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STATE OF NEW JERSEY

In the Matter of Michael Curran, *et al.,* Police Lieutenant (various), various jurisdictions

CSC Docket Nos. 2022-971, *et al.*

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Examination Appeals

ISSUED: MARCH 25, 2022 (ABR)

Michael Curran (PM4089C), Cinnaminson Township; Joseph Rubel III (PM4184C), Union Township; Paul Beyers III (PM4106C), Gloucester Township; John Yurkovic, Jr. and Sean Cahill (PM4147C), City of New Brunswick; Robert Flynn II and George Resetar (PM1241C), Lacey Township; Daniel Niekrasz (PM4083C), Bloomfield Township; Ralph Merced (PM4155C), City of Passaic; Felipe Trueba (PM4118C), City of Jersey City; James Richie (PM4174C), Township of Scotch Plains; George Tsimpedes (PM4154C), Township of Parsippany-Troy Hills; and Joseph Angelo (PM4196C), Woodbridge Township, appeal the promotional examination for Police Lieutenant (various jurisdictions). In addition, Michael Curran appeals the administration of the promotional examination for Police Lieutenant. These appeals have been consolidated due to common issues presented by the appellants.

The subject examination was administered on October 23, 2021 and consisted of 80 multiple choice questions.

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

Question 4 presents that a resident of Pottersville comes to the Pottersville Police Department and says that she would like to make an internal affairs complaint. She explains that she owns a store in the neighboring jurisdiction of Watertown, which is in the same county as Pottersville, and that when Officer

Biltmore from Watertown Police Department was in her store yesterday, he acted rudely when she refused to give him free merchandise. The question asks which of the listed responses to the resident's request to make the internal affairs complaint complies with the New Jersey Attorney General's Internal Affairs Policy and Procedures (IAPP). The keyed response is option c, she should file her complaint with the Watertown Police Department, but if she has fears or concerns about making the complaint to the Watertown Police Department, she may instead file a complaint with the respective County Prosecutor or the Attorney General's Office. Flynn argues that while the keyed response is a correct statement based upon the IAPP, it is not the best response to the question. Rather, he avers that the most important principle for any police officer, including a Police Lieutenant, is to never turn away someone attempting to report a case of officer misconduct. He contends that several IAPP excerpts support this position, including the declaration in IAPP 1.0.1 that "[t]he goals of the policy are to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services, and assure the people of New Jersey that complaints of police misconduct are properly addressed"; the directive in IAPP 5.0.1 that every enforcement agency "establish a policy providing that any complaint from a member of the public is readily accepted and fully and promptly investigated"; the requirement in IAPP 5.1.1 that "[a]ll complaints of officer misconduct shall be accepted from all persons who wish to file a complaint, regardless of the hour or day of the week"; the mandate in IAPP 5.1.2 that "[a]t no time should a complainant be told to return at a later time to file their report"; and the statement in IAPP 5.1.2 that "[m]embers of the public should be encouraged to submit their complaints as soon after the incident as possible." The Commission observes that IAPP 5.1.10 states as follows:

> If a person comes to a particular law enforcement agency to make a complaint about a member of another law enforcement agency, he or she should be referred to that agency. The complainant should also be advised that if they have fear or concerns about making the complaint directly to the agency, they may instead file a complaint with the County Prosecutor or the Attorney General's Office.

Given that IAPP 5.1.10 squarely addresses the scenario presented in Question 4, the Commission finds that the keyed response is the best answer. The Commission further notes that IAPP 1.0.1 addresses the broad goals of the IAPP, rather than providing a specific directive for addressing the subject scenario. Additionally, having a jurisdiction other than the one where the misconduct is alleged to have occurred would be contrary to the intentions expressed in IAPP 5.0.1, which discusses ensuring that law enforcement executives are made aware "of both actual or potential problems and the community's perceptions and attitudes about police practices of procedures." Having Potterstown take the complaint does not accomplish these goals, as it does not apprise the relevant authorities—Watertown's Police Department executives and/or the county prosecutor—about issues within the Watertown Police

Department. Finally, the keyed response is consistent with the principles articulated in IAPP 5.1.1 and 5.1.2, as they address the timing for accepting a complaint, not the proper jurisdiction for receiving it.

Question 6 presents a scenario involving a 17-year-old's abduction by her non-custodial father. Multiple witnesses state that the father put his arm around his daughter's shoulders and roughly steered her towards his vehicle as he parked nearby. The father loudly yelled at his daughter to get in the car, slapped her across the face and then aggressively pushed her into the vehicle. The father then drove away erratically. His ex-wife subsequently informs police that they divorced after multiple domestic violence charges were filed against him. She also states that he had recently been terminated from his job after showing up to work with alcohol on his breath on multiple occasions. The question asks if, based on this information and the New Jersey Attorney General's Directive Revising New Jersey's AMBER Alert Plan (Directive No. 2010-3), it would be appropriate to request activation of an AMBER Alert for this situation. The keyed response is option c, that it would be "appropriate, because the criteria for activation have been met." Merced argues that the best response is option d, that an AMBER Alert would be appropriate only if the witnesses overheard the father make a direct verbal threat of violence towards the daughter. Merced maintains this is because among the three requirements for issuing an AMBER Alert is reason to believe that the abducted child may be in danger of death or serious bodily injury. He contends that this factor was not met because the child being slapped in this scenario did not provide a sufficient basis to conclude that bodily injury or death would occur. In particular, Merced observes that the fact pattern does not indicate that the father had made threats, had any weapons in his possession or was intoxicated at the time. The Division of Test Development, Analytics and Administration states that option d is not the best response because while violence or threat of violence is a factor to consider, it does not have to be present in the fact pattern to activate an AMBER Alert. Further, it notes that pursuant to Directive No. 2010-3, there are a number of circumstances to consider in assessing whether the child may be in danger of death or serious bodily injury in family abduction cases, including, in relevant part:

> 3. Whether violence or threat of violence was used in committing the abduction, and whether force was used or directed against the child (e.g., the child resisted or tried to escape), or put the child at immediate risk of harm, even if the force was directed against another (e.g., the use or threatened use of a firearm or other weapon; assault by auto, motor vehicle eluding or reckless driving, etc.);
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> 4. Whether there is a family history of domestic violence or child abuse, or a history of custody disputes or past abductions;

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8. Whether the abductor has a history of alcohol or other substance abuse.

Given these considerations, the Commission finds that Question 6 is correct as keyed.

Question 8 states that the examinee's department continued to detain an individual past the time she would have otherwise been eligible for release from custody based solely on a civil immigration detainer request. The individual was eligible for release at 11:00 a.m. on Monday and she was detained until 10:30 a.m. on Tuesday (the following day). The individual had been convicted of a second degree offense ten years earlier. The question asks, based on the New Jersey Attorney General Directive Strengthening Trust Between Law Enforcement and Immigrant Communities (Directive No. 2018-6 v2.0), which of four listed statements is true. The keyed response is option b, that the department "violated the Directive because the individual's detention under these circumstances lasted longer than is permissible." Richie selected the keyed response, therefore his appeal of this question is moot. Resetar selected option a, that the department "violated the Directive because the detention of an individual past the time he or she would otherwise have been eligible for release is prohibited under any circumstances." Resetar argues the department violated the directive because "the individual . . . was held beyond the time permitted." Thus, because he appears to be arguing that the keyed response is correct, his appeal of Question 8 is moot. Cahill argues that the question should be removed from the test because it failed to state when the person would have been eligible for release, and options a, b and d[1] were all correct responses. Yurkovic argues that the best response is option d, that the department "violated the Directive because the individual's conviction for a second degree offense occurred more than five years ago." Yurkovic argues that option d is the best response because, unlike the keyed response, it references the portion of the guideline that states that "in the past 5 years, has been convicted of an indictable crime other than a violent or serious offense." The Commission observes that option a is incorrect because the directive does permit the detention of an individual past the time he or she would have been eligible for release under several circumstances specified in Directive No. 2018-6 v2.0. Option d is incorrect because one of the limited instances where Directive No. 2018-6 v2.0 permits the continuation of an individual past the time they would otherwise be eligible for release from custody based solely on a civil immigration detainer request is when they have been "currently charged with, [ ] convicted of, [ ] adjudicated delinquent for, [ ] found not guilty by reason of insanity of, a violent or serious offense as that term is defined in Appendix A," regardless of when the offense occurred. Appendix A of Directive No. 2018-6 v2.0 provides that any first or second

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[1] In his appeal, Cahill asserts that option "(C) it was violated because the conviction that the question referenced for a 2nd degree charge had occurred greater than five years ago . . . is also correct . . ." However, it is noted that this response was actually option d for Question 8 on the subject examination.

degree offense is considered a "violent or serious offense" for purposes of the directive. Accordingly, the Commission finds that Question 8 is correct as keyed.

Question 10 involves a scenario where an officer "recovers a handgun that he found abandoned in a local park" and asks, based on the New Jersey Attorney General's Directive on Submission and Analysis of Information Related to Seized and Recovered Firearms (Directive No. 2008-1), when the information should be entered into the New Jersey Trace System. The keyed response is option a, "as soon as practicable, but no later than within 24 hours of the time that the weapon was recovered." Resetar argues that either all of the options should be correct or that none of them should be correct. In this regard, he avers that the policy regarding "found" firearms can't be assumed to be inclusive of weapons that were "recovered." He also asserts that the term "as soon as practicable" is not a definitive timeframe compared to a minimum time period of "within 24 hours" as established under the policy for recovered property. He argues that the question is too vaguely worded, as it does not "indicate[ ] that the found property was either 'abandoned or discarded,'" as noted in the directive. He also observes that the relevant portion of Directive No. 2008-1 specifies the time period for a "recovered" weapon as opposed to a "seized" or "found" one. He notes that "recovered" has a dictionary definition of "something that has been found or regained possession of" and that "found" has a dictionary definition of "something that has been discovered by chance or unexpectedly." The Commission observes that, with respect to e-Trace data entry, Directive No. 2008-1 provides as follows:

> When a law enforcement agency on or after the effective date of this Directive seizes or recovers a firearm that was unlawfully possessed or used, or that was recovered from a crime scene or is otherwise reasonably believed to have been involved in the commission of a crime, or that was found property (e.g., abandoned or discarded), the agency shall enter e-Trace-related information directly into the NJ Trace System, which is part of the Criminal Justice Information System (CJIS) available to all law enforcement agencies. The information shall be entered as soon as practicable, but no later than within twenty-four hours of the time that the weapon was recovered.

The Commission finds that Question 10 is not vaguely worded. Rather, Resetar's reading of the question is overly technical. Stated differently, his argument appears to be a complaint that because the question uses the words "recovers," "found" and "abandoned" in the same sentence it renders the fact pattern too vague to make it possible to determine the correct answer. The relevant portion of the subject directive refers to "found property (e.g., abandoned or discarded)." Merriam-Webster states that "[*e*].*g.* stands for *exempli gratia* in Latin, which means 'for example.' It introduces one or more examples that illustrate something stated." *E.g.,* Merriam-Webster, https://www.merriam-webster.com/dictionary/e.g. (last visited Feb. 28,

2022). Question 10 unambiguously refers to "a handgun . . . found abandoned." In the context of the relevant portion of Directive No. 2008-1, "abandoned or discarded" is clearly a non-exhaustive list of examples of "found property." The e-Trace policy articulated therein clearly states that with found property—like the firearm "found abandoned" in the local park in Question 10—"[t]he information shall be entered *as soon as practicable, but no later than within twenty-four hours of the time that the weapon was recovered*." Accordingly, Question 10 is correct as keyed.

Question 11 presents four statements about the New Jersey Attorney General's Alternate Care for Arrestee's Dependents Model Policy (Model Policy) and asks, in relevant part "which of the[m] is a **FALSE** statement. . .?" (emphasis in original). The statements are as follows:

I. In relation to this policy, a dependent person is strictly defined as a child of the arrestee, under the age of 18, who is dependent upon the arrestee for care, sustenance, and supervision.

II. When an arrestee is taken into custody and is accompanied by a dependent person, if another appropriate adult is present with the arrestee, the arrestee will be permitted to place the dependent person in the care of that adult.

III. If it becomes necessary for an arrestee's dependent to be transported to police headquarters, the dependent person may be transported with the arrestee or in a separate vehicle, as required by the circumstances.

IV. Whenever a person is arrested or taken into custody and is likely to be detained more than one hour, the arrestee shall be questioned about anyone dependent solely upon the arrestee for care, sustenance, or supervision.

The keyed response is option a, statements I and IV only. Resetar argues that the keyed response is incorrect because Statement IV is inaccurate. Specifically, the relevant standard in the Model Policy is "[w]henever a person is arrested or taken into custody and is likely to be detained more than *two hours*, that person shall be questioned as to whether or not any child or other person is dependent solely upon the arrestee for care, sustenance or supervision" (emphasis added). The Commission observes that candidates were instructed to identify the *false* statements. As such, Resetar's objection to statement IV is misplaced and Question 11 is correct as keyed.

Question 12 asks, according to N.J. Attorney General Directive No. 2016-6 v3.0 (Directive No. 2016-6 v.3.0), a law enforcement agency shall apply for a complaint-warrant if there is probable cause to believe that the defendant committed which of these:

I. Escape
II. Sexual Assault
III. Carjacking
IV. Attempted Robbery

The keyed response is option d, all four listed crimes. Curran argues that this question should be re-keyed or omitted from the examination because it is incorrect according to Burlington County Prosecutor's Directive 2017-1 v.3.0. Specifically, a flow chart provided with that directive lists sexual assault, carjacking, robbery and escape as among the offenses for which a warrant or summons should be issued, but not attempted robbery. Section 4.4 of Directive No. 2016-6 v. 3.0 states that "a law enforcement agency shall apply for a complaint-warrant if there is probable cause to believe that the defendant committed" any of the four offenses listed in Question 12. Since Question 12 asks "according to N.J. Attorney General Directive No. 2016-6 v3.0" and not "according to Burlington County Prosecutor's Directive 2017-1 v.3.0," Curran's reliance on that document is without merit. Therefore, the Commission finds Question 12 correct as keyed.

Question 13 presents a scenario where an officer believes that a stationhouse adjustment would be appropriate for a juvenile engaged in conduct constituting a disorderly persons offense, which did not constitute an act of bias, sexual misconduct, or violence, and did not involve a controlled dangerous substance (CDS) or CDS paraphernalia. The scenario indicates that the victim has informed the officer that she objects to the stationhouse adjustment agreement and asks, based on the New Jersey Attorney General Directive Establishing Policies, Practices, and Procedures to Promote Juvenile Justice Reform (Directive No. 2020-12), which of four statements is true. The keyed response is option b, that the law enforcement officer "must notify the County Prosecutor, or designee, who must decide whether to authorize the agreement notwithstanding the victim's objection." Niekrasz argues that the question should be double keyed, as option c, that the law enforcement officer "should continue with the stationhouse adjustment and note the victim's objection on the written agreement," is also a correct response. In this regard, he contends this is so because the question asks which statement is true rather than what should be done first and because Section I.I.H.3 of Directive No. 2020-12 states that "for all discretionary stationhouse adjustments, or cases where the victim objects, the approval of the County Prosecutor, or designee, shall be noted on the agreement." The Commission observes that since the scenario involves conduct constituting a disorderly persons offense, which did not constitute an act of bias, sexual misconduct, or violence, and did not involve a CDS or CDS paraphernalia, there is a presumption in favor of a stationhouse adjustment. However, per the subject directive, where one or more victims object to the agreement, the law enforcement office is required to notify the County Prosecutor or designee, who, in turn, must decide whether to authorize the agreement in spite of the victim's objections. Thus, option c is incorrect because the officer will not be able to proceed with a stationhouse agreement if the victim objects

and they do not get the appropriate authorization. Therefore, the Commission finds that Question 13 is correct as keyed.

For Question 20, both Curran and Resetar selected the keyed response. Therefore, their appeals of this item are moot.

With Question 23, Curran selected the keyed response. Therefore, his appeal of this item is moot.

Question 29 presents the following scenario:

> At about 11:00 p.m., Officers Ruiz and James were dispatched to the high-crime area at the intersection of Atlantic Avenue and Washington Street, in reference to an anonymous call of "shots fired." While patrolling the area, the officers received another dispatch in response to an anonymous 9-1-1 call reporting an individual seated in a blue van with a gun in his lap. No other information was given.
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> The officers soon spotted a blue van parked on Atlantic Avenue near the intersection with Washington Street. They parked their vehicle behind the blue van and directed a spotlight on it, then exited their vehicle with their weapons drawn. Officer Ruiz observed the occupants moving frantically inside the vehicle, as if trying to hide something. Officer Ruiz ordered the occupants from the van and the front seat passenger exited, as instructed. The driver began to exit and then retreated to the driver's seat. Fearing the driver might be trying to retrieve a weapon, Officer Ruiz struck the driver and pulled him from the vehicle. Officer Ruiz then frisked the driver for weapons. Finding none, he transferred the driver to a responding backup officer.
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> Officer Ruiz then returned to the vehicle to search its interior. As he entered the vehicle, Officer Ruiz observed the handle of a handgun protruding from the van's middle console. In addition to retrieving the handgun from the van, the officers recovered shell casings at the scene.

The question then asks which statement is true based upon relevant New Jersey case law. The keyed response is option a, "[b]oth the investigatory stop of the vehicle and the protective sweep of the passenger compartment of the van were lawful." Flynn argues that the correct response is option c, "[w]hile the investigatory stop of the vehicle was lawful, the protective sweep of the passenger compartment of the van was unlawful." In this regard, he notes that the examination scenario provides that the occupant was searched, transferred to another officer, and the initial officer returned to the vehicle to search it. Flynn argues that per *State v. Robinson* (*Robinson*), 228 *N.J.* 529 (2017), "the protective sweep exception to the warrant requirement does not

apply to motor vehicle stops when all passengers are safely secured and monitored outside of the vehicle and do not have immediate access to items in the car." As such, he avers that the search of the van was not permissible under the examination scenario. He also maintains that the language in the question is problematic, as it fails to draw the distinction between the terms "search" and a "protective sweep." Flynn emphasizes that a protective sweep is permitted only to look for weapons that might be used against the officer or the public, and must be cursory and limited in scope to the area in which the danger may be concealed. Conversely, a full search would have to be permissible based upon the totality of the circumstances. He also submits that in *State v. Lund*, 119 *N.J.* 35 (1990), the New Jersey Supreme Court held that the rule in *Michigan v. Long*, 463 *U.S.* 1032 (1983), that "police may conduct a 'protective search' of the interior of a stopped automobile, 'as long as they possess an articulable and objectively reasonable belief that they suspect is potentially dangerous,'"[2] was "compelling precedent and should be followed to protect New Jersey's police community." *State v. Lund* 119 *N.J.* at 48. Flynn avers that because the driver had been removed from the vicinity of the vehicle and secured elsewhere by the officers, any weapon that may have been present in the vehicle no longer posed a danger to the officers or the public. Flynn also contends that because the exam scenario failed to provide a full accounting of the totality of the circumstances and failed to make the distinction between the search and a less intrusive and narrowly applied "protective sweep," the search in the exam scenario was improper, making option c the best response. The Commission observes that the scenario presented in Question 29 is nearly identical to the fact pattern in *State v. Gamble* (*Gamble*)*,* 218 *N.J.* 412 (2014). In *Gamble*, the court found that:

> [t]he totality of the circumstances—specifically the 9-1-1 calls, the late hour, the location of the van, the frantic movements of the occupants, and the hesitancy of the driver to leave the van—permitted the responding police officers to form a reasonable suspicion that either one or both of the occupants of the van were armed or that a weapon would be found in the vehicle. The frisk of both occupants failed to produce a weapon. That finding underscored the need to inspect the interior of the vehicle to make sure it did not contain a weapon before the driver and passenger reentered the van. Under the totality of the circumstances, we conclude that the officers conducted a valid investigatory stop, *Terry* frisk, and protective sweep of the passenger compartment of the van.

Gamble 218 *N.J.* at 419. Here, the scenario for Question 29 has many of these same elements, including the 9-1-1 call, late hour, location of the van in a high-crime area, frantic movements of the occupants, and the driver's hesitancy—beginning to exit the van and quickly retreating. Thus, based upon the totality of the circumstances and the relevant case law, Officers Ruiz and James conducted a valid investigatory stop and a valid investigatory sweep. The Commission sees no issue with the language in

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[2] *State v. Lund* 119 *N.J.* at 53 (citing *Michigan v. Long* 463 *U.S.* at 1051).

Question 29. The term "protective sweep" describes a particular type of search. In the context of a vehicle search, a protective sweep is a "protective search of a vehicle based on a reasonable belief that the vehicle contain[s] weapons potentially dangerous to the officers." *Id* at 426-27 (quoting *Michigan v. Long* at 1034-35). Thus, the reference to a "search" in the fact pattern but to a "protective sweep" in the answer options is a reasonable test of candidates' knowledge regarding protective sweeps. Finally, *Robinson* is distinguishable from this fact pattern and *Gamble* on several fronts. Critically, at the time of the search at issue in *Robinson*, officers had a greater degree of control over the scene and vehicle involved, such that there was not a reasonable basis to believe that an occupant would have immediate access to a weapon in the vehicle that was searched. Specifically, the number of officers on scene in *Robinson* (five) outnumbered the number of vehicle occupants (four); two occupants had been placed under arrest under arrest; two other occupants not under arrest complied with the officers' instructions to remain away from the vehicle and did not make any motion to suggest that they were reaching for a weapon, attempting to hide any object, or resisting the directions of officers; and the occupants not under arrest would not have been permitted to drive the vehicle home, as they were not licensed drivers. *See Robinson,* 228 *N.J.* at 538. Accordingly, Question 29 is correct as keyed.

Question 30 presents a scenario where surveillance reveals that an individual is engaged in the packaging of large quantities of controlled dangerous substances into small plastic bags. It indicates that after the issuance of a warrant and the arrest of that individual, a question comes up as to whether the officer's information within the affidavit establishing probable cause had become "stale" based on the date of the last surveillance. Question 30 then asks which of four listed statements is false based upon relevant New Jersey case law. The keyed response, is option d, "[t]o avoid the staleness of probable cause, the amount of time between the last occurring event contained within an affidavit and the date of the affidavit's presentation must not exceed ten days." Niekrasz selected the keyed response, therefore his appeal of this question is moot. Tsimpedes argues that the best response is option b, "[t]he question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." In this regard, he maintains that Larry E. Holtz, *New Jersey Law Enforcement Handbook Vol. 1*, states that "[i]n order to guard against the execution of a search warrant at a time when the probable cause has become 'stale,' a majority of jurisdictions have adopted the '10-day rule'." The Commission observes that the majority "10-day rule" referenced in the copy of the text that Tsimpedes has provided refers to the timeframe in which a search must be conducted after a warrant is issued. The text cited by Tsimpedes also refers to New Jersey *R.* 3:5-5(a), which provides, in pertinent part that "[t]he warrant must be *executed within 10 days after its issuance* and within the hours fixed therein by the judge issuing it, unless for good cause shown the warrant provides for its execution at any time of day or night" (emphasis added). This is a different "staleness" concept from the statement in option d, which talks about a 10-day period between "between the last occurring event contained within an affidavit" in support of a

warrant application and "the date of the affidavit's presentation." Further, the courts have observed that "[t]he question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." *State v. Blaurock,* 143 *N.J. Super.* 476, 479 (App. Div. 1976) (quoting *U.S. v. Harris,* 482 *F.2d* 1115, 1119 (3d Cir. 1973). Further:

> the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit. Together with the element of time we must consider the nature of the unlawful activity. Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

State v. Blaurock, 143 *N.J. Super.* at 479 (quoting *U.S. v. Johnson* 461 *F.2d* 285 (10th Cir. 1972)). In other words, the question of staleness of probable cause is fact-sensitive determination, rather than one determined by a set number of days. As such, option b is a true statement and option d is a false statement. Since Question 30 asks for the *false* statement among the listed options, option d is therefore the best answer. Accordingly, Question 30 is correct as keyed.

Question 31 presents the following four situations and asks which among them police may properly impound a vehicle after its driver is arrested, based upon relevant New Jersey case law:

I. police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment, the vehicle will be removed by a third party.
II. police have probable cause to believe that the vehicle contains evidence of a crime and that absent immediate impoundment, the evidence will be lost or destroyed.
III. vehicle, if not removed, constitutes a danger to other persons or property or the public safety, and the driver cannot arrange for alternate means of removal.
IV. driver consents to the impoundment.

The keyed response is option d, "I, II, III and IV." Curran and Richie selected option c, "II, III, or IV only." Richie argues that statement I, "police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment, the vehicle will be removed by a third party," is incorrect because *N.J.S.A.* 2C:43-2.4 only provides officers with the authority to

impound a vehicle when it is used to commit a crime under specified circumstances specified therein. Curran argues that the question should be thrown out because he contends that statement IV, the "driver consents to the impoundment," is inaccurate. In this regard he proffers that the Attorney General Law Enforcement Directive No. 2001-5 (Directive No. 2001-5) states that "if the vehicle is not owned or leased by the person arrest [sic], then the owner or lessor can claim the vehicle at any time." Curran adds that Directive No. 2001-5 also indicates that although John's Law calls for the immediate impoundment of the vehicle being operated by the person arrested, it does not negate the right of the arrested person to make other arrangements for the removal of the vehicle by another person who is present at the scene of the arrest. Curran avers that the "driver" of a motor vehicle cannot override the owner's right to take custody/control of the vehicle by simply giving consent to the towing of the owner. Curran contends that for statement IV to be correct, it would have to specify that the owner or lessor of the vehicle is not present. Curran also argues that in situations covered by the Predatory Towing Prevention Act and *N.J.S.A.* 39:4-56.5, law enforcement does not need the consent of a driver to tow a vehicle. The Commission observes that the Question 31 is phrased in terms of relevant case law. Here, the relevant case law is the Appellate Division's decision in *State v. Ercolano* (*Ercolano*), 79 *N.J.* 25 (1979). In that case, the Appellate Division indicated that absent a warrant, impoundment of a vehicle after its driver's arrest is permissible in exactly the four situations listed in Question 31. Directive No. 2001-5 is not case law. Rather it is guidance from the Attorney General regarding the implementation of a specific statute—*N.J.S.A* 39:4-50.23—which provides for a mandatory 12-hour impoundment of the motor vehicle operated by a person arrested for a driving while intoxicated, in violation of *N.J.S.A.* 39:4-50, or for refusal to submit to chemical breath testing, in violation of *N.J.S.A.* 39:4-50.4a. Similarly, Curran's arguments about *N.J.S.A.* 39:4-56.5 involve the application of a statute related to abandoned motor vehicles, rather than the application of case law. Moreover, Curran has not presented any New Jersey case law showing that the general rule in *Ercolano* has been overruled or adjusted in scope and as an appellant in this matter, Curran bears the burden of proof. *See N.J.A.C.* 4A:2-1.4(c). Accordingly, the Commission finds that Question 31 is correct as keyed.

Question 35 presents the following for consideration:

I. The history of domestic violence between the parties, if any
II. The past criminal history of each party
III. The comparative extent of the injuries

Question 35 then asks the following: "*N.J.S.A.* 2C:25-21 specifically states that in determining which party in a domestic violence incident is the victim where both parties exhibit signs of injury, the officer should consider which of these?" The keyed response is option c, "I and III only." Curran selected the keyed response, therefore his appeal of this question is moot. Beyers and Trueba argue that the best response

is option d, "I, II, and III." In this regard, both Beyers and Trueba submit that *N.J.S.A.* 2C:25-21 states that to determine the victim when both parties exhibit injuries, the officer should consider domestic violence history between parties, comparative extent of injuries, and also "any other relevant factor." Beyers contends that given the open-ended nature of that provision, it can include any additional factor that the officer deems relevant during an investigation and that past criminal history is relevant because it would show if someone has previous domestic violence or violent offense convictions. Moreover, Beyers proffers that the New Jersey Attorney General's Office and Division of Criminal Justice lists "criminal history" as one of the factors to determine the predominant aggressor in a domestic violence incident. Trueba maintains that both parties in domestic violence situations often make accusations against one another and that while a person's criminal history does not in and of itself prove guilt or innocence, it can help an officer get a clearer understanding of what transpired in cases where individuals are making accusations against one another. The Commission observes that *N.J.S.A.* 2C: 25-21c(2) states that "[i]n determining which party in a domestic violence incident is the victim where both parties exhibit signs of injury, the officer should consider the comparative extent of the injuries, the history of domestic violence between the parties, if any, and any other relevant factors." *N.J.S.A.* 2C: 25-21 does not specifically define "other relevant factors. At its core, Question 35 asks: "*N.J.S.A.* 2C:25-21 specifically states. . .which of these?" Thus, while it may be true that the past criminal history of each party may be considered as a "relevant factor," for purposes of *N.J.S.A.* 2C:25-21(c), it was not a correct choice for Question 35 because it is not *specifically* listed in that statute. Accordingly, Question 35 is correct as keyed.

Question 40 asks the examinee to consider the following:

I. Your department values efficient communication and encourages orders to be given by upper management directly to the officers who will perform work, rather than having the orders proceed through the chain of command.

II. Since flexibility in a police department is important, decisions regarding which unit will be responsible for responding to certain common situations will be determined on a case-by-case basis as they occur.

III. Each member of the department reports to one and only one superior, which has been pre-determined.

IV. Individual units in the department have frequent disputes about which one is responsible for certain calls for service, but management is always willing to mediate these disputes.

It then asks, based on Kenneth J. Peak, *et al., Managing and Leading Today's Police: Challenges, Best Practices & Case Studies* (4th ed. 2019), which of the above statements "suggests that [the examinee's] department is experiencing ambiguity

over authority or has **NOT** properly established unity of command?" (emphasis in original). The keyed response is option c, "I, II and IV only." Resetar states that "reports to one supervisor predetermined" is missing from the question and further indicates that "if the design and rank structure, as according to the text, regards placing officers to follow the Chain of Command, that would be a 'predetermined' person whom an officer would report to." The Commission observes that Resetar's argument appears to be based on a misreading of Question 40, as examinees are asked to identify the statements which suggest ambiguity over authority or that the department has *not* properly established unity of command. Having each member of the department report to one and only one predetermined supervisor would suggest clear authority and proper unity of command, while the remaining items listed in Question 40 would not. Accordingly, Question 40 is correct as keyed.

Question 50 involves perceptual problems occurring in the communications process, using the example of finding that information relayed from the examinee's chief to the examinee's subordinates and is received differently and thought to be more significant and accurate than when the examinee provides the same accurate information to them. It then asks what to Peak, *et al., supra* refer to this common perceptual problem as. The keyed response is option b, status. Curran argues that the question should be rekeyed to option a, stereotyping, or double keyed with option b and option a being the correct answers. In this regard, he avers that the text cites stereotyping as a perceptual problem, defining it as "judgements made about communications because of the sender's traits or qualities," and providing the example of the assumption that "a police union leader and a police captain would likely interpret the same information differently, because of their relative orientations about the department. Curran contends that with the fact pattern presented in Question 50, one would think that the patrol officers would interpret information differently because of their relative position in the rank and structure of a police department, which would affect the perception of the patrol officers as the "receivers" in this case. He further notes that the textbook also "talks about 'subordinate acceptance of leadership' which is essentially stereotyping of a hire [sic] rank due to their qualities or traits." The Commission finds that the keyed response is the best response to Question 50. In this regard, Curran agrees that the difference in the example is related to the chief's higher rank relative to that of the examinee. Status is the more specific answer, as it is the "quality or trait" at the root of this difference in the receipt of messaging described in the example. Further, the test scenario is clearly a much closer match to the example for status in the source material, which is "[i]nformation from an assistant chief will be received differently from information that is given by a lieutenant." *See* Peak, *et al.* at 70.

Question 56 notes that Peak, *et al., supra,* discuss the concept of adaptive change and asks which of four options is an adaptive problem that a police department may face. The keyed response is option c, reducing gang activity. Resetar

argues that any of the options other than the keyed response would be correct. In this regard, he indicates that the authors state as follows:

> There are problems. . .that are technical only—purchasing a new computer system, installing body-worn cameras, providing officers with less than deadly force weapons, and so on. Such problems are fixable by technical expertise. On the other hand, there are problems that technicians cannot fix, and that require people in the community or department to change their values, behavior, and attitudes.
>
> Technical fixes alone will not work with drug, gang, and other police problems.

Peak, *et al.* at 60. Resetar avers that the language that the authors used suggests "that their intent was to say that '[t]echnical fixes' maybe [sic] singled out, but the adaptive problems would also be inclusive of the technical ones, as cited above." The Commission disagrees with Resetar's contentions. Based upon a reading of the relevant text, it is eminently clear that the authors described "reducing gang activity" as an example of adaptive change and the other options as "technical only." Indeed, the sentence which immediately follows the passage quoted by Resetar states that for drug, gang, and other police problems "our leaders must call for adaptive change, which is engaged collaboratively through the conferred authority of those being led." Accordingly, Question 56 is correct as keyed.

Question 59 asks, in pertinent part, which of the answer options "is **NOT** specifically listed by Peak, et al. as things that commanders consider through the use of crime analysis" (emphasis in original). The keyed response is option d, "[t]he adequacy of the department's response time to calls for service." Curran argues that Question 59 should be stricken from the examination because Peak *et al.* at 211 describes CompStat, in relevant part, as "a computerized tool for tracking the most serious crimes and mapping them to determine patterns and trends through crime analysis . . ." and adds that "four principles govern CompStat: timely and accurate intelligence, effective tactics, rapid deployment, and relentless follow-up and assessment." Curran maintains that "rapid deployment" refers to response time. Further, Curran observes that Peak, *et al.* at 214 states that "[o]ver time, crime analysis has evolved to include other data: census demographics, arrest and summons activity, average response time, domestic violence incidents, unfounded radio runs, personnel absences, and even citizen complaints and charges of officer misconduct." The Commission observes that the question asks for the items "**NOT** specifically listed by Peak, et al." There is no dispute that options a, b, and c *are* specifically listed in the subject text book and thus are not correct responses to this question. Curran is correct that Peak, *et al.* refer to "average response time" as quantifiable information reviewed as part of crime analysis. However, "adequacy of the department's response time to calls for service," as stated in the keyed response, is distinguishable as a more

subjective determination and it is not *specifically* listed by the authors. Therefore, the Commission finds that Curran's arguments are misplaced and that Question 59 is correct as keyed.

Question 60 states that the examinee's department uses a type of patrol where additional officers are placed in areas where there are concentrations of crime or disorder. These hot spots can be analyzed to determine the nature of the offenses and possibly the cause, and additional officers can then be assigned or directed to those specific areas. The question then asks, based upon Peak, *et al.*, *supra,* which patrol strategy the examinee's department uses. The keyed response is option b, directed patrol. Curran argues that this question should be double keyed with or re-keyed to option c, saturation patrol. In this regard, he submits that Peak, *et al.* indicate that saturation patrols assign a large number of officers, "especially in high crime and disorder areas, [and] make as many arrests as possible to gain control." Curran further discusses the detailed examples of saturation patrol that the text provides in support of his arguments. The Commission observes that the language in the prompt is lifted directly from the source material. *See* Peak, *et al.* at 222. Moreover, Peak, *et al.* distinguishes saturation patrols or crackdowns as being more temporary in nature, noting that saturation patrols or crackdowns are temporary assignments and focused on making as many arrests as possible. Accordingly, the Commission finds that Question 60 is correct as keyed.

The prompt for Questions 64 and 65 references the advice in Peak, *et al.*, *supra*, that supervisors constantly provide subordinates with feedback about their performance. The prompt later states, in relevant part, that the examinee has "research[ed] how to provide constructive criticism and [that the examinee] find[s] that when framing what the problem is, [they] should focus on the behavior displayed, not the person. Also, [the examinee] should be specific when informing someone of what the problem is." Question 64 then presents a scenario where the examinee overhears a conversation between Sergeant Danbury and his subordinate, Officer Baker, in which both make derogatory remarks, about a fellow officer, Officer Nixon. Sergeant Danbury then shares some confidential information about Officer Nixon with Officer Baker, which Sergeant Danbury only has by virtue of his position as a supervisor. The examinee plans to discuss this with Sergeant Danbury. The question then asks, "[k]eeping in mind that criticism should focus on behavior and not the person, which of [the listed choices] would be **BEST** [ ] to say to Sergeant Danbury when identifying for him what the problem is?" (emphasis in original). The keyed response is option a, "[i]t was unacceptable for you to talk to a subordinate about another officer and make negative comments and share confidential information." Cahill argues that the best response was option b, "[y]our conduct earlier today made me question your ability to act as a mature supervisor who can exhibit good judgment when speaking to subordinates." In this regard, he maintains that option b more clearly addressed the question's focus on behavior, particularly as it used the word "conduct," which is synonymous with the word "behavior." He also maintains that the

source material, Peak, *et al.*, *supra,* does not address this scenario or anything similar to it. The Division of Test Development, Analytics and Administration asserts that option a is the best choice because it most clearly speaks to the problematic behavior and that option b is wrong because it moves into questioning Sergeant Danbury's abilities and characteristics rather than squarely focusing on the problematic actions, *i.e.,* talking about an officer, making negative comments, and sharing confidential information. The Division of Test Development, Analytics and Administration further advises that the prompt in the examination for Questions 64 and 65 is based upon the discussion of formalized feedback to employees in Peak, *et al.* at 100. The Commission observes that while Cahill appears to be correct that the portion of the text cited by the Division of Test Development, Analytics and Administration does not contain a similar example, the prompt for Questions 64 and 65, and the direction in Question 64 to "keep[ ] in mind that criticism should focus on behavior and not the person," provided sufficient information to enable candidates to identify the correct response to Question 64. Accordingly, based upon the foregoing, including Division of Test Development, Analytics and Administration's justification for the keyed response, the Commission finds that Question 64 is correct as keyed.

For Question 65, Curran selected the keyed response. Therefore, his appeal of this item is moot.

Questions 67 through 80 on the examination are based on the information in the Facility Visitor Identification Policy included in the test booklet. For these questions, the examinee is the commander of the Bethany Township Police Department's Administrative Unit and is asked to choose the best response. Question 79 indicates that the examinee has been assigned the task of reviewing the policy and recommending any changes that might be beneficial. In reading over the policy, the examinee realizes that there is something not outlined in the current policy that they think would be helpful to include, in order to avoid any confusion. It then asks which of the listed missing pieces of information would be most helpful to include in the updated policy, in order to clarify the proper procedures regarding visiting identification. The keyed response is option b, "[h]ow to determine when to issue someone a hard plastic visitor identification pass versus a yellow sticker visitor identification pass." Angelo argues that option a, "[t]he reasons why someone under the age of 18 may not be in possession of a valid photo ID when they arrive at the facility" is the best response, as it was "the only answer that specifically involved some sort of identification." Rubel argues that the keyed response and option c, "[t]he number of hard plastic visitor identification passes that are currently available for use," are the two major issues with the existing policy. Rubel argues that option c is the better response, as he maintains that in the event of a security breach, the plastic passes can be issued if the correct number is known and the sticker passes can be eliminated to restore integrity to the visitor pass program. Further, he contends that without source material to draw from, issuing sticker passes at all would invite a security breach, while a properly counted and audited plastic pass system would only

have the listed passes be valid. Richie argues that the question should be double keyed to include both options b and c as correct response. In this regard, he contends that the question is subjective and there is no way to support one of these two responses over the other, as neither one is mentioned definitively in the outdated policy and none of the sources listed in the examination orientation guide can be used to evaluate it. He presents arguments as to why he feels that each of these options is correct. He observes that the policy does not mention the total number of badges available but does note that the total number of badges would never change. He also notes that there is nothing in the policy that details that stickers are issued for any other reason, benefit, restriction, or purpose that would differ from the issuing of a badge. He also posits that the sticker policy is problematic because there is no way to account for or determine if a sticker is missing or has been removed from the building. The Commission finds that option a is not the best response, as the existing policy makes clear that when a visitor under age 18 does not have proper identification, "Minor" should be entered in the space allotted for "Type of ID Shown." As such, the reasons why a minor may not be in possession of a valid photo identification are immaterial. As to option c, the Division of Test Development, Analytics and Administration indicates that it is not a correct response, because the number of passes currently available is likely to fluctuate depending on how many are lost and/or located. This issue would require frequent revision of the policy as the number of available passes, making it infeasible to incorporate into the policy itself. Moreover, the Division of Test Development, Analytics and Administration contends that having this information would not help an individual carry out the policy correctly. The Commission finds that listing the number of hard plastic identification passes currently available is not as pressing of a need for revision as the clarification between when plastic badges are utilized instead of stickers, based upon the Division of Test Development, Analytics and Administration's contentions and other considerations with the policy in its current form. In particular, under the existing policy provided in the examination, the pass inventory number is supposed to be entered into the "Visitor Pass #" field in the visitor log if a hard plastic pass is issued or an "S" is supposed to be entered in the field if a sticker is issued. Thus, if a hard plastic badge goes missing, since the pass inventory numbers are entered into the visitor's log, it should apparent which hard plastic badge(s) is/are missing and information about the total number of badges currently available would not be necessary to make that determination. Similarly, if a sticker is not returned, the visitor's log would be expected to show that the visitor to whom that sticker was linked was not checked out. Conversely, the lack of clarity between when to issue a sticker as opposed to a hard plastic badge is not addressed at all under the existing policy. Therefore, the Commission finds that Question 79 is correct as keyed.

Concerning the administration of the subject promotional examination, Curran sets forth several complaints about the environment in the test room. He indicates that he was distracted and unable to focus because the door to the room was left open. Additionally, he complains that wearing a mask impeded his ability to

focus, think and concentrate. Moreover, he states that several people had their face coverings down or were wearing them improperly. He contends that the totality of these issues negatively impacted his performance on the examination. The Commission observes that this agency has a duty to carry out the constitutional mandate that appointments and promotions "in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive. . ."*See N.J. Const.* art. VII, § I, ¶ 2. The Commission is mindful of the unique challenges both administrators and candidates faced with the administration of the subject examination during the COVID-19 pandemic. While the Commission appreciates that the requirement to wear a mask during the examination was a notable adjustment from prior examination administrations, such a measure was warranted in light of the exigencies of the COVID-19 pandemic[3] and the relevant public health guidance at the time for indoor settings like those in which the examination was conducted.[4] As to the conditions at Curran's testing location, the Division of Administration, which was charged with oversight of the administration of the subject examination, states that monitors were not given a specific directive on whether to keep doors to testing rooms open or closed. Rather, monitors were entrusted to evaluate whether a door may need to be opened because of stuffiness or closed due to excess noise in the hallways. The Division of Administration further notes that excessive noise would likely impact an entire test center and not just an isolated room or candidate. As to masking requirements, the Division of Administration indicates that candidates were informed via email prior to the administration that they and monitors would be required to wear a mask at all

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[3] Indeed, according to the National Law Enforcement Memorial Fund, COVID-19 was the leading cause of deaths of police officers in the line of duty in 2021, claiming the lives of 301 federal, state, tribal and local officers. *See* Tim Stelloh, *Law Enforcement Fatalities Spiked in 2021. COVID-19 Was the Leading Cause of Death*, MSNBC, Jan. 11, 2022, https://www.nbcnews.com/news/us-news/law-enforcement-fatalities-spiked-2021-covid-19-was-leading-cause-deat-rcna11873.

[4] For example, at the time of the examination, guidance from the State indicated in relevant part that face masks were:

> **strongly recommended for both vaccinated and unvaccinated individuals in indoor settings where there is increased risk,** including:
> - Crowded indoor settings
> - Indoor settings involving activities with close contact with others who may not be fully vaccinated
> - Indoor settings where the vaccine status of other individuals in the setting is unknown
> - Where an individual is immunocompromised or at increased risk for severe disease

(emphasis in original). *See* State of New Jersey, *Should I Wear a Mask to Stop the Spread of COVID-19?,* New Jersey COVID-19 Information Hub (September 21, 2021), *available at* https://web.archive.org/web/20211022040839/https://covid19.nj.gov/faqs/nj-information/slowing-the-spread/should-i-wear-a-mask-to-stop-the-spread-of-covid-19. Further, pursuant to Executive Order No. 192 (2020), the majority of State offices open to the public require masking of staff and visitors.

times while in the building.[5] The Division of Administration states that monitors were told that if a candidate was not wearing a mask correctly (e.g., below the nose), they should politely ask the candidate to adjust it accordingly. Further, if a candidate refused a request to properly wear their mask, monitors were instructed to summon the Center Supervisor, who would give the candidate a final warning that if they did not wear their mask correctly they would be disqualified from the examination. In the case of Curran's testing location, the Center Supervisor's Report on Conduct indicates that it was necessary to constantly remind candidates to wear their masks properly during the examination. The monitor's report from Curran's testing room states that Curran asked who he could make a complaint with after the examination and that Curran was referred to the Center Supervisor. The Commission finds that Curran's complaints about the administration do not entitle him to any relief. In this regard, Curran's concerns about other candidates being improperly masked and about excess noise coming into the testing room should have been raised with the monitors during the administration of the examination. *See In the Matter of Kristin Ceppaluni and Jamie Kircher* (MSB, decided May 5, 2004) (If candidates felt that movement of furniture over test room was distracting and interfering with test performance they could have informed monitor who could ask for furniture movement to cease). Curran has not given any indication that he raised his concerns about these issues until testing concluded. Further, Curran appears to be the only candidate raising these issues on appeal. Therefore, these issues do not establish a basis to grant any relief to Curran. As to Curran's complaints about the requirement that he remained masked during the examination impeded his performance, the Commission observes that, apart from those candidates who received a special accommodation due to a medical condition that precluded them from wearing a mask during the examination, all candidates for the subject examination were subject to the same masking requirement. Thus, as the candidate population for the subject examination was generally subject to the same condition and Curran does not allege that he was medically unable to wear a mask during the exam, it does not provide him with a basis for relief.

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.

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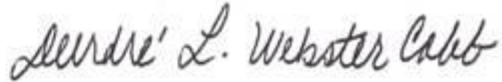
[5] Candidates with medical conditions that prevented them from wearing a mask during the examination were provided with a special accommodation.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MARCH, 2022



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Sean Cahill (2022-1252)
Robert Flynn II (2022-1241)
George Resetar (2022-1250)
Daniel Niekrasz (2022-1244)
Ralph Merced (2022-1246)
Felipe Trueba (2022-1270)
James Richie (2022-1291)
George Tsimpedes (2022-1320)
Joseph Angelo (2022-1322)
Records Center