STATE OF NEW JERSEY

In the Matter of Tyler Bender, *et al.*, Police Lieutenant, various jurisdictions	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2024-1067, *et al.*	:	Examination Appeal

ISSUED: March 20, 2024

Tyler Bender and Caitlin Hurley (PM3226E), Ewing; and Dane Coleman, Joemy Fernandez, Ryan Macaluso, Sean Mullahey, Matthew Scalcione, Juan Velazquez and Gregory Wojtowicz (PM3381E), Jersey City; appeal the promotional examination for Police Lieutenant (various jurisdictions). These appeals have been consolidated due to common issues presented by the appellants.

The subject exam was administered on October 19, 2023 via a computer-based testing system and consisted of 80 multiple choice questions.

Scalcione presents that he was only provided with 30 minutes for review and he was not permitted to review his test booklet and scored answer sheet. In addition, he contends that his ability to take notes on exam items was severely curtailed. As such, he requests that any appealed item in which he selected the correct response be disregarded and that if he misidentified an item number in his appeal, his arguments be addressed.

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 7 indicates that your department has implemented an Early Warning System (EW System) that includes only the performance indicators that were mandated by the N.J. Attorney General Directive No. 2018-3, Statewide Mandatory Early Warning Systems. Candidates were presented with four statements concerning their subordinate, Officer Dawson. The question asks, based on the Directive, for the statement(s) which would require an entry into the department's EW System. The keyed response, option c, includes statement I, "An arrest made by Officer Dawson is dismissed by the court;" statement III, "Officer Dawson is arrested for Driving Under the Influence;" and statement IV, "Officer Dawson is the subject of a domestic violence investigation;" but does not include statement II, "Officer Dawson receives minor discipline for lateness."[1] Bender and Hurley maintain that statement II would be

[1] Directive No. 2018-3 provides, in pertinent part:

C. Selection of Performance Indicators

An EW System may monitor many different categories of officer conduct which indicate potentially escalating risk of harm to the public, the agency, and/or the officer. The following performance indicators shall be included in all EW Systems, but also can be supplemented based upon the unique characteristics of the department and the community it serves. The chief executive of the department shall determine any such supplemental performance indicators. To the extent possible, supplemental performance indicators should be objectively measurable and reasonably related to potentially escalating harmful behavior by the officer.

1. Internal affairs complaints against the officer, whether initiated by another officer or by a member of the public;
2. Civil actions filed against the officer;
3. Criminal investigations of or criminal complaints against the officer;
4. Any use of force by the officer that is formally determined or adjudicated (for example, by internal affairs or a grand jury) to have been excessive, unjustified, or unreasonable;
5. Domestic violence investigations in which the officer is an alleged subject;
6. An arrest of the officer, including on a driving under the influence charge;
7. Sexual harassment claims against the officer;
8. Vehicular collisions involving the officer that are formally determined to have been the fault of the officer;
9. A positive drug test by the officer;
10. Cases or arrests by the officer that are rejected or dismissed by a court;
11. Cases in which evidence obtained by an officer is suppressed by a court;
12. Insubordination by the officer;
13. Neglect of duty by the officer;

considered an internal affairs complaint based on "the Attorney General's Internal Affairs Policy and Procedures (IAPP[)] [(Revised] November 2022) [which] provides an example of a minor rule infraction to include 'Complaint [emphasis added] for conduct such as untidiness, tardiness, faulty driving, or failure to follow procedures.'"[2] Bender and Hurley add that under Directive No. 2018-3, "unexcused absences by the officer" is listed as one of the performance indicators and argues that "an employee that is late by two minutes, two hours, or completely missing would be considered absent [pursuant to the definition of 'absence' provided in the Merriam-Webster dictionary] and their absence would be an Early Warning performance indicator." Macaluso, who misremembered the question as presenting five statements to the candidates, argues that statement II "should not be excluded as one of the correct answers due to the clear guideline in the directive stating, 'Any other indicators, as determined by the agency's chief executive.' The directive further states, performance indicators can be supplemented based upon the unique characteristics of the department and the community it services . . . [G]iven the vagueness of the guideline, it is reasonable to argue that all of the options provided in the question should be considered correct answers." Mullahey notes that Directive No. 2018-3 provides, "Cases or arrests by the officer that are rejected or dismissed by a court," whereas statement I provides, "An arrest made by Officer Dawson is dismissed by the court." In this regard, Mullahey argues that the Directive "is written in the plural form . . . whereas [statement I] uses the singular . . . The question is easily identified as different from the wording utilized in the Directive and therefore not correct." With respect to statement II, Scalcione presents that "being late for a work shift by definition is being absent from work" and "lateness for work equates to unexcused absence and this therefore [is] a mandatory performance indicator." Scalcione also refers to Internal Affairs Policy and Procedures, *supra*, which provides under "section 3.4.1 under Early Warning and Risk Management states, in pertinent part, '…agencies must also proactively work to detect **troubling patterns** in police conduct before that conduct escalates…' [emphasis added] . . . Multiple instances of lateness would certainly be indicative of a pattern that the EWS was designed to track. Had the [statement] stated '**A** minor discipline' for lateness or 'one instance of minor discipline' for lateness the meaning would be clear to mean one instance of lateness." Regarding the claim that statement II should be considered an internal affairs complaint, while a complaint may be filed, as indicated in the IAPP, for minor rule infractions, which includes tardiness, statement I does not indicate that a complaint has been filed in this regard. With respect to the arguments that statement II is equivalent to "unexcused absence," it is noted that the Division of Test

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14. Unexcused absences by the officer; and
15. Any other indicators, as determined by the agency's chief executive.

[2] Specifically, IAPP Section 2.2 Rules and Regulations provides:

> 2.2.2 The rules and regulations should identify general categories of misconduct or inappropriate behavior that are subject to disciplinary action. An incident of misconduct or inappropriate behavior may fall into one or more of the following categories . . . (i) *Minor rule infractions*. Complaint for conduct such as untidiness, tardiness, faulty driving, or failure to follow procedures.

Development, Analytics and Administration (TDAA) contacted Subject Matter Experts (SMEs) regarding this issue who indicated that "unexcused absences by the officer" is a serious issue and far eclipses the degree that is described in the question regarding the minor discipline that Officer Dawson has received. The SMEs further indicated that entering Officer Dawson into the EWS could not be justified under these circumstances without broadening the seriousness of the act that he received minor discipline for. With regard to Macaluso's claim that "all of the options provided in the question should be considered correct answers" given the "vagueness of the guideline," the question clearly provides that your department's EWS "includes only the performance indicators that were mandated by the N.J. Attorney General Directive No. 2018-3, Statewide Mandatory Early Warning Systems." As such, Macaluso's argument is misplaced. Regarding Mullahey's assertion that statement I is incorrect as it uses the singular whereas the Directive is written in the plural, there is nothing in the Directive to suggest that multiple instances of cases or arrests by the officer that are rejected or dismissed by a court must occur in order for entry into a department's EWS. Accordingly, the question is correct as keyed.

Question 9 indicates that you are instructing newly hired officers regarding what constitutes a strip search. The question presents candidates with five statements and asks, based on the N.J. Attorney General's Strip Search and Body Cavity Search Requirements and Procedures for Police Officers,[3] "you should inform the officers that the removal or rearrangement of clothing to permit visual inspection of which of these constitutes a strip search?" The keyed response, option d, included statement III, anus.[4] Macaluso contends "while I acknowledge that the [subject guidelines] distinguishes a visual inspection of the anus as an element of a strip search and differentiates it from an inspection of the anal cavity (which it classifies as a body cavity search), my understanding was based on the perception that inspecting this intimate area may be

[3] Revised June 1995. *See* https://www.nj.gov/lps/dcj/agguide/stripout.htm.

[4] The Strip Search and Body Cavity Search Requirements and Procedures for Police Officers provides, in pertinent part:

I. Definitions
   A. Strip Search
      1. Removal or rearrangement of clothing to permit visual inspection of a person's
         a. undergarments
         b. buttocks
         c. anus
         d. genitals
         e. breasts
      2. The following does not constitute a strip search:
         a. removal or rearranging of clothing reasonably required to render medical treatment or assistance, or
         b. removal of articles of outer clothing, such as coats, ties, belts or shoelaces.

   B. Body Cavity Search
      1. Visual inspection or manual search of a person's
         a. anal cavity
         b. vaginal cavity

more invasive, aligning it closer to a body cavity search." In this regard, Macaluso contends that "while conducting a strip search that includes a 'visual inspection of the anus', there's an inherent possibility of inadvertently observing into the anal cavity, particularly depending on the position or posture of the individual, thus making it a body cavity search. This places the act of visually inspection the anus in a gray zone between the two definitions provided."[5] It is noted that the question specifically refers to the Strip Search and Body Cavity Search Requirements and Procedures for Police Officers, *supra*. In this regard, Macaluso, as noted above, "acknowledge[s] that the [subject guidelines] distinguishes a visual inspection of the anus as an element of a strip search and differentiates it from an inspection of the anal cavity . . ." As such, the question is correct as keyed.

Question 12 indicates that according to the N.J. Attorney General Directive No. 2020-9, Establishing "Statewide Handle With Care" Program, all New Jersey law enforcement agencies must implement a Handle With Care (HWC) program. As part of this program, when a law enforcement officer responds to, or encounters, an incident involving a traumatic event where a child is present, the officer must complete a HWC Notice promptly following the encounter. The question further indicates that Officer Grace asks for clarification about who is considered a "child" pursuant to this Directive. The question presents candidates with five statements and asks which of these people meet definition of "***child***" pursuant to Directive No. 2020-9. Scalcione misremembered the question as asking, "following a traumatic event which '**students**' would be subject to their school being notified via HWC." As such, his appeal of this item is misplaced.

For question 16, since Bender selected the correct response, his appeal of this item is moot.

For question 19, since Mullahey selected the correct response, his appeal of this item is moot.

Question 22 indicates that officers in your department have probable cause to believe that CDS is located within a local residence. The officers discuss whether exigent circumstances might justify a warrantless entry, rather than obtaining a search warrant, in order to seize the CDS. Candidates are presented with five factors. The question asks, "***According to relevant N.J. case law***, which of these are factors that the Court finds to be helpful in analyzing whether sufficient exigent circumstances exist to justify officers' warrantless entry into a home in drug cases?" (emphasis added). The keyed response is option d, I. The degree of urgency involved and the amount of time necessary to obtain a warrant; II. Reasonable belief that contraband is about to be removed; III. The possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; IV. Information indicating the possessors of the contraband are aware that the police are on their trail; and V. The ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics

[5] Macaluso does not indicate that he possesses medical (anatomical) training in this regard or cite any resources he consulted which would support his claims.

and to escape are characteristic behavior of persons engaged in the narcotics traffic. It is noted that this item was sourced from *State v. Lewis*, 116 *N.J.* 477 (1989) in which the court noted:

> We also noted in [*State v. Hutchins*, 116 *N.J.* 457 (1989)] that numerous **federal courts** have applied the exigent-circumstances exception in the context of warrantless home entries in drug cases. *See* [*Hutchins*, supra, at 457 n. 1]. Suggested criteria for testing the validity of warrantless home entries in drug cases, on the basis of exigent circumstances, were advanced by the **Third Circuit** in *United States v. Rubin*, 474 *F.*2d 262 (1973):
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> (1) The degree of urgency involved and the amount of time necessary to obtain a warrant; (2) The reasonable belief that contraband is about to be removed; (3) The possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) The presence of information indicating the possessors of the contraband are aware that the police are on their trail; and (5) The ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic. [citation omitted] (emphasis added)

Given that the question asks for "relevant N.J. case law" and the court in *Lewis*, *supra*, cites a United States Court of Appeals (Third Circuit) matter, *Rubin*, *supra*, for the above indicated factors, TDAA determined to omit this item from scoring prior to the lists being issued.

For question 23, since Bender selected the correct response, his appeal of this item is moot.

Question 30 provides:

> In the middle of May, Officers Bradford and Coolidge of the Longwood Police Department were on patrol and assigned to the Community Response Unit (CRU), which concentrates on narcotics and "quality of life" issues in the community. At the time, the officers were in plain clothes and driving in an unmarked police vehicle. Two areas of their patrol included the Grand Court and Garfield Court Federal Housing Projects. Both projects have placards identifying the nature of the housing project and informing individuals that there is no trespassing. As a result of routinely patrolling these locations for over five years, the two officers knew almost everyone who lived in the projects, their families, and the people who visited the residents.
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> At 4:00 p.m., Officers Bradford and Coolidge saw a male, later identified as Elvin Dover, ride his bicycle out of the Garfield Court project and pass them as they were going in the opposite direction. Not recognizing Dover,

> the officers turned their unmarked car around and followed Dover for approximately a quarter of a mile, at which point they pulled abreast of him. Without activating any lights or siren, the officers rolled the window down and asked Dover if he would stop so that they could talk. Dover stopped and the officers exited their vehicle.
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> While Dover sat on his bicycle, the officers requested and received his identification, which consisted solely of a piece of paper from a local healthcare center. The officers then began to question Dover, per department procedures, to ascertain if he ever lived in Garfield Court, had a family member there, or was visiting the area for any legitimate purpose. They asked Dover about his purpose for being in the area and Dover responded that he was visiting his cousin, but was unable to provide the cousin's last name, apartment number, or location of the apartment. Dover's responses to the brief questions asked by the officers led the officers to believe that he was trespassing at the housing project. As a result, he was placed under arrest for defiant trespass. In accordance with police department procedures, and out of concern for their own safety, one of the officers patted down Dover prior to transporting him to police headquarters. During the pat-down, the officer felt what he believed to be a knife in Dover's front pocket. The officer reached into the pocket to retrieve the object, which turned out to be a lighter, but, as he pulled it out, he observed a translucent orange baggie, which the officer reasonably believed was crack cocaine.

The question asks, based on relevant New Jersey case law, for the true statement. The keyed response is option c, The seizure of the suspected crack cocaine from Dover's pocket was "lawful, since the search was conducted incident to a valid arrest." Bender asserts that the keyed response is "not consistent with New Jersey case law and the Fourth Amendment" and refers to *State v. Dangerfield*, 171 *N.J.* 446 (2002). Bender argues that the court in *Dangerfield*, *supra*, "affirmed that the arrest was not supported by probable cause and no facts were presented that would have allowed for a pat-down or frisk." Scalcione maintains that "the search was invalid as the facts presented in the scenario did not equate to probable cause for the arrest in the first place, therefore any subsequent search is invalid." In this regard, Scalcione maintains that there were no "No Trespassing" signs posted[6] which would satisfy the requirements of *N.J.S.A.* 2C:18-3 (Unlicensed entry of structures; defiant trespasser; peering into dwelling places; defenses);[7] there is "nothing presented that indicated that [the officers] actually saw the

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[6] As noted above, the question clearly indicates, "Both projects have placards identifying the nature of the housing project and informing individuals that there is no trespassing."

[7] Although Scalcione cites this provision as "*N.J.A.C.* 2C:18-3" throughout his appeal, it appears that he is referring to *N.J.S.A.* 2C:18-3, given that the New Jersey Administrative Code does not contain a Title 2C.

subject within the complex"[8] and the actual stop occurred outside of the housing complex; a trespass occurring within a housing complex "would be a disorderly persons offense, not a crime" pursuant to *N.J.S.A.* 2C:18-3; given that the officers were in plain clothes in an unmarked vehicle, "there is no logical inference to be drawn that the subject altered or adjusted his behavior as a reaction to the presence of the officers;" and "the stop itself did not give rise to a well-grounded suspicion that an offense had been committed or was about to be committed." Scalcione concludes, "Simply stated there were no objective facts in the scenario that the subject was actually on the property. Absent these facts there was no probable cause for the arrest and therefore the search was invalid." It is noted that the fact pattern provided in the question is taken almost verbatim from *State v. Daniels*, 393 *N.J. Super.* 476 (App. Div. 2007). It is noted that the court in *Daniels*, *supra*, stated that it "resolve[s] a question left open in *State v. Dangerfield*, [*supra*], concerning the permissible scope of a search incident to an arrest for the petty disorderly persons offense of defiant trespass." *Id.* at 48. The court determined that the officers had probable cause, based on the totality of the circumstances, to arrest defendant for defiant trespass pursuant to *N.J.S.A.* 2C:18-3(b). *See id.* at 486. The court further determined:

> The police power to arrest in the first instance for these minor offenses is restricted to non-pretextual arrests, *Dangerfield*, *supra*, 171 *N.J.* at 463 . . . but once the decision is made to take the person into custody and transport him to police headquarters, a full search should be permitted.
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> Applied to the facts of this case, there is no doubt that the search of defendant's person was permissible. Indeed, even if a *Terry* frisk limitation were imposed, the patdown here went no further than permitted under that rationale. The officer felt a hard object in defendant's pocket that he felt might be a knife. Even putting aside the officer's subjective belief, he had the right to examine the object to determine if it might be a weapon, regardless of what type of weapon. In retrieving the item, which turned out to be a lighter, the plastic bag came into view. There is no basis to conclude, given these facts, that defendant's rights, under either the Fourth Amendment or our State Constitution, N.J. Const. art. I §7, were violated. *Id.* at 491.

As such, the question is correct as keyed.

> Question 33 provides:
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> An assistant prosecutor contacted the Grover Police Department regarding a forfeiture order issued from David Levito's prior conviction for unlawful possession of a weapon. The order directed that members of the department respond to Levito's home, located at 103 Beavertown Road, for

[8] As noted above, the question clearly indicates that the officers "saw a male, later identified as Elvin Dover, ride his bicycle *out of the Garfield Court project* and pass them . . ." (emphasis added).

> the limited purpose of retrieving from that home any and all firearms, including one particular handgun. A records check performed after the prosecutor's phone call revealed that Levito was the target of two outstanding municipal arrest warrants. The police also learned that Levito lived at 81 Beavertown Road, not 103 Beavertown Road where his parents lived. An arrest team consisting of six officers approached the area of 81 Beavertown Road and stationed themselves around the premises. Before long, an officer saw an individual wearing blue enter the rear of the home. The officer also heard a loud bang that was a metallic sound but did not sound like a gunshot. Within a few minutes, other officers saw Levito wearing a blue jacket as he exited the front door of 81 Beavertown Road carrying a laundry basket. As Levito placed the laundry basket in the backseat of a vehicle parked in the driveway, he was seized and arrested. Once Levito was in custody, the police concluded a protective sweep of 81 Beavertown Road was necessary out of a concern there might be others inside, along with the handgun they had come to retrieve. They then entered the residence to conduct this protective sweep.

The question asks, based on relevant New Jersey case law, for the true statement. The keyed response is option a, The "officers did not have a reasonable and articulable suspicion that the place to be swept (81 Beavertown Road) harbored a danger."[9] Scalcione, who selected option d, The "protective sweep was lawful since the officers had a legitimate purpose for being on the property of 81 Beavertown Road at the time the protective sweep was conducted," maintains that the forfeiture order presented in the scenario is "a civil action, not a criminal action. Completely missing from the fact pattern were any details at all in regard to the provisions of this order inclusive of any actions officers serving said order would be authorized by the court to undertake in its service, or the underlying reasons for its issuance other than that the subject was no longer legally permitted to possess firearms . . . Absent clarification from the fact pattern, a test taker can only draw an inference that some danger exists. Additionally, the wholesale lack of detail with respect to the actions that the court authorized and the enforcement of this order leaves the test taker without critical information as to what actions may or may not be lawful, prudent, or both."[10] In this regard, Scalcione refers to *Washington v. Chrisman*, 455 *U.S.* 1 (1982)[11] and New Jersey Attorney General

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[9] It is noted that this question is based on the fact pattern presented in *State v. Radel,* 249 *N.J.* 469 (2022).

[10] As noted in the question, the forfeiture order was for 103 Beavertown Road. As further noted in the question, it was determined that Levito lived at 81 Beavertown Road where he was observed and arrested. Given this, Scalcione does not explain the relevance of the forfeiture order for 103 Beavertown Road in this matter or how it affected his answer choice.

[11] As noted by the court, a Washington State University Police Officer stopped and asked a student leaving a dormitory with a bottle of gin for identification given that the possession of alcoholic beverages by those under 21 was illegal. The officer accompanied student to his dormitory room where the student wanted to retrieve his identification. The officer, while standing in the open doorway observing the student and

Directive 2019-2[12] for the proposition that "upon contact with the subject the offices would be permitted to remain with the subject while he moved about the house for the purpose of retrieving the weapons pursuant to the Court Order."[13] In addition, Scalcione notes that the question does not indicate the proximity of the two properties, *i.e.*, 81 and 103 Beavertown Road.[14] Scalcione presents that the question "then adds the detail that [Levito] had two warrants for his arrest. The arrest warrants now inject a criminal aspect to the fact pattern and thus change[s] any calculus that an officer must make . . . Thus, the facts present for the test taker are the presence of one (1) Forfeiture Order for Weapons (noting that the subject now was no longer legally permitted to possess them) which is potentially defective on its face as it contains the incorrect address, and two (2) arrest warrants for unspecified violations. Both factors relate to a subject that poses a danger (albeit unknown why as facts are missing), and who possesses firearms in need of seizure." Scalcione emphasizes that "the arrest occurs at the property NOT listed on the Court Order . . . As the scenario contains no facts that a follow-on in presence search under the guidance provided in *Washington v. Chrisman*, [*supra*,] was conducted, what officers in the scenario are left with is a facially deficient Co[u]rt Order that can only be remedied by either the amendment of the that [*sic*] Order or the issuance of another Order from the Court." Scalcione continues, "in evaluating if the protective sweep of the home was lawful the test taker must take into consideration the following: 1. The officer still need to seize the weapons, 2. The fact pattern is noticeably silent on the provisions of the Forfeiture Order related to search for the weapons to be seized, 3. The Order itself is facially invalid, 4. The officers heard a loud known [*sic*] noise prior to affecting the arrest of the subject that the fact pattern notes

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his roommate, saw what he believed to be marijuana seeds and a pipe lying on a desk in the room. The officer entered the room and informed the student and his roommate of their *Miranda* rights which they waived. Subsequently, the students voluntarily consented to a search of the room where additional marijuana and other controlled substances were discovered. *See Washington v. Chrisman*, *supra*, at 3-4. The court noted that this was "a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy. The Fourth Amendment does not prohibit seizure of evidence of criminal conduct found in these circumstances." The court determined based on the circumstances presented in this matter that the seizure of drugs pursuant to respondent's valid consent did not violate the Fourth Amendment." *Id.* at 10.

[12] Attorney General Directive 2019-2, "Attorney General Directive Pursuant to the Extreme Risk Protective Order Act of 2018" (August 15, 2019). As discussed in Directive 2019-2, "This directive provides guidelines to law enforcement agencies and prosecutors' offices on the implementation of the Extreme Risk Protective Order Act of 2018 ('ERPO Act' or 'Act'), *N.J.S.A.* 2C:28-20 to -32. The Act provides procedures through which select people (the 'petitioner') may apply for an extreme risk protective order ('ERPO') against the person (the 'respondent') who poses a danger of causing bodily injury to himself or others by possessing or purchasing a firearm."

[13] Again, Scalcione does not explain the relevance of these matters given that the forfeiture order was for 103 Beavertown Road and ***not*** 81 Beavertown Road where Levito was observed and the arrest occurred.

[14] Scalcione does not explain the relevance of the proximity of the properties in this matter.

but does not explain further[,][15] 5. There is a reasonable articulable suspicion that weapons are present in house #81." Scalcione contends that "the officers in the scenario are going to have to remain at house #81 awaiting follow on [*sic*] guidance/Orders from the court" and refers to *State v. Davila*, 203 *N.J.* 97 (2010) in which "the Court held that officers must have a reasonable articulable suspicion that the area [subject to the protective sweep] harbors danger . . . As officers must still seize the weapons and are awaiting court orders, they must remain on scene for an extended period of time thus putting them in jeopardy from an unknown subject launching an attack from the house where firearms are likely present. It defies all logic that it would be legal for officers to walk through this home with the subject under arrest in a *Chrisman* search, for the limited purpose of seizing the weapons pursuant to the court order but would not be permitted to take the same action as an effort to ensure their own safety."[16] Given this, Scalcione argues that "the keyed answer that the protective sweep is not valid fails to address the weapon[s] seizure presented in the scenario in the first place, and is thus incorrect." Wojtowicz refers to *State v. Radel* and *State v. Terres*, *supra*,[17] and maintains that option c, The "loud bang coupled with the fact that a weapon was known to be inside 81 Beavertown Road provided the reasonable and articulable suspicion that the officers' safety was in danger," is the best response. Specifically, Wojtowicz presents, with respect to *Radel*, *supra*, that "a protective sweep was conducted for the purpose of officer safety because there were weapons and other persons 'potentially on the property.' When objective facts provide the police with reasonable and articulable suspicion that their lives may be placed in imminent danger by a person or persons inside the home, officers will be justified in entering the dwelling to carry out a protective sweep to safeguard their lives." Regarding *Terres*, *supra*, Wojtowicz notes that the court "decided that the appropriate standard for the justification of these protective sweeps is that there must be reasonable and articulable suspicion that a person or persons are present inside the home and post and imminent threat to officer safety." Wojtowicz concludes that based on the facts provided in [*Radel*, *supra*,] not knowing if the individual who entered the rear of [the home] was the same individual as Radel, the loud metallic bang

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[15] As noted in the question, the officer heard "a loud bang that was a metallic sound but *did* ***not*** *sound like a gunshot*" (emphasis added).

[16] Scalcione does not explain how "it would be legal for officers to walk through this home [at 81 Beavertown Road] with the subject under arrest in a *Chrisman* search" when the forfeiture order was for 103 Beavertown Road. It appears that Scalcione's argument contradicts itself throughout his appeal. As noted above, Scalcione acknowledges that the forfeiture order for 103 Beavertown Road is "defective" and "facially invalid" for 81 Beavertown Road. However, he relies on this "facially invalid" forfeiture order to support his claim that a search of 81 Beavertown Road would be appropriate.

[17] As noted by the court, "The two consolidated appeals before us present different scenarios. In both cases, police officers, armed with arrest warrants, apprehended the suspects outside of homes -- defendant Christopher Radel as he carried laundry to his car parked in his driveway, and Tyler Fuller as he was brought to the ground on the front porch of defendant Keith Terres's mobile home from which he had fled. The police conducted protective sweeps of the homes based on claims of officer safety and, though discovering no one inside the dwellings, observed in plain view weapons in both homes, and also drugs in Radel's home . . . Based on our review of the different factual scenarios presented in *Radel* and *Terres*, we now uphold the conclusions reached by the Appellate Division in both cases." *Id.* at 477.

in the rear of the house, the knowledge of Radel owning firearms, two vehicles parked in the driveway, the obstructed view into the residence, the order directed to retrieve the firearms and the factors under [*Terres*, *supra*], therefore under relevant NJ case law I believed that based on the totality of the circumstances officers had reasonable and articulable suspicion that their lives may be placed in imminent danger by a person or persons inside the home who could launch an attack on the offices and the protective sweep of [the home] was justified." It is noted that this question is based on the fact pattern presented in *Radel*, *supra*. The court in *Radel*, *supra,* indicated that this issue "is one of first impression. We must determine whether the police have a right to conduct a protective sweep of a home when an arrest is made outside of the home and, if so, the requisite justification for a warrantless entry and protective sweep." *Id.* at 493. The court further noted that "some factors that may be considered in determining whether a protective sweep is justified when an arrest is made outside the home are (1) whether the police have information that others are in the home with access to weapons and a potential reason to use them or otherwise pose a dangerous threat; (2) the imminence of any potential threat; (3) the proximity of the arrest to the home; (4) whether the suspect was secured or resisted arrest and prolonged the police presence at the scene; and (5) any other relevant circumstances." *Id.* at 501. Specifically with respect to *Radel*, *supra,* the court found:

> No crisis arose at the scene; the operation went according to plan. The police could have escorted Radel off the property, placed him in a patrol car, and transported him to headquarters; secured the perimeter of the property; and secured a search warrant. Instead, Sergeant Prall directed three officers to conduct a protective sweep of the house, despite the absence of any discernible exigency. The police had no information that another person was either in the house or posed a danger. Sergeant B. Prall saw someone wearing a blue jacket enter the rear door of the house; but Radel, wearing a blue jacket, walked out the front door ten minutes later. The blue-jacketed person was apparently the same person – Radel . . . Sergeant B. Prall heard a loud metallic sound in the backyard but did not suggest that the sound indicated a gunshot. Presumably, an experienced police officer, like Sergeant B. Prall, can recognize the sound of gunfire . . . The State's supposition that some unknown person in Radel's house could have launched a surprise attack from the front or back door or fired a weapon from the window constituted no more than an 'inchoate and unparticularized suspicion or 'hunch' -- not 'specific and articulable facts,' as required by *Buie*. [citation omitted]. *Id.* at 502-503

Thus, the court determined that a protective search was not justified under these circumstances. *Id.* at 506. Accordingly, the question is correct as keyed.

Question 44 refers to Kenneth J. Peak, *et al.*, *Managing and Leading Today's Police* (4th ed. 2018), and indicates that a critical incident has occurred in your jurisdiction, which requires the use of the incident command system (ICS). ICS involves specific sections which have different responsibilities during an emergency situation.

Candidates are provided with four statements and required to determine which, according to the text, the operations section is responsible for. The keyed response, option b, does not include statement I, "Disseminating intelligence to the incident commander," and statement IV, "Maintaining status of resources assigned to the incident." Velazquez argues that "while these options are clearly listed in the text during the 'planning section' portion of the text, it is implied that that these actions are being done during operations and passed out to planning as resources become available." Velazquez refers to the text which provides:

> The most critical period of time for controlling a crisis is those initial moments when responders arrive at the scene. They must quickly contain the situation, analyze the extent of the crisis, request additional resources and special teams if needed, and communicate available information and intelligence to headquarters. Their initial actions provide a vital link to the total police response, and will often determine its outcome.

Velazquez asserts that "You can see that resources and intelligence are being referred to as early as the initial response . . . The initial response will put out information and keep track of those resources. That intel and those deployed resources would be maintained by the operations section, until a determination is made as to how involved the incident is." Velazquez argues that "the answer that is keyed correct is based on the words that are used to describe the ideal responsibilities of each section. It is my opinion that it does not account for the implication that this information is taken (as stated and supported in the text) by the initial responders and then passed along as the UC[18] is established. For this reason, I believe that is MOST CORRECT to say that the operations section does in fact maintain status of resources and disseminate intelligence." As such, Velazquez argues, in essence, that in the practical application of the system, the responsibilities of these different sections are not neatly categorized and performed as described in the text. However, as discussed in the text, under the section, "Preparing for the Worst: A National Incident Management System," the National Incident Management System (NIMS) "provides a consistent nationwide [ICS] approach for federal state, and local governments to work effectively together to prepare for, prevent, respond to, and recover from disasters and domestic incidents . . . By adopting a national consistent response protocol, agencies at all levels have a standard set of procedures when responding to an event." The text continues, in pertinent part:

> A key strength of ICS is its unified command component, which is composed of four sections: operations, planning, logistics, and finance. . . The operations section is responsible for all activities focused on reduction of the immediate hazard, saving lives and property, establishing control of the situation, and restoring normal operations . . . The planning section collects, evaluates, and disseminates incident situation information and intelligence to the incident commander or unified command, prepares

[18] Velazquez does not indicate whether he is referring to "Unified Command" or this is a typographical error and he is referring to "Incident Command."

> status reports, displays situation information, and maintains status of resources assigned to the incident. It basically records and evaluates the actions taken at the scene.

As noted in the text, ICS is a standardized approach and "may be simple in some cases depending on the event, while in other cases it may be large and complex." In this regard, the text notes, "*The following discussion is limited* to some of its primary components with primary emphasis placed on the Incident Command System (ICS)" (emphasis added). Furthermore, the question specifically refers to the text and asks candidates, "***According to Peak, et al.,*** the operations section is responsible for which of these?" (emphasis added). As such, the focus of the question was on the definition as provided in the text. Accordingly, the question is correct as keyed.

Question 45 refers to Peak, *et al.*, *supra*, and indicates:

> A serious incident is taking place in your jurisdiction. In resolving the incident, there are several functions that must be worked on simultaneously. The incident command system (ICS) is being utilized to effectively respond to this situation, and as the highest-ranking officer at the scene, you have taken on the role of incident commander. Currently, you are concerned with all the support requirements needed to facilitate effective incident management. This includes functions involving facilities, transportation, supplies, equipment maintenance and fuel, food services, communications and technology support, and emergency medical services.

The question asks, based on the subject text, for the section of the unified command component of ICS that you are currently dealing with. The keyed response is option c, Logistics. Velazquez maintains that option b, Planning, is the best response. In this regard, he argues that "the text does not speak about the incident commander during the logistics section . . . The text states[,] 'The logistics section is responsible for all support requirements needed to facilitate effective incident management.' The text goes on to describe how the amount of logistical support needed will be influenced by the magnitude of the event. This implies that the decisions on what support is needed is made by the incident commander or unified command based on the information they are given about the incident." Velazquez argues that the text discusses the incident commander in "the planning section . . . [The text] states that the planning section 'collects, evaluates, disseminates incident situation information and intelligence to the incident commander or unified command. The text continues . . .[,] 'the planning section continuously monitors the situation and makes recommendations to the incident commander about incident requirements.' Those recommendations are based on the intelligence collected by the 'planning section' . . . and the incident commander will make decisions as to what resources are needed at this time . . . This implies that the incident commander would be 'dealing' with the decisions about other sections, in this case the logistics section, during the planning section." Velazquez again argues, in essence, that in practical application, the responsibilities of the different sections of the unified

command cannot be precisely categorized and executed as presented in the text. However, as discussed further above, the text only provides a limited discussion of the primary components. In addition, the question specifically refers to the text and specifically asks candidates, "***Based on the text by Peak, et al.,*** which section of the unified command component of ICS are you currently dealing with?" (emphasis added). Again, the focus of this question was on the definition as presented in the text. As such, the question is correct as keyed.

For question 52, since Mullahey selected the correct response, his appeal of this item is moot.

Question 62 refers to Peak, *et al.*, *supra*, and indicates that you are evaluating your subordinates as part of your department's annual performance appraisal. When completing the evaluation for Sergeant Stott, you think of his leadership abilities, which you find to be exemplary. He does an excellent job in providing appropriate guidance to his officers and is skilled in training them on a variety of topics. However, Sergeant Stott makes mistakes on his reports and has lost his temper a couple of times when dealing with the public this year. Because you are so impressed with his leadership abilities, which you value highly, your judgment is clouded and you rate him highly on all dimensions, even when it is not warranted. The question asks, based on the subject text, for the rater error you committed. The keyed response is option c, "Halo effect."[19] Coleman and Velazquez, who selected option d, "Rater bias,"[20] refer to the text and argue that the definitions of these two types of rater error overlap. They maintain that "question #62 was written in a way that led [them] to believe that the focus was on the Lieutenant's values and not a singular function done by the Sergeant." Specifically, Coleman presents that "From how the book reads, the halo effect is when a rater evaluates a subordinate as high or low on all rating dimensions because of one dimension. This is compared to rater bias, where the rater's values and prejudices can negatively or positively affect the rating on all dimensions . . . In the book, under the halo effect, there is nothing about the rater's values affecting the rating. The halo effect also deals with only one dimension or action, and the fact pattern in question 62 deals

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[19] The text, under the heading, "Rater Error," provides:

> The halo effect occurs when a rater evaluates a subordinate high or low on all rating dimensions because of one dimension. For example, a sergeant may believe that patrol officers should write a generous number of traffic citations. Officers who tend to write more citations receive higher ratings in all categories, while those who do not write above average numbers of tickets receive only average or below average ratings. In this example, the sergeant allows the number of citations written by officers to cloud his or her judgment about other rating dimensions.

[20] The text, under the heading, "Rater Error," further provides:

> Rater bias refers to rater's values or prejudices distorting their ratings. People have all sorts of biases that can affect ratings: religious, race, gender, appearance, existence of a disability, prior employment history, or membership in civic clubs and organizations. Biases can help or detract from an officer's ratings, or in some cases, increase an officer's ratings.

with more than one value and dimension. Rater bias, however clearly states that a rater's values or prejudices distort their ratings." Velazquez maintains that the text implies that "the distinction between [h]alo [e]ffect and rater bias is that the [h]alo effect focuses on a singular action that an officer takes in which the rater thinks is an important function, which leads to a higher or lower rating, while the rater bias is a value or prejudice held by the rater, that the rater observes in the subordinate, and it affects the ratings given by the rater . . . The fact that the Sergeant is described as excelling in multiple areas appears to be an additional attribute affecting the supervisor's decision. It also detracts from the [h]alo effect as being the most correct answer as the text clearly states that a subordinate's rating will be high or low on all dimensions because of one dimension." Velazquez also notes that the question indicates that the Lieutenant values the Sergeant's leadership abilities and argue that "the text makes it very clear that there are many definitions of leadership and that there are multiple skills and traits that affect a person's leadership." Both Coleman and Velazquez ignore the key factor in the definitions of "rater bias" and "halo effect" as presented in the text. In this regard, the text clearly indicates that "rater bias" is related to non-job performance based considerations whereas the "halo effect" is related to job performance based dimensions. Specifically, the text defines "rater bias," as noted above, as pertaining to the "rater's values or prejudices" and provides the following examples, "religious, race, gender, appearance, existence of a disability, prior employment history, or membership in civic clubs and organizations." The question states, as noted above, "because [the rater] are so impressed with [the Sergeant's] leadership abilities," "[the rater] rate[s] him highly on all dimensions, even when it is not warranted." Thus, the question unambiguously indicates that a job performance dimension, *i.e.*, leadership abilities, has clouded the rater's judgment regarding all other job performance dimensions. The question does not indicate that the rater's preconceptions or predispositions regarding non-performance based considerations, *e.g.*, religion, race, gender, has affected the Sergeant's performance appraisal. As such, the scenario presented in the question matches the definition of "halo effect" as provided in the text and thus, the question is correct as keyed.

CONCLUSION

A thorough review of 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 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 20TH DAY OF MARCH, 2024

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