



STATE OF NEW JERSEY

In the Matter of Kelly Dato, *et al.*,
County Correctional Police Captain
(various jurisdictions)

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2022-3254, *et al.*

Examination Appeals

ISSUED: October 12, 2022 (**ABR**)

Kelly Dato and Michael Cumiskey (PC4801C), Bergen County; and Thomas Campagnolo, Eric Halle, and Jonathan Gaul (PC4810C), Monmouth County appeal the promotional examination for County Correctional Police Captain (various jurisdictions). These appeals have been consolidated due to common issues presented by the appellants.

The subject examination was administered on May 26, 2022 and consisted of 70 multiple choice questions. It is noted that during the test administration, candidates were provided with two booklets: Booklet A (County Correctional Police Captain Supplemental Examination Material) and Booklet B (2022 County Correctional Police Captain Examination). Booklet A contained stimulus material and Booklet B contained the exam questions.

Question 8 asks which of four statements is false according to *N.J.A.C.* 10A:31-9.5. The keyed response is option a, “whenever chemical or natural agents are used as a means of control, a report shall be submitted to the shift supervisor which provides the reason(s) for the use of chemical or natural agents and the results achieved from such use.” Halle selected option c, “[c]hemical and natural agents shall be safely stored, legibly labeled to show the chemical or natural agent name and expiration date, and properly inventoried to ensure security and an adequate unexpired supply.” Halle acknowledges that the reference to “shift supervisor” in option a, instead of “facility administrator,” as appears in *N.J.A.C.* 10A:31-9.5, makes

option a the proper response to this question. However, he avers that it is misleading because *N.J.A.C.* 10A:31-8.17 states that a use of force report “shall be prepared and completed before the tour of duty.” The Civil Service Commission (Commission) observes that Halle’s argument appears to be that he confused the requirements for *when* to file a use of force report (“written reports shall be prepared and completed before the completion of the tour of duty” in *N.J.A.C.* 10A:31-8.17) with the requirement of *whom* he is to file a report on the use of chemical and natural agents with in accordance of *N.J.A.C.* 10A:31-9.5. In this regard, the Commission observes that there is no reference to the “shift supervisor” in *N.J.A.C.* 10A:31-8.17, or to whom a use of force report is to be submitted to. As such, it cannot be said that his confusion is reasonable, particularly as he is the only appellant from the administration of the 2022 County Correctional Police Captain examination claiming to have been confused by this question, the question explicitly refers to *N.J.A.C.* 10A:31-9.5 and it does not in any way reference *N.J.A.C.* 10A:31-8.17. Accordingly, the Commission finds that Halle’s objections are without merit and that Question 8 is correct as keyed.

Question 26 presents a scenario involving a fight between three inmates in a housing unit. The prompt states that “CO Rome called a code purple, and the probe and response teams arrived to deescalate the situation. However, the situation intensified and all of the inmates in the housing unit refused to lock in their cells and began to destroy property in the dayroom.” It then provides that the shift commander is notified of the situation at this time and asks what action should the shift commander direct officers to take at this point. The keyed response is option a, to “[l]eave the dayroom area to safely plan next steps.” Gaul argues that the best response is option b, to “[d]eploy O.C. spray to gain control of the inmates.” Dato and Halle argue that the best response is option c, to “[c]all for additional officers to assist.” Gaul argues that the keyed response does not interrupt the flow of events taking place, attempt to protect individuals from harm, or prevent property damage. Gaul also contends that having officers retreat violates the prohibition against custody staff leaving their posts without being properly relieved unless authorized by the Administrator or designee, per *N.J.A.C.* 10A:31-8.12(d). Gaul also notes that *N.J.A.C.* 10A:31-8.18(a) permits the use of non-deadly force under these circumstances. As such, he contends that deploying O.C. spray is the best response. Dato avers that in accordance with *N.J.A.C.* 10A:31-7.18, the goal is to restore order as expeditiously as possible while maintaining effective security and that leaving the room allows the situation to escalate. Dato contends that based upon the information in Booklet A, one can infer that a team has arrived with the necessary gear for the response and that if both the geared-up response team and the probe team are in the unit and having difficulty gaining control, it would make the most sense to call for additional officers. Halle argues that the keyed response is problematic because it would allow combative inmates additional time to organize against a staff response and could jeopardize the safety of inmates not involved in the altercation. Halle further proffers that the New Jersey Attorney General’s Use of Force Guidelines state that a law enforcement officer is not required to retreat in the face of resistance. As

such, Halle argues that calling for backup is the best response. The Division of Test Development, Analytics and Administration (TDAA) contacted two Subject Matter Experts (SME) who have knowledge regarding the performance standards and requirements of the job. The SMEs assert that it is critical to ensure that staff are adequately prepared when responding to a situation like this and that with this situation escalating, there is a particular need to ensure that the probe and reaction teams have the correct equipment to safely respond. The SMEs proffer that leaving the dayroom area allows for safe planning, proper equipping of staff and an opportunity for non-participants to retreat from the incident. Conversely, they maintain that deploying O.C. spray without allowing those not involved to retreat would be a misuse of force. The SMEs also present that, based on applicable use of force guidelines, high-volume O.C. delivery systems should not be used unless de-escalation techniques are attempted and prove to be unsuccessful. TDAA avers that, in accordance with the SMEs' rationale, option a is the best option. TDAA also submits that with two similar incidents in housing units at correctional facilities in the State of Michigan, the prudent course of action was to withdraw officers from the housing units to safely plan and execute the deployment of an emergency response team. See Paul Egan, *Mich. Inmates Gain Control of Housing Unit, Cause Extensive Damage*, Corrections1 by Lexpol, Sept. 14, 2020, <https://www.corrections1.com/riots-and-crowd-control/articles/mich-inmates-gain-control-of-housing-unit-cause-extensive-damage-BUILKUpC1kT38gaR/>. The Commission agrees that, based upon the rationales articulated by TDAA and the SMEs, and the two real-world scenarios presented, the keyed response is the best response to the scenario presented in Question 26.

Question 28 presents a scenario where Sergeant Washington is completing a tour and stops to speak with a corrections officer who is supervising inmates in the dayroom area of a housing unit. The corrections officer complains to Sergeant Washington about having to work extra hours due to staff shortages. The question then asks for the best way for Sergeant Washington to handle the situation. The keyed response is option c, to quietly tell the corrections officer that they can discuss the situation when inmates are not present. Campagnolo argues that the best response is option d, to “empathize with the officer and inform him that overtime is done fairly and based on seniority.” Campagnolo asserts that the question stem does not present any information that would lead examinees to conclude that continuing with this conversation would interfere with the safety, security or orderly running in the facility and that by speaking with the officer, he is allowing the officer to express his concern and frustration in an acceptable and productive manner. Campagnolo maintains that instructing the officer that they can discuss the matter when inmates aren't around can easily be viewed as being dismissive or uncaring and that by “empathizing and letting him know it is done fairly [he is] engaging [his] officer but also leaving the door open for a more in-depth conversion” should the need arise, “without shutting the door on his concerns.” Campagnolo also draws a comparison to Question 31 from the 2017 County Correction Sergeant examination. Initially, the

Commission notes that Campagnolo misreads option d, as it has Sergeant Washington to “emphasize to the corrections officer that everything is being done to fairly distribute extra hours to staff,” and does not use the word “empathize.” As such, his assessment of that option is incorrect, as it does not really show any willingness to hear what the corrections officer has to say and comes off as dismissive. Additionally, it makes his comparison to the cited question from 2017 County Correction Sergeant examination inapplicable. Further, the Commission disagrees with Campagnolo’s evaluation of the keyed response. The prompt clearly states that the corrections officer has publicly remarked about staff shortages. A conversation about staff shortages and morale implicates safety, security and the orderly running of the facility and therefore should be discussed privately. Therefore, the Commission finds that Question 28 is correct as keyed.

Question 33 states that while inmates were in a housing unit’s dayroom area, Inmate Zapata approached Sergeant Washington and said he has been verbally and physically abused by his cellmate over the past several weeks. Inmate Zapata does not have any visible injuries, but does seem to be genuinely afraid. Sergeant Washington notifies Lieutenant Winston of the situation and asks the examinee to consider which of the following four actions Lieutenant Winston should take at this point:

- I. Ensure the housing unit is secured
- II. Have Inmate Zapata seen by medical
- III. Have Inmate Zapata and his cellmate questioned privately
- IV. Ensure Sergeant Mitchell documents the incident

The keyed response is option d, all four actions should be taken. Campagnolo argues that it is unnecessary to secure the housing unit and that the best response is therefore option c, actions II, III and IV only. TDAA and the SMEs proffer that for confidentiality and security purposes, the unit should be secured. The SMEs observe that doing so protects officer and inmate safety alike and permits the investigative team to investigate the allegations privately and with minimal disruption to operations. Therefore, TDAA maintains that the keyed response is the best response. The Commission agrees with this assessment and therefore finds that Question 33 is correct as keyed.

Question 43 provides that while speaking to Sergeant Martin in his office, the examinee observes that the papers in the printer are tickets for a concert that he is going to this weekend. It indicates that this is the first time the examinee has encountered Sergeant Martin using office supplies for personal use and it asks what the best way is to handle the situation at this point. The keyed response is option c, to “[g]ive Sergeant Martin a verbal warning not to use the printer for personal use again.” Cumiskey argues that while a verbal reprimand is a good answer, it is incomplete. As such, he contends that the best response is option d, to “[d]ocument the incident so there is a record if Sergeant Martin uses office supplies for personal

use again.” In this regard, he proffers that supervisory training courses stress that documentation is essential when it comes to disciplinary action. He also argues that options c and d, as written, can essentially mean the same thing. However, because training stresses the importance of documentation when witnessing a rule violation or misconduct, it makes option d the better answer. Cumiskey also proffers that having a documented file ensures that an employee has received information that their actions have violated a rule or procedure and that they have received specific information about the rule or procedure. TDAA and the SMEs indicate that documenting a verbal warning is not a standard practice at county correctional facilities, though TDAA acknowledges that some supervisors may prefer to document a verbal warning. The Commission observes that option d has the examinee document the incident without reminding Sergeant Martin that he cannot use office supplies for personal purposes. Conversely, option c has the examinee convey the issue to Sergeant Martin in an effort to correct the problematic conduct. Given that option c most directly and effectively addresses and attempts to correct the improper behavior, the Commission finds that Question 43 is correct as keyed.

Question 46 provides that an inmate deliberately clogged his toilet so that it flooded and caused a disruption. When asked to explain, the inmate proffered that he had been mistreated by staff due to his controversial beliefs and that this was his form of protest. The prompt then asks the examinee, based on the information provided, which of the following four “actions are **NOT** appropriate to take at this point” (emphasis in original):

- I. Place Inmate Brennan in Protective Custody.
- II. Charge Inmate Brennan with a disciplinary infraction.
- III. Explain to Inmate Brennan that he should keep his controversial beliefs to himself for his own safety.
- IV. Interview Inmate Brennan in a secure location and ask for specific examples of mistreatment and have him document those incidents.

The keyed response is option b, “I and III only.” Halle avers that it not charging the inmate would be wrong, as it would create an impression that it is permissible to destroy facility property or disrupt the facility. The Commission agrees that charging inmate is an appropriate action to take at this time. However, Question 46 asks which “actions are **NOT** appropriate to take at this point” (emphasis in original). Option II is not part of the keyed response because it is a correct action. Therefore, the Commission finds Question 46 is correct as keyed.

Question 51 states that the examinee has observed CO Bastardo talk harshly to inmates in the Disabled Housing Unit on a few occasions and asks for the best way to handle the situation. The keyed response is option a, to talk to Sergeant Winston about these observations. Gaul argues that the question should be stricken from the examination because of an inconsistency between the prompt and Booklet A.

Specifically, because the organizational chart in Booklet A contains a “Lieutenant Winston,” rather than a “Sergeant Winston,” as appears in option a, it made it appear as though option a was a trick answer to catch examinees who did not read the organizational chart provided in Booklet A. Upon review, TDAA has determined to omit this item from scoring prior to the list being issued based upon this discrepancy. Accordingly, Gaul’s appeal concerning Question 51 is moot.

Question 52 presents a scenario where an advocacy group protesting outside has not complied with initial instructions to disperse and asks which among the following four orders should be given by the shift commander:

- I. Display and point firearms at the protesters as a sole means of constructive authority.
- II. Immediately contact Master Control, alerting them to the situation and request backup.
- III. Provide clear and audible warnings of the consequences for non-compliance.
- IV. Announce final instructions clearly and immediately begin carrying those out to disperse the crowd.

The keyed response is option b, “II and III only.” Gaul asserts that this question should be removed from the examination because the source is the new Attorney General’s Use of Force Policy, which is just now being implemented in training and has not yet been codified in Title 10A of the New Jersey Administrative Code. Gaul asserts that because the source material is a new policy and many agencies had not completed their 2022 training at the time of the examination, it was unreasonable to test candidates’ knowledge on the subject, especially where it has not yet been codified and was not part of the supplemental materials provided to candidates. The Commission observes that on December 21, 2020, the New Jersey Attorney General issued Attorney General Law Enforcement Directive (AG Directive) No. 2020-13, which implemented a comprehensive update to the Attorney General Directive Establishing the Use of Force Policy and Procedures (Use of Force Policy), effective December 31, 2021. AG Directive No. 2021-14 implemented a handful of changes to the Use of Force Policy. AG Directive No. 2021-14 also had an effective date of December 31, 2021. The relevant portion of the directive is Section 3.8.1, which provides:

Prior to using force against people in a crowd, officers shall:

- (a) provide clear instructions and warnings in a manner that can be heard by persons in the crowd, such as through a bullhorn or speaker system when available;

- (b) state the consequences of refusing to comply with a mandatory directive, including that arrests will occur and force may be used unless persons comply; and
- (c) give a reasonable opportunity to comply.

Critically, this exact language appears in Section 3.8.1 of the Use of Force Policy issued with both AG Directive Nos. 2020-13 and 2021-14, and in the most recent version of the Use of Force Policy, which was published in April 2022. *See* <https://www.nj.gov/oag/force/docs/UOF-2022-0429-Use-of-Force-Policy.pdf>. Since Section 3.8.1 was published as part of an Attorney General directive issued in December 2020 and has been in effect since December 31, 2021, it cannot reasonably be argued that candidates should not be expected to be familiar with the aspect of the Use of Force Policy referenced in Question 52. Therefore, the Commission finds that Gaul's objection to Question 52 is without merit and that Question 52 is properly keyed.

Question 57 provides that a Lieutenant, who is the shift commander and is preparing for roll call, observes a Corrections Officer (CO) clearing the metal detector and entering the secure area of the facility five minutes prior to 0700 hours. Later in the shift, as the Lieutenant is preparing an overtime report, he notices that the same CO submitted an overtime slip for 15 minutes of prep time. The question then asks for the best way for the Lieutenant to handle the situation. The keyed response is option a, to contact the CO, request that he adjust his overtime slip to reflect his arrival time, and counsel the officer on submitting accurate information for review. Dato argues that the best response is option c, to immediately contact the Sergeant who supervises the CO and have him counsel the CO on submitting accurate timeslips. In this regard, Dato maintains that Booklet A shows a strong chain of command in the correctional facility and that it is not customary for the chain of command to be broken for issues like the correction of an overtime slip. In support, he notes that the Counts section on Page 9 of Booklet A provides that “[d]iscrepancy resolution should be handled by the chain of command; a CO or sergeant should not reach out to administration to resolve count issues.” Dato avers that this shows that it would not make sense for the Lieutenant to contact the CO. Further, he submits that Todd Clear and George Cole, *American Corrections* (6th ed. 2003) states that a Lieutenant can't oversee everything and must rely on a lower-ranked staff member to pass directives down. He further submits that Clear and Cole indicate that the chain of command is a series of organization principles in order of authority with each person receiving orders, directives and criticism from the one immediately above and issuing orders to the one immediately below. Accordingly, Dato contends that the Lieutenant should have the Sergeant speak with the officer about the overtime slip. The SMEs and TDAA maintain that option a is the best option, as it provides for adjusting the overtime slip, while option c does not. TDAA also observes that the Lieutenant has firsthand knowledge of the discrepancy between what the CO's overtime slip shows and when the CO actually arrived in the secured area of the facility. TDAA maintains that if the Lieutenant were to sign the slip, it would mean

that the Lieutenant falsified an official document. The Commission agrees that based upon the considerations cited by the SMEs and TDAA, option a is the best response to Question 57.

Question 60 states that an inmate is refusing to lock in his cell in his housing unit while all other inmates are locked in. After a corrections officer gives him multiple orders to lock in, the inmate starts undressing in the dayroom. The question then asks what the examinee should do first, upon being notified of the situation. The keyed response is option a, to report to the housing unit. Campagnolo argues that the correct response is option c, to form an extraction team and remove the inmate from the unit. In this regard, he avers that because the inmate has already ignored lawful orders to lock in their cell and appears to be displaying some type of mental health episode, it would allow for the incident to be safely dealt with if it escalates. Campagnolo contends that after the extraction team arrives, the supervisor can evaluate the situation and attempt to de-escalate it. With the extraction team already at the scene, they can physically remove the inmate if the supervisor is unable to de-escalate the incident and take him for a medical or mental health evaluation without delay. The SMEs assert that the circumstances detailed in the scenario call for an attempt at de-escalation before assembling an extracting team, rather than the immediate deployment of an extraction team. In this regard, the SMEs state that the Attorney General's Use of Force Policy generally mandates an attempt at de-escalation before force is utilized and they maintain that having the examinee, as a supervisor, respond to the scene may allow for a de-escalation of the incident without the use of force. The SMEs also observe that doing so would not prevent the assembly of an extraction team to remove the inmate if the inmate remains non-compliant. The SMEs also note that having the examinee report to the scene will allow the examinee to observe the situation and determine the appropriate action to be taken. Given these considerations, TDAA maintains that the keyed response is the best response, as it is the most likely to prevent unnecessary use of force. The Commission finds that given the considerations noted by the SMEs and TDAA, forming an extraction team to remove the inmate from the unit is an action that should not be taken until the supervisor reports to the scene and assesses the situation. Accordingly, it finds Question 60 correct as keyed.

CONCLUSION

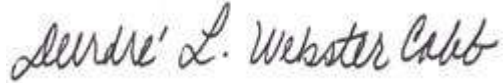
A thorough review of the appellants' submissions and the test materials reveals that, other than the scoring change noted above, the appellants' examination scores are amply supported by the record, and the appellants have failed to meet the burden of proof in this matter.

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 12TH DAY OF OCTOBER, 2022



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