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STATE OF NEW JERSEY

In the Matter of Albert Herbert, *et al.*, Police Sergeant, various jurisdictions	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2022-2514, *et al.*	:	Examination Appeal

ISSUED: August 24, 2022

Albert Herbert (PM4505C), Atlantic City; Jerome Bunin and Gabriel Megale (PM4506C), Bayonne; Michael Forte (PM4509C), Belleville; Joseph Cevallos (PM4514C), Bloomfield; Brian Farnkopf, Bryan Murphy and Michael Zolezi (PM4518C), Brick; Kyle Hess (PM4529C), Cinnaminson; Ilmi Bojkovic (PM4536C), Dover; Richard Hernandez (PM4542C), Elizabeth; Dylan Coladonato (PM4550C), Freehold; Roman Babyak, Sean Dorney, Joseph Iucolino, Justin Mura, Kevin Perkins and Matthew Quarino (PM4556C), Hamilton; Ryan Houghton and Joseph Mezzina (PM4562C), Hoboken; Lydiana Diaz (PM4569C), Jersey City; Nicole Cain, Michal Gontarczuk and John Grimm (PM4571C), Kearny; Michael Hein, Scott Keefe and Anthony Sarno (PM4573C), Lacey; Daniel Gould (PM4585C), Long Branch; Donna Gonzalez (PM4592C), Marlboro; Raymond Bradley and Kurt Saettler (PM4593C), Middle Township; Jason Caruso and Eric Van Schaak (PM4594C), Middletown; Ryan Daughton, Daniel Faller, Elfi Martinez and Robert Runof (PM4604C), New Brunswick; Juan Cosme and Jamie Rivera (PM4605C), Newark; Richard Wilent (PM4613C), Ocean City; Jimmy Michel (PM4617C), Parsippany-Troy Hills; Sebastian Gomez (PM4619C), Paterson; Michael Gamad (PM4626C), Pleasantville; Kyle Scarpa (PM4632C), Ridgewood; Anthony Bachmann (PM4638C), Rutherford; Chrystina Burt (PM4641C), Sayreville; Jose Martinez, Sebastian Montes and Harold Polo (PM4659C), Union City; Joseph Peterson (PM4661C), Union Township; and Andrew Kondracki, Perry Penna and Thomas Ratajczak (PM4678C), Woodbridge; appeal the examination for Police Sergeant (various jurisdictions). These appeals have been consolidated due to common issues presented by the appellants.

This was a two-part examination, which was administered on February 26, 2022, consisting of a video-based portion, items 1 through 20, and a multiple-choice portion, items 21 through 85. The test was worth 80 percent of the final average and seniority was worth the remaining 20 percent. As noted in the 2022 Police Sergeant Orientation Guide (Orientation Guide), which was available on the Civil Service Commission's (Commission) website, the examination content was based on the most recent job analysis verification which includes descriptions of the duties performed by incumbents and identifies the knowledge, skill and abilities (KSAs) that are necessary to perform the duties of a Police Sergeant. As part of this verification process, information about the job was gathered through interviews and surveys of on-the-job activities of incumbent Police Sergeants throughout the State. As a result of this process, critical KSAs were identified and considered for inclusion on the exam.

Michel contends that at review, his ability to take notes on exam items was curtailed and he was not permitted to review his answer sheet. 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. It is noted that 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:

In the video-based portion of the examination, candidates were presented with a scenario, "Eviction." The instructions for this portion indicated that candidates were to assume the role of a Police Sergeant. The scenario was divided into segments, which presented information and circumstances that candidates were to consider before responding to questions in their test booklet.

The first video segment for the scenario indicated that you are dispatched to assist an officer taking a report that a family has been locked out of their apartment by a landlord. As you arrive, the individual who made the call, Monica Johnson, tells you that she has been working all day and just picked up her children from their after-school programs but when she got home, the keys to the front door and side door did not work. She further tells you that she texted her landlord and he initially did not respond but then sent the following messages, "I changed the locks.

No more free rides. I have a crew coming to clear your stuff out tomorrow." She asks you, "he can't just throw us out, right?"

For questions 1 through 5, candidates were presented with five potential actions and were instructed, based on the information presented in the scenario, and considering New Jersey Attorney General Directive No. 2021-2 (Protecting Tenants from Illegal Evictions) and *N.J.S.A.* 2C:33-11.1 (Certain actions relevant to evictions, disorderly persons offense), to decide if the action should or should not be taken, at this point, by law enforcement personnel in response to this incident.

Question 2 refers to the action, "Identify who is evicting the occupant or attempting to do so." The keyed response is option a, "At this point, this action should be taken in response to this incident." Montes contends that "identification of the landlord at this particular point in the video scenario is not essential. Firstly, the immediate issue that needs to be dealt with is a woman and children displaced from their home." Montes argues that the scenario "shows that the landlord has been in contact with the tenant, and based on the information presented, it was clear that he/she had no intention of restoring access to the apartment. Identifying the landlord at this point in the video scenario would, contrary to Section 33-11.1, delay the entry into the premises." Directive No. 2021-2, in the section, "Law Enforcement Response to Reports of Illegal Eviction,"[1] provides, in pertinent part:

> ***Step 1: Determine Facts Regarding Eviction or Threatened Eviction***. As soon as officers learn of a potential violation of Section 33-11.1, they should attempt to determine the basic facts regarding the eviction or threatened eviction. In particular, officers should seek answers to the following questions: …
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> - *Who is evicting the occupant or attempting to do so?* Typically, the evicting party will be the property owner or landlord. In some cases, the eviction or attempted eviction will be

[1] As noted in Directive 2021-2:

> This Directive outlines a four-step process that law enforcement officers must follow when responding to a report of an illegal eviction. As a first step, when officers arrive at the scene, they should attempt to determine the basic facts regarding the eviction or threatened eviction. If the officers identify potential violations of Section 33-11.1, they should promptly issue warnings to the responsible parties. Next, if the officers determine that a tenant was evicted illegally, then they should ensure that the tenant is immediately restored to their residence. Finally, if the warned individuals refuse to comply with requirements of Section 33-11.1, then the officers should promptly charge those individuals by complaint-summons. By following these simple steps, law enforcement officers can ensure compliance with the law and protect tenants from illegal evictions.

> performed by an agent of the landlord, such as employees of a property management company.

As noted above, the scenario indicates that you have just arrived on the scene and thus, you are in the process of assessing the situation and establishing the basic facts. In this regard, although Monica Johnson has told you that she exchanged text messages with her landlord, you would need to verify the accuracy of this information, including who the individual she allegedly texted is, *e.g.*, landlord, property owner, property management company or other. Thus, the question is correct as keyed.

Question 3 refers to the action, "Determine whether Monica Johnson has in fact been denied access to her residence and is no longer able to reside at the property." The keyed response is option a, "At this point, this action should be taken in response to this incident." Burt and Houghton maintain that option b, "At this point, this action should not be taken in response to this incident," is the best response. Specifically, Burt, who misremembered the question as "ask the woman why she is locked out of her residence," argues that "this information was already provided by the victim" and "to require an officer to obtain information that was clearly provided would create an additional burden on a citizen that was already negatively impacted by the incident described." Houghton contends that Monica's statement "alone without any further information would have led a reasonable police officer to verify if Monica was actually unable to access her property." However, Houghton asserts that Monica's statement in addition to the text message from the landlord, would make it "completely unreasonable to request Monica's keys from her to actually attempt to open the door…" Directive No. 2021-2, Step 1, as noted above, provides, in pertinent part:

> - *Is the occupant no longer able to access their property?* The officers should determine whether the occupant has in fact been denied access to their residence and is no longer able to reside at the property.

As indicated previously, the scenario indicates that you have just arrived on the scene and as such, you are in the process of assessing the situation and establishing the basic facts. While Monica Johnson claims that she is unable to unlock the doors (and claims that she exchanged text messages with the landlord), you do not have anything further at this point than what she has told you. Thus, as a "reasonable police officer" and pursuant to Directive No. 2021-2, you need to verify the accuracy of this information. Accordingly, the question is correct as keyed.

Question 4 refers to the action, "Charge the landlord with a disorderly persons offense in violation of *N.J.S.A.* 2C:33-11.1." The keyed response is option b, "At this point, this action should not be taken in response to this incident." Michel contends that option a, "At this point, this action should be taken in response to this incident," is the best response. In this regard, Michel asserts that "based on the

information in the scenario, officers have already determined that the landlord has violated [*N.J.S.A.*] 2C:33-11.1 . . . Then the officers should have instructed the landlord to immediately cease their illegal conduct and warn them that failure to do so will result in charges. The term 'unreasonable time' gave the inference that the landlord was not immediately taking steps shows that Step 4, to issue a complaint-summons to the landlord." Murphy contends, "the question verbiage stated 'Should' which would allow this action to be take[n] by officers. The verbiage would have been better understood if it stated 'Shall' or 'Shall Not.'" It is noted that Murphy does not explain how "shall" or "shall not" would have offered greater clarity especially given that "shall" or "shall not" is not used in the four-step process outlined in the Directive. The four-step process pursuant to Directive No. 2021-2 provides, in pertinent part:

> ***Step 2: Issue Warnings to Responsible Persons***. Based on the information gathered during Step 1, officers should determine whether any person has violated or appears likely to violate Section 33-11.1, either by illegally evicting the occupant (including by forcible entry and detainer) or refusing to allow an illegally evicted occupant to immediately reenter the premises. If a violation has occurred or appears likely to occur, then the officers should instruct the relevant persons to immediately cease their illegal conduct and warn them that failure to do so will result in charges . . .

As such, if officers determine that Section 33-11.1 has been violated or likely to be violated, the next step is to provide a warning. Directive 2021-2 further provides, "***Step 4: If Warnings Goes Unheeded, Issue Complaint-Summons***. If officers issue a warning to an individual during Step 2 and the person nonetheless violates Section 33-11.1, then the officers should promptly charge that person by complaint-summons." Thus, at this point, a warning should be given before charges are filed. It is noted that the term, "unreasonable time," does not appear in the scenario, the subject item or Directive 2021-2. Thus, the question is correct as keyed.

Question 5 refers to the action, "Provide legal advice to Monica Johnson to assist her in gaining access to the property." The keyed response is option b, "At this point, this action should not be taken in response to this incident."[2] Since

[2] Directive No. 2021-2 provides, in pertinent part, under Step 1, as indicated above:

> In seeking answers to these questions, officers should be mindful of their role during Step 1 of this process: to ascertain whether an illegal eviction has occurred, and not to provide legal advice to tenants or other parties. If officers believe that a person requires legal advice about their housing status but cannot afford private counsel, officers should encourage the individual to contact Legal Services of New Jersey at 888-LSNJ-LAW. In addition, the New Jersey Department of Community Affairs has posted a reference guide on the rights and responsibilities of residential landlords and tenants, which is

Houghton selected the correct response, his appeal of this item is moot. Bunin, Forte, Gamad, Iucolino, Perkins, Rivera, Scarpa and Van Schaack contend that option a, "At this point, this action should be taken in response to this incident," is the best response. Specifically, Bunin refers to the "last paragraph of 'Step 1' states[,] 'If a person requires legal advice about their housing status but cannot afford private counsel, officers should encourage the individual to contact Legal Services of New Jersey at 888-LSNJ-LAW' – this mentioned section can be interpreted as providing legal advice to assist gaining access to property – rectifying the scenario provided – instructions prior to answering questions regarding illegal evictions stated: 'Considering Directive No. 2021-2' and did not state to solely rely on the directive to answer the questions." Forte refers to the Attorney General's "Notice to Law Enforcement Concerning New Unlawful Eviction Law (July 20, 2009)[3] and argues that the portion that provides, "THIS LAW DOES NOT: . . . Require law enforcement to determine who should have lawful possession when both parties claim they should be allowed entry (in such cases, the parties should be directed to the Superior Court – Special Civil Part, which handles landlord/tenant disputes, or to the police department or clerk's office so that they can file a citizen's complaint for a disorderly persons offense in violation of *N.J.S.A.* 2C:33-11.1) . . ." means that "law enforcement officers would be required to provide legal advice." Gamad contends that "it's my duty to advise the victim of their legal options and actions that I'm going to take to resolve the situation. Doing so is in fact . . . legal advice, as I informed her of the law and legal options to gain access back to the residence. The question was not clear on what was meant by giving legal advice on gain[ing] access to the residence." Iucolino argues that "for officers on the scene at such a call, this would require an explanation of the law to both the evicting party and more specific to the question asked on the promotional test, the evicted party. Explanations of 2C:33-11.1 would includ[e] advising the evicted party that 'legal occupants unlawfully displaced shall be entitled without delay to re[e]nter and re occupy the premises, and shall not be considered trespassers or chargeable with any offence, provided that a law enforcement officer is present at the time of reentry.' Advising someone of the verbiage of the law . . . would be considered providing legal advice which is a subjective term in [of] itself." Perkins refers to Webster's Dictionary for the definitions of "legal" and "advice" and avers, "I feel when a person who has been illegally evicted from her place of residence. If I advise her that she, 'shall be entitled without delay to reenter and reoccupy the premises . . .' I would be providing legal advice." Rivera maintains that "if I were to tell the tenant how they can go about regaining entry into their apartment that would constitute legal advice . . . I believe that this question is a game of semantics." Scarpa and Van Schaack

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available at https://www.nj.gov/dca/divisions/codes/offices/landlord_tenant_information.html.

[3] This notice provides that it "supersedes the notice by Attorney General Zulima Farber, dated June 5, 2006, regarding P.L. 2005, c. 319, (codified at *N.J.S.A.* 2C:33-11.1). The law protects tenants from becoming the victims of illegal evictions by those who do not follow the required legal process for eviction." However, as noted previously, this question refers specifically to Directive No. 2021-2.

contend that "encouraging someone to contact a lawyer is legal advice." As noted above, the instructions for this section clearly directed candidates to consider Directive 2021-2 which provides, as indicated previously, "***not to provide legal advice*** to tenants or other parties." In the sentence immediately following, the Directive indicates, "If officers believe that a person requires legal advice about their housing status but cannot afford private counsel, officers should encourage the individual to contact Legal Services of New Jersey" and/or direct the person to the New Jersey Department of Community Affairs' reference guide." It is not clear from the appellants' submissions how they determined that these two sentences provided contradictory directions. Moreover, it is noted that the question did not require candidates to determine whether certain statements constituted "legal advice."[4] Rather, the question only required candidates to refer to Directive 2021-2 which clearly states that officers are "***not to provide legal advice*** to tenants or other parties." As such, the appellants' arguments are misplaced.

In the second video segment for the scenario, Johnson tells you that she texted her landlord and told him she was talking with the police. She indicates that the landlord "just texted back that he knows his rights and there is no way he's letting my family back into the apartment. What's going to happen to all of our stuff? What do we do now?"

For questions 6 through 9, candidates were instructed that after listening to what was reported to you as the Police Sergeant responding to the scene, and considering the New Jersey Attorney General Directive No. 2021-2 (Protecting Tenants from Illegal Evictions), you are considering issuing a warning to the landlord for a violation of *N.J.S.A.* 2C:33-11.1. Candidates were presented with four statements and were required to decide if the statement were true or false with regard to the details of the incident.

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[4] In this regard, it is not clear from the appellants' submissions what criteria they used in determining what constitutes "legal advice." Although Directive 2021-2 does not define the term "legal advice," such a definition was not necessary to answer the question. However, for informational purposes, it is noted that legal information that is publicly available, *e.g.*, on the internet or in printed materials, and is general in nature would not be considered legal advice. As such, informing an individual of what a particular statute states or providing the telephone number for a legal services organization or directing them to a website for information would not be considered legal advice. However, interpreting some aspect of the law based on the individual's specific factual circumstances and recommending a specific course of action; and/or assisting the individual in completing any necessary legal documents would be considered legal advice. *See e.g.*, https://www.courts.ca.gov/documents/mayihelpyou.pdf; https://www.txcourts.gov/media/1220087/legalinformationvslegaladviceguidelines.pdf; and https://www.findlaw.com/hirealawyer/do-you-need-a-lawyer/what-is-legal-advice.html. Moreover, it is noted that the practice of law "also encompasses offering legal advice. *See In re Estate of Margow*, 77 *N.J.* 316, 328 (1978) (finding unauthorized practice of law when offering legal advice to testatrix and actively participating in the drafting of a will)." *See Baron v. Karmin Paralegal Services*, Docket No. A-1025-18T1 (App. Div. November 21, 2019). Thus, only a licensed attorney may provide legal advice. *See e.g.*, *N.J.S.A.* 2C:21-22 and *N.J. Ct. R.* 1:21-1.

Question 6 refers to the statement, "A warning can be issued to a landlord who has violated or appears likely to violate *N.J.S.A.* 2C:33-11.1." The keyed response is option a, "This is a true statement." Gonzalez and Montes maintain that option b, "This is a false statement," is the best response. In this regard, Gonzalez refers to Directive No. 2021-2 and *N.J.S.A.* 2C:33-11.1 and contends that any person who engages in prohibited conduct after being warned "CAN BE CHARGED WITH A DISORDERLY PERSONS OFFENSE." Montes asserts that "the way the statement is worded in the question, more specifically, using the word 'can,' implies that the officer has a choice in whether or not to provide a warning . . . This is contrary to the directive which reads that a warning SHOULD be issued . . ." The focus of the question is on whether a warning is permissible or not permissible where a landlord has violated or appears likely to violate *N.J.S.A.* 2C:33-11.1. As such, the use of "should" or "can" is not at issue in this item. As noted previously, Step 2 provides, in pertinent part, "If a violation has occurred or appears likely to occur, then the officers should instruct the relevant persons to immediately cease their illegal conduct and warn them that failure to do so will result in charges." Accordingly, the question is correct as keyed.

Question 7 refers to the statement, "A minimum of four (4) hours is required following the warning to allow for a good faith effort by the landlord to restore the occupants to their residence before a complaint can be filed." The keyed response is option b, "This is a false statement." Hess contends that "the fact pattern presented in this question lacks substance and the question is flawed, which does not allow the testing aspirant to select a correct answer . . . The question presented failed to clearly state if the tenant was actually illegally evicted from the home or lawfully evicted from the home with a court order." Hess adds that the fact pattern fails to indicate the outcome of steps 1 through 4 and argues that "due to the fact that the question lacked a substantial amount of content it did not allow the test taking candidate to answer this question properly therefore this question should be omitted." The focus of the question is whether Directive 2021-12 requires a certain amount of time, *i.e.*, four hours, after providing a warning to file a complaint. In this regard, Directive 2021-2, "Step 4: If Warning Goes Unheeded, Issue Complaint-Summons" provides, in pertinent part, "The officers need not wait a specified amount of time after issuing the warning before charging the person; as soon as the warned individual indicates their refusal to comply with the law, the officer may issue the complaint-summons." As such, the question is correct as keyed.

Question 9 refers to the statement, "The landlord must be physically present at the premises to be responsible for the violation of *N.J.S.A.* 2C:33-11.1." The keyed response is option b, "This is a false statement." Dorney argues that the question "didn't establish that a warning had been issued to the landlord which is a requirement of the statute if a complaint summons is to be issue[d] to the landlord . . . If a warning hasn't been issued to the landlord, it is irrelevant whether the landlord is on the scene or not because a complaint summons can't be issued at the current time." The focus of the question is whether Directive 2021-2 requires that

the landlord be physically present to be responsible for the violation. In this regard, Directive 2021-2, "Step 2: Issue Warnings to Responsible Persons" provides, in pertinent part, "In determining which persons should receive a warning, officers should evaluate who appears to be responsible for the illegal conduct and who has the authority to restore the occupant to the premises. An individual need not be physically present at the premises to be responsible for the violation, provided that the individual directed an agent to perform the illegal eviction or has the authority to allow the occupant to reenter the premises." As such, the question is correct as keyed.

In the third video segment for the scenario, the responding officer tells you that he noticed that Johnson's three children are "pretty upset about today's traumatic event" and in speaking with Johnson and the children, he discovered that two of her children attend the same elementary school in town while her older child attends a charter high school in a different town nearby. The responding officer then asks if you would be able to clarify some points about the Statewide "Handle With Care Program."

For questions 11 through 13, the instructions indicated that after listening to what was reported to you as the Police Sergeant responding to the scene, you are clarifying the New Jersey Attorney General Directive No. 2020-09 Establishing the Statewide "Handle With Care Program" for the officer. Candidates were presented with three statements and were to decide if the statement is true or false according to the Directive.

Question 12 refers to the statement, "The responding law enforcement agency shall **not** complete a Handle With Care Notice for a child attending a school outside of that agency's area of responsibility." The keyed response is option b, "This is a false statement." It is noted that Dorney misremembered the question as, "The responding law enforcement agency should not complete a Handle With Care Notice for schools outside of their agency" and the keyed response as, "this action was not appropriate." In this regard, Dorney argues that the question "doesn't take into consideration the part of the directive which requires the responding law enforcement agency to send the notice to the local law enforcement agency where an affected child's school is located. The question fails to specify whether the Handle With Care Notice is being sent to the school in the outside agency or the local police department of the outside agency." Directive No. 2020-09 provides, in pertinent part:

> B. Transfer of Notice to Point of Contact at School
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> Once the HWC Notice is complete, the law enforcement officer must immediately send the HWC Notice to the appropriate Point of Contact at the child's school. In order to determine the Point of Contact, the agency shall contact and coordinate with the schools within their respective areas of responsibility (AOR).

> Some children may attend schools in areas outside the responding law enforcement agency's AOR. In such cases, the responding law enforcement officer shall still complete the HWC Notice and send it immediately to the local law enforcement agency where an affected child's school is located. The receiving local law enforcement agency shall be responsible for sending the completed HWC Notice to the school's appropriate Point of Contact, but shall not share with the school any related incident report.

Accordingly, the question is correct as keyed.

Question 13 refers to the statement, "A Handle With Care Notice shall **not** be completed for children attending private or charter schools." The keyed response is option b, "This is a false statement." It is noted that Dorney misremembered the question as "ask[ing] if the responding law enforcement agency should not complete a Handle With Care Notice for charter or private schools" and the keyed response as, "this action was not appropriate." In this regard, Dorney argues that the question "doesn't take into consideration the part of the directive which requires the responding law enforcement agency to send the notice to the local law enforcement agency where an affected child's school is located . . . [T]he question fails to specify whether the Handle With Care Notice is being sent to the school in the outside agency or the local police department of the outside agency." Directive No. 2020-09 provides, in pertinent part, "to the extent practicable, HWC notices shall be completed regardless of whether the child attends a public school or a private school." As such, the question is correct as keyed.

Question 14 asks, based on New Jersey Attorney General Directive No. 2020-09 Establishing the Statewide "Handle With Care Program," for the true statement when considering the need for a Handle With Care Notice for Monica Johnson's two elementary school-aged children. The keyed response is option b, "A Handle With Care Notice shall be completed for each child and both Handle With Care Notices shall be sent to the school." Saettler asserts that option a, "One Handle With Care Notice shall be completed, which includes both children, and the Handle With Care Notice shall be sent to the school," is equally correct. Saettler presents that Directive No. 2020-09 does not indicate that "each child must be placed on 'separate' handle with care forms, simply that the HWC Notice be completed for each child." Saettler notes that while the model form "only has space to put one child's information on," Directive No. 2020-09, in a footnote, provides, "Law enforcement agencies may use an existing form so long as it comports with the information collected on the Attorney General's HWC Notice, Form A, and does not include any details regarding the underlying incident." Saettler maintains that "assuming both children go to the same school, the point of contact will be receiving the same information whether it is one or separate Handle With Care Notices." It is noted that the Division of Test of Development and Analytics contacted Subject Matter Experts (SMEs) regarding this matter who noted that while most departments

attempt to use the model forms provided by Attorney General Guidelines or Directives, there are instances, when appropriate, in which a department will create their own form which is similar to the model form. The SMEs further noted that if a department utilized a form that allowed for more than one child, so long as they attend the same school, on a single Handle With Care Notice, this would not contradict or violate Directive No. 2020-09. As such, the SMEs concluded that both answers would be valid. Accordingly, the Division of Test Development and Analytics determined to double key this item to option a and option b prior to the lists being issued.

For questions 15 through 20, the instructions indicated that after listening to what was reported to you as the Police Sergeant responding to the scene, and considering the New Jersey Attorney General Directive No. 2020-09 Establishing the Statewide "Handle With Care Program," for the officer, you are determining what information needs to be included on a Handle With Care Notice. Candidates were presented with six statements and were to determine what information shall be included on a Handle With Care Notice.

Question 16 refers to "Name of child's parent/guardian." The keyed response is option b, "This information shall not be included on a Handle With Care Notice." Bojkovic argues that "the parent/guardian information is not essential to the Handle With Care Form, however, may is [*sic*] essential when further investigative measures commence . . . The correct answer should be A, essential." The instructions specifically indicate that "you are determining what information needs to be included on a Handle With Care Notice." In this regard, it is noted that Directive No. 2020-09 provides, in pertinent part, "to protect the privacy of affected children the HWC Notice shall *only* include the following information: the child's name, age, grade, school of enrollment, and the date and time of the incident." As such, the question is correct as keyed.

Question 19 refers to "Support services recommended for the child." The keyed response is option b, "This information shall not be included on a Handle With Care Notice." Wilent misremembers the question as asking "about [a] counselor being recommended for the student" and refers to Directive 2020-09 which provides, in part, "This notice allows educators to assess whether certain actions are appropriate, such as postponing tests, re-teaching lessons, forgoing disciplinary action for an incomplete homework assignment, or referring the child to the school counselor." However, the instructions specifically indicate that "you are determining what information needs to be included on a Handle With Care Notice." As noted above, Directive No. 2020-09 provides, in pertinent part, "to protect the privacy of affected children the HWC Notice shall *only* include the following information: the child's name, age, grade, school of enrollment, and the date and time of the incident." Thus, a law enforcement officer would not recommend support services on the HWC Notice. Rather, as noted in the Directive, the notice allows educators to assess whether the child should be referred to support services, *e.g.*, the school counselor. Thus, the question is correct as keyed.

Question 20 refers to "A summary of the incident." The keyed response is option b, "This information shall not be included on a Handle With Care Notice." Bradley presents, "Incident summary – as per the AG Guideline the Incident Date [and] time are a required field. The question was a brief incident summary, which includes the time [and] date which is a required field." Directive No. 2020-09 provides, "To protect the privacy of affected children, the HWC Notice shall only include the following information: the child's name, age, grade, school of enrollment, and date and time of the incident . . . To protect the parties involved, *the notice shall never include details of the incident*" (emphasis added). Accordingly, the question is correct as keyed.

Question 21 indicates that an officer is considering whether to arrest an individual for a disorderly persons offense and asks you whether probable cause must exist and whether the offense must have occurred in the officer's presence. The question asks for the true statement. The keyed response is option c, "Unless otherwise stated in the specific statute, probable cause alone is an insufficient basis for an arrest for a disorderly persons offense." Diaz maintains that option b, "Probable cause, which alone is sufficient for an arrest, may be supplied by others who witnessed the disorderly persons offense," is correct. Diaz cites the following from the Model Civil Jury Charge for False Imprisonment, 3.20E Arrest Without Warrant for Disorderly Person's Offense or Breach of Peace:[5]

> **E. ARREST WITHOUT WARRANT FOR DISORDERLY PERSON'S OFFENSE OR BREACH OF PEACE**
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> It is the law of this State that a person -- whether a private citizen or a police officer -- may arrest another person without a warrant if the arrested person has *[committed what is called a disorderly person's offense] [violated a municipal ordinance involving a breach of the peace]* in the arresting person's presence . . .

Diaz argues that "a private person is and can be construed as being 'someone else' in answer choice B given. The same holds true for arrest of a DP for Shoplifting (2[C]:20-11) that does not need to occur or does occur within the officer[']s presence but requires probable cause. It can be witnessed by someone else such as a loss prevention officer and[/]or an employee of the store, or an innocent bystander.

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[5] *See* https://www.njcourts.gov/attorneys/civilcharges.html. It is noted that this jury charge does not support option b as the jury charge clearly states that a police officer may arrest another person, who has committed a disorderly person's offense, without a warrant if it occurred "in the arresting person's presence," *i.e.*, the officer. In other words, the jury charge does not state that if a private citizen observes an individual committing a disorderly person's offense then a police officer may arrest the individual.

Same goes for Theft of Library Materials (2C:20-12) . . ." As noted by the court in *State v. Morse*, 54 *N.J.* 32 (1969), "The word 'presence sums up the requirement that the officer know of the event by the use of his senses.' *State v. Smith,* 37 *N.J.* 481, 495 (1962). Although in the case of a 'crime,' an officer may arrest upon probable cause supplied by others, he cannot arrest for an offense of a lower grade unless he himself knows of it." *Id.* at 35. Thus, for an "offense of a lower grade," *i.e.*, a disorderly persons offense, it must be committed in the officer's presence. Although Diaz notes that there are legislative exceptions to the "in presence requirement," this is not indicated in option b. As such, option b is not the best response. Sarno, who selected option a, "The existence of probable cause alone is sufficient for the arrest of an individual for all disorderly persons offenses," asserts that the keyed response "fails to address the fact that if probable cause is found during the course of an investigation for a disorderly persons offense and establishes probable cause to charge it will allow for a non-custodial arrest through the use of a special complaint summonses (as listed in NJ Court Rules)[6] although it did not occur directly in the officer[']s presence. For example, video surveil[l]ance does not satisfy the in-person requirement, but allows for charging on a special complaint once probable cause is established." It is noted that the Division of Test Development and Analytics contacted SMEs regarding this matter who indicated that the issuance of a special complaint summons does not equate to an arrest. Rather, the SMEs indicated that a special complaint summons is often used in lieu of an arrest. The SMEs noted that if an officer does not witness the offense, he or she could still issue a summons but it would **not** be considered an arrest. The SMEs further indicated that although court rules may reference a non-custodial arrest, it is not the same as an arrest where an individual is taken into custody. The SMEs emphasized that the process described by Sarno would result in a "charge" not an arrest. As such, the question is correct as keyed.

Question 24 indicates:

> One November evening, at approximately 6:40 p.m., Detectives Kraft and Williams were dressed in plainclothes and driving in an unmarked car. They were targeting Maple Park and Elm Park federal housing complexes for trespassing and drug violations. At the time, there were established procedures for apprehending trespassers within the housing complexes and management had provided officers with a list of all tenants for that purpose. When an individual was stopped inside one of the complexes, police officers were instructed to ask his or her purpose for being there. If the individual stated that he or she was visiting a resident who could be found on the list, the person was usually released. Otherwise, police would bring the individual to the specific apartment the individual claimed to be visiting. If the resident

[6] Sarno does not specify the New Jersey Court Rules to which he is referring.

> at that apartment did not know the individual, the individual would be arrested for trespassing.
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> On this evening, the detectives got out of their vehicle after they observed a person sitting on a bicycle, in the rain, between two buildings in Maple Park, which was an area in the complex known for narcotics activity. "No Trespassing" signs were posted in the area. As the detectives approached the person, Detective Kraft recognized him as Marcus Devine, whom he knew from several prior encounters with him at the Maple Park and Elm Park housing complexes. On those two prior occasions, when Detective Kraft had investigated the lawfulness of Devine's presence at the complexes, Devine appeared to have a valid reason for being at the complexes.
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> When Detective Kraft was within fifteen or twenty feet of Devine, Devine began to ride away. Detective Kraft chased Devine, grabbed his arm, and stopped him. Upon seizing Devine, Detective Kraft asked Devine what his reason was for being in Maple Park and why he tried to flee. Devine responded that he was doing nothing. Detective Kraft placed him under arrest for trespassing. A search of Devine's person revealed two bags of cocaine in his left pocket.

The question asks, according to relevant New Jersey case law, for the true statement. The keyed response is option c, "Based on the totality of the circumstances, the detectives failed to establish probable cause to arrest Marcus Devine for trespassing."[7] Gontarczuk argues that option b, "Marcus Devine's attempted flight from the scene after observing the detectives established the necessary reasonable suspicion for the detectives' stop of Devine," is equally correct. He refers to *Dangerfield*, *supra*, and contends that "within the court's decision, two conclusions are reiterated: one pertaining to probable cause, and one pertaining to reasonable suspicion. The second point describes that Dangerfield's flight, alone, did not provide the officers with reasonable suspicion, and is quoted as follows: '. . . flight alone does not create reasonable suspicion for a stop, let alone probable cause' . . . Clearly, the most meaningful conclusion inferred from *Dangerfield*, and from its references to *Tucker*, [is] that flight alone does not create reasonable suspicion. These cases, however, do *not* directly address a scenario in which flight is preceded by other circumstances or actions." Gontarczuk asserts that "the fact pattern of question #24 did *not* depict a scenario involving flight alone." In this regard, Gontarczuk reiterates the scenario presented above and argues that "these factors cause question #24 to depart from the 'flight alone' logic described in the courts' dissections of Dangerfield and Tucker, resulting in significant ambiguity." As noted previously, this item is based on *Dangerfield*, *supra*, in which the flight ***is***

[7] It is noted that this item is based on *State v. Dangerfield*, 171 *N.J.* 446 (2002).

preceded by other circumstances or actions, *i.e.*, the scenario presented in the item is almost identical to the fact pattern presented in *Dangerfield*, *supra*. Given the fact pattern presented in *Dangerfield*, *supra*, the court determined:

> **Based on the totality of the circumstances,** the facts in this case fail to establish that probable cause existed to arrest defendant . . . Although defendant rode away on his bicycle after observing the detectives, flight alone does not create reasonable suspicion for a stop, let alone probable cause. *State v. Tucker*[*, supra,* at] 169. There simply was no reasonable articulable suspicion to which the flight could add weight. *State v. Citarella,* 154 *N.J.* 272*,* 281*,* 712 *A.2d* 1096 (1998). Accordingly, we agree with the Appellate Division that 'there was no reasonable suspicion for [defendant's] stop and no probable cause for his arrest [and therefore] no justification for the ensuing search.' [*State v.] Dangerfield,*[339 *N.J. Super.* 229, 238 (App. Div. 2001)] (emphasis added). *Id*. at 457-458.

As such, the question is correct as keyed.

> Question 25 indicates:
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> After establishing probable cause following two controlled buys of narcotics, your department obtained a warrant to search the person and apartment (located 'on the edge' of a high drug-trafficking area) of Jeffrey Dillon. You (the commanding officer) and seven other detectives and officers, some of whom were in uniform, entered the apartment to execute the warrant. Rolando Perez and another male who was known to the police from a prior drug "situation" arrived at the apartment during the search. As soon as Perez and his companion saw what was happening, they tried to leave, but were stopped and brought back inside by one of the detectives. Perez and his companion were immediately patted down. The pat-down of Perez's companion revealed no weapons or contraband and he was told he could leave. As a detective patted down Perez, the detective asked Perez if he had anything on him, to which Perez replied in the affirmative and produced from his pants pocket a small amount of cocaine.

The question asks, according to relevant New Jersey case law, for the true statement, "The interaction between the detective and Rolando Perez constituted . . ." The keyed response is option c, "a custodial interrogation, for which *Miranda* warnings were required." Bradley, Diaz, Dorney and Michel maintain that option b, "an investigative detention, for which *Miranda* warnings were not required," is correct. Bradley maintains that "*State v.* [illegible] states that custody is not found when they are free to move. The other person was free to go and he [illegible] so

Miranda was not required." Diaz refers to *State v. Hall*[8] and argues that "this fact pattern was missing an important factor which states 'Mr. Hall was placed under arrest' . . . Civil Service removed this very crucial important factor . . . Understandably, his statements are inadmissible because custody interrogation requires *Miranda*, however removing any specific part of the case changes the nomenclature." Dorney presents that "Perez and his companion were not in custody at the time, they were temporarily detained for the duration of time the search warrant was being conducted. When the officers asked Perez and his companion if they had anything on them, that question is 'general on scene questioning' and doesn't require *Miranda* warnings." Dorney refers to *Muehler v. Mena* and *Michigan v. Summers* for the proposition that "police are allowed to detain individuals who are present in a residence that is currently being searched with a search warrant."[9] Michel refers to *Baker v. Monroe Tp.*, 50 *F.3d* 1186 (3d Cir. 1995) and asserts that "police are allowed to detain parties at a premise[s] during the execution of a search warrant as well as any parties coming to the premises . . . If during [a *Terry*] stop, probable cause to arrest is developed, the suspect will be arrested. A *Terry* stop is not considered custodial and *Miranda* warnings do not apply. Once cocaine was found on the person, then he is under arrest (i.e., in custody) and *Miranda* applies." Keefe, who selected option d, "an investigative detention, for which *Miranda* warnings were required," argues that "when Perez was stopped and brought back into the building, Perez would reasonable not feel free to leave. Therefore making it an investigatory detention." It is noted that this item is based on *State v. Hall*, *supra*, in which the court noted:

> Here the officer physically controlled defendant's movements, and was frisking and asking questions at the same time. Though it was accomplished in a relatively brief encounter, not at police headquarters, there were seven other officers in the apartment and defendant had been prevented from leaving. It is significant that the question was open-ended and by definition called for an incriminating answer. Defendant did not spontaneously volunteer; the circumstances were obviously and inherently coercive. Under the totality of the circumstances, I cannot conclude that a reasonable, innocent person would have felt free to leave at the time the defendant was asked whether he had 'anything.' He had attempted to leave while he was still at the door to the apartment. The officer had brought him inside, and immediately began patting him down and questioning him. *Id.* at 90.

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[8] Although Diaz does not provide a citation for this matter, it appears that she is referring to *State v. Hall*, 253 *N.J. Super.* 84 (App. Div. 1990).

[9] Although Dorney does not provide citations for these matters, it appears that he is referring to *Muehler v. Mena*, 544 *U.S.* 93 (2005) and *Michigan v. Summers*, 452 *U.S.* 692 (1981).

The court determined that "the defendant was not the target of the search warrant, was only an intended visitor to the apartment being searched. The police had no independent reason for detaining and questioning him other than his arrival on the scene. Had they stopped him at the door and asked what he was there for, that would have been a permissible investigatory detention for which *Miranda* warnings are not required." *Id.* at 90. As such, the question is correct as keyed.

Question 28 indicates that Sergeant Casey explains that consent searches can save the police valuable time and officer resources. The question asks for the true statement regarding consent searches of dwellings. The keyed response is option a, Police need "no level of suspicion before requesting consent to search a dwelling." Bachmann, who selected option d, "probable cause that a criminal act has been committed before requesting consent to search a dwelling," contends that "officers in the United States and the state of New Jersey cannot routinely ask for consent to search without justification . . . Without a reason, justification, or suspicion, there would be no purpose to search one's private property and teeters on the violating an individual's civil liberties." Ratajczak maintains that option b, "reasonable suspicion that a crime is afoot before requesting consent to search a dwelling," is equally correct. In this regard, Ratajczak presents that option b "does not specifically say you must believe crime is afoot to ask for consent, it merely says you believe crime is afoot . . . The way the question and answer is written clearly shows that it is the appropriate answer for this question." In *State v. Domicz*, 188 *N.J.* 285 (2006), the court noted that "a search conducted pursuant to consent is a well-established exception to the constitutional requirement that police first secure a warrant based on probable cause before executing a search of a home. [citations omitted]. Indeed, consent searches are considered a 'legitimate aspect of effective police activity.' [citation omitted]." *Id.* at 305. The court further determined that "for the reasons discussed, we decline to extend [*State v. Carty*, 170 *N.J.* 632, *modified on other grounds*, 174 *N.J.* 351 (2002)] to require that the police have a reasonable and articulable suspicion of criminal activity in a home to justify requesting consent to conduct a search of the premises." *Id.* at 309-310. As such, option b and option d are clearly incorrect.

Question 31 indicates that over the years, the elements needed to satisfy the legal requirements to justify a warrantless search of a residence under the "emergency aid" doctrine have been modified. The question further indicates that according to current New Jersey case law, to justify a warrantless entry or search under the "emergency aid" doctrine, a two-prong test must be satisfied. The question asks for the statement which is one of the required elements. The keyed response is option b, "There must be a reasonable nexus or connection between the emergency and the area or places to be searched." Bradley and Bunin contend that option a, "The primary motivation for entry into the residence must be to render assistance, not to find and seize evidence," is the best response. Specifically,

Bradley argues that "*State vs. Frankel*[10] also states that police entry must be separate and apart from whether there is probable criminal activity . . . Although the one prong states there needs to be reasonable nexus, it is also true that the entry must be to render assistance and not for criminal purposes." Bunin maintains that "the most recent case law regarding the doctrine does not change the fact that one of the prongs is: the prime motive of entry is to render aid, not to seize/find evidence." Bunin refers to *State v. Edmonds*, 211 *N.J.* 117 (2012), and asserts that the court "states the primary motive of entry is to render aid and not seize/find evidence as one of the prongs required for the [emergency aid] doctrine." As noted by the court in *Edmonds*, *supra*, "In light of recent federal precedent, we conclude that the second factor in the emergency-aid test set forth in *Frankel*, which addresses the officer's subjective motivation[, *i.e.*, the public safety official's primary motivation for entry into the home must be to render assistance, not to find and seize evidence,] is no longer consonant with Fourth Amendment jurisprudence." *Id.* at 131. The court continued, "Therefore, for a warrantless search to be justified by the emergency-aid doctrine, the State must prove only that (1) the officer had 'an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury' and (2) there was a 'reasonable nexus between the emergency and the area or places to be searched.'" [citation omitted] *Id.* at 132. As such, the question is correct as keyed.

Question 32 indicates that officers have conducted a lawful stop of a motor vehicle. During the stop, the officers removed the occupant from the vehicle, placed the occupant under custodial arrest, and secured the occupant in the police car. The question asks, based on current New Jersey case law, for the true statement by completing the sentence, "As a general rule, once the occupant of the vehicle has been removed and secured elsewhere, the police are . . ." The keyed response is option a, "not permitted to conduct a warrantless search of the vehicle." Babyak, who misidentified this item as question 38,[11] argues that the question "is vague and incorrect and does not provide enough information or correct answer." Babyak refers to *State v. Eckel*[12] which "states that police may not conduct a warrantless search of an auto as incident to arrest. The exception to this may be plain view,

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[10] Although Bradley does not provide a citation, it appears that he is referring to *State v. Frankel*, 179 *N.J.* 586 (2004). In *Frankel*, *supra*, the court indicated, "We have adopted a three-prong test to determine whether a warrantless search by a public safety official is justified under the emergency aid doctrine. [citations omitted] Under that test, the public safety official must have an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or prevent serious injury; his primary motivation for entry into the home must be to render assistance, not to find and seize evidence; and there must be a reasonable nexus between the emergency and the area or places to be searched." *Id.* at 600.

[11] It is noted that Babyak selected the correct response for question 38.

[12] Although Babyak does not provide a citation, it appears that he is referring to *State v. Eckel*, 185 *N.J.* 523 (2006).

protective sweep or inventory search, all in which were not asked in [the question]." Coladonato argues that "there is no legitimate correct answer" since "this question seems to be relying on the rule in *State v. Eckel* where the court determined that the police cannot search a vehicle under search incident to arrest once the occupant has been arrested, removed and secured elsewhere.[13] That rule would not apply if the police are searching a vehicle under the automobile exception. This question does not specify which scenario and simply asks when can a vehicle be searched once the occupant has been removed and taken into custody." Given that the question stem does not indicate under which circumstances the search is being conducted, *e.g.*, search incident to arrest, consent, plain view or automobile exception, the Division of Test Development and Analytics determined to omit this item from scoring prior to the lists being issued.

For question 34, since Gonzalez selected the correct response, her appeal of this item is moot.

Question 37 indicates that a uniformed officer in a marked car pulls up alongside an individual walking along the street and calls out to him, "Hey, I want to talk to you." The individual turns to see the officer and then attempts to flee by running in the opposite direction. The question asks, according to current New Jersey case law, for the true statement regarding the individual's attempt to flee the scene. The keyed response is option d, "The individual's flight, by itself, is an insufficient basis for an investigatory stop." Runof, who selected option b, "'The individual's flight alone created probable cause to arrest the individual," maintains that this situation "is very similar to the fact pattern in State of NJ vs Crawley (2006)[14] . . . [in which] the officer had probable cause to arrest for obstruction. The

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[13] The court in *State v. Eckel*, *supra*, noted that "We granted the State's petition for certification . . . limited to the single issue raised: whether the search was lawful under *Belton*[, *i.e.*, search incident to arrest]." *Id.* at 527. However, the court further noted that "the trial judge did not base her decision on the search incident to arrest exception but on theories including consent, plain view, and the automobile exception to the warrant requirement . . . [T]he merits of the trial judge's decision have never been tested against the arguments advanced by defendant on appeal. We therefore return the matter to the Appellate Division to consider the remaining unresolved issues." *Id.* at 542. As such, while the court determined that the search incident to arrest exception was not applicable, it indicated that the search may be valid under the consent, plain view or automobile exceptions.

[14] Although Runof does not provide a citation, it appears that he is referring to *State v. Crawley,* 187 *N.J.* 440 (2006). As noted by the court in that matter:

> Shortly after midnight on March 15, 2002, Newark Police Officers Paul Williams and Matthew Milton received a radio dispatch reporting that there was a man armed with a gun at the Oasis Bar on South Orange Avenue. The dispatcher described the suspect. Fewer than two minutes later, while driving westbound on South Orange Avenue toward the bar, the officers observed a man walking eastbound 'at a semi-brisk pace.' The man, later identified as Saleem Crawley, exactly matched the dispatcher's description of the suspect. Without activating the patrol car's siren or overhead lights, the officers made a u-turn and approached Crawley from behind. As the car pulled alongside Crawley, Officer Williams called out, 'Police. Stop. I need to

ruling in Crawley[, *supra*,] is that the defendant may be convicted of obstruction when he flees from an investigatory stop, despite a later finding that the police action was unconstitutional." Runof further argues that "if the question is based on State of NJ vs Tucker (1994)[15] the fact pattern is significantly different . . . State vs Tucker was unprovoked flight alone without other factors." It is noted that this item is not sourced to a particular matter. However, as noted by the court in *Tucker*, *supra*, "the difficulty with this case is that the sole basis asserted for police action was the youth's flight. Although flight is evidence that a fact finder may consider in assessing guilt, our model jury charge requires that it be accompanied by some evidence of criminality." *Id*. at 168-169. Thus, the court in *Tucker*, *supra*, determined, in part, that "because the flight of defendant alone, without other articulable suspicion of criminal activity, generated by the pursuit does not meet the *Terry* standards for an articulable suspicion, the police seizure was not justified." *Id*. at 173. Furthermore, as noted previously, the court in *Dangerfield*, *supra*, determined that "flight alone does not create reasonable suspicion for a stop, let alone probable cause. [citation omitted]." *Id*. at 457. As such, the question is correct as keyed.

Question 40 indicates:

> In the middle of May, around 7:00 p.m., one of your officers was told by dispatch that an anonymous caller reported a man with a handgun at the corner of New Street and Sparrow Lane. The caller described the individual as a tall, thin, dark-skinned male wearing a black jacket and a black and red cap. The officer quickly arrived at the scene and saw three men standing at the corner, one of whom was wearing a red jacket and a black and red cap. He noticed that, except for the color of

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> speak with you.' In response, Crawley turned and began running. Officer Williams pursued on foot, while Officer Milton circled the block in the car. *Id*. at 440.

Thus, the circumstances presented in *Crawley*, *supra*, are clearly distinguishable from those presented in the item.

[15] Although Runof does not provide a citation, it appears that he is referring to *State v. Tucker,* 136 *N.J.* 158 (1994). As noted by the court in that matter:

> This appeal arises from an encounter between police and a young man sitting on a curb who fled after the approach of a marked police car. The patrolling officers pursued the young man and radioed for assistance. A second police car on a nearby street responded to the call and traveled toward defendant. Defendant, on seeing the second car, reversed course, and was caught by the initial officers. He dropped a packet, which was shown to contain cocaine. *Id*. at 161.

The issues before the court were, "first, did police seize defendant within the meaning of the Fourth Amendment? Second, did they have sufficient grounds to seize the defendant? Third, if the answer to that second question is no, did defendant nonetheless abandon the drugs?" *Id*. at 161.

> the individual's jacket, the man, later identified as Zack Heath, matched the physical description relayed by dispatch. Heath's jacket was open, and he wore a long white tee-shirt that hung well below his jacket.
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> The officer pulled his patrol car onto the sidewalk next to where Heath stood with his companions. At that time, the officer recognized Heath from prior narcotics investigations and recalled that he had previously arrested him for drug violations. The officer was also aware that Heath lived in the area and was "associated" with a local street gang. He did not know Heath to carry a weapon, but the officer's experience suggested that it was common for guns to be found in connection with narcotics offenses. Additionally, your police department had received information almost daily regarding incidents concerning both handguns and shootings in that area involving the same gang.
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> Upon seeing the patrol car approach the corner, Heath and his companions began to walk away. The officer noticed that Heath appeared quite nervous and observed him move his hand towards his waistband as he was turning away. From his experience, the officer was aware that suspects hide weapons in their waistbands, and, on this occasion, believed that Heath was hiding a gun there. The officer exited his police car, approached Heath, and had him place his hands against a nearby chain-link fence. Heath cooperated. The officer then lifted Heath's tee-shirt (to expose his stomach) and observed the top of a plastic bag protruding roughly two inches from his waistband. The officer removed the bag and found that it contained suspected crack cocaine.

The question asks, according to relevant New Jersey case law, for the true statement. The keyed response is option b, "Lifting Heath's shirt exceeded the scope of the permissible pat-down search needed to protect the officer against Heath having a weapon." Since Bojkovic selected the correct response, his appeal of this item is moot. Bradley, who selected option d, "The totality of the circumstances did not provide the officer specific and particularized reasons for him to conduct an investigatory stop of Heath," indicates, "State vs. Pivott[16] states all key points involved on test question. The question on the test changed the fact pattern by adding that the officer 'did not know him to carry a gun.[']17 This substantially changes the fact pattern to establish RAs to believe they were armed and dangerous. With that substantial change, I believe the officer w[as] not justified to

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[16]Although Bradley does not provide a citation, it appears that he is referring to *State v. Privott,* 203 *N.J.* 16 (2010).

[17] As indicated above, the scenario provided to candidates indicated, "He did not know Heath to carry a weapon . . ."

stop and frisk. RAs from narcotics arrests is not the same as RAs they're armed and dangerous." Forte, who selected option a, "When the officer observed Heath appearing nervous and moving his hand towards his waistband, the officer was justified in exceeding a traditional pat-down search of Heath's outer clothing," argues that "lifting the shirt to examine where the suspect was reaching (waistband) for officer safety was a mere visual inspection of the pat-down. No search of pockets or further intrusion was made to escalate the pat down to an improper search. Once shirt was lifted, contraband was visible in plain view." The question is based on *Privott*, *supra*, in which the court notes that the officer "recognized defendant from prior narcotics investigations. He recalled that he had previously arrested defendant for drug charges. [The officer] testified that although he had never known defendant to carry a weapon, it was common for guns to be found in connection with narcotics offenses and that he had discovered a weapon in over twenty prior drug arrests." *Id.* at 21. As such, Bradley's argument is misplaced. In addition, the court in *Privott*, *supra*, determined:

> Here, the relevant circumstances extend well-beyond an isolated anonymous tip of a man with a gun at a particular location. As the officer approached and made eye contact with defendant, who partially matched the description given by the anonymous informant, the officer recognized defendant from prior narcotic arrests. The officer also knew that defendant was associated with violent gangs that were responsible for recent shootings in the area . . . Defendant appeared nervous, walked away from the officer, and moved one hand towards his waistband. From his extensive experience in the field, the officer was aware that the waistband is an area commonly used by armed persons to conceal a weapon. Based on the totality of the circumstances, we conclude that there were specific and particularized reasons for the officer to conduct an investigatory stop. *Id.* at 28-29.

As such, option d is clearly incorrect. It is further noted that the court found:

> A reasonable search, as well as the least intrusive maneuver needed to protect the safety of the officer against a possible weapon, would have been the traditional pat-down search of defendant's outer clothing. That did not occur. Rather, the police officer lifted defendant's tee-shirt to expose defendant's stomach, and in doing so, observed a plastic bag with suspected drugs in the waistband of defendant's pants. That maneuver exceeded the scope of the pat-down search needed to protect the officer against defendant having a weapon and was akin to a generalized cursory search of defendant that is not condoned. *Id.* at 31

Thus, the court "conclude[d] that the officer's conduct in lifting defendant's shirt exceeded the reasonable intrusion that we permit as part of a *Terry* stop." *Id.* at 32. Accordingly, the question is correct as keyed.

Question 41 provides:

> As police officers arrived at a house to execute a warrant to search the house for narcotics, they saw Andrew Hill walk out the front door of the house and proceed across the porch and descend the front steps. The officers asked Hill to open the door. He told them that he could not, because he had left his keys inside, but he could ring someone over the intercom. Jordan Burke came to the door, but did not admit the officers. The officers then gained entry by forcing open the front door. Hill, who was still on the porch, was brought inside the house and detained while they searched the premises. Eight additional occupants were discovered inside the house and they were all detained during the search as well. The search revealed two bags of suspected narcotics in the basement. After finding the narcotics and determining that Hill owned the house, Hill was placed under arrest and a search of his person was conducted. Inside Hill's coat pocket, officers discovered an envelope containing heroin.

The question asks, according to relevant case law, for the true statement. The keyed response is option d, "The search warrant implicitly carried with it the limited authority to detain Hill and any other occupants of the premises while a proper search was conducted."[18] Elfi Martinez, who selected option a, "Officers exceeded the authority of the search warrant when they detained Hill," asserts that the warrant in the scenario "fail[ed] to comply with the 'particularity requirement'" and "officers in the scenario should not be permitted to stop individuals who exited that home if the warrant did not authorize, 'any and all persons arriving at, departing from and located therein reasonably believed to be associated with this investigation' (State VS Carlino/State VS Marshall)."[19] It is noted that the Division of Test Development and Analytics contacted SMEs regarding this matter who indicated that in a narcotics investigation it is standard language to include a statement which would seek to authorize the search of "any and all persons arriving at, departing from, and located therein, reasonably believed to be associated with this investigation." The SMEs noted that this standard language would be included in particular for a search warrant of a house involved in narcotics activity because officers will likely not know who will be at the location at the time of the search. The SMEs explained that in a narcotics investigation, it is likely that the officers would not know the names of those individuals who may be present even if the individuals had been under surveillance and had been seen coming and going from a suspected house used in narcotics activity. The SMEs indicated that given the circumstances presented in the question, officers would not allow an individual to

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[18] It is noted that this item is based on *Michigan v. Summers*, 452 *U.S.* 692 (1981).

[19] It is noted that Elfi Martinez did not provide citations for these matters. However, it appears that he is referring to *State v. Carlino*, 373 *N.J. Super.* 377 (App. Div. 2004) and *State v. Marshall*, 199 *N.J.* 602 (2009).

walk past them and leave a residence suspected in narcotics activity. The SMEs emphasized that in cases where the search is based on a narcotics investigation, the person could easily be leaving with evidence, so officers would be justified in stopping the individual. The SMEs also emphasized that the particularity requirement does not apply in this situation because the particularity requirement, which requires "officers to clearly and precisely describe the place to be searched and things to be seized in order for a search warrant application to be approved by a magistrate," has more to do with places and things rather than individuals; and because the ultimate search and arrest of Hill was not based on the warrant, but rather the search incident to his arrest. The SMEs further noted that officers were executing "a warrant to search the house for narcotics" so naming particular individuals would not have been necessary, or possible, due to the fact that many unknown people could have been coming or going from the residence. In this situation, the SMEs stated that the officer was justified in stopping Hill from leaving the residence and once the search of the residence was conducted and "after finding narcotics and determining that Hill owned the house," Hill was properly arrested and searched incident to that arrest. Thus, the item is correct as keyed.

Question 43 provides:

> One evening during rush hour, Officer Wilson observed a vehicle change lanes on the roadway without displaying a turn signal. Officer Wilson activated his overhead lights in order to effectuate a motor vehicle stop. The driver pulled the vehicle over to the shoulder of the road approximately 15 seconds after Officer Wilson activated his overhead lights. Officer Wilson then alerted headquarters of the stop, after which he approached the vehicle on the driver's side. He asked the driver, Rex Boone, for his credentials. After producing his license, Boone activated his directional signal in response to the officer's request. Though the blinker gave an audible signal, the dashboard light was not working. At Officer Wilson's direction, both he and Boone went to the back of the vehicle, where both observed that the blinker light was working.
>
> After speaking with Boone at the rear of the vehicle, Officer Wilson detected an odor of alcohol on Boone's breath and he asked Boone if he had been drinking. Boone nervously replied, "I'm not going to lie to you; I had a beer." At this point, Officers Chang and Hollister arrived as back-up. After conducting a pat-down search of Boone, which revealed no weapons, Officer Wilson directed the two passengers to exit the vehicle. Both passengers were searched for weapons; none were found. While Boone and both passengers were waiting behind the vehicle with Officers Chang and Hollister, Officer Wilson began to search the vehicle for open containers of alcohol by going to the driver's side of the vehicle and looking in the immediate area of the driver's seat for alcohol containers. Underneath the driver's seat, he found a

> plain plastic bag containing a white substance, which he believed to be cocaine. Boone and both passengers were placed under arrest and given their *Miranda* warnings.
>
> Officer Wilson returned to the vehicle to conduct a further search. On the right front floor in front of the passenger seat, he found a black plastic bag containing a zip-lock bag with a larger quantity of cocaine.

The question asks, according to relevant New Jersey case law, for the true statement. The keyed response is option c, "Officer Wilson did not establish the probable cause required to conduct a warrantless search of the vehicle." Bojkovic, who selected option a, "The lack of signaling during a lane change, combined with the admission by Boone that he had consumed alcohol, justified the warrantless search of the vehicle, presents, "the officer was looking for alcohol containers which yielded the find of the cocaine. The officer had the subject under arrest for DWI Alcohol due to his admissions and observations. AG Directive No. 2007-2. #1 states that this constitutes the search to be permissible because it was within the scope of the actual arrest (DWI Alcohol)." Rivera contends that Officer Wilson had probable cause to search and indicates that "under *State v. Witt*,[20] the automobile exception to the warrant requirement allows a police officer to search a motor vehicle merely when the off[ic]er has probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to the probable cause are unforeseeable and spontaneous." It is noted that Rivera does not provide any further information as to why he believes Officer Wilson had probable cause to conduct a search. It is noted that this matter is based on *State v. Jones*, 326 *N.J. Super.* 234 (App. Div. 1999), in which the court noted:

> The trial judge found that the smell of alcohol on Jones's breath, combined with his admission of consumption of beer, his apparent nervousness, his failure to use the turn signal, and what Trooper Casais believed was an unusually long time to stop the vehicle, established probable cause on the part of a trained police officer to believe that a violation of law had been or was committed, namely the possession of open containers of alcohol. **We disagree** (emphasis added). *Id*. at 238.

It is further noted that the court in *Jones*, *supra*, determined:

> Here, as in [*State v. Woodson,* 236 *N.J. Super.* 537 (App. Div. 1989), 541], there was no justification for searching the interior for an open container. The record before us is completely devoid of facts which support a reasonable suspicion that defendants Jones and Freeman

[20] Although Rivera does not provide a citation, he appears to be referring to *State v. Witt*, 223 *N.J.* 409 (2015).

> possessed open containers of alcohol to establish probable cause necessary to conduct a search of the interior of the vehicle. The odor of alcohol the Trooper detected on Jones's breath, together with his nervousness and admission concerning the consumption of one beer, ***does not***, when viewed with the other existing circumstances, establish a well-grounded suspicion that either Jones or his passengers had open containers of alcohol in the vehicle in violation of *N.J.S.A.* 39:4-51a (emphasis added). *Id.* at 244.

As such, the question is correct as keyed.

> Question 44 provides:
>
> On a January morning, at approximately 2:30 a.m., two of your officers were on patrol when they received a radio report from dispatch that headquarters had gotten an anonymous tip that 'an individual in a green Toyota Highlander with a N.J. temporary tag was flashing a gun at the 1300 block of York Road.' Your officers responded in separate marked patrol vehicles and arrived at the scene, which was as a well-lit business district. As the officers approached the green Highlander, they noticed that it had dark-tinted windows, making it difficult to see inside and as a result, they executed a 'high risk traffic stop.' The driver and passengers were ordered out of the vehicle. They complied. A pat-down search of the driver and passengers did not turn up any weapons. Additional officers arrived at the scene. After the driver and passengers were taken to a secure location, several officers searched the vehicle for weapons. A gun was found under the front passenger seat. The driver and passengers were then arrested.

The question asks, according to relevant New Jersey case law, for the true statement. The keyed response is option b, "The circumstances did not provide the officers with an objectively articulable and reasonable basis to believe the subject of the stop was armed and dangerous." Bojkovic, Daughton, Diaz and Megale contend that option c, "The investigatory stop and subsequent search of the vehicle were justified under the officers' community caretaking function," is the best response. Specifically, Bojkovic[21] argues that "there is not enough probable cause in this scenario" to support the keyed response. Bojkovic adds that although the call was anonymous, "the officers did not need probable cause because they were acting under [the community caretaking function]." Daughton presents:

> This is a Case Law Question which is written improperly. The wording includes a portion of one Case Law, but the answer is keyed

[21] It is noted that Bojkovic selected option a, "The anonymous tip provided the officers with justification for *Terry* pat-down searches and the search of the vehicle."

> based on the ruling of another Case Law, which is inappropriate. The beginning of the question starts out with a[n] anonymous 9-1-1 call reporting a man flashing a gun in a vehicle, but it does not give the second portion of the case law (*State v. Gamble*),[22] which states they received a second anonymous caller reporting shots fired. It also did not include the full facts of the case it was attempting to interpret. With the following being stated, the question was not written as the Case Law intended the ruling to be interpreted and the answer was miskeyed, as not being appropriate based on an anonymous tip alone which follows the facts of *Florida v. J.L.*[23]

Diaz refers to *State v. Matthews*[24] and argues that "the given answers along with the chosen 'best' keyed answer [do] not fully embed [*sic*] the case or fit directly to the holding . . . [T]he valid holding of the case and the best true statement to apply – states that both the *Terry* pat-down searches and the search of the vehicle violated the 4th amendment . . . The specific case is a two part prong. The initial stop of the vehicle is LAWFUL under the community care-taking function in which was reflected under answer choice B [*sic*] – moreover, was half right/half wrong which still makes it wrong. However, answer choice D, was also relevant to the case that stated the circumstances presented did not present a well-grounded suspicion that a crime was about to be committed. Three out of four answer choices correlat[e] to the case itself. This question should have been asked explicitly of the holding of the stop and secondly of the holding of the searches." Megale contends that this item "appears to be convoluted combining two separate cases with an answer keyed to be correct for one case but yet incorrect for the other . . . The first case the second portion of the scenario is omitted and the second case changes the scenario from involving a motor vehicle being present and strictly refers to an individual."[25] It is noted that this item is based on *State v. Matthews*, *supra*, in which the court determined:

> In the present case, the police officers received a dispatch that headquarters had gotten an anonymous tip that someone in a burgundy Durango with a temporary tag was flashing a gun at a certain location. It was 2:30 a.m. When they arrived at the location, they found the vehicle, as described, parked, with three occupants

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[22] While Daughton did not provide a citation for this matter, he appears to be referring to *State v. Gamble*, 218 *N.J.* 412 (2014).

[23] While Daughton did not provide a citation for this matter, he appears to be referring to *Florida v. J.L.*, 529 *U.S.* 266 (2000).

[24] It is noted that Diaz did not provide a citation for this matter. However, it appears that she is referring to *State v. Matthews*, 398 *N.J. Super.* 551 (App. Div. 2008).

[25] It is noted that Megale does not identify the "first case" or the "second case" he refers to in his appeal. Absent this information, the Commission is unable to review his claim further.

> inside. Under their community caretaking function, the police were justified, absent the tip, in conducting an investigatory stop to determine if help was needed based on the circumstances of an occupied vehicle parked on the roadway in the wee hours of the morning. Beyond that, the existence of the tip, the lateness of the hour, and the confirmation of the type, color, and location of the vehicle reported in the tip justified an investigatory stop to permit the police to inquire as to what the occupants of the Durango were doing. *See State v. Nishina*, 175 *N.J.* 502, 513, 816 *A.2d* 153 (2003).
>
> Where we part company with the State is with its contention that the tip provided justification for *Terry* pat-down searches and the search of the vehicle. The pat-down searches of the driver and occupants and the search of the Durango were based solely on an unidentified anonymous tip. There are simply no other facts in the record demonstrating that the police had an objectively articulable and reasonable basis to believe the subject of the stop was armed and dangerous. The circumstances also did not present a well-grounded suspicion that a crime had been or was about to be committed. *State v. Deluca*, 168 *N.J.* 626, 632-33, 775 *A.2d* 1284 (2001). Similar to the circumstances in [*Florida v.*] *J.L.*, all the police had to go on was the 'bare report of an unknown, unaccountable informant' that someone was seen flashing a gun. *See J.L., supra*, 529 *U.S.* at 271, 120 *S. Ct.* at 1379, 146 *L. Ed. 2d* at 260. There is nothing in the record before us establishing the required indicia of reliability to justify the more intrusive pat-down or vehicular searches. *Id*. at 559-560.

Thus, although the court in *Matthews*, *supra*, determined that based on the circumstances, the police were justified, under their community caretaking function, in conducting an investigatory stop, it further determined that there was "nothing in the record before us establishing the required indicia of reliability to justify the more intrusive pat-down or vehicular searches." *Id.* at 560. As such, option c is not the best response.

Question 45 indicates that Officer Nunez is patrolling through a neighborhood in the early afternoon. She observes a school bus driver operating a school bus while using a cellular phone. Officer Nunez knows that, with certain exceptions, it is unlawful for a driver of a school bus to use a cellular or other wireless telephone while operating a school bus. Candidates were presented with four statements and were required to determine which are specifically listed as exceptions according to *N.J.S.A.* 39:3B-25.[26] The keyed response, option b, does not

[26] *N.J.S.A.* 39:3B-25 (Use of cell phone prohibited while driving school bus, exception; fines) provides, in pertinent part:

include statement IV, "The driver witnessed a motor vehicle violation and is notifying dispatch and/or the authorities." Bachmann, Bunin, Forte, Gomez, Grimm, Hein, Keefe, Penna, Peterson and Van Schaack maintain that statement IV is correct. In this regard, the appellants argue that there are some motor vehicle violations which could give rise to an emergency situation, *e.g.*, driving while under the influence (*N.J.S.A.* 39:4-50), reckless driving (*N.J.S.A.* 39:4-96), careless driving (*N.J.S.A.* 39:4-97), death by auto (*N.J.S.A.* 2C:11-5), leaving an accident scene resulting in death or serious bodily injury (*N.J.S.A.* 2C:11-5.1). Hein adds that "while all Title 39 offenses will not constitute an emergency to blanketly state that they can never constitute an emergency is short sighted and inaccurate." Hein and Peterson also refer to "*State v. Golotta*, 837 *A.2d* 359, 178 *N.J.* 205 (2003), in which "the court acknowledges that the Title 39 violation of 39:[4]-50 constitutes an emergency as specified in the statute." As noted by Hein, not all motor vehicle violations would constitute an emergency. Given that statement IV does not specify the motor vehicle violation involved, it is not clearly "an emergency situation." As such, statement IV is not the best response.

Question 48 indicates that while reviewing common motor vehicle offenses with your officers, you introduce the topic of an individual being classified as a "habitual offender." The question required candidates to complete the following sentence, "According to *N.J.S.A.* 39:5-30a, a habitual offender is defined as a person who has his license to operate a motor vehicle suspended . . ." Bachmann, Cevallos, Coladonato, Dorney, Faller, Gomez, Gonzalez, Hein, Iucolino, Mura, Murphy, Perkins and Quarino challenge the validity of this item. Specifically, they argue, in part, that "habitual offender" appears twice in Title 39, *N.J.S.A.* 39:5-30a and *N.J.S.A.* 5-30e, and only provides sentencing guidelines, "neither of which would be any function served by a law enforcement officer or any supervisor." They further note that that the term "habitual offender" is not utilized in Title 2C and "it has no implication in any scenario when it comes to charging under Title 2C or Title 39." The Division of Test Development and Analytics contacted SMEs regarding this matter and they indicated that while the term "habitual offender" is a legitimate designation, it would not be commonly known or useful in the day to day activities of a Police Sergeant. Given this, the Division of Test Development and Analytics determined to omit this item prior to the lists being issued.

Question 49 indicates that as a newly promoted Sergeant who will be supervising the department's designated juvenile officer, you are reviewing N.J. Attorney General Directive No. 2020-12 Establishing Policies, Practices, and Procedures to Promote Juvenile Justice Reform. The question asks, according to

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a. It shall be unlawful for the driver of a school bus, as defined in R.S. 39:1-1, to use a cellular or other wireless telephone while operating the school bus.
b. The prohibition contained in subsection a. of this section shall not apply:
(1) when the school bus is parked in a safe area off of a highway; or
(2) in an emergency situation.

Directive No. 2020-12, for the true statement regarding the victim's role in the stationhouse adjustment process. The keyed response is option c, The victim "may, but is not required to, sign the stationhouse adjustment agreement." Bojkovic contends that option b, The victim "cannot object to the stationhouse adjustment agreement," is the best response. In this regard, Bojkovic refers to the "AG Guidelines for Stationhouse Adjustment of Juvenile Delinquency Offenses"[27] which provides that "a stationhouse adjustment may proceed without the active participation of a victim, but shall not proceed over the objection of a victim. A victim who objects to a stationhouse adjustment should be permitted to sign a juvenile delinquency complaint . . ." As noted previously the question specifically refers to Directive No. 2020-12 which provides under "Stationhouse Adjustment Agreements":

> In cases where one or more victims object to the agreement, the law enforcement officer must notify the County Prosecutor, or designee, who must decide whether to authorize the agreement notwithstanding the victim's objection. Further, 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.

Given that the question asks for the **true** statement, option b is clearly incorrect since the directive provides for situations in which the victim objects to the agreement. Polo argues that option d, The victim "shall determine the conditions that the juvenile must meet in exchange for declining to pursue a formal delinquency complaint against the juvenile," is the best response. Specifically, Polo refers to Directive No. 2020-12 which provides, in part, under "Victim Engagement":

> As part of any stationhouse adjustment process, the law enforcement officer shall notify any victims of the juvenile's unlawful conduct and seek to engage those victims in the resolution. Where appropriate, law enforcement agencies may—and are encouraged to—employ restorative justice models, as they develop, that facilitate reconciliation between the victim and the juvenile.

It is noted that the Division of Test Development and Analytics contacted SMEs regarding this matter who stated that that the conditions which must be satisfied by a juvenile pursuant to a Stationhouse Adjustment are **not** determined by the victim but rather, they are determined mainly by the agency, but can involve the victim "where appropriate," as indicated above in "Victim Engagement." The SMEs also stated that the agency typically proposes the conditions and the victim can agree or disagree with those conditions. However, the SMEs noted that even if the victim disagrees with the conditions set forth by the agency, the Stationhouse

[27] Bojkovic appears to be referring to Attorney General Law Enforcement Directive No. 2008-2 (Revises and Replaces Directive 2005-4) (March 31, 2008).

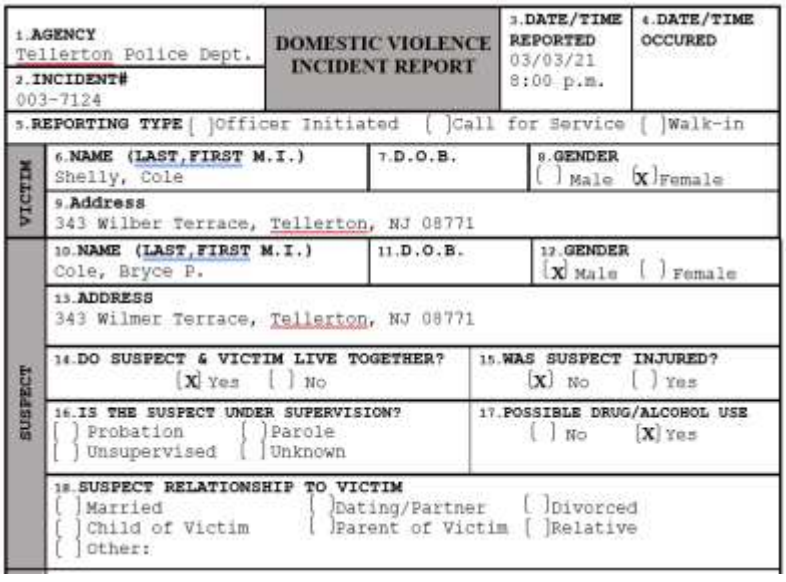
Adjustment can proceed with approval from the County Prosecutor or designee, as indicated above in "Stationhouse Adjustment Agreements." As such, the question is correct as keyed.

Questions 51 through 60 refer to the Domestic Violence Incident Report and the Domestic Violence Narrative provided to candidates in their test booklets. In this regard, the Domestic Violence Incident Report provides, in part:

> On Wednesday, March 3, 2021, at approximately 8:00pm, a 911 call was received indicating a domestic violence incident at 343 Wilber Terrace, Tellerton, NJ 08771. I was dispa[t]ched to respond and investigate the incident. When I arrived on scene, I found Shelly Cole sitting on her front porch. I exited my vehicle, identified myself, and ap[p]roached the porch. As I got closer, I noticed that her hands were trembling and it appeared as though she was crying. I began by asking what was going on. Shelly stated that she had called 911 after her husband, Bryce P. Cole, punched her in the stomach. He arrived home from work later than normal and she could tell that he had been drinking. She stated that he stumbled out of the car when he arrived and she could smell alcohol on his breath.

Question 52 required candidates to determine, according to the information contained in the Domestic Violence Incident Narrative, which box in the Domestic Violence Incident Report was completed incorrectly. The keyed response is option b, Box 6.[28] Bojkovic maintains that option d, Box 17, is the best response. Bojkovic asserts that "the rationale behind this is because in the report it fails to list the name as Mr. or Mrs. Shelly Cole, which leaves the boxed answer confused due to AG

[28] The Domestic Violence Incident Report provides, in part:

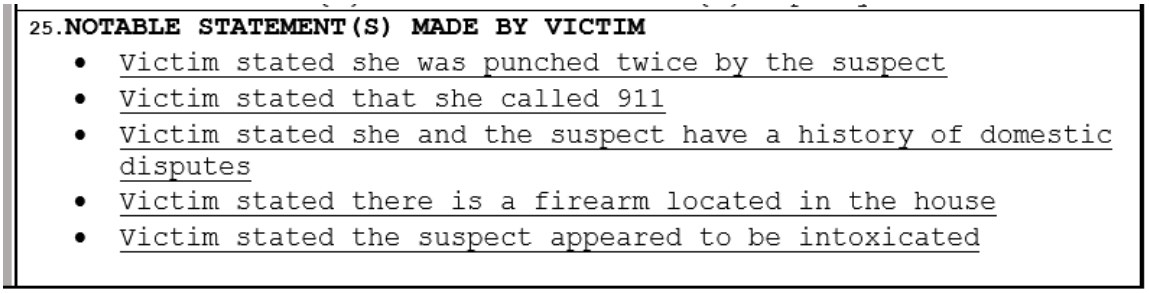


1.AGENCY Tellerton Police Dept. 2.INCIDENT# 003-7124	DOMESTIC VIOLENCE INCIDENT REPORT	3.DATE/TIME REPORTED 03/03/21 8:00 p.m.	4.DATE/TIME OCCURED
5.REPORTING TYPE [ ]Officer Initiated [ ]Call for Service [ ]Walk-in			
VICTIM	6.NAME (LAST,FIRST M.I.) Shelly, Cole	7.D.O.B.	8.GENDER [ ] Male [X]Female
	9.Address 343 Wilber Terrace, Tellerton, NJ 08771		
SUSPECT	10.NAME (LAST,FIRST M.I.) Cole, Bryce P.	11.D.O.B.	12.GENDER [X] Male [ ] Female
	13.ADDRESS 343 Wilmer Terrace, Tellerton, NJ 08771		
	14.DO SUSPECT & VICTIM LIVE TOGETHER? [X] Yes [ ] No	15.WAS SUSPECT INJURED? [X] No [ ] Yes	
	16.IS THE SUSPECT UNDER SUPERVISION? [ ] Probation [ ]Parole [ ] Unsupervised [ ]Unknown	17.POSSIBLE DRUG/ALCOHOL USE [ ] No [X] Yes	
	18.SUSPECT RELATIONSHIP TO VICTIM [ ]Married [ ]Dating/Partner [ ]Divorced [ ]Child of Victim [ ]Parent of Victim [ ]Relative [ ]Other:		

Directive No. 2019-3. Section D. Non-Binary and Gender Non-Conforming Individuals. In this report, the officer failed to identify Shelly Cole as Mr. or Mrs. which leads the boxed answer cockeyed / confused. The MOST correct answer is the Drinking Box [Box 17]. It should be checked **No** because the simple fact that Shelly Cole stated that the subject was drinking does not give any evidentiary support that the domestic partner was drinking . . ." Bojkovic does not identify the box he believes is "cockeyed" due to the failure to identify the genders of the parties in the narrative. However, it is noted that Box 8 was not one of the answer choices. Box 17, the "Drinking Box" as identified by Bojkovic, asks whether there is "**Possible** Drug/Alcohol Use" (emphasis added). As indicated in the narrative, Shelly Cole tells the officer that "she could tell that [Bryce] had been drinking. She stated that he stumbled out of the car when he arrived and she could smell alcohol on his breath." Accordingly, the possibility of alcohol use is indicated. With respect to Box 6, the box requires the name of the victim in the following order: Last, First, M.I. As noted in the report, Shelly's name is indicated as "Shelly, Cole" (*i.e.*, First, Last) and thus, is clearly incorrect.

Question 56 presented candidates with the five statements provided in Box 25 of the Domestic Violence Incident Report and required candidates to determine, according to the information provided in the Domestic Violence Incident Narrative, which statements are incorrect.[29] The keyed response, option d, includes statement III, "Victim stated she and the suspect have a history of domestic disputes." Houghton argues that statement III "is not contradicted (to make it incorrect) or verified (to make it correct) when comparing it to all the other statements. If anything, statement III is giving you the additional information that may have been OMITTED from the narrative, which would not make it incorrect." Mezzina presents "Roman numeral III. (The victim stating that there was a history of domestic disputes) was omitted from the Domestic Violence Incident Narrative in my test booklet and therefore cannot be INCORRECT. This information was not included in the Domestic Violence Incident Narrative." The instructions provided to candidates at the beginning of the test booklet stated, "When answering the questions contained in this test booklet, ***you should base your decisions on the information provided***, as well as your knowledge of the subject matter." (emphasis added). Given that the Domestic Violence Incident Report does not

[29] Box 25 provides:



25. **NOTABLE STATEMENT(S) MADE BY VICTIM**

- Victim stated she was punched twice by the suspect
- Victim stated that she called 911
- Victim stated she and the suspect have a history of domestic disputes
- Victim stated there is a firearm located in the house
- Victim stated the suspect appeared to be intoxicated

indicate that the "victim stated she and the suspect have a history of domestic disputes," statement III is clearly incorrect.

Question 59 presented candidates with the following passage from the Domestic Violence Incident Narrative:

> As I entered the house, Bryce was descending the stairs and it looked like he had just taken a shower. Bryce did not appear to be suprised that I were standing in the doorway to their home.

The question required candidates to determine how the sentence should be rewritten in order to file a properly written report. The keyed response is option a, "As I entered the house, Bryce was descending the stairs and it looked like he had just taken a shower. Bryce did not appear to be surprised that I was standing in the doorway to their home." Bojkovic and Mezzina argue that option d, "As I entered the house, Bryce was descending and it looked like he had just taken a shower. Bryce did not appear to be surprised that I was standing in the doorway to their home," is equally correct. Specifically, Bojkovic argues that "descending the stairs" is wordy and pursuant to the concept of "parallelism,"[30] "the fact that the officers were inside of the house and 'descending' makes it clear to the reader that he was descending the stairs as it was made apparent that the officers were conducting an investigation inside of the dwelling since Shelly Cole stated that the subject was inside of the house." Mezzina maintains that "this sentence is correct as it contains a subject (Bryce) and a predicate containing an action verb (descending). The sentence is structured correctly in both option (A) and option (D) and should both be keyed as CORRECT answers." It is noted that "descending" functions as a transitive verb in the subject sentence, which means that it requires a direct object in order to express a complete meaning or thought. Thus, without the direct object "stairs" following the transitive verb "descending" in option a, the sentence is unclear and the reader of the report is left to guess from what the individual is descending, *e.g.*, a ladder, pull-down attic stairs, step stool or a staircase. As such, option a provides clarity and specificity required in a well written report whereas option d offers less detail and is less clear than option a. Accordingly, the question is correct as keyed.

Question 66 indicates that your officers have shown some confusion about when the charge of Simple Assault is appropriate. The question asks for the situation in which Simple Assault would be the most appropriate *N.J.S.A.* 2C charge. The keyed response is option a, an individual "negligently causes bodily

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[30] In this regard, Bojkovic refers to John J. Ruszkiewicz, *The Scott Foresman Handbook for Writers* (9th ed. 2010) which he indicates provides, "Sentences are easier to read when closely related ideas within them follow similar language patterns. Subjects, objects, verbs, modifiers, phrases, and clauses can be structured to show such a relationship, called parallelism." Bojkovic does not explain the applicability of "parallelism" in the subject sentence.

injury to another with deadly weapons." Cosme, who selected option d, "knowingly causes bodily injury to another with a deadly weapon," presents that "anything involving [']with a deadly weapon[']] is always considered aggravated assault. Answer should be know[ing]ly. Since he knew he was going to commit such crime with a deadly weapon." *N.J.S.A.* 2C:12-1a (Simple assault) provides that a person is guilty of assault if he: (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (2) Negligently causes bodily injury to another with a deadly weapon; or (3) Attempts by physical menace to put another in fear of imminent serious bodily injury. Accordingly, the question is correct as keyed.

Question 67 indicates that John Jones was leaving a convenience store when he was bumped into by Fred Ford, who was entering the store. The two exchanged insults and Jones pulled a handgun from his waistband. Knowing the gun was not loaded, Jones silently raised the gun and pointed it at Ford, holding it only inches from Ford's head, in order to scare him. When Jones noticed the cashier calling the police, Jones fled. The question asks for the most appropriate *N.J.S.A.* 2C charge for Jones. The keyed response is option c, aggravated assault. Farnkopf, Hein, Keefe, Kondracki, Ratajczak and Scarpa argue that option b, terroristic threats, is equally correct.[31] In this regard, Farnkopf adds that "pointing a firearm at someone's head would both terrorize a victim and put a victim in imminent fear of being killed." Kondracki and Ratajczak add that "the act of pointing a firearm at a person's head communicates the threat to threat to kill the person and puts that person in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood it will be carried out. This person does not know the gun is unloaded and it pointed at this head. One trigger pull would undoubtedly end his life." Kondracki and Ratajczak further add that "not all communication life is verbal and a threat conveyed by actions, in this scenario the action of pointing a firearm, is even more threatening than a verbal threat. There is nothing in the Terroristic Threats statute, in subsections a or b, that requires the threat to be verbal." Scarpa adds that "the terroristic statu[t]e is more specific as someone is [*sic*] an imminent threat of death and the immediacy of threat would make one believe the likelihood if it being carried as probable . . ." Finally, the appellants emphasize that terroristic threats is a third degree crime whereas aggravated assault is only a fourth degree crime. As noted by Kondracki and Ratajczak, *N.J.S.A.* 2C:12-3 does not require that the threat be verbal.[32] In this regard, as indicated in the scenario, Jones pointed a gun inches from Ford's head after having an argument which would appear to meet the criteria pursuant to

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[31] *N.J.S.A.* 2C:12-3b (Terroristic threats) provides that a person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.

[32] As noted by the court in *State v. Brown*, Docket No. A-0639-12T4 (App. Div. December 24, 2013), in regard to *N.J.S.A.* 2C:12-3, "The words or ***actions*** of the defendant must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person (emphasis added)."

N.J.S.A. 2C:12-3b, *i.e.*, there is a threat to kill (pointing a gun at a individual's head), the immediacy of the threat (pointing the gun during an argument) which would likely put the ordinary person in imminent fear of death. It is further noted that question does not ask of what the individual would be convicted, since the trier of fact would be responsible for making that determination, but rather for the appropriate charges. As such, the Division of Test Development and Analytics determined to double key this item to option b and option c prior to the lists being issued.

Question 69 indicates that Kim Glover entered a retail clothing store and took a jacket and other items from a clothing rack into the dressing room. While in the dressing room, she removed the price tag from the jacket and replaced it with a lower priced tag from another item. She then attempted to purchase the jacket at this lower price. The question asks, based on the information presented in the scenario, for the most appropriate *N.J.S.A.* 2C charge for Kim Glover. The keyed response is option c, shoplifting.[33] Caruso, Cosme and Forte argue that option b, theft by deception, is equally correct. They maintain that the situation presented in the question meets the criteria pursuant to *N.J.S.A.* 2C: 20-4 (Theft by Deception).[34] In this regard, Caruso adds that "the actor purposefully changed the value of the item and presented that item as having lesser value (false impression due to the wrong price tag), in order to gain possession of that item for less than the actual value of the item. Therefore, preventing the owner of that item from receiving its full value." It is noted that the Division of Test Development and Analytics contacted SMEs regarding this matter who noted that shoplifting specifies, in pertinent part, ". . . and to ***attempt*** to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the value thereof" (emphasis added). However, theft by deception provides, in pertinent part, "a person is guilty of theft if he purposely ***obtains*** property of another by deception." Thus, the SMEs noted that theft by deception requires an individual to obtain the property of another whereas shoplifting only requires the mere attempt to purchase an item. The SMEs emphasized that the scenario indicates that Glover attempted to purchase the

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[33] *N.J.S.A.* 2C:20-11 (Shoplifting) provides, in pertinent part, that for any person purposely to alter, transfer or remove any label, price tag or marking indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment and to attempt to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the value thereof. *See N.J.S.A.* 2C:20-11b(3).

[34] *N.J.S.A.* 2C: 20-4 provides, in part, that a person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind, and including, but not limited to, a false impression that the person is soliciting or collecting funds for a charitable purpose; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise. *See N.J.S.A.* 2C: 20-4(a).

jacket at a lower price and did not indicate that she obtained the jacket at any point. As such, option b is not the best response.

Question 70 indicates that Joyce Taylor uses the train to commute to work Monday through Friday. Yesterday, Marcus Doyle introduced himself to her in the train station parking lot and suggested they get a drink one night after work. Taylor politely declined. Today, after exiting the train, she returned to her car to find a note, written by Marcus Doyle, taped to the windshield. Doyle used offensively coarse language in the note and accused her of being an arrogant snob for not wanting to get a drink with him. Taylor was very annoyed by his behavior. The question asks, based on the information presented in the scenario, for the most appropriate *N.J.S.A.* 2C charge for Marcus Doyle. The keyed response is option d, harassment.[35] Hernandez argues that "the question, as written, is problematic in that it lacks the content of the letter. What is written in the letter, is a crucial factor in determining whether all of the elements to lodge the charge of harassment are present. Without these facts, the question, is vague and broadly worded." Hernandez asserts that "throughout the years the courts have been critical of the statute in order to prevent penalizing a person's First Amendment right to free speech" and refers to *State v. Burkert*, 231 *N.J.* 257 (2017), *State v. Duncan*, 376 *N.J. Super.* 253 (App. Div. 2005), *Corrente v. Corrente*, 281 *N.J. Super.* 243 (App. Div. 1995) and *Murray v. Murray*, 267 *N.J. Super.* 406. Hernandez indicates that "although the above noted examples are not identical to the fact pattern in question 70, they all critically analyze the content of the communication. For these reasons, the question, as worded, is lacking the factual basis to properly apply the charge of harassment and should be omitted." As noted previously, the instructions provided to candidates at the beginning of the test booklet stated, "When answering the questions contained in this test booklet, ***you should base your decisions on the information provided***, as well as your knowledge of the subject matter." (emphasis added). For this item, candidates were not presented with a copy of the note and thus, they were required to rely on the information available to them in the item. In this regard, the question specifically indicates that "Doyle used *offensively coarse language* in the note," which reflects the language provided in

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[35] *N.J.S.A.* 2C:33-4 (Harassment) provides, in pertinent part, that a person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received . . .

N.J.S.A. 2C:33-4. Furthermore, it is noted that the question does not ask of what the individual would be convicted, since the trier of fact would be responsible for making that determination, but rather for the appropriate charges. As such, the question is correct as keyed.

Question 72 indicates that Officer Ruiz responds to the scene of a reported domestic violence incident. Officer Ruiz interviews Felicia Mitchell, who claims that her husband, Steve Mitchell, hit her several times. The question further indicates that Officer Ruiz makes the following determinations: 1. Felicia exhibits no signs of injury caused by an act of domestic violence; 2. There is no warrant in effect for Steve Mitchell; 3. No judicial order or protective order has been violated; 4. There is no probable cause to believe that a weapon has been involved in the commission of a crime of domestic violence. The question asks, according to *N.J.S.A.* 2C:25-21 (Arrest of alleged attacker; seizure of weapons, etc.), and the information presented in the scenario, for the true statement. The keyed response is option a, Officer Ruiz "may still arrest Steve Mitchell if there is probable cause to believe that an act of domestic violence has been committed." Scarpa[36] argues that "not enough information was clearly given in the question to give rise to probable cause so that police make an arrest. The facts given for the question are mere accusations of an assault as there were no signs of injury or even complaint of pain reported in the question. Additionally, nothing further in the question gives any rise of probable cause that may enable officers to make an arrest. Moreover given the fact pattern and going on Ms. Ruiz's [*sic*] statements, I believe the correct answer was to have Ms. Ruiz [*sic*] come down and sign a complaint if she wishes to do so."[37] As noted above, the keyed response, option a, provides, Officer Ruiz "may still arrest Steve Mitchell ***if there is probable cause*** to believe that an act of domestic violence has been committed" (emphasis added). Thus, candidates were not required to make a determination of whether probable cause existed in the scenario. Bachmann, Cain, Gamad,[38] Herbert, Polo and Saettler assert that option d, *supra*, is the best response. Specifically, Bachmann presents that "if the officer has probable cause to arrest the offender, and does not, the officer is permitting more violence to be conducted upon leaving. AG Guideline 3.8.2B 'Where the victim exhibits no visible sign of injury, but states that an injury has occurred, the officer should consider other relevant factors in determining whether there is probable cause to make an arrest. *N.J.S.A.* 2C[:]25-21c(1).' If the officer in the question determined there was probable cause for an arrest, then the arrest shall be made."

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[36] It is noted that Scarpa selected option d, Officer Ruiz "is required to arrest Steve Mitchell if there is probable cause to believe that an act of domestic violence has been committed."

[37] It is noted that none of the answer choices provided to candidates included "hav[ing] the [victim] come down and sign a complaint if she wishes to do so." In this regard, all of the answer choices referred to Officer Ruiz.

[38] It is noted that Gamad selected option c, "may still arrest Steve Mitchell if there is a reasonable belief that an act of domestic violence has been committed."

Cain asserts that "even if none of the mandatory arrest criteria were satisfied, an arrest of the husband would still be made if there proved to be probable cause that he assaulted his wife." Gamad contends that "there is a duty to protect the victim from any further acts of violence. If probable cause is present the accused should be taken into custody . . . Police officers in most cases must make an arrest if probable cause exists during a Domestic Violence incident. If there is no probable cause, an arrest will not be made and the victim may sign complaints against the accused." Herbert argues that "the information provided in the question establishes two (2) of the preliminary conditions for subsection A of [*N.J.S.A.*] 2C:25-21a which states an officer 'shall arrest' . . . 'May arrest' scenarios are scenarios where officers develop probable cause based on their own observations and/or which are supplemented by additional information such as 3rd party reports in which they 'may arrest' even with an uncooperative victim." Herbert also refers to *In the Matter of William Martin*, *et al.* (CSC, decided October 19, 2016) and argues that a portion of the discussion regarding question 52 "is practically identical to the scenario provided on the test, and it is concluded that the officer SHALL ARREST in this situation."[39] Polo refers to the Attorney General Domestic Violence Procedures Manual (June 2004), Section 3.8 Mandatory Arrest, and argues that option d "would also be a true statement." Saettler presents that "the answer reads if probable cause is established to make an arrest under Domestic Violence 2C:25-21 then an officer SHALL make an arrest. It does not state what act of domestic violence probable cause was established for." Saettler adds, "If we are referencing the stated scenario, (that a victim is assaulted, but does not sustain any injuries) and then you develop probable cause that the assault did occur, then an officer is obligated to make an arrest under 2C:25-21." As noted above, this question specifically refers to *N.J.S.A.* 2C:25-21 which provides:

> a. When a person claims to be a victim of domestic violence, and where a law enforcement officer responding to the incident finds probable cause to believe that domestic violence has occurred, the law enforcement officer shall arrest the person who is alleged to be the person who subjected the victim to domestic violence and shall sign a criminal complaint if:
>
> (1) The victim exhibits signs of injury caused by an act of domestic violence;

[39] It is noted that Herbert specifically refers to "Question 52 [which] indicates that one of your officers asks you about the 'in presence' requirement for making a legal arrest. The question asks, based on relevant case law, for the true statement regarding the 'in presence' requirement . . ." Herbert highlights the portion of the discussion which provides, "In this regard, for example, the Prevention of Domestic Violence Act of 1991, *N.J.S.A.* 2C:25-17 *et seq.*, provides that when a person claims to be a victim of domestic violence, and where a law enforcement officer responding to the incident finds probable cause to believe that domestic violence has occurred, the law enforcement officer shall arrest the person who is alleged to be the person who subjected the victim to domestic violence." Thus, the section highlighted by Herbert is **not** "practically identical to the scenario provided on the test" and as such, Herbert's argument is misplaced.

(2) A warrant is in effect;

(3) There is probable cause to believe that the person has violated *N.J.S.* 2C:29-9, and there is probable cause to believe that the person has been served with the order alleged to have been violated. If the victim does not have a copy of a purported order, the officer may verify the existence of an order with the appropriate law enforcement agency; or

(4) There is probable cause to believe that a weapon as defined in *N.J.S.* 2C:39-1 has been involved in the commission of an act of domestic violence.

b. A law enforcement officer may arrest a person; or may sign a criminal complaint against that person, or may do both, where there is probable cause to believe that an act of domestic violence has been committed, but where none of the conditions in subsection a. of this section applies.

c.

(1) As used in this section, the word 'exhibits' is to be liberally construed to mean any indication that a victim has suffered bodily injury, which shall include physical pain or any impairment of physical condition. Where the victim exhibits no visible sign of injury, but states that an injury has occurred, the officer should consider other relevant factors in determining whether there is probable cause to make an arrest.

The question clearly informs candidates that ***none*** of the conditions specified in *N.J.S.A.* 2C:25-21a exist, *i.e.*: (1) The victim exhibits signs of injury caused by an act of domestic violence; (2) A warrant is in effect; (3) There is probable cause to believe that the person has violated *N.J.S.* 2C:29-9, and there is probable cause to believe that the person has been served with the order alleged to have been violated; or (4) There is probable cause to believe that a weapon as defined in *N.J.S.* 2C:39-1 has been involved in the commission of an act of domestic violence. As such, *N.J.S.A.* 2C:25-21b governs this matter. As noted above, *N.J.S.A.* 2C:25-21b provides: "A law enforcement officer may arrest a person; **or** may sign a criminal complaint against that person, **or** may do both, **where there is probable cause** to believe that an act of domestic violence has been committed, **but where none of the conditions in subsection a. of this section applies**" (emphasis added). Accordingly, the question is correct as keyed.

Question 79 indicates that according to the N.J. Attorney General's Use of Force Policy, de-escalation is the action of communicating verbally or non-verbally in an attempt to reduce, stabilize, or eliminate the immediacy of a threat. Candidates are presented with four statements and required to determine which

are de-escalation techniques, specifically listed by the policy, which should be used to create the time needed to allow the situation to resolve itself or to position additional resources to resolve the situation with the least amount of force necessary. The keyed response, option c, does not include statement IV, "Displaying weapons including firearms, Conducted Energy Devices (CEDs), batons, or OC Spray." Gould and Zolezi argue that statement IV is correct. Specifically, Gould presents that "in the AG guideline it states 'avoiding the unnecessary' display of weapons, including firearms…etc. [T]he key words are 'avoiding the unnecessary' display. The answer in question 79 did not state that. That answer is stating that it practicable to do so in certain de-escalation situations." Zolezi asserts that "section 2.5(h) of the Use of Force policy states officers should avoid THE UNNECESSARY display of weapons . . . There was no information in the question stem or information in a fact pattern that was provided to the test taker to lead them to believe the display of weapons . . . would have been unnecessary or should not be used." It is noted that the Division of Test Development and Analytics contacted SMEs regarding this matter and they indicated that the question asks for, as noted above, the de-escalation techniques that are ***specifically listed*** by the policy. The SMEs noted that although there may be occasions when the display of weapons is necessary, this is not listed as a de-escalation technique.[40] The SMEs also noted that the display of weapons is a show of force, even if it does have the effect of

[40] The Use of Force Policy (December 2020) provides:

> 2.5 De-escalation. De-escalation is the action of communicating verbally or non-verbally in an attempt to reduce, stabilize, or eliminate the immediacy of a threat. De-escalation may also be used to create the time needed to allow the situation to resolve itself or to position additional resources to resolve the situation with the least amount of force necessary. Officers should employ de-escalation techniques when feasible, which include, but are not limited to, the following:
>
> (a) communication techniques to calm an agitated subject (e.g., regulating tone and pitch, such as speaking slowly in a calm voice);
> (b) techniques to promote rational decision making, such as ensuring that only one officer addresses the person and the other officers remain detached as safety permits as to not escalate the situation; and splitting up individuals at the scene who may be arguing;
> (c) active listening techniques, such as sharing the officer's name, asking the subject their name, and exhibiting a genuine willingness to listen;
> (d) slowing down the pace of the incident by taking deep breaths, slowing speech, and/or applying strategic or critical thinking;
> (e) using calming gestures and facial expressions (e.g., arms extended with palms out and avoid angry expressions);
> (f) practicing procedural-justice techniques, such as explaining the officer's actions and responding to questions;
> (g) verbal persuasion and advisements (*e.g.*, explaining, without threats, how the person would benefit from cooperation, and the subject's rights or what the officer wants the subject to do); and
> (h) avoiding the unnecessary display of weapons, including firearms, Conducted Energy Devices (CEDs), batons, or OC Spray.

reducing resistance or gaining compliance, and the officer is then instructed to reduce their use of force (*i.e.*, put the weapon away) to match the level of resistance. In this regard, the SMEs emphasized that the intention of de-escalation is to avoid any use of force initially which is evidenced by the examples of acceptable techniques provided in the policy, *e.g.*, listening, communicating, slowing the pace, etc. As such, the question is correct as keyed.

Question 81 indicates that you arrive on the scene of a suspected theft to find Officer Morales attempting to apply handcuffs to the suspect, Kyle Schmidt. Schmidt is uncooperative and failing to comply with directions from Officer Morales. Schmidt has sat down and tensed his arms underneath his body to avoid being handcuffed. The question requires candidates to complete the following sentence, "According to the N.J. Attorney General's Use of Force Policy, Schmidt would most accurately meet the definition of . . ." The keyed response is option c, "an active resistor."[41] Since Jose Martinez selected the correct response, his appeal of this item is moot. Bunin, Cevallos, Gould, Herbert, Michel and Montes maintain that option b, "a passive resistor," is equally correct.[42] Specifically, Bunin argues that "the subject failed to listen to officer instructions (passive resistor), sits down (passive resistor), tenses arms under body refusing to be handcuffed (active resistor). The most frequent actions of the subject makes the BEST answer as passive resistor due to all listed actions by subject not being correct in all details nor exact, the BEST answer can be both passive or active resistor." Cevallos contends that Schmidt "was not listening to verbal commands. 'Passive resistor.' Also, [Schmidt] tensed arms, though it stated he sat down. How could he tense arms underneath his body as it says in the definition of active resistor if he only sat down and did not lie down. Would be physically impossible." Gould asserts that "the question failed to describe that [Schmidt] was actively resisting by force. Does not state any physical contact was made by the officer. It made it appear that [he] simply sat down being non-compliant similar to protest situations . . . By sitting down and not complying should be considered passive resistance as well. The question failed to describe a good image of active resistor, made [*sic*] contain both passive and active." Herbert presents that "the question fails to establish that the person is 'moving.' This question was a poor choice due to some ambiguity in the question; and also due to commonalities between the AG's definitions for Active and Passive resistor." Michel presents that "while the term 'tensing arms beneath the body to avoid handcuffing' is in the definition of an active resistor, the fact that Mr. Schmidt sat down indicates a 'failure to comply in a non-movement way' which is

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[41] An "Active Resistor" is defined as "a person who is uncooperative, fails to comply with directions from an officer, and instead actively attempts to avoid physical control. This type of resistance includes, but is not limited to, evasive movement of the arm, flailing arms, tensing arms beneath the body to avoid handcuffing, and flight."

[42] An "Passive Resistor" is defined as "a person who is non-compliant in that they fail to comply in a nonmovement way with verbal or other direction from an officer."

defined in the passive resistor term.[43] I believe that the passive resistor term is more correct as there is no way to tense one's arms beneath the body in a sitting position, as Mr. Schmidt was in the scenario." Montes indicates that "the information presented in the question sufficed only to identify the resistor as passive, due to the question not listing an overt act of resistance, which is required for active resistance, committed by the individual."[44] The Division of Test Development and Analytics contacted SMEs regarding this matter and they emphasized that the Use of Force Policy defines a passive resistor as an individual who simply does not comply with instructions from an officer. However, the scenario clearly indicates that Schmidt is not only "uncooperative and failing to comply with directions" but "actively attempts to avoid physical control" by sitting down and "tens[ing] his arms beneath his body." As such, the SMEs indicated that Schmidt clearly meets the definition of an active resistor. Thus, the question is correct as keyed.

Question 83 indicates that as the first supervisor arriving on the scene of a suspected bias incident, you confer with Officer Moore, who was the initial responding officer. Officer Moore informs you that she has provided assistance to the victim and protected the crime scene to prepare for the gathering of evidence. Officer Moore is looking to you for guidance on what to do next. The question requires candidates to determine, according to the N.J. Attorney General's Guideline on Bias Incident Investigation Standards (Bias Incident Investigation Standards), which is an action that is specifically listed as a responsibility of the initial responding officer. The keyed response is option a, "Obtain the names and addresses of all persons who witnessed or who are acquainted with the circumstances of the incident." Bachmann asserts that option c, "Determine if additional personnel are required to provide complete public safety services," is the best response. In this regard, Bachmann argues that "if an officer is the only officer to arrive on scene to a bias incident, then the first response should be to determine if backup officers are required. Scene safety and officer safety is paramount to controlling a bias incident. Under the AG Guideline '3. Protect the crime scene to prepare for the gathering of evidence. 4. Request that a law enforcement supervisor respond to the scene, as appropriate,' both of these steps require the determination of if additional officers are needed. Requesting a supervisor in of itself is requesting an additional officer to respond. Obtaining names and addresses of witnesses is not until step 6 of the guideline." Cosme and Ratajczak present that option b, "Take steps to insure that the incident does not escalate," is the best response. Specifically, Cosme contends that "as the initial responding officer on the scene, the officer shall contact their immediate supervisor [i]n the f[ie]ld. Officer shall secure the scene till the field supervisor arrive[s] . . . The initial officer shouldn't interview

[43] It is not clear from the submissions from Herbert and Michel as to why they concluded that sitting down was not movement.

[44] Montes does not clarify what he means by an "overt act." It is noted that the definition of "active resistor" does not state, "overt act."

anyone but secure the scene and make sure it doesn't escalate." Ratajczak asserts that in policing, there is "an emphasis on making sure moments . . . do not escalate . . . [and] a bias crime has the ability to escalate." The Bias Incident Investigation Standards provide:

> **7. INITIAL LAW ENFORCEMENT RESPONSE TO A BIAS INCIDENT**
>
> This section outlines the initial law enforcement response to a reported bias incident. This outline is designed to provide a practical approach to initial response and initial investigation of suspected or confirmed bias incidents.
>
> Bias incidents may generate fear and concern among victims and the community. These incidents have the potential of recurring, escalating, and possibly causing counter-violence. Therefore, bias incidents require a thorough and comprehensive law enforcement response.
>
> **Responding Officer:**
>
> When the initial responding officer arrives on the scene and determines that the situation may involve a bias incident, he or she shall:
>
> 1. Apprehend the actor (if applicable).
> 2. Provide assistance to the victim.
> 3. Protect the crime scene to prepare for the gathering of evidence.
> 4. Request that a law enforcement supervisor respond to the scene, as appropriate.
> 5. Conduct a standard preliminary investigation.
> 6. Obtain the names and addresses of all persons who witnessed or who are acquainted with the circumstances of the incident. All such persons should be questioned in detail.
> 7. Prepare a standard police incident report. Document the basic facts and circumstances surrounding the incident to include the following:
>   a. Name, address, telephone numbers and other information regarding the victim and witnesses.
>   b. Where incident occurred.
>   c. Person and/or property targeted.
>   d. How targeted.
>   e. Means of attack.
>   f. Time of incident.
>   g. Method of operation, trademark, or unusual characteristics of incident.
>   h. Any and all other relevant information provided by the victim and witnesses.

8. Refer the victim and witness to the appropriate Office of Victim-Witness Advocacy.

Law Enforcement Supervisor:

Upon arriving at the scene of a suspected or confirmed bias incident, he or she shall:

1. Supervise the preliminary response and investigation.
2. Confer with the initial responding officer.
3. Assist in the stabilization of the victim as required.
4. Ensure that the crime scene is properly protected and preserved.
5. Take steps to insure that the incident does not escalate.
6. Determine if additional personnel are required to provide complete public safety services.
7. Arrange for an immediate increase of patrols throughout the affected area, as appropriate . . .

As noted above, the question asks for the "action that is ***specifically listed*** as a responsibility of the initial responding officer" (emphasis added). Options b and d are ***not*** specifically listed as duties of the initial responding officer but rather, as the duties of the law enforcement supervisor. Accordingly, options b and d are incorrect.

Question 85 indicates that following a recent rise in complaints against officers in your unit, you are attempting to clarify for them the general categories of misconduct or inappropriate behavior that are subject to disciplinary action. The question requires candidates to complete the following sentence, "According to the N.J. Attorney General's Internal Affairs Policy and Procedures [(Internal Affairs Policy and Procedures)], conduct such as untidiness, tardiness, faulty driving, or failure to follow procedures is **MOST** accurately categorized as a . . ." The keyed response is option d, "minor rule infraction." Cosme maintains that "department complaint shall not be minor complaint but [option] c[, 'demeanor complaint']." The Internal Affairs Policy and Procedures provide, under Section 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." Thus, the question is correct as keyed.

CONCLUSION

A thorough review of appellants' submissions and the test materials reveals that, other than the scoring changes 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 24TH DAY OF AUGUST, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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