may accept Gray's internal affairs complaint. The keyed response, option c, does not include statement IV, "any civilian personnel." Grasso argues that statement IV is correct since "the AGG Model Policy Appendix A clearly states all Department personnel shall accept complaints. There is no wording in the entire Guideline that states civilian personnel cannot accept complaints." The

Attorney General's Internal Affairs Policy and Procedures (revised July 2014) (Internal Affairs Policy and Procedures), under the heading, "Accepting Reports Alleging Officer Misconduct," provides that "all complaints of officer misconduct shall be accepted from all persons who wish to file a complaint . . . Internal affairs personnel, if available, should accept complaints. If internal affairs personnel are not available, supervisory personnel should accept reports of officer misconduct, and if no supervisory personnel are available, complaints should be accepted by any law enforcement officer." The Internal Affairs Policy and Procedures, Appendix A, Model Internal Affairs Standard Operating Procedure provides, in pertinent part:

> B. Accepting Reports Alleging Officer Misconduct
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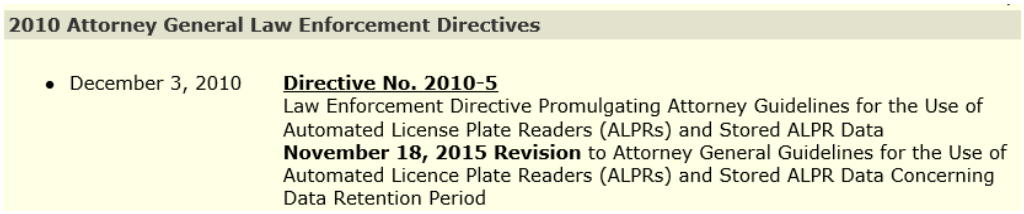
> 1. All department personnel are directed to accept reports of officer misconduct from all persons who wish to file a complaint regardless of the hour or day of the week. Citizens are to be encouraged to submit their complaints in person as soon after the incident as possible. If the complainant cannot file the report in person, a department representative shall visit the individual at his or her home, place of business or at another location to complete the report, if feasible.
> 2. Complainants shall be referred to the Internal Affairs Unit if an officer is immediately available.
> 3. If an internal affairs officer is not immediately available, all supervisory personnel are directed to accept the report of officer misconduct.
> 4. If an internal affairs officer and a supervisor are not available, any law enforcement officer shall accept the complaint . . .

A comprehensive reading of the Directive indicates that "personnel" is limited to Internal Affairs officers, supervisors and law enforcement officers. Furthermore, "any civilian personnel," which presumably could include cleaning staff, is overly broad. As such, the question is correct as keyed.

Question 8 refers to Section 9 of the Attorney General's Use of Automated License Plate Readers (ALPRs) and Stored ALPR Data Concerning Data Retention Period, (Revised November 18, 2015).[2] The question asks, "according to the guideline, agencies may seek authorization from the Director of the Division of Criminal Justice to purge ALPR data before the expiration of the required retention period for good and sufficient cause (e.g., to reduce documented storage costs), provided that the data to be purged has been retained for a minimum of how many

[2] Attorney General Directive No. 2010-5.

years?" The keyed response is option a, 2 years.[3] Orange indicates that Directive No. 2010-5 is available on the Office of the Attorney General's website (http://www.state. nj.us/lps/dcj/directiv.htm):



However, he maintains that "the November 18, 2015 Revision was the only link that was not underlined . . . [and it] was placed underneath Directive Number 2010-5 and did NOT have a date next to it." He adds that any updates to the directives are "placed in chronological order"[4] and argues that the November 18, 2015 revision to

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[3] The revision provides (as noted in the revision, "new material is italicized and boldfaced . . . deleted text is bracketed . . ."):

> 9. RETENTION PERIOD AND PURGING OF STORED DATA
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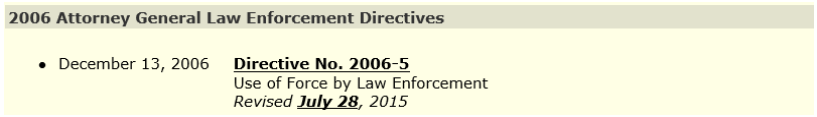
> Each law enforcement agency shall, pursuant to the provisions of Section 14 of these Guidelines, establish and enforce procedures for the retention and purging of stored ALPR data in accordance with this Section. ALPR stored data shall be retained for a period of five years, after which, the data shall be purged from the agency's data storage device or system. A law enforcement agency may purge ALPR data before the expiration of the five-year retention period **[**only**]** if the data has been transferred to the State Police Regional Operations Intelligence Center (R.O.I.C.) or any other system that aggregates and stores data collected by two or more law enforcement agencies in accordance with the provisions of these Guidelines. ***A law enforcement agency also may seek authorization from the Director of the Division of Criminal Justice to purge ALPR data before the expiration of the five-year retention period for good and sufficient cause (e.g., to reduce documented storage costs), provided that the data to be purged has been retained for a minimum of two years.*** Any ALPR data transferred to another agency shall indicate the date on which the data had been collected by the ALPR so that the receiving agency may comply with the five-year retention and purging schedule established in this Section. *See also* Section 11.1 and 11.2, *infra*.

[4] In this regard, Orange refers to Directive 2006-5 which is listed under the 2006 Attorney General Law Enforcement Directives:



He notes that the 2015 revision is also listed under the 2015 Attorney General Law Enforcement Directives:

Directive Number 2010-5 is not listed under the 2015 Attorney General Law Enforcement Directives and thus, this item "is unfair because the information is essentially hidden, and the information is out of order." It is noted that the Civil Service Commission has no input or control over how information is presented on the Attorney General's website and all candidates who accessed the website were similarly situated. Furthermore, although the 2015 revision was not in the format Orange was anticipating, a visit to the Attorney General's website finds that when a cursor is placed over "November 18, 2015 Revision," this phrase becomes highlighted which signifies a hyperlink and clicking on this link accesses the revision.[5] Moreover, Orange acknowledges that he observed that there was a revision to Directive Number 2010-5 on the Attorney General's website, *i.e.*, "November 18, 2015 Revision." As such, it was incumbent upon him at that point to take additional action. In this regard, Orange does not indicate that he investigated any further into this matter, *e.g.*, placed a cursor over "November 18, 2015 Revision," contacted the Office of the Attorney General or attempted to access other resources.

Question 12 indicates that a Sergeant under your command has been ordered by the chief to prepare a training session concerning the use of deadly force, as detailed in the Attorney General's Use of Force Policy. The Sergeant has asked you to review the training outline that she prepared. You begin reading over the information she plans to cover in the training and realize that one of the points in her outline contains incorrect information. The question asks, based on the Attorney General's Use of Force Policy, for the incorrect point. The keyed response is option c, "Law enforcement officers must identify themselves and state their intention to shoot before using a firearm." Conte argues that option d, "The discharge of any projectile from a firearm, including less lethal means such as bean bag ammunition, is considered deadly force," is equally correct. The Attorney General Use of Force Policy (revised June 2000) provides, "Under current state statutes the discharge of any projectile from a firearm is considered to be deadly force, including less lethal means such as bean bag ammunition or rubber bullets." However, effective January 4, 2006, *N.J.S.A.* 2C:3-11(b) was amended to provide, in pertinent part, "Purposely firing a firearm in the direction of another person or at a vehicle, building or structure in which another person is believed to be constitutes

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2015 Attorney General Law Enforcement Directives

- July 28, 2015 — **AG Directive 2015-1**
  Law Enforcement Directive Regarding Police Body Worn Cameras (BWCs) and Stored BWC Recordings
- July 28, 2015 — **AG Directive 2006-5**
  Supplemental Law Enforcement Directive Regarding Uniform Statewide Procedures and Best Practices for Conducting Police-Use-of-Force Investigations

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[5] It is also noted that the revisions which are underlined on that page also become highlighted when a cursor is placed over them.

deadly force *unless the firearm is loaded with less-lethal ammunition* and fired by a law enforcement officer in the performance of the officer's official duties" (emphasis added).[6] It is noted that the Attorney General's Approved List of Less-Lethal Ammunition (December 2010) includes bean bag ammunition. As such, the Division of Test Development and Analytics determined to double key this item to option c and option d, prior to the lists being issued.

Question 21 indicates that a Sergeant asks for your opinion regarding whether probable cause is sufficiently established in a search warrant affidavit prepared by two of her subordinates. The affidavit states the following:

> A confidential informant gave officers under Sergeant Stevens' supervision a tip that a man named 'Biggie' was selling cocaine at 236 Roebling Place. That address is the ground floor apartment of a two-story row home that is located within a housing project. The informant described the man as black, about twenty-five years old, 5'9" tall, and weighing 235 pounds. After the police showed the informant a picture of William Sykes, the informant identified him as 'Biggie.' A criminal background check revealed that William Sykes had previous convictions for various drug offenses. The informant then agreed to help the police perform a controlled buy at 236 Roebling Place. Officers searched the informant to ensure that he did not possess any contraband, provided him with money, and arranged to meet with him upon his return. The layout of the buildings within the housing project obstructed the officers' surveillance efforts during the controlled buy. Because it was not possible to gain a direct view of 236 Roebling Place from where the officers were positioned, they could observe only the general area of the apartment. As a result, the officers did not see the informant physically enter the residence. However, the informant met the police afterwards at the predetermined location where he told the officers that while inside 236 Roebling Place, he handed money to 'Biggie' in exchange for what he believed was cocaine. A field test confirmed that the substance the police received from the informant was indeed cocaine.

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[6] Subsequently, the Supplemental Policy on Less-Lethal Ammunition (March 19, 2008), which "supplements the Attorney General's Use of Force Policy by providing express criteria for the use of less-lethal ammunition," indicates that the policy applies to the use of less-lethal ammunition, as defined in *N.J.S.A.* 2C:3-11(f), that is ejected from a firearm and that is targeted at a person." It is noted that *N.J.S.A.* 2C:3-11(f) provides, "Less-lethal ammunition" means ammunition approved by the Attorney General which is designed to stun, temporarily incapacitate or cause temporary discomfort to a person without penetrating the person's body. The term shall also include ammunition approved by the Attorney General which is designed to gain access to a building or structure and is used for that purpose.

> The affidavit further provides that this confidential informant has been proven reliable and has provided information in the past that has resulted in the arrest of numerous suspects and the recovery of proceeds from drug sales.

The question asks, based on relevant State case law, what you should advise the Sergeant regarding the affidavit. The keyed response is option a, "The affidavit contains sufficient probable cause, due to the totality of the circumstances." Grasso maintains that option b, "insufficient probable cause, because the officers did not observe the informant enter and exit the apartment," is the best response. In this regard, he contends that "the facts given are similar to the *State v. Sullivan*[7] case where there were two actual buys, both in the same manner, which still did not meet the probable cause standard.[8] The facts given in this question do not meet the probable cause standard as there was only one drug buy . . . Totality of the circumstances is a catchphrase that refers to a method of analysis based on all of the information of a given incident to determine if probable cause is reached. The analysis of all the facts in this question do not amount to probable cause." It is noted that this item is based on *State v. Keyes*, 184 *N.J.* 541 (2005). As indicated in *Keyes*, *supra*, "under the totality of the circumstances test, courts must consider all relevant circumstances to determine the validity of a warrant" [citations omitted]. *Id.* at 554. The court examined "the totality of the circumstances, including the confidential informant's veracity, his basis of knowledge, and all relevant police corroboration of those two factors, to determine whether the issuing court had a substantial basis to conclude that probable cause existed to search [the address] . . . We emphasize that the presence or absence of either the veracity or basis of knowledge factors is not determinative and that the analysis must examine all relevant factors." *Id.* at 557. In this regard, the court noted that "under the totality of the circumstances presented in this case, we conclude that this affidavit satisfies the veracity factor. The corroborating evidence . . . reinforces that conclusion." *Id.* at 557. In addition, the court indicated that "the controlled buy is thus central to our analysis whether the corroborating facts presented in the police affidavit adequately support the confidential informant's veracity and basis of knowledge . . . When coupled with at least one additional corroborating circumstance, a controlled buy typically suffices to demonstrate that the police, under the totality of the circumstances, had probable cause [citation omitted]. Here, the other police corroboration of the informant's tip substantially supports the motion court's finding of probable cause to search [the address]." *Id.* at 559. Furthermore, the court

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[7] Grasso does not provide a citation for this matter but it appears that he is referring to *State v. Sullivan*, 169 *N.J.* 204 (2001).

[8] The court in *Sullivan*, *supra*, held that "the warrant application satisfied the applicable federal and State tests for establishing probable cause. The two controlled drug purchases, as well as the additional police corroboration of the informant's tip, sufficiently demonstrated probable cause." *Id.* at 217. Thus, Grasso misremembered the court's determination in this matter.

determined that "given all of the police corroboration . . . the officers' inability to witness the informant enter the apartment does not alter our conclusion that the police had probable cause to obtain a search warrant." *Id.* at 560. As such, the question is correct as keyed.

Question 23 provides:

> On a February morning, at approximately 2:30 a.m., two of your officers were on patrol when they received a radio report from dispatch that headquarters had gotten an anonymous tip that 'an individual in a red Explorer with a N.J. temporary tag was flashing a gun at the 1300 block of Hudson Avenue.' Your officers responded in separate marked patrol vehicles and arrived at the scene, which was as a well-lit business district. As the officers approached the red Explorer, they noticed that it had dark-tinted windows, making it difficult to see inside and as a result, they executed a 'high risk traffic stop.' The driver and passengers were ordered out of the vehicle. They complied. A pat-down search of the driver and passengers did not turn up any weapons. Additional officers arrived at the scene. After the driver and passengers were taken to a secure location, several officers searched the vehicle for weapons. A gun was found under the front passenger seat. The driver and passengers were then arrested.

The question asks, according to relevant State case law, for the true statement. The keyed response is option b, "Neither the *Terry* frisks nor the warrantless search of the vehicle were justified by the circumstances and the anonymous tip." Matullo maintains that option c, "The *Terry* frisks were justified; however, the vehicle should have been impounded and searched only after obtaining a valid search warrant," is the best response. In this regard, Matullo argues that item is "incorrectly sourced to *State v. Matthews*, 398 *N.J. Super.* 551 (App. Div. 2008)" since "the examination scenario was based on 'an anonymous 9-1-1 call'" and thus, "the circumstances are different from those in *Matthews* and therefore we cannot rely on the court[']s decision in *Matthews* to answer this question." He refers to *State v. Golotta*, 178 *N.J.* 205 (2003), which determined that "the 9-1-1 system provides the police with enough information so that users of that system are not truly anonymous even when they fail to identify themselves by name," *Id.* at 219, and thus, the information imparted by a 9-1-1 caller should not be 'viewed with the same degree of suspicion that applies to a tip by a confidential informant' [citation omitted]" *Id.* at 220. It is noted that this item is sourced to *Matthews*, *supra*.[9] As

[9] The court in *Matthews*, *supra*, indicated that "the central issue presented by this appeal is whether an anonymous tip, standing alone, can form the basis for a *Terry* stop and frisk search, as well as a search of a motor vehicle. We hold that, under the circumstances of this case, both the stop and frisk

indicated above, the question clearly states, "anonymous tip," and not, as indicated by Matullo, "an anonymous 9-1-1 call." Thus, Matullo misremembered the question stem and his reliance on *Golotta*, *supra*, is misplaced.[10]

Questions 24 and 25 refer to the following scenario presented to candidates in the test booklet:

> At 6:20 p.m., Sergeant Potter, along with five other police officers, went to David Smart's apartment to execute a warrant for his arrest. The officers knew that Smart had a number of prior criminal convictions and they had information that he might be armed with a weapon.
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> Smart lived in a second-floor apartment with a back porch adjacent to the unit's living room. Apartment access was by a door on the first floor. Three officers positioned themselves behind the building, allowing them to observe Smart's back porch, while Sergeant Potter and two other officers knocked on the front door. After knocking, the sergeant heard what sounded like a "commotion" – the movement of something and multiple people inside the apartment. Sergeant Potter announced that he had a warrant, and seconds later an officer guarding the rear called out that Smart had run into the apartment from the back porch. Sergeant Potter then banged on the door. A female voice responded, "Hold on." The sergeant stated that he had an arrest warrant for Smart and that the door would be kicked in unless Smart answered.
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> Smart's daughter opened the door and Sergeant Potter and one other officer climbed the stairs, which opened into the apartment's living room. There, the officers found Smart lying on a couch. Smart was handcuffed and placed under arrest.
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> Sergeant Potter then conducted a protective sweep of the bedroom, bathroom, and back porch to ensure that no one could launch a surprise attack against the officers. A sliding glass door separating the living room from the porch was open. When Sergeant Potter stepped onto the porch, he observed a camouflage rifle bag on the floor. It was

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and the search of the vehicle violated the Fourth Amendment prohibition against unreasonable searches and seizures." *Id.* at 554.

[10] It is further noted that *Golotta*, *supra*, involved a 9-1-1 caller who reported that a motor vehicle traveling northbound on Route 206 was being driven erratically. Moreover, as noted in *Matthews*, *supra*, "the court [in *Golotta*] distinguished between an anonymous tip of erratic driving and a tip regarding a person with a gun." *Id.* at 558.

> next to a storage bin in which he feared someone might be hiding. He picked up the bag and knew by its weight and feel that a rifle was inside. He opened the bag and found an assault-type rifle, a banana clip, and numerous rounds of ammunition, other magazines, and speed loaders. The rifle and contents of the bag were seized as evidence.

Question 24 asks, based on relevant State case law, for the true statement regarding the protective sweep of the apartment following Smart's arrest. The keyed response is option a, "It was lawful, since the sweep did not violate the Fourth Amendment or Article I, Paragraph 7 of the New Jersey Constitution." Grasso presents the following for both question 24 and question 25:

> The [c]ase of *State* [*v*]. *Cope*[11] is very complicated. The question offers a fact pattern that does not match the actual facts of the case. The actual facts are as follows[:] Sgt. Brintzinghoffer along with five other Officers were affecting [*sic*] an arrest warrant and an arrest was made inside the apartment. The Sergeant performed a protective sweep of multiple areas of the apartment including the back porch where he knew through prior knowledge that a storage locker, large enough to house a person, was present. There he found a camouflage bag which through his training and experience, he believed to contain a riffle [*sic*]. He did not immediately seize the weapon as would be necessary to claim it was being seized in a plain view seizure. He then conducted a search of the bag by lifting it up. He then concluded that by its appearance, weight, feel and length that there was a riffle [*sic*] inside. He immediately opened the bag and checked to verify the riffle [*sic*] was secured, an ammunition magazine not in place, nor a round in the chamber. This verified that a gun was in the bag. At all of these points he could have seized the riffle [*sic*] but did not and continued his investigation. The arrested subject was taken to the police station along with Sgt. Brintzinghoffer. The riffle [*sic*] was left at the apartment guarded by two officers who secured the entire apartment. There are two possible reasons to leave the riffle [*sic*] at the apartment, first the riffle [*sic*] could be left behind if not seized. Secondly the weapon could grant the opportunity to further search the apartment for additional weapons. Either way the riffle [*sic*] was not seized and they left [it] at the apartment. The Sergeant conducted further investigation at Police Headquarters and found the gun to be stolen. At this point he did not have the riffle [*sic*] seized, but applied for a search warrant for additional weapons through a Superior Court Judge and was denied. He returned to the home four hours after the

[11] Grasso does not provide a citation for this matter but it appears that he is referring to *State v. Cope*, 224 *N.J.* 530 (2016).

> start of the operation and related to the officers on scene that he did not in fact obtain a search warrant. The officers re-entered the apartment and finally seized the riffle [*sic*]. The question relates a fact pattern that simply says, see contraband take contraband, which is clearly not the case here. In summary, the rifle was not seized simply as a plain view seizure, due to the Sergeant's actions of further investigation of the riffle [*sic*] at Police Headquarters then applying for search warrants without actually taking possession of the weapon until four hours later; after all other options had been exhausted. Sgt. Brintzinghoffer clearly did not believe he seized the riffle [*sic*] in plain view hence the multiple steps to find reason to seize the riffle [*sic*], first leaving it within the apartment and continuing his investigation by checking if the weapon was reported stolen and once he did find it was stolen he still did not take possession of the riffle [*sic*], but used the information to apply for a search warrant and was denied. These facts are what led the Appellate Court to suppress the riffle [*sic*]. The Supreme Court's decision simply states it would have been a proper plain view seizure justifying the later seizure that was no longer in plain view.

It is noted that this item is based on *Cope*, *supra*, in which the court recounted the following information:

> On July 5, 2006, at approximately 6:20 p.m., Sergeant Brintzinghoffer, along with five other police officers, went to defendant's unit at the Chateau Apartment complex in Burlington Township to execute a warrant for his arrest. Sergeant Brintzinghoffer knew that defendant had a number of prior criminal convictions and had information that he '[m]ight be armed' with a weapon. [footnote omitted] Defendant resided in a second-floor apartment that has a back porch adjacent to the unit's living room. The apartment is accessed by a door on the first floor. Three officers positioned themselves behind the building, allowing them to observe defendant's back porch, while Sergeant Brintzinghoffer and two other officers knocked on the front door. After knocking, Sergeant Brintzinghoffer heard what sounded like a 'commotion' -- the movement of something and 'multiple people inside the apartment.' The sergeant announced that he had a warrant, and seconds later an officer guarding the rear called out that defendant had run into the apartment from the back porch. Sergeant Brintzinghoffer then banged on the door. A female voice responded, '[H]old on.' The sergeant stated that he had an arrest warrant for defendant and that the door would be kicked in unless defendant answered. April Grant, defendant's adult daughter, opened the door, and Sergeant Brintzinghoffer and one other officer climbed the stairs, which opened into the apartment's living room. There, the officers

> found defendant lying on a couch. Defendant was handcuffed and placed under arrest. Sergeant Brintzinghoffer then conducted a protective sweep of the bedroom, bathroom, and back porch to ensure that no one could launch a surprise attack against the officers. A sliding glass door separating the living room from the porch was open. When Sergeant Brintzinghoffer stepped onto the porch, he observed a camouflage rifle bag on the floor next to a storage bin in which he feared someone might be hiding. He picked up the bag and knew by its weight and feel that a rifle was inside. He opened the bag and found an assault-type rifle, a 'banana clip,' and 'numerous rounds of ammunition, other magazines, [and] speed loaders.' The rifle and contents of the bag were seized as evidence. *Id.* at 537-538.

Thus, Grasso misremembered the facts in *Cope*, *supra*. Nevertheless, it is noted that the court addressed "whether the protective sweep of defendant's apartment following his arrest in the living room conformed to the dictates of the Fourth Amendment of the United States Constitution and or Article I, Paragraph 7 of the New Jersey Constitution." *Id.* at 545. In this regard, the court determined that "the porch was in such close proximity to the place of arrest – indeed, immediately adjoining it – that a protective sweep of that area was permissible even without probable cause or reasonable suspicion [citations omitted] . . . Even so, given all of the information available to Sergeant Brintzinghoffer, he would have been justified entering the porch based on the reasonable-and-articulable-suspicion standard [citation omitted] . . . Second, the sweep was limited to a brief visual inspection of an area from which a person might have emerged to surprise and threaten the officers [citation omitted] . . . Third, the sweep was swiftly conducted and did not exceed the time 'necessary to dispel the reasonable suspicion of danger' [citations omitted]." *Id.* at 549-550. As such, the question is correct as keyed.

Question 25 asks, based on relevant State case law, for the true statement regarding the seizure of the weapon following Smart's arrest. The keyed response is option a, "It was lawful and the rifle is admissible as evidence, since the rifle was discovered within the scope of the plain view doctrine." Grasso argues as previously noted. The court in *Cope*, *supra*, determined that "the seizure of the rifle bag and its contents met the plain-view exception to the warrant requirement [citation omitted]. Sergeant Brintzinghoffer was lawfully on the porch when he first saw the rifle bag; his discovery of the bag was inadvertent, that is, he did not know in advance that a rifle would be located on the porch; and it was immediately apparent to him that the bag and its contends were evidence of a crime [citations omitted]." *Id.* at 550. Thus, the question is correct as keyed.

Question 27 indicates that you are reviewing the annual crime statistics for your jurisdiction and notice that several people were charged with Aggravated Assault last year but you also notice that an error was made in one case since the

criteria to elevate a Simple Assault to an Aggravated Assault was not met. The question asks, "A Simple Assault committed upon which of these people should **NOT** automatically be elevated to a *N.J.S.A.* 2C charge of Aggravated Assault?" The keyed response is option b, "A State Investigator for the Attorney General's Office with the Division of Consumer Affairs while being clearly identifiable as being engaged in the performance of his or her duties." Grasso, Kubert, Riaz and Vaness contend that option c, "A direct care worker at a State psychiatric hospital while clearly identifiable as being engaged in the duties of providing direct patient care," is equally correct. In this regard, they refer to *N.J.S.A.* 2C:12-1b(5)(k) which provides, "any direct care worker at a State or county psychiatric hospital or State developmental center or veterans' memorial home, while clearly identifiable as being engaged in the duties of providing direct patient care or practicing the health care profession, *provided that the actor is not a patient or resident at the facility who is classified by the facility as having a mental illness or developmental disability*." Given that option c does not indicate who the actor is, it is unclear that option c would automatically be elevated to a charge of aggravated assault. As such, the Division of Test Development and Analytics determined to double key this item to option b and option c, prior to the lists being issued.

Questions 30 through 64 refer to Kären Matison Hess, Christine Hess Orthmann, and Shaun LaDue, *Management and Supervision in Law Enforcement* (7th ed. 2015).

Question 32 indicates that your Captain has asked for input regarding the areas in which the department should provide in-house training for its officers during the coming year. You begin brainstorming ideas of how you might go about determining the training areas that would be most beneficial for your subordinates. The question provides candidates with four statements and requires candidates to determine which are strategies suggested by Hess, *et al.*, for determining the training needs of officers. The keyed response, option d, includes all four statements. Orange contends that statement IV, "Obtain input from the community," is incorrect. He notes that the text provides, "Getting input from other agencies and the community," which he argues indicates that "to identify training needs, input should be gathered from BOTH other agencies AND the community. The listed answer only includes obtaining input from SOLELY the community." Despite Orange's claim, there is nothing in the text that indicates that the two actions, "input from other agencies and the community," must occur in tandem. Furthermore, candidates are instructed to choose the best answer choice from those provided. Although statement IV does not contain the exact phrase from the text, the action itself, "obtain[ing] input from the community," is correct. As such, the question is correct as keyed.

For question 35, since Cullen selected the correct response, his appeal of this item is moot.[12]

Question 40 indicates that Sergeant Poole comes to you for advice on how to delegate an important task to his subordinate. The question provides candidates with three statements and asks, "based on the text by Hess, *et al.*, in order to ensure that the task will be done correctly, which of these should Sergeant Poole decide when delegating a task?" The keyed response, option d, includes all three statements. Orange maintains that statement I, "How much time the officer will need to complete the task," is incorrect. He presents that the text provides, "when you delegate, establish a timeline," which is "NOT the same thing" as "how much time to complete." In this regard, he refers to the "definition of timeline from Dictionary.com: noun 1. a linear representation of important events in the order in which they occurred[;] 2. A schedule; timetable[;] 3. Digital Technology. A collection of online posts or updates associated with a specific social media account, in reverse chronological order." He argues that "the phrase[, ']how much time to complete[,'] infers exactness, whereas a timeline infers a period of time in which to complete a delegated task. Inferring exactness would be consistent with micromanaging, which is what the question seeks to avoid." The text provides, under the heading, "Authority, Responsibility, and Delegation," "Managers can put their minds at ease when they delegate important tasks by carefully selecting the right person, thoroughly defining the task, and specifying the qualifications for doing it well. The results, standards, and deadlines should be clearly defined. Managers should also decide how much authority, support, and time the officer will need." The text also provides, under the heading, "Delegating Revisited," "When you delegate, establish a timeline. Delegated tasks should be concise and clear. You must also give authority along with a level of responsibility." It is not clear how Orange arrived at a distinction between "how much time" and "timeline" and their relative degrees of "exactness." However, both indicate a period of time in which to complete a task. In this regard, the period between the start point of a timeline and the end point of a time line indicate "how much time" one has to complete a task. As such, the question is correct as keyed.

Question 47 indicates that there are times when you will be ordered by upper management to act as your department's official representative to the press, business entities, or community committees and organizations. To work effectively with these groups, you will need to understand their varied expectations and represent your department in a professional manner. Candidates are required to complete the following sentence, "Based on the text by Hess, *et al.*, in such situations, you will be acting in the role of a(n) . . ." The keyed response is option c, "interactor." Since Orange selected the correct response, his appeal of this item is moot. Cresong argues that option b, "interfacer," is correct. He asserts that the text

[12] It is noted that Cullen misidentified this item as question 33 in his appeal.

provides that "managers are the interfacers between all actions of agency personnel and all other people and agencies in contact with these personnel." He argues that "the press and community organizations should be included as 'all other people' as stated in the 'Interfacers' paragraph." The text provides:

> **Interfacers** Law enforcement executive managers must be interfacers who communicate with all segments of the agency, from chief deputy to patrol officer. They must have knowledge of communications and specialized staff activities and relationships and must understand that the division of labor and the allocations of personnel. Managers must set agency goals and work plans with input from all agency members. Managers are the interfacers between all actions of agency personnel and all of other people and agencies in contact with these personnel. Like good drivers, they can look toward the horizon without losing sight of immediate concerns.
>
> **Interactors** Law enforcement mangers also must be interactors who work effectively with a number of groups. They act as the department's official representatives to the press, other local government departments, the business community, schools, and numerous community committees and organizations . . . Each organization with whom the executive interacts sees the importance and conduct of the position from different viewpoints. Law enforcement managers must determine these varied expectations and develop goals and work plans to meet them effectively.

It is noted that the action indicated in the question stem is clearly indicated in the "interactor" paragraph. Thus, option c is the best response.

Question 48 indicates that according to Hess, *et al.*, there are real differences in the way that men and women tend to communicate. You believe that it is helpful to be aware of these potential differences in order to avoid there being a gender barrier during communication. The question asks, according to Hess, *et al.*, for the false statement. The keyed response is option d, Women tend to "interrupt when others are speaking." Vaness misremembered the question as asking, "what women tend to d[o] when communicating in reference to the gender barrier." As such, his appeal of this item is misplaced.

Question 54 indicates that you need to communicate information about a change in departmental policy to your subordinates. You are not in favor of the change in policy and you are concerned that you may inadvertently express your negative feelings about the policy to your subordinates. You are aware that your message will be conveyed both through verbal and nonverbal communication. Candidates are presented with four statements and required to determine,

according to Hess, *et al.*, which are considered to be aspects of nonverbal communication. The keyed response, option c, includes statement I, "Tone of voice," but does not include statement II, "Word choice." Gonzalez misremembered the keyed response as including statement II and not including statement I. As such, her appeal of this item is misplaced.

For question 60, since Quinn selected the correct response, his appeal of this item is moot.

Question 69 refers to the Policy on Citizens' Police Academy provided to candidates in the test booklet. The question indicates that the chief has asked you to review the policy and submit any recommendations you have for updating and/or revising it. During your review, you realize that there is an important piece of information that is not currently addressed in the policy and you think adding it would help to make the policy more complete. The question asks, "Adding which of these pieces of information to the policy would be **BEST**?" The keyed response is option b, "Whether or not there is a cost for citizens to enroll in the Academy." Mango, Quinn and Vulcano maintain that option d, "The particular criminal charges that will be filed if a participant violates the indemnity agreement," is the best response. Specifically, Mango argues that "in my 25 years in law enforcement, I have never heard of any police dep[artment] charging people for a citizen[']s academy . . . If there was a cost that would deter people from possibly participating and that is not what a citizen's police academy is trying to do." Quinn asserts that "boiler plate language is a deterrent to the applicant. Utilizing specific statutory language and charge . . . provides the applicant [with] a clear [and] complete understanding of the violation." Vulcano presents that "including the criminal charge is specifically related to the policy provided in the examination. In addition, including the criminal charge is the best response because in court the vagueness of the policy without listing the criminal charge would render the document invalid." Vulcano adds that "the policy did not state [that] a fee would be charged. Although the policy stated that if the academy did not have a minimum of participants it would be cancelled, it did not state how a fee if charged would have been returned." It is noted that the Division of Test Development and Analytics contacted SMEs on this matter who indicated that the Policy provides, in pertinent part:

> As part of the application process, interested citizens must sign a liability waiver and an indemnity agreement . . . The indemnity agreement informs the student of the confidential nature of police work . . . It also advises them that they MUST NOT relay any of this confidential information to anyone outside the department. Any violation of this agreement will be grounds for expulsion from the program and may result in criminal charges being filed.

The SMEs indicated that there could be a number of different charges depending on what the exact violation of the indemnity agreement was, and thus, the charges would be determined on a case by case basis. As such, it would be impractical to list every conceivable charge that could be made. The SMEs further stated that it is important for both the department and any interested citizen to have a clear understanding of any costs associated with the Academy up front. The SMEs noted that if applicants are not advised about a fee until after completing the application process, the cost might be prohibitive for some applicants and they would not be able to enroll in the Academy. Thus, the SMEs emphasized that any potential cost, or lack thereof, is an important consideration for applicants. The SMEs concluded that this information should be clearly and directly stated in the policy. Therefore, the question is correct as keyed.

CONCLUSION

A thorough review of appellants' submissions and the test materials reveals that the appellants' examination scores, with the exception of the above noted scoring changes, are amply supported by the record, and the appellants have failed to meet their burden of proof in this matter.

ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deidre L. Webster Cobb

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