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STATE OF NEW JERSEY

In the Matter of William Martin, *et al.*, County Police Sergeant and Police Sergeant, various jurisdictions	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2016-2618	:	Examination Appeal

ISSUED: OCT 19 2016 (JH)

William Martin and Daniel Pleskonko (PC0105S), Camden County; Anthony Litterio, Julio Lopez, Jannor Navarro, Daniel Niekrasz and Luca Piscitelli (PM0151S), Bloomfield; Richard Herbe and Philip Kanka (PM0154S), Ewing; Eduardo Santana (PM0155S), Freehold; Samuel DellaSala, Robert Flynn, George Resetar, Noah Schaffer, Andrew Slota and Dimitri Tsarnas (PM0161S), Lacey; Kenneth Schilling (PM0164S), Little Egg Harbor Township; Erik Nolte (PM0167S), Marlboro; James Harper and Clifford Spencer (PM0171S), Mount Holly; Jason Appello (PM0172S), North Bergen; Todd Stowe (PM0173S), Park Ridge; Peter Fabiani and Raymond Kern (PM0174S), Pennsauken; Alan Hill (PM0176S), Pohatcong; James Richie (PM0178S), Scotch Plains; and Mark Burton, James DeHart, David Hoffman, Erik Lewis, Michael Rebecca and Gene Sulzbach (PM1204T), Monroe Township; appeal the examination for County Police Sergeant and 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 January 1, 2016, consisting of a video-based portion, items 1 through 50, and a multiple-choice portion, items 51 through 110. The test was worth 80 percent of the final average and seniority was worth the remaining 20 percent. As noted in the 2015/2016 Police Sergeant Orientation Guide (Orientation Guide), which was available on the Commission's 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.

In the video-based portion of the examination, candidates were presented with three separate scenarios: Scenario #1: School Board, Scenario #2: School Search and Scenario #3: Domestic Incident. The candidates were to assume the role of a Police Sergeant as they viewed scenarios associated with the duties of a Police Sergeant. Each scenario was divided into segments, which presented information and circumstances that candidates were to consider before responding to questions in their test booklet. As indicated in the Orientation Guide, questions for the video portion of the exam were presented in two formats:

> Multiple-Choice: Following information presented in the video, questions will have up to four choices from which candidates will select one answer which **BEST** addresses the problem or situation.
>
> Essential / Not Essential: Following information presented in the video, candidates will be presented with several follow-up questions they may wish to ask or actions they may choose to take based on the information presented. Candidates will have to choose whether or not the question or action presented is essential or not essential to successfully resolving the situation.

Messrs. DellaSala, Flynn and Schaffer present that the term "essential" was not defined in the test booklet or in the Orientation Guide. Specifically, Mr. DellaSala contends that due to this, "certain questions . . . cannot be answered definitively in the positive or negative since it may be a matter of opinion." Mr. Flynn asserts that "the lack of a clear definition or expectation in this regard has significant consequences on how the questions are approached. What may seem essential to one person may be non-essential to another, based on experience, interpretation, and definition." Mr. Schaffer avers that it is not clear "whether it is 'essential' for: an arrest, a complete investigation, to meet the criteria of an assault. Without a definition of essential, th[ese] question[s are] open to interpretation and [are] subjective rather than objective." It is noted that for those segments that presented candidates with follow-up questions in the "essential / nonessential" format, the instructions for these items frame the context. For example, Mr. Flynn refers to question 7, which is discussed more fully below, in which "it was asked whether video surveillance of the meeting was available was essential or nonessential. The exam review indicated it was non-essential, while clearly it is a related to, necessary, and important thing to ask for, as the charges in that case were 3rd degree aggravated assault charges, and the collection and preservation of video surveillance would be of the utmost importance." As noted below, the

instructions for this item required candidates to decide if the question was essential or not essential to ask *before advising Officer Redd on how to proceed with managing the scene.* Mr. Flynn has not demonstrated that another answer choice was correct within this context based on his definition of "essential."

Mr. Litterio argues that for the video portion, candidates were "provided only one view of the video and did not give me enough time to document all the notes necessary to apply the incident to the questions given." It is noted that each scenario was divided into short video segments. As noted in the Orientation Guide, "Candidates will assume the role of a Police Sergeant as individuals portraying roles in the video speak directly to the camera. Candidates will answer questions as if they are involved in the event or conversation that is unfolding on the monitor." Thus, these brief segments were not designed to be repeated as they simulated a real-time situation.

Messrs. Burton, DellaSala, Hill, Nolte, Richie, Santana, Sulzbach and Tsarnas maintain that they were not provided with sufficient time to complete the multiple choice portion of the exam. It is noted that all candidates were provided with the same amount of time to complete the subject test. Furthermore, all candidates are responsible to budget their time appropriately in order to complete the test within the allowed time limit. *See In the Matter of William O'Neal, Jr.* (MSB, decided February 9, 2005).

Messrs. Kanka, Lopez, Navarro, Niekrasz and Piscitelli maintain that they were only provided with 30 minutes for review and they were not permitted to review their test booklets, answer sheets and the correct answer key. In addition, they contend that their ability to take notes on exam items was severely curtailed. As such, they request that any appealed item in which they selected the correct response be disregarded and that if they misidentified an item number in their appeals, their arguments be addressed.

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

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

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

For Scenario #1: School Board, in the first video segment, Officer Redd, who was assigned security detail for the school board meeting, tells you that two women, Jane Seymour and Mary Vernon, got into an argument which escalated quickly. He also indicates that Ms. Seymour slapped Ms. Vernon in the face giving her a bloody nose.

For questions 1 through 8, candidates were presented with eight potential questions for Officer Redd and were instructed, based on the information presented in the scenario, to decide if the question is essential or not essential to ask before advising Officer Redd on how to proceed with managing the scene.

For question 1, since Mr. Navarro selected the correct response, his appeal of this item is moot.

Question 2 refers to the question, "What was the argument about?" The keyed response is option b, "This is not an essential question to ask." Messrs. DellaSala, Lopez, Richie and Schaffer contend that option a, "This is an essential question to ask," is the best response. Specifically, Mr. DellaSala presents that "asking what the argument [is] about is essential. This is basic police work and is one of the first things you would ask as part of the 'who, what, where, why, when' taught in every PTC certified Policy Academy in NJ . . . You can reference the answers to questions #9 and #13 (of this test) to support the necessity of asking what the argument is about . . ." Mr. Lopez argues that the keyed response "contradicts the majority of 'report writing' and 'note taking' teaching" and refers to Jill Meryl Levy, *Take Command of Your Writing,*[1] and Kirk B. Redwine, *The Importance of the Police Report.*[2] Mr. Richie refers to the Basic Police Training Course for Police Officers and to the job specification for Police Sergeant and argues that "when the Sergeant first arrives on the scene it would not necessarily be essential at that very moment in time to know what the argument was about. However[,] ultimately[,] it may be essential for the Sergeant to know what the argument was about to correctly perform their job function." Mr. Schaffer inquires, "how could an officer properly investigate any incident without inquiring or finding out what happened and what led to the incident unfolding[?] As a police officer[,]

[1] http://www.firebelleproductions.com/newsletters/ReportWriting.pdf

[2] http://www.cji.edu/site/assets/files/1921/importance_of_police_reports.pdf

we start every investigation by attempting to answer the basic questions for any incident (Who, What, When, Where and Why)." The directions, as noted above, instruct candidates to determine whether the question is essential in order to manage the scene. The Subject Matter Experts (SMEs) indicated that, at this point, you are trying to ensure that the scene is stabilized. As such, the basis of the argument is unimportant *at this time.* Accordingly, the question is correct as keyed.

Question 3 refers to the question, "What is the extent of the victim's injuries?" The keyed response is option a, "This is an essential question to ask." Since Mr. Navarro selected the correct response, his appeal of this item is moot. Mr. Stowe, who selected option b, "This is not an essential question to ask," presents that "it is directly reported that the victim 'was slapped and had a bloody nose.'" The scenario does not indicate the extent of the victim's injuries, *e.g.*, whether the victim's nose is bleeding profusely or whether the bloody nose is the only injury. Moreover, establishing the extent of the injuries will determine what additional resources may be necessary. Thus, the question is correct as keyed.

Question 4 refers to the question, "How many witnesses were there to the incident?" The keyed response is option b, "This is not an essential question to ask." Since Mr. Hoffman selected the correct response, his appeal of this item is moot. Messrs. Appello, DeHart, DellaSala, Kern, Lopez, Rebecca and Schaffer contend that option a, "This is an essential question to ask," is the best response. Specifically, Mr. Appello asserts that this is an essential question "as the offense is a 3rd degree crime. Also[,] Question #9 states witness statements are essential. These questions contradict each other. In one question witnesses are not essential but in the next they are." Messrs. DeHart and Rebecca present that the number of witnesses is essential in order to determine the number of interviews to be conducted and to verify the aggravated assault charge. Mr. DellaSala contends that "during an investigation, witness statements must be obtained if available (AG Guidelines). Also, due to the limited information given, this could be a Bias Crime[3] among other things, so seeking witness statements is necessary (AG Guidelines)." Mr. DellaSala adds that "if the answer to question #9 is correct, then the answer to question #4 should be Essential." Mr. Kern maintains that "based on the nature of the offense[,] I feel as though witnesses would play a factor in obtaining vital

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[3] Although Mr. DellaSala presents that this scenario may be a bias incident, there is nothing in the scenario which would indicate this. In this regard, the Attorney General Bias Investigation Standards (Revised January 2000) provides, in pertinent part:

> For New Jersey Law Enforcement purposes, a bias incident is defined as any suspected or confirmed offense or unlawful act which occurs to a person, private property, or public property on the basis of race, color, religion, sexual orientation or ethnicity. An offense is bias-based if the motive for the commission of the offense or unlawful act is racial, religious, ethnic or pertains to sexual orientation.

information which could assist with the investigation." Mr. Lopez avers that the keyed response "contradicts the majority of 'report writing' and 'note taking' teaching" and refers to Levy, *supra,* and Redwine, *supra.* Mr. Schaffer indicates that "the officer should inquire as to the how many witnesses there are . . . because they should be interviewed and their statements will be documented in the case file." With regard to the reference to question 9 made by Messrs. Appello and DellaSala, the instructions presented to candidates in the test booklet provide, "When you are responding to a question, you may turn back to the previous page to refer to notes you have made, but you are not permitted to move forward in your booklet." Further, question 9 is in regard to the next video segment which contains additional information. Moreover, question 4, as noted above, is in regard to managing the scene whereas question 9 is in regard to determining Title 2C charges. Thus, their reliance on question 9 is misplaced. As indicated previously, at this point, you are trying to ensure that the scene is stabilized. As such, the SMEs noted that determining the number of witnesses can wait until after the scene is under control. The SMEs further noted that witnesses to the incident may be questioned at some point but they are not more important than dealing with the two involved individuals. Accordingly, the question is correct as keyed.

For question 5, since Mr. Navarro selected the correct response, his appeal of this item is moot.

Question 6 refers to the question, "Was the school board meeting underway when the incident occurred?" The keyed response is option b, "This is not an essential question to ask." Since Messrs. Flynn and Hoffman selected the correct response, their appeals of this item are moot. Messrs. DellaSala, Lewis, Martin, Rebecca, Richie and Schaffer argue that option a. "This is an essential question to ask," is the best response. Specifically, Mr. DellaSala asserts that "asking if the School Board meeting was underway helps to clarify if the victim was a 'teacher clearly identifiable as being engaged in the performance of his duties' for the purposes of an Aggravated Assault charge as per 2C:12-1b(5)d." Messrs. Lewis and Rebecca contend that "determining if the meeting was underway is essential to determine if other charges are applicable such as[,] Disrupting Meetings and Processions (2C:33-8)[.]" Mr. Martin refers to *N.J.S.A.* 2C:33-8 (Disrupting meetings and processions) and asserts that it is essential to know if the meeting had begun "for the officer to determine *which* charges would be appropriate." Mr. Schaffer asserts that "this goes back to the officer thoroughly documenting the facts and circumstances of this event. Along with the appropriate assault charge, disrupting meetings and processions would be an additional charge against the suspect." Mr. Richie argues that "by presenting this question in which the correct answer choice is to overlook or disregard a possible violation of the law not only contradicts the law enforcement function it contradicts the [Police Sergeant] job description . . ." As noted previously, the SMEs emphasized that at this point, you should be concentrating on stabilizing the scene and making sure that the proper

actions are taken. As such, the SMEs indicated that asking about the meeting is not imperative *at this point* and can be determined at a later time. Thus, the question is correct as keyed.

Question 7 refers to the question, "Is there surveillance video of the meeting?" The keyed response is option b, "This is not an essential question to ask." Messrs. Appello, DellaSala, Flynn, Hoffman, Lewis, Lopez, Rebecca, Schaffer, Schilling, Spencer and Stowe maintain that option a, "This is an essential question to ask," is the best response. Specifically, Mr. Appello presents that "video evidence can be a determining factor in obtaining probable cause. It is also a[n] unbiased view on the events that took place." Mr. DellaSala argues that "during an investigation, video surveillance must be obtained if available (AG Guidelines). Also, due to the limited information given, this could be a Bias Crime among other things, so seeking video surveillance is necessary (AG Guidelines). Video Surveillance will act as a witness." Mr. Flynn indicates that a "police supervisor would more likely be subject to disciplinary action if he/she did not ensure that the officers under his/her supervision inquired as to whether video surveillance was available . . . If the video evidence is not obtained or requested immediately, it has the potential of being lost." Messrs. Hoffman, Lewis and Rebecca note that "it would be beneficial in determining if a crime took place and also to determine probable cause." Messrs. Hoffman and Rebecca add, "In today's day and age [*sic*], there should be no reason to not acquire video footage of an incident if available." Mr. Lopez contends that the keyed response "contradicts the majority of 'report writing' and 'note taking' teaching" and refers to Levy, *supra,* and Redwine, *supra.* Mr. Schaffer refers to the job specification for Police Officer and contends that "the value of having video evidence . . . cannot be overstated. [H]av[ing] an unbiased depiction as to the true events of what occurred is essential." Mr. Schilling notes that he "would not respond to a scene and neglect to gather video evidence which would show the incident." Mr. Spencer argues that video footage of the incident would "make an officer's report more compete and would give an impartial, firsthand view of the crime." Mr. Stowe presents, "not for immediate viewing, but preservation of evidence for charges and future court proceedings." As indicated previously, at this point, you are trying to ensure that the scene is stabilized and the proper actions are being taken. The SMEs indicated that the collection of evidence may be done at a later point. In this regard, the SMEs noted that surveillance video is not likely to be destroyed immediately and thus, there is no exigency in securing it. As such, the question is correct as keyed.

In the second video segment for Scenario #1, Officer Redd refers you to school board president David Salcedo who tells you that Ms. Vernon, a teacher who was suspended a few weeks ago, ran a blog that trashed school board members. At tonight's meeting, the school board was voting on whether to dismiss her or not. He notes that before the vote, Ms. Vernon was permitted to make a statement to the school board in her defense at which point she got up and spouted "all kinds of

mean stuff about the administrators, other teachers, and even some students . . . you know, the same kind of things she was writing about in her blog." He tells you that is when a parent in the audience, Ms. Seymour, went after her.

For questions 9 through 14, candidates were presented with six factors and were instructed, based on the information presented in the scenario, to decide if the factor presented should or should not be used in determining the *N.J.S.A.* Title 2C charge to be filed against Jane Seymour.

Question 10 refers to the factor, "acceptance or refusal of the victim to sign a complaint." The keyed response is option b, "This should not be a factor used to determine which charge will be filed against Jane Seymour." Messrs. Martin, Richie and Schaffer contend that option a, "This should be a factor used to determine which charge will be filed against Jane Seymour," is the best response. It is noted that Mr. Schaffer misremembered the question as asking, "whether it was essential or not essential for the officer to inquire how the victim felt about how they felt [*sic*] about the filing of the complaint."[4] Mr. Martin presents that "if the teacher does not wish to sign a complaint for aggravated assault then that charge would not be filed . . . There may be other charges which could be filed against the suspect, but the question asks if the teacher[']s decision would affect *which* charges would be filed. The teacher's decision would affect which charges are filed and is therefore essential." Mr. Richie maintains that "it would be [a] requirement under this scenario for the victim or complainant to sign the charges against the parent as well as the suspended teacher if the [*sic*] wish." The SMEs indicated that the acceptance or refusal of the victim to sign a complaint is not a factor in determining which charge will be filed. Thus, the question is correct as keyed.

For question 11, since Mr. Sulzbach selected the correct response, his appeal of this item is moot.

Question 13 refers to the factor, "Possible special and protected status possessed by either of the parties involved." The keyed response is option a, "This should be a factor used to determine which charge will be filed against Jane Seymour." Since Mr. Schaffer selected the correct response, his appeal of this item is moot. Mr. Navarro maintains that "the video presented already indicated it was a teacher who had been assaulted and . . . the offense would be an aggravated assault [pursuant to *N.J.S.A.*] 2C:12-1b[(5)](d) . . ." Candidates were required to determine whether possible special and protected status would be a factor in determining the charge. As indicated by Mr. Navarro, the victim's status as a

[4] In this regard, Mr. Schaffer maintains that pursuant to the Attorney General Guidelines on Crime Victims' Rights, "the courts are very sensitive to how and to what extent a crime victim feels about the incident they were involved in."

teacher may determine whether Jane Seymour is charged with aggravated assault pursuant to *N.J.S.A.* 2C:12-1b(5)(d).[5] As such, the question is correct as keyed.

Question 14 refers to the factor, "The personal nature of the information revealed in the victim's speech." The keyed response is option b, "This should not be a factor used to determine which charge will be filed against Jane Seymour." Messrs. DellaSala, Flynn and Richie argue that option a, "This should be a factor used to determine which charge will be filed against Jane Seymour," is correct. Specifically, Mr. DellaSala presents that "without asking about this, you would not know if it was a Domestic Violence incident, a Violation of a Restraining Order, a Bias Crime, if the victim has Special and Protected Status (among various other things). You can reference the answer to question #13 (of this test) to support the necessity of asking about the personal nature of information from the victim, since this question and correct answer reference special and protected status." Mr. Flynn refers to the Attorney General Guidelines on Bias Incidents (revised January 2000) and argues that "the descriptions of her targeting specific people with 'mean' and 'really nasty' comments would raise the possibility of the incident being a bias incident." Mr. Richie avers, "I disagree with this answer choice because under the requirement set forth in [*N.J.S.A.*] 2C:2-2 General Requirements of Culpability[,] the Police Sergeant would have a responsibility to ensure a proper investigation was completed and with that respect[,] the nature of the speech is essential to determine if it was a factor needed to establish culpability of the parent as well as the suspended teacher regarding this offense." The SMEs indicated that while the information revealed by the victim may provide evidence of the "provocation" for the attack, it would not justify the actions of the suspect or be a factor in the charges filed. Thus, the question is correct as keyed.

Question 15 asks, based on what has been reported to you, for the most appropriate *N.J.S.A.* Title 2C charge for Jane Seymour. The keyed response is option c, "aggravated assault." Since Messrs. Hoffman and Santana[6] selected the correct response, their appeals of this item are moot. Mr. Schaffer contends that the appropriate charge should be aggravated assault "due to the victim being a teacher

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[5] *N.J.S.A.* 2C:12-1b(5)(d) provides that a person is guilty of aggravated assault if he commits a simple assault upon any school board member, school administrator, teacher, school bus driver or other employee of a public or nonpublic school or school board while clearly identifiable as being engaged in the performance of his duties or because of his status as a member or employee of a public or nonpublic school or school board or any school bus driver employed by an operator under contract to a public or nonpublic school or school board while clearly identifiable as being engaged in the performance of his duties or because of his status as a school bus driver

[6] Mr. Santana misremembered the keyed response as option b, Harassment, and argues for the keyed response.

and it was a result of her status of a teacher."[7] Given that Mr. Schaffer selected and argues for the keyed response, his appeal of this item is moot. Messrs. Harper, Herbe, Kanka, Lewis, Pleskonko,[8] Rebecca, Resetar, Richie and Sulzbach refer to *N.J.S.A.* 2C:12-1b(5)(d) and argue that option a, "simple assault," is the best response. Specifically, Mr. Harper argues that "the teacher was not engaged in the performance of her duties" and "her appearance was not requested by the school board or mandatory." Mr. Herbe contends that "the victim was not 'clearly identifi[a]ble as being engaged in her duties' and [the] assault was not the result of her 'status as a member or employee of a public or nonpublic school.'" Mr. Kanka argues that "having a teacher at a council [*sic*] meeting for the sole purpose to appeal the suspension and fight for her job back does not constitute her being engaged in the performance of her duties. Furthermore[,] it did not state the parent[']s sole intention was to hit her because she was a teacher. It could also be implied the parent only wanted to assault the teacher to stop her from being unruly." Mr. Kanka adds that he contacted the Mercer County Prosecutor's Office and he was told by the Assistant Prosecutor that "there were insufficient facts to sustain a charge of [a]ggravated [a]ssault . . . She was not teaching students, she was not acting as a hall monitor or in any other way that could be considered 'her duties' . . . [The Assistant Prosecutor] also questioned the individual's status since it appeared that she was suspended."[9] Messrs. Lewis and Rebecca contend that "the protected status of the teacher is unknown because suspended could be pending termination, which may remove the protective status of the teacher." Mr. Pleskonko presents, "Teacher is SUSPENDED. NOT 'WORKING'; should be simple assault." Mr. Resetar asserts that "although a topic of the meeting was the teacher's job, she was not there or engaged in the performance of her duties." Mr. Richie presents that the definition of suspension is "temporary separation from permanent employment for disciplinary reasons"[10] and this "prevent[s] the teacher from being engaged in the performance of h[er] duties . . . [T]his suspended teacher was exercising her right t[o] speak at the public meeting . . . regarding her job status and was not related to providing education. There is no information that she was required to attend this meeting by the school board[. T]herefore[,] she is not engaged in the performance of h[er] duties . . ." Mr. Richie also presents that

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[7] In his appeal, Mr. Schaffer misidentifies this item as question 16. In this regard, it is noted that he describes this item as, "The question asked what was the appropriate 2C Charge[.] Keyed answer on the Exam – None." However, "aggravated assault" was not one of the answer choices presented to candidates for question 16 as that item refers to Ms. Vernon.

[8] In his appeal, Mr. Pleskonko states, "Question 3; 9; 10; 11. These question[s] deal with the answer to question 15." However, Mr. Pleskonko fails to explain how these items are related to question 15.

[9] It is not clear what information regarding this item was imparted by Mr. Kanka to this individual.

[10] Mr. Richie appears to be referring to *N.J.A.C.* 4A:1-1.3.

pursuant to the definition of suspension, as indicated above, "she is technically not an employee/teacher and would not retain that status at the time of the assault." Mr. Richie adds that "the assault was committed in response to the nature of the speech. There is no evidence to suggest that the parent assaulted the teacher . . . d[ue] to her status as a member or employee of a public or nonpublic school." Finally, Mr. Richie contends that this item "fails to address [*N.J.S.A.* 2C:33-8 Disrupting meetings and processions . . . The information in this scenario does satisfy the required element to charge the parent with [*N.J.S.A.* 2C:33-8 Disrupting meetings and processions . . . By presenting this question in which the correct answer choice is to overlook or disregard a violation of the law not only undermines the law enforcement function, it contradicts the N.J.C.S.C. job description . . ." It is noted that the question does not ask for all possible charges for Jane Seymour. Furthermore, as previously noted, candidates were informed that "questions will have up to four choices from which candidates will select one answer which **BEST** addresses the problem or situation." Mr. Sulzbach asserts that since "the teacher was suspended at the time of the meeting . . . [she] was not a teacher at the time of the assault . . . *N.J.S.*[*A.*] 2C:12-1b(5)(d) does not provide consideration for suspended employees." It is noted that the question does not ask of what Ms. Seymour would be convicted, since the trier of fact would be responsible for making that determination, but rather for the appropriate charge. While Ms. Vernon may not have been engaged in the performance of her duties as a teacher at the time of the assault, she was clearly at the meeting regarding her status as a teacher. In this regard, as noted above, Ms. Vernon was appearing at a school board meeting, the purpose of which was to determine whether or not she would continue her employment as a teacher. At this meeting, Ms. Vernon was permitted to make a statement in defense of her position as a teacher. Thus, the SMEs determined that the circumstances presented in the question were sufficient to charge Ms. Seymour with aggravated assault. Accordingly, the question is correct as keyed.

Question 16 asks, based on what has been reported to you, for the most appropriate *N.J.S.A.* Title 2C charge for Mary Vernon. The keyed response is option d, "none." Messrs. Martin and Richie maintain that option b, "Disrupting meetings and processions,"[11] is the best response. Specifically, Mr. Martin refers to *State v. Rosenfeld*[12] and *State v. Charzewski,*[13] and argues that "certain forms of

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[11] *N.J.S.A.* 2C:33-8 (Disrupting meetings and processions) provides that a person commits a disorderly persons offense if, with purpose to prevent or disrupt a lawful meeting, procession or gathering, he does an act tending to obstruct or interfere with it physically.

[12] Although Mr. Martin does not provide a citation for this matter, it appears he is referring to *State v. Rosenfeld*, 62 *N.J.* 594 (1973). It is noted that the defendant in that matter was charged with violating *N.J.A.C.* 2A:170-29(1) by using foul language at a public meeting. It is further noted that *N.J.A.C.* 2A:170-29 was repealed effective September 1, 1979.

speech may be charged as disrupting a public meeting. Words characterized as 'fighting words,' or language capable of causing an imminent bre[a]ch of the peace could constitute disruption. The teacher's words were just that, personal attacks on parents and faculty which were likely to elicit a strong emotional response, even to the point of physical assault." Mr. Richie argues that "in this situation[,] the nature of the suspended teacher[']s speech did not serve the intended purpose of the meeting . . . According to *State v*[.] *Kane*[,][14] what is permissible conduct at a public meeting depends, of course, on the nature and setting of the meeting. In this scenario[,] the fact that the suspended teacher is using a public platform to utter disparaging remarks would fall outside the purpose of the public meeting." Mr. Richie emphasizes that the teacher's speech is described as "disparaging"[15] which "would be considered fighting words which would have incited [the] parent by passion & provocation (as recognized under the New Jersey Justice Code) to act out and assault the suspended teacher . . ." and refers to *New Jersey v. Rosenfeld.*[16] The SMEs indicated that there is insufficient information provided in the scenario to charge Ms. Vernon pursuant to *N.J.S.A.* 2C:33-8. The SMEs stated that the information provided in the scenario fails to establish that Ms. Vernon's words were as inflammatory as those discussed in *Rosenfeld, supra.* In this regard, the SMEs noted that Ms. Vernon's statement was described in the scenario as "mean stuff . . . the same kind of things she was writing about in her blog." Thus, the SMEs determined that relying on the analysis in *Rosenfeld, supra,* would require additional facts not presented in the scenario. The SMEs also noted the court in *Charzewski, supra,* indicated that *N.J.S.A.* 2C:33-8 "by its very terms restricts itself to acts that physically obstruct or interfere with the meeting. While speech may qualify in such an act, it would have to be speech intended to disrupt and capable of doing so." *Id.* at 156. In this regard, the court further noted that the comments to *N.J.S.A.* 2C:33-8 provide, in part:

> As noted, the section is limited to physical interference . . . That is not to say that speech could never be physically disruptive; where an actor's speech was intended to make it impossible for the person addressing the meeting to be heard, speech would constitute a physical obstruction.

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[13] Mr. Martin does not provide a citation for this matter. However, it appears he is referring to *State v. Charzewski,* 356 *N.J. Super.* 151 (App. Div. 2002).

[14] Mr. Richie does not provide a citation for this matter. However, it appears he is referring to *State v. Kane,* 303 *N.J. Super.* 167 (App. Div. 1997). As noted by the court in *Charzewski, supra,* the court in *Kane, supra,* "did not analyze what speech might qualify as disruptive." *Id.* at 157.

[15] As noted above, the school board president does not describe Ms. Vernon's statement as "disparaging."

[16] Mr. Richie does not provide a citation for this matter. However, it appears he is referring to *State v. Rosenfeld, supra.*

> Similarly, if a person with no privilege to speak in a meeting repeatedly interrupted it, he might well be in violation of the section whatever the content of his speech. [citation omitted]. *Id.* at 157.

The SMEs emphasized that the scenario indicates that Ms. Vernon was permitted to make a statement to the school board in her defense. In addition, the SMEs noted that the scenario does not indicate that the meeting chairperson objected to her statement or tried to control her speech in order to maintain order. As such, option b is not the best response.

In the third video segment for Scenario #1, Officer Redd indicates that there is a crowd forming in the lobby. Mr. Salcedo adds that Ms. Vernon is popular with the students and found out that the board was voting on her status tonight. The students started posting about it on social media and he thinks that they are starting up a protest in her defense. He states that it "looks like it's getting pretty rowdy out there."

Question 17 asks, based on the information reported to you, for the first action you should take in response to the crowd forming in the hallway. The keyed response is option b, "Have the crowd moved to a specific area outside the building to continue their protest." Since Messrs. Hoffman and Santana selected the correct response, their appeals of this item are moot. Mr. Piscitelli asserts that option a, "Inform the School Board President you are cancelling the rest of the meeting," is the best response. In this regard, Mr. Piscitelli argues that "moving the meeting to another location would not change the attitude and plans of any aggressors and therefore a riot would ensue even at the new location." Messrs. Lewis, Niekrasz, Pleskonko and Rebecca argue that option c, "Order the protestors to disperse from the scene," is the best response. Specifically, Messrs. Lewis and Rebecca maintain that the crowd is "only entitled to a peaceful protest" and "if they are blocking the hallways in the school," dispersing it "would also be important for the safety of others in the school should an emergency arise and evacuation be necessary." Mr. Niekrasz contends that moving this "group of emotionally charged individuals to a different location does not effectively reduce the possibility of further acts of violence" and argues that "the most effective way to ensure the safety of the officer[s] at the scene, the victim, the actor, the school board representatives, and the crowds themselves is to remove the crowd f[rom] the situation, not simply move the threat outside." Mr. Pleskonko states, "what authority to move crowd, must order them." The SMEs indicated that option a would exceed your authority. With respect to option c, the SMEs noted that the protestors have the right to assemble in a peaceful and orderly fashion. Regarding option b, the SMEs indicate that allowing the individuals to exercise their right to protest should be done in an organized way that does not interfere with the board meeting. Thus, the question is correct as keyed.

For questions 18 through 21, candidates were presented with four potential actions and were instructed, based on the information presented in the scenario, to decide if the action is essential or not essential in response to the crowd forming in the hallway.

Question 18 refers to the action, "Inform your supervisor about the situation." The keyed response is option a, "This is an essential action." Since Messrs. Appello, Burton and DeHart selected the correct response, their appeals of this item are moot. Mr. Resetar asserts that he "can't see how it is possible that you, as a supervisor, would need to notify your supervisor while on scene." The SMEs indicated that since the incident is escalating beyond the initial fight, you should inform command of the situation. As such, the question is correct as keyed.

Question 19 refers to the action, "request a tactical unit to deal with the protestors." The keyed response is option b, "This is not an essential action." Mr. Litterio maintains that option a, "This is an essential action," is the best response. He argues that "the video clearly stated that the crowd was 'getting rowdy' and 'getting out of control.'[17] I feel a tactical unit would be necessary to prevent the 'out of control' crowd from escalating. The dispatching of a tactical unit does not automatically guarantee that they will be utilized into action . . . At this point, the video had progressed into a violent situation and evolved into a problem for the entire school as well as the surrounding area." The SMEs indicated that a tactical unit would be excessive since nothing in the scenario indicated that the crowd was violent. The SMEs added that the presence of a tactical unit may cause the crowd to become violent, as they may see the unit's presence as an unreasonable show of force given the venue and situation. As such, the question is correct as keyed.

Question 20 refers to the action, "issue an update on the department's social media accounts is an essential or not an essential action in response to the crowd forming in the hallway. The keyed response is option b, "This is not an essential action." Since Mr. Flynn selected the correct response, his appeal of this item is moot. Messrs. DellaSala and Schaffer present that option a, "This is an essential action," is the best response. Specifically, Mr. DellaSala contends that "Law Enforcement has received training about the importance and necessity to as soon as possible relay facts and information to the public, utilizing means such as social media, to prevent civil unrest and riots . . . Social Media has been touted as one of the most important tools law enforcement can use to effectively relay information to the public and prevent civil unrest." Mr. Schaffer adds that "posting an update of the current standing of a public meeting would be an important step to quelling any further disturbance." The SMEs indicated that maintaining control of the crowd

[17] As indicated above, in the third video segment Mr. Salcedo states that it "looks like it's getting pretty rowdy out there." He does not state that the crowd "is getting out of control" or is "out of control."

and of the situation is of primary importance at this point. Issuing updates on social media can be done after the situation is brought under control. The SMEs further indicated that issuing an update on the department social media accounts would likely have little to no effect on the crowd currently gathered at the school or stem the response of additional people to the crowd. In this regard, the SMEs noted that those who are gathering in the crowd are unlikely to follow the police department's social media accounts. As such, the question is correct as keyed.

For questions 22 through 26, candidates were advised that the situation at the school has ended and you have returned to your department. They were presented with five potential actions and were required to decide, using the information contained in the scenario, if the action is essential or not essential to properly conclude the incident.

Question 22 refers to the action, "Contact the local media to ensure their reporting of the incident does not include inaccurate information." The keyed response is option b, "This action is not essential to properly conclude the incident." Messrs. Flynn, Martin and Schaffer assert that option a, "This action is essential to properly conclude the incident," is correct. Specifically, Mr. Flynn contends that "with the potential of the exam scenario being a bias incident . . . the supervisor should continue to ensure the investigation is properly conducted in accordance with the New Jersey Attorney General Guidelines on Bias Incidents . . . [which] also requires that 'the law enforcement agency conduct appropriate media relations and prepare accurate and timely public information news releases . . .'"[18] Mr. Martin asserts that "ensuring factual and timely media releases and public relations is an essential part of the supervisory process. It is essential that a supervisor ensure that correct and factu[al] information is provided to the media." Mr. Schaffer argues that "the fact that the students and parents within the scenario utilized social media . . . is evidence in itself of how valuable news media and social media [are]. By releasing information and a statement to the news media, it allows for the police department to provide direct and accurate transmission to the public [of] what actually happened at the event . . ." The SMEs indicated that you would not proactively contact the media to discuss the incident. The SMEs stated that the only interaction with the media would be in the form of a press release if the information was requested. Thus, the question is correct as keyed.

Question 24 refers to the action, "Ensure that any charges that have been filed are reported to the appropriate court." The keyed response is option a, "This action is essential to properly conclude the incident." Mr. Santana presents, "According to [the] Civil Service Commission[,] the charg[e] against the lady who slapped the teacher [is] harassment. Harassment is a Disorderly Persons Offense. According to the New Jersey Court Rules 3:2-2. Harassment complaint (or

[18] As indicated previously, there is no indication in the scenario that this is a bias incident.

Disorderly Persons Offense) can be put on a summons or CDR1 which notifying the court is not required, it[']s optional." As noted previously, Mr. Santana misremembered the keyed response to question 15 as harassment. Thus, his argument is misplaced.

Question 26 refers to the action, "recommend training for all officers in the area of dealing effectively with the pubic and methods of crowd control." The keyed response is option b, "This action is not essential to properly conclude the incident." Messrs. Burton, DellaSala, Hoffman, Lewis, Litterio, Lopez, Martin, Niekrasz, Rebecca and Sulzbach contend that option a, "This action is essential to properly conclude the incident," is correct. Specifically, Mr. Burton maintains that "a conclusion of any potentially dangerous situation involving officers dealing with the public and method of crowd control would always require a recommendation of training for officers on a departmental scale." Mr. DellaSala presents that "as a supervisor, you should not wait until a problem occurs to train (reactive training), rather supervisors should progressively train officers and be able to identify areas that need to be improved upon with further training, prior to a failure or incident." Messrs. Hoffman, Lewis and Rebecca assert that "obviously there w[ere] some issues with the way the officers on scene handled the situation. RECOMMENDING additional training, is not saying that the training ITSELF needs to happen to conclude the incident." Mr. Litterio contends that "it was obvious that the incident got out of control quickly and resulted in injuries and an unsafe condition for all attendees. Training in law enforcement has always essential. Training helps officers learn their mistakes such as letting an incident get out of control . . ." Mr. Lopez contends that the keyed response is "contrary to the Attorney General Guidelines, Internal Affairs Policy and Procedures, Mandatory Training and the majority of training provided to Police Supervisors. Most of the training provided to police supervisors give emphasi[s] on anticipating problems among officers before they result in improper performance or conduct." Mr. Martin asserts that "while I understand that the scenario did not indicate that officer[s] had any problems with crowd control during the incident, as a follow up it is critical for supervisor[s] to prepare their officer[s] for future similar incidents through training." Mr. Niekrasz refers to the Mandatory In-Service Law Enforcement Training Guideline (revised April 2000) and argues that "to determine that training is not an essential action for any supervisor to recommend based on an incident would undermin[e] the duty of law enforcement agencies to provide efficient training based on their needs." Mr. Sulzbach presents that "based on the video these officers, and possibly the entire police department, appear to be inexperienced in dealing with large crowds . . . More training can never hurt and in this situation it was definitely warranted." The SMEs noted that while proactive training in the areas of dealing effectively with the public and methods of crowd control are important, it would not be required for this scenario to be properly resolved. The SMEs indicated that there are no mandates or guidelines that require such training to be provided. The SMEs noted that the only scenario which may give rise to the claims that the action would

be essential would involve some level of inappropriate handling of the job, which was not indicated in the scenario. Thus, the question is correct as keyed.

For Scenario #2: School Search, in the first video segment, Officer Blake tells you that a student, Billy Preston, appears to be high on something. He further tells you that his teacher noticed that he was acting strange and sent him to the principal's office. Preston said that he took a pill that he bought from another student, Jeff Calhoun, who is in his auto shop class. The principal searched Calhoun's pockets, his locker, and his car and found some drug paraphernalia and possible CDS.

For questions 27 through 31, the directions indicate that after listening to what has been reported to you, you require more information about the situation. Candidates were presented with five potential questions for Officer Blake. Candidates were instructed, based on the information contained in the scenario, to decide if the question is essential or not essential to ask before you proceed.

Question 27 refers to the question, "What charge is Officer Blake considering?" The keyed response is option a, "This is an essential question to ask." Messrs. Piscitelli and Santana maintain that option b, "This is not an essential question to ask," is correct. Specifically, Mr. Piscitelli refers to "New Jersey v. Thomas Best,"[19] and argues that "it does not indicate anywhere whether the officer knew immediately, at the scene (school) what charges he would charge Best with." Mr. Piscitelli adds that "there are many times an officer comes across pills that the officer would not immediately know what the pills are. In those cases, . . . until the pill is identified, a specific criminal statute (NJS 2C) would not be known . . . The exact charge is not known at the scene and has to be researched . . ." Mr. Santana contends that "thinking about the charges against the students should not be the first priority." Mr. Santana refers to the Attorney General Guidelines on Juvenile Matters and maintains that he "believe[s] that the first priority should be the well[-] being of the juvenile and once all evidence gathered, decide on the charges or with Prosecutor[']s permission conduct a Stationhouse Adjustment." The segment indicates that you have just arrived on scene and Officer Blake provides you with an overview of the situation. The item does not indicate that you are determining the final charges that will be filed in this matter. Rather, the SMEs determined that asking about charges would provide you with an opportunity to gather further relevant details from Officer Blake. As such, the question is correct as keyed.

Question 28 refers to the question, "Has the County Prosecutor been notified?" The keyed response is option b, "This is not an essential question to ask."

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[19] Although Mr. Piscitelli does not provide a citation, he appears to be referring to *State v. Best*, 201 *N.J.* 100 (2008).

Mr. Martin argues that "it is important to contact the prosecutor's office for several reasons during this scenario. The prosecutor's office should be involved in charging decision for juvenile CDS offenses. This incident also involved a juvenile who had ingested CDS and was having a medical issue related to the ingestion. It was also conceivable that he may or may not be charged with a CDS offense related to his acquisition of CDS. With the recent Overdose Prevention [A]ct, the prosecutor's office must be contacted if any charges result from CDS possession involving an overdose situation. It is important to get their input in determining whether the student und the influence should receive protection under the [O]verdose [P]revention [A]ct." The SMEs indicated that the situation presented would not be covered by the Overdose Prevention Act.[20] In this regard, the SMEs explained that there is no indication that Billy Preston is suffering from an overdose. The SMEs further indicated that at this stage, it is not essential to notify the County Prosecutor's Office. As such, the question is correct as keyed.

Question 31 refers to the question, "Did the Principal receive consent before he conducted the searches?" The keyed response is option b, "This is not an essential question to ask." Mr. Flynn argues that option a, "This is an essential question to ask," is correct. He indicates that the New Jersey School Search Policy Manual (1998) (Manual) "goes to great lengths to discuss the issue of consent regarding school related searches." He refers to Section 8.1 of the Manual which provides, "In the absence of any controlling or even persuasive Fourth Amendment legal precedent, however, the better practice in this state would be for school officials to comply whenever possible with the same basic rules that govern police requests for permission to conduct a search." Mr. Flynn does not explain how asking this question would affect how he would proceed with the investigation at this point. Given that the scenario indicates that the principal has already conducted a search of Calhoun's pockets, locker, and car, the SMEs determined that asking this question is not critical at this point. Thus, the question is correct as keyed.

In the second video segment for Scenario #2, the principal tells you that one of the teachers mentioned to him that Preston was acting funny and she thought that he might be high or something. He called Preston into his office where Preston openly admitted that he took a pink colored pill that he bought from Calhoun. Preston said that he was not sure what kind of pill it was but he got it from Calhoun while they were in auto shop.

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[20] As noted in Attorney General Law Enforcement Directive No. 2013-1, "The Overdose Prevention Act specifically provides that when a person, in good faith, seeks medical assistance for a person believed to be experiencing a drug overdose, whether the person is seeking assistance for him/herself or for another, the person calling for help and the person experiencing the overdose shall not be arrested, charged, prosecuted, or convicted for certain specified criminal offenses."

Question 32 asks, based on what has been reported to you, for the most important follow-up question you should ask the principal at this point. The keyed response is option d, "Have Preston and Calhoun's parents been contacted?" Mr. Niekrasz argues that option a, "What behaviors led the teacher to believe Preston was under the influence of a CDS?," is equally correct.[21] He refers to the Overdose Prevention Act and argues that "at this point in the fact pattern we have no knowledge of what type of CDS the individual consumed or the quantity . . . The most important police response would be to protect the safety of the individual and provide medical care. It should also be noted that because the individual was eighteen at the time it would not be required to notify the parents before providing *medical attention*." As noted previously, the SMEs indicated that the Overdose Prevention Act is not applicable in this situation. In addition, it is noted that in preceding segment, question 30 refers to the question, "Where is Preston and does he require medical attention?" Furthermore, at this point in the scenario, neither Preston's nor Calhoun's ages have been discussed. Moreover, the SMEs determined that the teacher's impressions of why he or she thought Preston was high is not a priority at this point. As such, option a is not the best response.

In the third video segment for Scenario #2, the Principal tells you that he pulled Calhoun in and told him that Preston had told him everything. Calhoun still denied selling Preston the pill. The Principal further advises you that Assistant Principal Bullock was with him the whole time and it was obvious that Calhoun was lying. The Principal indicates that he searched Calhoun's pockets and found a few blue pills but not pink pills. Calhoun then tells him that he sold the pill to Preston but it was some kind of headache medicine.

Question 33 asks, based on what has been reported to you, for the most important follow-up question you should ask the Principal at this point. The keyed response is option c, "Do you have the blue pills you took from Jeff Calhoun?" Mr. Santana maintains that option a, "Did Calhoun appear to be under the influence of a CDS?," is the best response. He argues that "according to Attorney General Guidelines Juveniles Matters & Memorandum of Agreement[,] the safety of the juvenile should be my first priority. Therefore[,] asking if the juvenile, Jeff Calhoun[,] appeared to be under the influence should be more important tha[n] inquiring about the pills." The SMEs noted that the scenario indicates that Preston was acting strangely, and not Calhoun. In addition, the SMEs emphasized that the most important action is to secure the evidence previously discovered in Calhoun's possession. As such, the question is correct as keyed.

In the fourth video segment for Scenario #2, the Principal tells you that he did not believe that the pills were headache medicine so they check Calhoun's locker

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[21] It is noted that Mr. Niekrasz misidentified this answer choice as option d.

but did not find anything. He tells you that at this point Assistant Principal Bullock is checking Calhoun's records and Calhoun is 18 years old and he has approval to bring his car on campus to have it worked on by the auto shop class. When the Principal tells Calhoun that he is going to search his car, Calhoun says he wants to call his dad.

Question 35 asks, based on what was reported to you, whether the Principal performed a justified and proper search of Jeff Calhoun's locker. The keyed response is option a, "yes." Messrs. Flynn and Richie contend that option c, "more information is needed to answer this question," is the best response. Specifically, Mr. Flynn refers to Section 2.1 of the New Jersey School Search Policy Manual, *supra*, which provides, in part, "Indeed, both the United States and New Jersey Supreme Courts in *T.L.O.*[22] made clear that students may have a reasonable expectation of privacy in property that the students do not actually own . . . [C]ourts will also consider whether the search violated a reasonable expectation of privacy. The mere fact that a school technically 'owns' a locker does not mean that the locker can be opened at anytime and without regard to the Fourth Amendment or Article I, Paragraph 7 of the State Constitution." Mr. Richie contends that "the main issue with question #35 is the school official is asking you what do you think regarding the search of the locker . . . The question about your opinion of w[he]ther the locker search was proper or not is not relevant and has no be[a]ring on the actual events." As such, Mr. Richie misremembered the question and his argument in this regard is misplaced. In addition, Mr. Richie also argues that this scenario is based on "State of New Jersey vs. Best case"[23] but in *Best*, *supra*, the locker search was not addressed "because there was no evidence found there and it was not part of the suppression argument presented to the court." The SMEs indicated that this scenario is based on *Best*, *supra*. In *Best*, *supra*, the issue before the court was "whether the reasonable grounds standard adopted by our Court and the United States Supreme Court in *State in the Interest of T.L.O.*, [*supra*,] and *New Jersey v. T.L.O.*, [*supra*,] applies to a public high school assistant principal's search of a student's car on school property." *Id.* at 103. The court determined that "the reasonableness standard, and not the traditional warrant and probable cause requirements, applies to the school's authorities' search of a student's automobile on school property." *Id.* at 114. In this regard, the court found:

> It was reasonable for the vice principal to believe that defendant may have additional contraband in all areas accessible to him on school property, including his locker and his car. Consequently, the vice

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[22] *See New Jersey v. T.L.O.*, 469 *U.S.* 325 (1985) and *State in the Interest of T.L.O.*, 94 *N.J.* 331 (1983).

[23] Although Mr. Richie does not provide a citation, he appears to be referring to *State v. Best*, 201 *N.J.* 100 (2010).

> principal's search of defendant's car was reasonably related in scope to the various locations on school property that defendant might have placed the contraband -- on his person, his locker, and his car. *Id.* at 115.

Thus, the SMEs concluded that the locker search was justified.

For question 36, since Mr. Flynn selected the correct response, his appeal of this item is moot.

In the fifth video segment for Scenario #2, the Principal tells you that he searches Calhoun's car and they find more pills, a bag of white powder, a syringe filled with some liquid, a pipe used to smoke marijuana, and what looks like a bag of weed. That is when the Principal calls Officer Blake. He also tells you that Assistant Principal Bullock thinks that they may have gone too far with all the searches.

Question 37 requires candidates to complete the following sentence, "You should inform the Principal that his search of the car was . . ." The keyed response is option d, "proper because it was reasonably related in scope to the areas Calhoun may have placed additional CDS." Mr. Flynn argues that option a, "improper because he lacked the exigent circumstances required for a warrentless search," is the best response. In support of his argument, he refers to the New Jersey School Search Policy Manual, *supra*, and *New Jersey v. T.L.O.*, *supra*. As noted previously, this scenario is based on *Best*, *supra*, in which the court determined that the school official's search of the student's car met the reasonable grounds standard and thus, was valid. Accordingly, the question is correct as keyed.

Question 38 asks, based on the information reported to you at this point, for the most appropriate Title 2C charge, if any, for Jeff Calhoun. The keyed response is option b, "Possession of suspected controlled dangerous substance and drug paraphernalia." Mr. Flynn maintains that option d, "No charge since the search which produced the contraband was improper," is the best response. In support of his argument, he refers to New Jersey School Search Policy Manual, *supra*, and *New Jersey v. T.L.O.*, *supra*. As noted previously, this scenario is based on *Best*, *supra* in which the court determined that the vice principal's search of the student's car met the reasonable grounds standard and thus, was valid. Accordingly, the question is correct as keyed.

For Scenario #3: Domestic Incident, in the first video segment, an officer comes to your office and tells you that a woman wants to talk to someone about an argument she had with her boyfriend. The woman enters your office and tells you that she got into an argument with her boyfriend, who is a cop in a different county than where they live, and he started screaming and yelling. She was going to call

but he grabbed her cell phone and smashed it on the ground. She got scared and picked up the broken cell phone.

For questions 39 through 42, candidates were presented with four potential questions for the woman and were instructed, based on the information presented in the scenario, to decide if the question is essential or not essential to ask the woman to determine if a criminal offense has occurred in this incident.

Question 39 refers to the question, "How long have you been dating?" The keyed response is option a, "This is an essential question to ask." Since Messrs. Lewis and Rebecca selected the correct response, their appeals of this item are moot. Messrs. Appello, Burton, DeHart, Hoffman, Litterio, Schilling and Spencer maintain that option b, "This is not an essential question to ask," is the best response. Specifically, Mr. Appello contends that "the video has female state they live together. This would be an automatic qualifier for domestic and relationship length would not matter." Mr. Spencer presents that "I understand that the length of a dating relationship would assist in prosecuting and determining if the act fell under the [PVDA], but this would only matter if the two parties did not live together . . ." As indicated above, while the woman tells you that she and her boyfriend live in a different county than where he works, she does not state that they "live together." Mr. Burton presents that "the length of dating history has NO ESSENTIAL bearing on the matter of 'to determine if a criminal offense has occurred' . . . The simple fact that they are in a dating relationship makes the criminal mischief as well as the information that followed a 'criminal offense.' Not one place within the Attorney General Guidelines or 2C statute does the length of a dating relationship have to be considered for a 'criminal offense' consideration." Messrs. DeHart and Hoffman argue that "merely the fact that they are in a dating relationship meets the criteria for the incident to fall under the Prevention of Domestic Violence Act . . . Nowhere in the PDVA, AG Guidelines or 2C statute does it mention the length of the dating relationship to be considered." Mr. Litterio contends that "the suspect was a police officer that pointed his weapon at the woman he is in a relationship with.[24] This incident immediately developed grounds for a mandatory arrest of the suspect. The length of the dating relationship is irrelevant at this point and has no bearing. In the Attorney General Guidelines concerning Domestic Violence, the length of the dating relationship is only relevant to determine if in fact the person is protected by the Domestic Violence Act . . ." Mr. Schilling asserts that "the woman stated that she and her boyfriend got into a dispute. Nowhere in the A.G. Guidelines does it state a length of time that parties must be dating." The SMEs indicated that the woman stating, "my boyfriend," is

[24] As indicated above, at this point in the scenario, the woman has not indicated that a gun was pointed at her.

not enough to establish a "dating relationship."[25] The SMEs refer to *Andrews v. Rutherford*, 363 *N.J. Super.* 252 (Ch.Div. 2003), in which the issue before the court was what constitutes a "dating relationship" pursuant to the PDVA. The court noted:

> The words 'dating relationship' provoke a different 'common usage' from one person to the next, and therefore any attempt to discern a universal meaning for the phrase is problematic . . . It is clear that the legislature when they amended the Act in 1994 could have merely extended the act to cover those individuals who were *'dating.'* However to do so would have left an undefined concept even more ambiguous. The legislature specifically intended the protected individuals to be in a relationship or more clearly, a *'dating relationship'* . . . *Id.* at 256-257.

In this regard, the court found:

> In determining whether a dating relationship actually exists under New Jersey's Prevention of Domestic Violence Act, this court finds six factors that should, at a minimum, be considered:[26]
>
> 1. Was there a minimal social interpersonal bonding of the parties over and above a mere casual fraternization?
> 2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
> 3. What were the nature and frequency of the parties' interactions?
> 4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?
> 5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
> 6. Are there any other reasons unique to the case that support or detract from a finding that a 'dating relationship' exists?

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[25] The Prevention of Domestic Violence Act (PDVA), *N.J.S.A.* 2C:25-17 *et seq.*, provides, in pertinent part, that a "victim of domestic violence" includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship. *See N.J.S.A.* 2C:25-19d.

[26] In determining the factors to be considered, the court reviewed the domestic violence statutes of other states and noted:

> Many of these same states also incorporate factors into their statutes in order to aid the courts in determining whether a dating relationship actually exists. For instance, Massachusetts lists several factors, including the length of time of the relationship . . . Washington's factors include the length of time the relationship has existed . . . Perhaps the most comprehensive set of factors is contained in Vermont's statute and includes the nature of the relationship, the length of time the relationship has existed . . . *Id.* at 258.

Id. at 259-260.

Thus, the SMEs emphasized that the length of the relationship is an important factor (factor 2, above) to be considered in establishing whether the dating relationship is covered by the Act. As such, the question is correct as keyed.

Question 40 refers to the question, "Does your boyfriend have a history of domestic violence?" The keyed response is option b, "This is not an essential question to ask." Since Messrs. Hoffman and Resetar selected the correct response, their appeals of this item are moot. Messrs. Flynn, Herbe, Lewis, Litterio, Lopez, Navarro, Niekrasz, Piscitelli, Rebecca, Schaffer and Stowe maintain that option a, "This is an essential question to ask," is correct. Mr. Flynn indicates that "when a victim of domestic violence seeks the protections offered in a temporary restraining order, and a law enforcement officer is required to prepare the application on behalf of the victim, Box #1 on the application for a Temporary Restraining Order asks whether there is a history of domestic violence between the parties." Mr. Herbe presents that the suspect's "history of domestic violence is required to be included in the State domestic violence reporting form and also on the application for a domestic violence complaint or temporary restraining order." Messrs. Lewis and Rebecca argue that "the history of domestic violence is essential in determining an arrest based on the Prevention of Domestic Violence Act, Section II Mandatory Arrest." Mr. Litterio contends that "the history in a domestic violence incident between the parties involved is pertinent in any domestic violence incident." Mr. Lopez avers that option b "is contrary to the Attorney General Guidelines and established New Jersey Case Law as well as mandatory forms that have to be filled out (ex. TRO, State DV Form)." Mr. Navarro presents that this question is essential to ask "due to the fact that it was not addressed if the female complainant in the police office or the boyfriend had any injuries and based on the Attorney General Guideline section Incident Response Protocols part D . . . In determining which party is the primary aggressor where both parties exhibit signs [o]f injury, the supervisor should consider such factors as: a. Any history of domestic violence or violent acts by either person." Mr. Niekrasz argues that "according to the Attorney General Guidelines on Domestic Violence, specifically the Model Polic[y] for Handling of Domestic Violence Incidents Involving Law Enforcement Officers, the policy states that determining the history regarding acts of domestic violence is the first item to be considered when determining who the aggressor was in the situation." Mr. Piscitelli refers to the "Attorney General's Model Policy: Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers . . . section VIII. INCIDENT RESPONSE PROTOCOLS, Part D. On-Scene Supervisor Response, and paragraph 7" which provides "In determining which party is the primary aggressor where both parties exhibit signs of injury, the supervisor should consider such factors as: a. Any history of domestic violence or violent acts by either person." Mr. Schaffer refers to the "New Jersey Attorney General Guidelines for Domestic Violence Cases, under the section [t]itled

'Mandatory Arrest' a police officer should consider 'the history of domestic violence between the parties as well as other relevant factors' . . ." Mr. Stowe provides:

> AG Guideline Model Departmental Policy for Handling of DV Incidents Involving Law Enforcement Officers Iss[ued] 12/09 Section D On Scene Supervisor Response #7a – "Any History of domestic violence or violent acts by either person." AG Guidelines Domestic Violence Procedures Manual Rev 10/2008, *Cesare v. Cesare*, 194 *N.J.* 394, 402 4. Dating relationship While the Act does not expressly define 'dating relationship,' the term should be construed liberally considering (1) . . (2) . . . (3) . . . (4) The previous history of violence between the parties.

As noted previously, the instructions for this item required candidates to decide whether the question is essential in order to determine if a criminal offense has occurred in this incident. As such, whether there is a history of domestic violence is not a factor used to determine whether an offense occurred in this instance. Thus, the question is correct as keyed.

Question 41 refers to the question, "Are you injured?" The keyed response is option a, "This is an essential question to ask." Mr. Martin contends that "this question asks if it is essential that the officer ask if the woman is injured in order to determine if a domestic violence offense has occurred . . ." As such, Mr. Martin misremembered the instructions for this item. Nevertheless, it is noted that the SMEs indicated that it was essential to ask this question since the severity of injuries would determine the appropriate charge to be filed, *e.g.*, whether the actor would be charged with simple assault or aggravated assault pursuant to *N.J.S.A.* 2C:12-1.

Question 42 refers to the question, "Can I see the damaged cell phone?" The keyed response is option a, "This is an essential question to ask." Since Mr. Flynn selected the correct response, his appeal of this item is moot. Mr. Fabiani contends that seeing the phone is not essential. In this regard, he asserts that "at this point [in] time in this scenario nothing has made this a mandatory arrest situation. Seeing the damaged phone is not necessary even if the victim wished to sign a complaint for criminal mischief. Also the damaged phone has no evidentiary value." The SMEs indicated that this is an essential question to ask because it would provide evidence that property was damaged during the reported incident. The SMEs further noted that the officer would be required to determine if property was damaged to confirm whether criminal mischief would be an appropriate charge.[27]

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[27] *N.J.S.A.* 2C:17-3 provides, in pertinent part, that a person is guilty of criminal mischief if he:

For the second video segment of Scenario #3, the woman tells you that she does not want her boyfriend to get fired. She figures that your department could have the boyfriend back off and keep it quiet. She does not want anyone from his department to know about this since it is really a private matter.

For questions 43 through 46, candidates were presented with four potential questions for the woman and were instructed, based on the information presented in the scenario, to decide if the question is essential or not essential to ask the woman to determine your next steps in this situation.

Question 44 refers to the question, "What department does your boyfriend work for?" The keyed response is option a, "This is an essential question to ask." Mr. Martin avers that "while it would be preferable to notify the offender[']s department, we can still proceed without doing so. According to the procedures for domestic violence incidents involving police officers, the only obligation the investigating department has in the initial stages of the investigation is to notify the subject officer[']s supervisor and the prosecutor of the incident, and return the officer[']s duty weapon to his department. The officer's department plays no role in the initial response and investigation, unless the officer resides in their jurisdiction." As noted above, candidates were required to determine whether the question is essential in order to determine your *next steps* in this situation. The SMEs indicated that this is an essential question because it would provide information required to complete the necessary notifications outlined in the Attorney General's Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers (issued December 2009).[28] The SMEs also noted that Attorney General Directive 2000-3 and Attorney General Directive 2000-4 indicate where any seized weapons from the officer should be sent. As such, the question is correct as keyed.

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(1) Purposely or knowingly damages tangible property of another or damages tangible property of another recklessly or negligently in the employment of fire, explosives or other dangerous means listed in subsection a. of N.J.S.2C:17-2; or

(2) Purposely, knowingly or recklessly tampers with tangible property of another so as to endanger person or property, including the damaging or destroying of a rental premises by a tenant in retaliation for institution of eviction proceedings.

[28] This model policy provides that if the officer is from another jurisdiction, the supervisor will ensure that notification is made to the Chief of Police or Law Enforcement Chief Executive in the department where the accused officer is employed.

Question 46 refers to the question, "Are you members of the same household?" The keyed response is option b, "This is not an essential question to ask." Messrs. Hoffman, Lewis, Lopez, Navarro, Niekrasz, Piscitelli, Rebecca, Resetar, Schaffer and Sulzbach maintain that option a, "This is an essential question to ask," is the best response. Specifically, Messrs. Hoffman, Lewis and Rebecca indicate that "it is a question on the Domestic Violence Report." Mr. Lopez presents that option b "is contrary to the Attorney General Guidelines and established New Jersey Case Law as well as mandatory forms that have to be filled out . . . The Domestic Violence Procedures Manual . . . and New Jersey Case Law go to great length to clarify: Dating Relationship, History of Domestic and Member of Household." Mr. Navarro asserts that "this information would need to be provided to the judge for T.R.O. purposes" and the woman "might have knowledge of the exact locations o[f] weapons in the household." Mr. Niekrasz argues that "at this point in the fact pattern we have no knowledge about the relationship of the individuals . . . A question earlier in the exam determined that it was essential to ask how long the parties were dating . . . While that question was deemed to be essential the test takers were not afforded an answer to that question . . ." Mr. Piscitelli maintains that "it is important to know if the parties live together for several reasons so that the appropriate course of action can be taken by law enforcement officers." Mr. Resetar contends that "it is necessary to obtain what the level of involvement they share as a couple." Mr. Schaffer asserts that pursuant to "the New Jersey Attorney General Guidelines for Domestic Violence Cases, under the section listed 'Victim of Domestic Violence,' it is essential to inquire if the victim and suspect reside together." Mr. Sulzbach maintains that this information "will be required for a Temporary Restraining Order." *N.J.S.A.* 2C:25-17d provides, in pertinent part, that a "victim of domestic violence" includes any person who is a present household member or was at any time a household member. At this point in the scenario, the nature of the relationship between the woman and the boyfriend is not known. As noted by Mr. Niekrasz, while question 39 presented the question, "How long have you been dating?," candidates were not provided with the answer. As such, asking the question, "Are you members of the same household?," provides an opportunity to determine whether this matter is a domestic violence situation. Thus, the Division of Test Development and Analytics determined to rekey this item from option b to option a prior to the lists being issued.

For the third video segment of Scenario #3, the woman tells you that their past arguments have not been physical. She tells you that she got scared when her boyfriend started pointing his gun at her. She further tells you that they have a couple of guns in the house. She emphasizes that she does not want her boyfriend to get in trouble for this.

Question 48 asks for the first action you should take in response to this situation. The keyed response is option d, "Ensure officers are dispatched to the location of the incident where the boyfriend was last seen." Since Mr. Hoffman

selected the correct response, his appeal of this item is moot. Messrs. Burton, DeHart, DellaSala, Flynn, Harper, Lewis, Niekrasz, Piscitelli and Rebecca maintain that option b, "Notify the County Prosecutor, where the charge will be filed, of the situation," is the best response. Specifically, Mr. Burton presents that according to "the Attorney General Guideline for a Supervisor[']s response to a police domestic, notification to the County Prosecutor will be made immediately . . . Sending officers to the accused [*sic*] location is not a wrong solution, but it is certainly not the immediate requirement as per the New Jersey Attorney General Guidelines." Mr. DeHart maintains that "the Attorney General Guideline states [that] a supervisor shall immediately respond to the scene . . . [and] will immediately contact the county prosecutor's office for direction on handling the case." Mr. DellaSala asserts that "since the victim is already safe, the first action taken should be to notify the County Prosecutor's Office" and refers to the "Attorney General Guidelines." Mr. Flynn argues that the keyed response is "in direct conflict with the New Jersey Attorney General Guideline for Investigating Domestic Violence Incidents Involving Police Officers." Mr. Harper contends that the "Attorney General Guidelines states that whenever a police officer is involved in a domestic especially when weapons are involved the Prosecutor's Office must be notified." Mr. Lewis notes that the victim is "safe in our police HQ. The Attorney General Guideline states . . . the Supervisor will immediately contact the county prosecutor's office for direction on handling the case." Mr. Niekrasz avers that "according to the Attorney General Guidelines on Domestic Violence, specifically the Model Polic[y] for Handling of Domestic Violence Incidents Involving Law Enforcement Officers, the policy states that the County Prosecutor will be immediately notified." Mr. Piscitelli argues that "the reporting party in the video never stated the town [where] she and her boyfriend (the officer) liv[e] . . . At this point[,] units cannot be dispatched to the officer's residence as it is not known whether it is in my jurisdiction or not." Mr. Piscitelli refers to the "Attorney General's Model Policy: Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers." Mr. Rebecca refers to "the A[ttorney] G[eneral] Guideline: Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers" and notes that "the victim is safe and secure at Police HQ. Ensuring that units are dispatched to his last known location should not be done without first checking with the Officer[']s Agency." The SMEs indicated that sending a unit to the boyfriend's location should be your initial action and once he is secured, other notifications can be made. The SMEs further indicated that the County Prosecutor should be notified "as soon as possible" but it does not need to be immediately.

For question 51, since Mr. Santana selected the correct response, his appeal of this item is moot.

Question 52 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.

The keyed response is option c, If an officer was not present at the time the offense was committed, the suspect could "be arrested if he admitted to an officer that he committed the offense."[29] Mr. Rebecca argues that option b, "be arrested if the victim story is corroborated by the officer's observation, such as signs of injury on the victim's body," is equally correct. In this regard, Mr. Rebecca refers to domestic violence assaults and asserts that "these arrest[s] are made on a routine basis based on victim[']s statement and signs of injury." Mr. Slota maintains that while there are legislative exceptions to the "in presence" requirement, none of these exceptions were listed among the answer choices. As noted by Mr. Slota, by statute, there are exceptions to the "in presence" requirement. 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.[30] *See N.J.S.A.* 2C:25-21. *N.J.S.A.* 2C:20-11e (Shoplifting) provides that "any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting . . ." Thus, under these legislative exceptions, option b, as noted above, and option d, "be arrested if the

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[29] This item is sourced to *State v. Morse*, 54 *N.J.* 32 (1969), in which the court addressed the "in presence" requirement for a *non-indictable* offense, which was not specified in the question stem. The court noted:

> 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. The thesis, no doubt, is that, unless the officer himself knows of the offense and the offender, it is better, in the light of the less serious nature of the alleged offense, to leave the determination of probable cause for an arrest to an officer in the judicial branch. [citations omitted] Yet the danger of a mistaken arrest is equally obviated when the officer, although not a witness to the offense, learns from the lips of the offender that he committed it. The officer then knows everything his senses could have gathered. So it has been held that an arrest may be made on the person's admission to the arresting officer even though without the admission the officer could not know of the offense. [citations omitted] *Id.* at 35-36.

[30] Domestic violence is defined as the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor: (1) Homicide *N.J.S.A.* 2C:11-1 *et seq.*; (2) Assault *N.J.S.A.* 2C:12-1; (3) Terroristic threats *N.J.S.A.* 2C:12-3;(4) Kidnapping *N.J.S.A.* 2C:13-1;(5)Criminal restraint *N.J.S.A.* 2C:13-2;(6) False imprisonment *N.J.S.A.* 2C:13-3;.(7) Sexual assault *N.J.S.A.* 2C:14-2; (8) Criminal sexual contact *N.J.S.A.* 2C:14-3; (9) Lewdness *N.J.S.A.* 2C:14-4; (10) Criminal mischief *N.J.S.A.* 2C:17-3; (11) Burglary *N.J.S.A.* 2C:18-2; (12) Criminal trespass *N.J.S.A.* 2C:18-3; (13) Harassment *N.J.S.A.* 2C:33-4; (14) Stalking P.L.1992, c.209 (C.2C:12-10); (15) Criminal coercion *N.J.S.A.* 2C:13-5; (16) Robbery *N.J.S.A.* 2C:15-1; (17) Contempt of a domestic violence order pursuant to subsection b. of *N.J.S.A.* 2C:29-9 that constitutes a crime or disorderly persons offense;(18) Any other crime involving risk of death or serious bodily injury to a person protected under the 'Prevention of Domestic Violence Act of 1991,' P.L.1991, c.261 (C.2C:25-17 *et al.*)

victim's story is corroborated by at least one witness," are correct answer choices. Given this, the Division of Test Development and Analytics determined to omit this item from scoring prior to the lists being issued.

Question 54 indicates that Jerry is 17 years old and has joined the Navy. After orientation, but prior to basic training, his 18-year-old girlfriend, Janet, informs him that she wants to date other people. Upset over the news, Jerry pushes Janet, causing her to fall and bruise her face on the floor. While investigating the incident, Officer Lawrence is not sure how to handle the situation. The question requires candidates to complete the following sentence, "According to the specific language in *N.J.S.A.* 2C:25, you should inform Officer Lawrence that Jerry is classified as . . ." The keyed response is option a, "an emancipated minor." Mr. Schilling argues that "Jerry has joined the Navy but had not yet entered. He had not gone to basic training. Was he on a delayed entry program?" The SMEs indicated that once an applicant completes processing, he or she takes an oath of enlistment at which point he or she is "in the Navy." The individual can then opt for the Delayed Entry Program, but only after enlisting. Thus, the question is correct as keyed.

Question 55 indicates that Robert is 18 years old and has been dating Allison, a 16-year-old, for two months. While on a date, Robert tells Allison that he wants to break off their relationship. Allison is upset and frustrated, so she intentionally throws a drinking glass at Robert, striking him in the face and causing a visible bruise. The question asks, according to Title 2C, for the most appropriate classification of the incident. The keyed response is option b, "non-domestic violence aggravated assault."[31] Messrs. Burton, DellaSala, Flynn, Harper, Herbe, Hoffman, Lewis, Pleskonko, Rebecca and Richie argue that option d, "non-domestic violence simple assault,"[32] is the best response. Given that the question stem does not provide sufficient information to make a determination as to whether aggravated assault or simple assault would be the most appropriate charge, the Division of Test Development and Analytics determined to double key this item to option b and option d.

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[31] *N.J.S.A.* 2C:12-1b (Aggravated assault) provides, in pertinent part, that a person is guilty of aggravated assault if he: (1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury; or (2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon; or (3) Recklessly causes bodily injury to another with a deadly weapon; or (4) Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in subsection f. of N.J.S. 2C:39-1, at or in the direction of another, whether or not the actor believes it to be loaded.

[32] *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.

Question 57 indicates that vacant business buildings in the heart of the downtown area are going to be torn down to make way for a new sports complex. During a routine patrol of the downtown area, Officer Mitchell notices that the back door to the old hardware store has been forced open. Officer Mitchell notifies the police dispatcher of his location and goes inside to investigate further. While searching inside of the hardware store for possible suspects, Officer Mitchell notices two piles of copper pipes that had been freshly cut away from the store's sprinkler system. As Officer Mitchell continues his search for suspects, he is suddenly struck across his back with a cut copper pipe by a suspect who had been hiding under an old plastic tarp. The suspect runs out of the store, but is quickly arrested by responding back-up officers. In addition to Aggravated Assault, Possession of a Weapon, and Possession of a Weapon for Unlawful Purposes, the question asks for the most appropriate *N.J.S.A.* Title 2C charge for this suspect. The keyed response is option b, "Robbery."[33] Mr. Litterio argues that the question "does not give enough specific information showing a nexus between the copper pipe being taken from the vacant building and suspect that jumped out from underneath a tarp. The fact pattern leaves out a lot of substance that not only connects the occupant to the theft of the copper pipe, but also his actual intentions inside the vacant building." In this regard, Mr. Litterio contends that the suspect "may have been a squatter or possibly even a person conducting an official action such as an inspector." 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. Thus, the SMEs determined that the circumstances presented in the question were sufficient to charge the individual. Moreover, it is noted that the answer choices provided to candidates did not include, "No charge." Mr. DellaSala maintains that option a, "Theft,"[34] is the best response. In this regard, Mr. DellaSala asserts that "a police officer would not fit the definition of 'another' in the robbery statute . . . Police Officers while on duty and in performance of their duties are not considered 'another' . . . There is no case law referencing a law enforcement officer would be 'another' with consideration to a robbery charge." In *State v. Mirault*, 92 *N.J.* 492 (1983), the court held that "using force or inflicting bodily injury on a police officer investigating a burglary constitutes the assault

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[33] *N.J.S.A.* 2C:15-1 provides that a person is guilty of robbery if, in the course of committing a theft, he: (1) Inflicts bodily injury or uses force upon another; or (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or (3) Commits or threatens to commit any crime of the first or second degree. An act shall be deemed to be included in the phrase 'in the course of committing a theft' if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

[34] *N.J.S.A.* 2C:20-3 (Theft by unlawful taking or disposition) provides that a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with the purpose to deprive him thereof.

'upon another' that elevates theft to robbery under *N.J.S.A.* 2C:15-1." *Id.* at 492. As such, the question is correct as keyed.

Question 59 indicates that Mario and Fred, 15 year old best friends, have prior convictions for receiving stolen property. On two previous occasions, Mario took his father's car without consent and drove around town with Fred. On both occasions Mario's father chose not to press charges. After Mario took the car without consent for a third time, and drove around with Fred, Mario's father decided to press charges against both boys. The question asks for the most appropriate *N.J.S.A.* Title 2C charge, if any, for Fred. The keyed response is option b, "Unlawful Taking of Means of Conveyance."[35] Messrs. Burton and Flynn contend that option d, "No Charge," is the best response and refer to *N.J.S.A.* 2C:20-10d. Specifically, Mr. Burton inquires, "there is no mention of his friend knowing or having any part in the unlawful taking of the vehicle, so why would he be charged with any offense?" Mr. Burton adds that the question stem describes Mario and Fred as "15 year old best friends" which could "imply that the two were friends for 15 y[ea]rs as opposed to them both being 15 y[ea]rs old . . . If the friends were '15 y[ea]r friends', then the unlawful taking is more unclear to the friend not knowing the details of the unlawful taking of the vehicle." Mr. Flynn asserts that "the information in the exam question did not establish the degree of culpability necessary to support the charge of [*N.J.S.A.*] 2C:20-10d for the passenger. Based on the information provided, you could not just assume that the passenger knew his

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[35] *N.J.S.A.* 2C:20-10 (Unlawful taking of means of conveyance) provides:

a. A person commits a disorderly persons offense if, with purpose to withhold temporarily from the owner, he takes, operates, or exercises control over any means of conveyance, other than a motor vehicle, without consent of the owner or other person authorized to give consent. 'Means of conveyance' includes but is not limited to motor vehicles, bicycles, motorized bicycles, boats, horses, vessels, surfboards, rafts, skimobiles, airplanes, trains, trams and trailers. It is an affirmative defense to prosecution under subsections a., b. and c. of this section that the actor reasonably believed that the owner or any other person authorized to give consent would have consented to the operation had he known of it.

b. A person commits a crime of the fourth degree if, with purpose to withhold temporarily from the owner, he takes, operates or exercises control over a motor vehicle without the consent of the owner or other person authorized to give consent.

c. A person commits a crime of the third degree if, with purpose to withhold temporarily from the owner, he takes, operates or exercises control over a motor vehicle without the consent of the owner or other person authorized to give consent and operates the motor vehicle in a manner that creates a risk of injury to any person or a risk of damage to property.

d. A person commits a crime of the fourth degree if he enters and rides in a motor vehicle knowing that the motor vehicle has been taken or is being operated without the consent of the owner or other person authorized to consent.

friend did not have consent to drive the car. In fact, it would be more reasonable to believe otherwise, based on the fact that he had driven in the car with his friend on several prior occasions with no indication that anything out of the ordinary was taking place." Mr. Flynn adds, "any reasonable person would believe that a son driving his parent's vehicle would be doing so with the consent or knowledge of his parents, absent any indication otherwise." It is noted that the question does not ask of what Fred would be convicted, since the trier of fact would be responsible for making that determination, but rather for the appropriate charges. In this regard, the SMEs determined that the circumstances presented in the question were sufficient to charge Fred. As such, the question is correct as keyed.

Question 61 indicates that one of your officers arrested a driver of a motor vehicle for Driving While Intoxicated and during the booking process, the officer develops a reason to believe that the driver may not be lawfully present in the United States. The officer then contacts Immigration and Customs Enforcement (ICE). After he makes this contact, he asks you what he needs to document regarding this situation. Candidates were required to complete the following sentence, "You should advise him that, according to the NJ Attorney General's Directive No. 2007-3 (Interaction with Federal Immigration Authorities), he **MUST** document . . ." The keyed response is option d, "when and by what means notification to ICE was made." Mr. Resetar misremembered the keyed response as "document the name and time that you spoke with someone from ICE." As such, his appeal of this item is misplaced. Mr. Navarro argues that the answer he selected, option c, "the subjective basis for believing that the person was an undocumented immigrant," is equally correct. Attorney General Law Enforcement Directive No. 2007-3 provides, in pertinent part: "Notification to ICE may be made telephonically, by facsimile transmission, or by such other means as ICE may provide. The officer shall document when and by what means notification to ICE was made and the ***factual*** basis for believing that the person may be an undocumented immigrant." (emphasis added) Thus, option c is incorrect.

Question 63 indicates that a juvenile classified as a Repetitive Disorderly Person has been taken into custody, along with a witness to an earlier Aggravated Sexual Assault, and a person charged with Burglary. Detective Moore turns to you, the desk Sergeant, and asks, "Sergeant, which of these people do I have to electronically record?" Candidates were required to complete the following sentence, "You correctly advise Detective Moore that, based on the AG Guideline on Electronic Recordation of Stationhouse Interrogations, he **MUST** electronically record a custodial interrogation of . . ." The keyed response is option c, "the person charged with Burglary only." Mr. Sulzbach asserts that "this question is confusing and misleading when we are given additional directives by our prosecutor[']s office that require us to record any and all statements of suspects and victims involved in investigations." Candidates were instructed: "Do **NOT** automatically assume that the rules of your particular department apply." In this regard, the question

specifically refers to the Attorney General Guideline on Electronic Recordation of Stationhouse Interrogations[36] which refers to *R.* 3:17. *R.* 3:17 (Electronic Recordation) provides, in pertinent part:

> (a) Unless one of the exceptions set forth in paragraph (b) are present, all custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes . . .

Thus, the question is correct as keyed.

Question 64 indicates that you overhear Officer Martin tell Officer Bradley, "There are some exceptions to the mandated electronic recordation of custodial interrogations. Here are a few." You listen to Officer Martin explain them to Officer Bradley. Officer Bradley then turns to you and says, "Sergeant are those correct?" The question asks, "Based on the language found in the AG Guideline, which is **NOT** a recognized exception regarding Electronic Recordation of Custodial Interrogations?" The keyed response is option a, "A statement is not recorded because there is a reasonable belief that the offense committed does not require electronic recordation."[37] Mr. Martin refers to *R.* 3:17(b)(vi) and (vii) and argues

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[36] *See* Attorney General Directive 2006-4 (October 10, 2006) and Attorney General Directive 2006-02 (January 17, 2006).

[37] The Attorney General Guideline on Electronic Recordation of Stationhouse Interrogations, which as indicated previously, refers to *R.* 3:17. *R.* 3:17 provides, in pertinent part:

> (b) Electronic recordation pursuant to paragraph (a) must occur unless: (i) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible, (ii) a spontaneous statement is made outside the course of an interrogation, (iii) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect, (iv) a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided however, that the agreement to participate under that condition is itself recorded, (v) a statement is made during a custodial interrogation that is conducted out of state, (vi) a statement is given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation, (vii) the interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been

that "these two statements in the policy are essentially the same as choice A which was labeled as incorrect. I will concede that the exact wording may not have been the same, but the essence of the wording was the same . . ." In this regard, Mr. Martin asserts that option a stated, "a statement obtained when it was not reasonably believed a crime for which recording is required was being discussed." As such, Mr. Martin misremembered option a and his argument is misplaced. Mr. DellaSala argues that "the wording of this question in combination with the wording of the answer is extremely difficult to understand and as a matter of question/answer writing it should not count as a valid question. The question asks which is 'NOT', and the correct answer has the word 'NOT' in it twice. The combination of trying to understand a double negative in the answer, and then trying to determine how the "NOT' in the question applies to the double negative answer, is unnecessarily difficult to understand and improper." The question requires candidates to determine which three statements of the four statements provided to candidates are exceptions and which one is not. *R.* 3:17 does not list reasonable belief as an exception. Thus, the question is correct as keyed.

Question 66 provides:

> While on routine patrol in the early morning hours, Officers Reed and Malloy observed two vehicles on the shoulder of the road, one behind the other. One of the vehicles appeared to be disabled and a total of six people were there. Officers observed two people underneath the car, attempting to reattach the gas tank. The officers stopped to see if they could render any assistance to the motorists and one of the people signaled that they were okay. The officers approached the car due to a feeling that "something wasn't right." Upon questioning the drivers of the two vehicles as to what was wrong, the officers became suspicious because they were acting nervous and gave conflicting stories. Based on this and the suspicion aroused by the gas tank falling off the car, Officers Reed and Malloy believed that evidence of criminal activity would be found in the vehicles and asked one of the drivers for consent to search the disabled car. The driver consented, but refused to sign the written form granting the consent. Officer Reed then advised the driver that he did not need to give consent and that they would just call for a drug-sniffing dog, but that all the parties would be detained until the dog arrived. The driver signed the form after being reminded again that his consent had to be voluntary. A large quantity of drugs was found under the car's hood and all six people at the scene were arrested.

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committed. The State shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions is applicable.

The question asks, based upon relevant New Jersey case law, whether the search was valid. The keyed response is option c, "No, because the officers did not have a reasonable and articulable basis to search, beyond the initial valid motor vehicle stop." Mr. Burton argues that "the question was based on the search being invalid due to a 'motor vehicle stop.' This was a disabled motor vehicle which is different from a motor vehicle stop. The officers provided assistance to the motorists on this occasion in a community caretaking situation."[38] Mr. Flynn, who selected option c, presents that option b, as indicated above, is equally correct. Mr. Flynn argues, in part, that "the Court in *Elders*[39] determined that consent was given freely and voluntarily in that case . . . [S]ince the officer had the right to call for a dog, his statement to the defendant was not an unlawful threat, but rather a fair prediction of the events to follow, should the defendant refuse to provide consent." Mr. Herbe contends that option d, "Yes, because the driver gave written consent to search the vehicle," is correct. In this regard, Mr. Herbe maintains that "alterations to gas tanks are common to drug trafficking and when this is combined with the parties[']deceptiveness and nervous appearance[,] an experienced officer would have reasonable grounds to suspect they are participating in criminal activity." Messrs. Hoffman, Lewis and Rebecca assert that "the answer should be[:] it was good because the occupants were nervous, gave inconsistent answers and the fact that the gas tank was on the ground, all led to reasonable articulable submission [*sic*] to obtain a consent to search."[40] Mr. Martin argues that the keyed response is incorrect since "the initial contact the officer had with the suspect was actually a community caretaking inquiry and not a motor vehicle stop requiring reasonable suspicion of an offense." Mr. Martin maintains that the response he selected, "the consent to search given by the driver was coerced bec[au]se there was no reasonable suspicion to request a consent search and no reasonable suspicion to call a drug sniffing dog, therefore the threat to call the dog if he did not sign the consent to search was unlawful. This statement is correct in itself. While it may or [may] not be the exact wording presented in the finding of the court, the way it was presented as a possible answer is correct."[41] Mr. Piscitelli, who selected option a, "No, because the consent search did not occur as a result of a valid motor vehicle stop, but rather after a 'community care-taking' stop involving a disabled motor vehicle," refers to

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[38] It is noted that Mr. Burton selected option b, "No, because the officers 'threat' to summon a drug-sniffing dog overcame the voluntariness of the consent."

[39] Mr. Flynn does not provide a citation. As such, it is not clear whether he is referring to *State v. Elders*, 386 *N.J. Super.* 208 (App. Div. 2006) or to the portion of *State v. Elders*, 192 *N.J.* 224 (2007) in which the State Supreme Court recounts the findings of the Appellate Division.

[40] It is noted that this was not included as one of the answer choices provided to candidates. It is also noted that Mr. Hoffman selected option b, and Messrs. Lewis and Rebecca selected option d.

[41] Mr. Martin appears to be referring to option b.

State v. Elders[42] in which the court noted, "the Appellate Division was persuaded that the troopers had the requisite suspicion to conduct an investigative detention and request a consent search and that Leach knowingly and voluntarily gave his consent to the search of the Lincoln. [citation omitted]" *Id.* at 237. Mr. Piscitelli contends that "the answer choices given for the question did not include one that would have stated that the search was valid because the police did, in fact, have reasonable and articulable suspicion." Mr. Pleskonko, who selected option b, presents, "answered keyed not a valid stop. Fact pattern was: Stop to assist / help and turned into an investigation, NOT A VEHICLE STOP, but threatened with a dog." Mr. Resetar, who selected option b, argues that "the search of the motor vehicle should not be '[v]alid' because of the use of the threat to summon the dog, which in turn caused the defendant to consent only because of the threat made." Mr. Sulzbach, who selected option b, argues that "this was a community caretaking situation. It was not a motor vehicle stop, this caused me confusion. I knew the search was invalid but I also knew it was not a motor vehicle stop."

It is noted that this item is sourced to *State v. Elders*, *supra*, in which there were two issues before the court: 1) "whether [*State v.*] *Carty*[, 170 *N.J.* 632, *modified on other grounds*, 174 *N.J.* 351 (2002)][43] protections apply not only to the occupants of motor vehicle stops but also to those whose cars have been disabled on a roadway;"[44] and 2) "whether the Appellate Division improperly substituted its own factfindings for those of the motion judge."[45] In this regard, the court noted that "both the trial court and the Appellate Division agreed that *Carty* applies to a disabled vehicle on a roadway, but came to different conclusions concerning the constitutionality of the consent search in this case."[46] *Id.* at 230. With respect to the first issue, the court determined:

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[42] Although Mr. Piscitelli does not provide a citation, he provides the following internet address: http://caselaw.findlaw.com/nj-supreme-court/1250180.html.

[43] As noted by the court, "In *State v. Carty*, [*supra*], we held that a police officer may not ask for consent to search a lawfully stopped vehicle or its occupants unless the officer has 'a reasonable and articulable suspicion' that the occupants are engaged in criminal wrongdoing. A consent search of a validly stopped car without the requisite suspicion will result in exclusion of the evidence at trial. [*Carty*] *at* 647-48 . . ." *Id.* at 230.

[44] *See id.* at 240.

[45] *See id.* at 242.

[46] The court noted, "The motion judge concluded that the troopers did not have reasonable and articulable suspicion either to conduct an investigatory detention of defendants or to request defendant Leach's consent to search the Lincoln Town Car . . . Based on its own review of the record, the Appellate Division reversed the motion judge, finding that the troopers possessed a reasonable and articulable suspicion for an investigative detention and a consent search." *Id.* at 243.

> We are in agreement with both the trial court and the Appellate Division that the underlying rationale and salutary purpose of *Carty* extends to cars disabled on the side of a road. Therefore, the drivers and occupants of disabled cars are entitled to the same level of protection afforded to the drivers and occupants of cars involved in a motor vehicle stop. In both cases, a police officer who wishes to conduct a consent search must have reasonable and articulable suspicion to believe that evidence of criminal wrongdoing will be found in the vehicle before seeking consent for the search. *Id.* at 242.

Regarding the second issue, the court concluded that "the Appellate Division in this case did not apply the deferential standard of review to the motion judge's findings." *Id.* at 245. Thus, based on the evidence in the record, the court held:

> [U]nder our State Constitution, law enforcement officers cannot request consent to search a disabled vehicle on the shoulder of a roadway unless they have reasonable and articulable suspicion to believe that evidence of criminal wrongdoing will be discovered in the vehicle. Under our deferential standard of appellate review, we conclude that there was sufficient credible evidence in the record to support the motion judge's findings that the troopers engaged in an unconstitutional investigatory detention and search of the Lincoln Town Car and individual defendants. *Id.* at 251.

Since Messrs. Flynn and Piscatelli refer to the determinations of the Appellate Division, their arguments are misplaced. Furthermore, option a is incorrect since, as noted above, the *Carty* standard applies to both occupants of motor vehicle stops and disabled vehicles. Option b and option d are incorrect since, as noted above, the police must have reasonable articulable suspicion, which was not present in this matter, in order to request consent to search.[47] Option c is incorrect as the situation presented in the question involved a disabled motor vehicle on the side of the roadway rather than a "valid motor vehicle stop." Given that there is no correct

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[47] The court noted that "the motion judge addressed all of the evidence that the State argued supported a finding of reasonable and articulable suspicion: defendants' nervous behavior, their conflicting statements, and the fallen-off gas tank . . . According to the motion judge, the State fell short in showing that there was an 'articulable' suspicion. From his viewpoint, the information available to the troopers gave rise to nothing more than a 'hunch' that 'something was wrong' . . . In the end, he held that the troopers did not possess the requisite suspicion either to conduct the investigatory stop or request consent to search the Lincoln." *Id.* at 249-250. Furthermore, the motion judge "noted that Leach was detained for a substantial period of time and not free to leave; that Leach had asked for a lawyer (a request that was either ignored or not heard by the troopers); that he was surrounded by troopers when asked to sign the consent form; and that when he refused to sign the form, Trooper O'Connor threatened to detain him even longer until a dog was called to the scene. He concluded that the State did not sustain its burden of proving that, *under the totality of circumstances*, Leach had freely given his consent to the search." (emphasis added) *See id.* at 236.

answer choice, the Division of Test Development and Analytics determined to omit this item from scoring prior to the lists being issued.

Question 67 indicates that Officers Tango and Cash were patrolling in the area of Cherry and Elm Streets, looking for a Ford Mustang that was stolen earlier that day. The car was allegedly stolen by the owners' daughter, Penny, and was believed to be in the area of Cherry and Elm, where Penny's boyfriend, Bob Lang, was supposed to be living. A warrant check of Lang revealed an active Failure to Appear warrant for his arrest. Tango and Cash spotted the Mustang with Penny driving and a male, later identified as Lang, in the front passenger seat. The officers pulled the car over and arrested Lang. After the officers handcuffed Lang and placed him in the rear of the patrol car, Penny asked if she could give Lang his clothes, which were inside the passenger compartment of the car. The officers were going to impound and tow the Mustang at the request of the owners, Penny's parents. Instead, Cash informed Penny, for officer safety reasons, he would retrieve the clothes. When Cash went to retrieve the clothing, he found a large quantity of a CDS and packaging materials under the clothing. The question asks, based on New Jersey case law, whether this was a valid search. The keyed response is option a, "No; it was not a valid search of the Mustang incidental to the arrest of Lang." This item is sourced to *State v. Eckel*, 185 *N.J.* 523 (2006). The court in *Eckel*, *supra*, noted that "in the Appellate Division, the State waived all justifications for the search save one: the search incident to arrest exception as interpreted in *Belton* . . . We granted the State's petition for certification . . . limited to the single issue raised: whether the search was lawful under *Belton*." *Id.* at 527. In this regard, the court determined that "once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations informing the search incident to arrest exception are absent and the exception in inapplicable." *Id.* at 541. However, the court further noted:

> The trial judge did not base her decision on the search incident to arrest exception but on theories including consent,[48] plain view,[49] and the automobile exception to the warrant requirement. Those exceptions, which defendant challenged on appeal, were not reached by the appellate panel because of the State's refusal to address them, apparently in order to force an adjudication of the *Belton* issue. In any event, the merits of the trial judge's decision have never been tested against the arguments advanced by defendant on appeal. We therefore

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[48] It is noted that option b provided to candidates states, "Yes; it was a valid consent to search, based on Penny's request to retrieve clothing."

[49] It is noted that option d provided to candidates states, "Yes; the CDS/packaging was discovered in plain view when Cash went to retrieve the clothing."

> return the matter to the Appellate Division to consider the remaining unresolved issues. *Id.* at 542.[50]

Thus, 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. As such, the court remanded the matter to the Appellate Division to address these exceptions, which correspond to some of the answer choices provided to candidates. Subsequently, the Appellate Division remanded the matter to the motion judge for further inquiry. Given that the final outcome of this matter was not readily available to candidates, the Division of Test Development and Analytics determined to omit this item from scoring prior to the lists being issued.

Question 70 indicates that police responded to an apartment building after the landlord reported finding cocaine in apartment 1A. Prior to calling the police, the landlord and the plumber entered the apartment to fix a leak in the kitchen ceiling at the request of the tenant, Tina Trout, who was not present at the time. Upon entering the apartment with a plumber, the landlord confirmed the leak and both feared that other parts of the apartment might have leaks. While checking the rest of the apartment, the landlord observed the cocaine on a bedroom dresser and called the police. The question asks, based on the information provided, for the true statement. The keyed response is option a, "Although the landlord was permitted to enter the apartment, a search warrant is needed prior to officers entering the apartment." Messrs. Flynn and Spencer maintain that option d, "Based on the 'third party intervention' doctrine, the officers are permitted to enter the apartment and confirm the presence of the suspected CDS," is correct. Specifically, they refer to *State v. Wright*, 431 *N.J. Super.* 558 (App. Div. 2013), in which the court found that "the third-party intervention doctrine justifies the warrantless search that was performed in this case." *Id.* at 564. It is noted that the question is based on *State v. Wright*, 221 *N.J.* 456 (2015),[51] in which the State Supreme Court determined that "the third-party intervention or private search doctrine does not exempt law enforcement's initial search of defendant's home from the warrant requirement. To offer guidance for the future, we repeat that if a landlord relays that he has seen

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[50] On remand, the court in *State v. Eckel*, Docket No. A-0363-03T40363-03T4 (App. Div. May 24, 2006), noted that "the State now contends that the warrantless search was valid under the 'community caretaking' doctrine, [citation omitted], and the 'automobile exception' [citation omitted]." The court found that the State's arguments were not applicable. The court went on to note that "for the second time, the State has declined to advance 'consent' as a basis for upholding the motion judge's determination. We are not so readily persuaded that consent is inapplicable in these circumstances . . . [W]e remand to the motion judge so that a focused inquiry can be conducted on the consent issue, followed by appropriate findings of fact and conclusions of law."

[51] On appeal from the Superior Court, Appellate Division, *See* 217 *N.J.* 283 (2014).

drugs or contraband in an apartment, as happened here, the police can use that information to obtain a search warrant and then conduct a search." *Id.* at 478. As such, the question is correct as keyed.

Question 71 indicates that during the course of a theft investigation, Detective Gates discovers that a computer with an IP address of 135.24.69.78 was used in the commission of the crime. The only way to identify the user of that IP address is to contact the internet service provider associated with the IP address. The question asks for what Detective Gates needs, before contacting the internet service provider, in order to obtain the subscriber information associated with the IP address from the internet service provider. The keyed response is option d, "A showing of relevance and a grand jury subpoena." Mr. Herbe maintains that option c, "Probable cause and a grand jury subpoena," is equally correct. He refers to *State v. Reid*[52] which "states police must obtain a grand jury subpoena based on probable cause[:] 'When there is probable cause to believe unlawful use has occurred, law enforcement has the tools to respond.'"[53] It is noted that on appeal from the Superior Court, Appellate Division,[54] the State Supreme Court, in *State v. Reid*, 194 *N.J.* 386 (2008), rejected "a heightened standard of probable cause to support the issuance of grand jury subpoena,"[55] but rather, determined:

> In *McAllister,* [184 *N.J.* 17, 875 *A.2d* 866 (2005)], this Court concluded that issuance of a grand jury subpoena to obtain bank records, upon a showing of relevance, satisfies the constitutional protection against improper government intrusion. 184 *N.J.* at 36, 875 *A.2d* 866. The Court further found that notice to the account holder was not constitutionally required. *Id.* at 37, 875 *A.2d* 866. The same principles apply here . . . [W]e see no material difference between bank records and ISP subscriber information and decline to treat them differently . . . In both cases, a grand jury subpoena based on a relevancy standard is sufficient to meet constitutional concerns. *Reid, supra,* at 403-404.

Thus, the question is correct as keyed.

Question 77 indicates that prior to the start of roll call, you overhear two officers debating whether a protective sweep of a dwelling is permissible in a non-

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[52] Although Mr. Herbe does not provide a citation for this matter, it appears that he is referring to *State v. Reid,* 389 *N.J. Super.* 563 (App. Div. 2007).

[53] Mr. Herbe appears to be quoting *Reid, supra,* at 575.

[54] *See* 190 *N.J.* 250 (2007).

[55] *Reid, supra,* at 403.

arrest setting. The question asks for the information that should be included in your correct response to the officers. The keyed response is option b, A protective sweep of a dwelling is "permissible when officers on the scene have reasonable articulable suspicion that the area to be swept harbors an individual posing a danger." Messrs. Hoffman, Lewis and Rebecca contend that option c, "permissible when officers on the scene have probable cause that the area to be swept harbors an individual posing a danger," is equally correct. In *State v. Davila*, 203 *N.J.* 97 (2010) the court held, in part:

> a protective sweep of a home may only occur when (1) law enforcement officers are lawfully within the private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger . . . Moreover, when a protective sweep is performed in a non-arrest setting, as when police presence in the home is not due to the execution of an arrest warrant, the legitimacy of the police presence must be probed. *Id.* at 125-126.

The SMEs indicated that since the question does not indicate whether the officers are lawfully on the premises, option b and c are incorrect. As such, the Division of Test Development and Analytics determined to omit this item from scoring prior to the lists being issued.

Question 78 indicates that a police officer has brought in a suspect for custodial questioning. The officer then learns that the suspect's attorney has arrived and wishes to speak with the suspect. The question requires candidates to complete the following sentence, "According to New Jersey case law, the courts have determined that a police officer **MUST** . . ." The keyed response is option c, "immediately advise the suspect that an attorney is present and available." Mr. Navarro argues that option b, "immediately allow the attorney access to the suspect," is the best response. He refers to *State v. Elmore*[56] in which the court determined that:

> Elmore was never told of the presence of 'her' lawyer or that Last had been retained by her family. She was only asked if she wished to see 'a' lawyer who happened to be in the building. Indeed, it is undisputed that Elmore thought that she was being asked to see the prosecutor when this issue was raised. Thus there is nothing in the confluence of

[56] Although Mr. Navarro does not provide a citation for this matter, he appears to be referring to *State v. Elmore*, 205 *N.J. Super.* 373 (App. Div. 1985). In *Elmore, supra*, after Elmore was taken to the County Prosecutor's Office for questioning, her sister contacted an attorney, Fred Last, on Elmore's behalf.

> events reflected in this record which would support a finding that Elmore knowingly and voluntarily waived her right to consult with Last, the lawyer retained for her by her family. As such, his denial of access to her while she implicated herself clearly invalidated the fruits of all interrogation which took place after the denial occurred. *Id.* at 383.

Thus, the court did not indicate that the officers should have "immediately allow[ed] the attorney access to the suspect." It is noted that this item is sourced to *State v. Reed*, 133 *N.J.* 237 (1993) in which the court held:

> [W]hen, to the knowledge of law-enforcement officers, an attorney has been retained on behalf of a person in custody on suspicion of crime and is present or readily available to assist that person, the communication of that information to the suspect is essential to making a knowing waiver of the privilege against self-incrimination, and withholding that information renders invalid the suspect's waiver of the privilege against self-incrimination. *Id.* at 269.

Thus, the question is correct as keyed.

Question 80 provides:

> At 1:00 a.m., a motorist identified as John Green observed Ann Fuller driving her car in the opposite direction in his lane. After Green pulled his car onto the shoulder to avoid a head-on collision, Fuller brought her car to a stop a car length away, then drove past him. Green turned his car around and followed Fuller. During the next few minutes, Green observed Fuller bounce off curbs twice and almost hit another car. He wrote down the license plate number of Fuller's car, and called the police to report what he had seen. Green followed Fuller to her house and showed the police the driveway her car had entered. Officer Carluzzo and other officers arrived at Fuller's house less than a minute after she pulled into her driveway. Officer Carluzzo parked his car in front of the house and walked down the driveway. As he approached, he saw Fuller standing at the entrance to her garage with the garage door open. Officer Carluzzo told her that police had received a report that she almost hit another car head-on. She denied being on the road where the reported incident occurred, but admitted she had been driving the car.
>
> While Fuller was speaking, Officer Carluzzo smelled the odor of an alcoholic beverage on her breath and observed that her eyes were bloodshot and watery. Officer Carluzzo asked her whether she had

> been drinking, and she replied that she had two drinks earlier that evening. He then asked her to recite the alphabet, but she was unable to do it correctly on either of two attempts. Until this time, Officer Carluzzo remained outside of Fuller's garage.
>
> Officer Carluzzo then requested her driving credentials. She re-entered her garage to retrieve them from her vehicle, and Officer Carluzzo followed her. Officer Carluzzo observed that Fuller was unsteady on her feet when she walked. She also had difficulty getting her license out of her purse and her other driving credentials out of the glove compartment of the car. Officer Carluzzo attempted to administer additional field sobriety tests to her, but she was unable to do them properly. When she almost fell down, Officer Carluzzo discontinued the tests and placed her under arrest.

The question asks for the true statement regarding the garage entry and arrest. The keyed response is option b, "Probable cause of DWI justified the entry and arrest." Mr. Martin argues that the keyed response "inferred that [the officer] required probable cause to enter the garage with the suspected intoxicated drive[r]. He actually only required reasonable suspicion to detain her, then he could follow her wherever she went. Probable cause would only come into play when he placed her under arrest after he was already in the garage."[57] In this regard, he presents that "the officer possessed reasonable suspicion to detain the subject, and had placed her in an investigative detention. He then followed her into the garage during this investigative detention where he obtained credentials and then conducted further field sobriety tests. He then established probable cause and arrested her." It is noted that the question is based on *State v. Nikola*, 359 *N.J. Super.* 573 (App. Div. 2003). In *Nikola, supra*, the court determined that the officer had probable cause to believe that Nikola had been driving while under the influence ***before*** he entered her garage. It is noted that the standard for an investigatory stop, *i.e.*, reasonable suspicion, "is lower than the standard of probable cause necessary to justify an arrest." *See State v. Nishina*, 175 *N.J.* 502, 511 (2003). Thus, whether the officer had "reasonable suspicion" is immaterial. As such, the question is correct as keyed.

Question 95 requires candidates to complete the following sentence, "According to the *Standards for Arrest and Filing Complaints* in *NJ Attorney General Directive 1990-1, Concerning the Handling of Juvenile Matters by Police and Prosecutors* [Attorney General Directive 1990-1], where a juvenile is taken into custody for an act of delinquency, a complaint alleging delinquency shall be filed if

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[57] It is noted that candidates were instructed to choose the single best answer among the options provided. In this regard, none of the answer choices provided "reasonable suspicion of DWI justified the entry and probable cause justified the arrest."

the delinquent activity . . ." The keyed response is option a, "involves any offense defined in Chapter 35 or 36 of *N.J.S.A.* Title 2C." Attorney General Directive 1990-1 provides:

> 7. Standards For Arrest and Filing Complaints.
>
> a. It shall be the policy of this State that a juvenile should ordinarily be taken into custody, consistent with the laws of arrest, and that a complaint should be filed, where any of the following circumstances exist:
>
> The delinquent activity involves the commission of an indictable offense;
>
> The delinquent activity is committed by a juvenile identified as an Impact Offender, or by a juvenile who has charges pending or has a history of committing repetitive disorderly persons offenses; or
>
> The delinquent activity constitutes a violation of a supervisory condition of probation, parole, home detention or suspended sentence.
>
> b. Notwithstanding any other provision of this Executive Directive, it shall be the responsibility of all sworn law enforcement officers to take into custody any juvenile where there is probable cause to believe that the juvenile has committed an act of delinquency that would constitute a violation of any offense defined in Chapter 35 or 36 of Title 2C ("The Comprehensive Drug Reform Act"), as required by Directive 5.7 of the Statewide Action Plan for Narcotics Enforcement. Where a juvenile is taken into custody for an act of delinquency involving a violation of any offense defined in Chapter 35 or 36 of Title 2C, a complaint alleging delinquency shall be filed.
>
> c. Subject to the provisions of subsections a. and b. of this section, it shall be the policy of this State that a complaint ordinarily should not be filed where the delinquent activity involves a petty disorderly persons offense or disorderly persons offense, other than a repetitive disorderly persons offense or a disorderly persons offense involving the use or possession of a controlled dangerous substance or drug paraphernalia.

The other answer choices provided to candidates were: option b, "is committed by a juvenile identified as an impact offender;" option c, "is committed by a juvenile who has had charges pending;" and option d, "involves the commission of an indictable

offense." Thus, pursuant to Attorney General Directive 1990-1, all of answer choices provided to candidates would require a complaint to be filed. Accordingly, the Division of Test Development and Analytics determined to omit this item from scoring prior to the lists being issued.

For questions 101 through 110, candidates were provided with "Photo Array Identification Procedure – Worksheet" (Worksheet) and "Photo Array Identification Procedure – Narrative" (Narrative) in their test booklets.

Question 102 asks, according to the information presented in the Narrative, how item #15 of the Worksheet[58] should be completed. The keyed response is option b, Sequentially. Mr. Resetar maintains that the "narrative portion of the sample photo lineup sheet the report dictates that the photos were shown in a 'random order' . . . While the correct term according to the Attorney General Guidelines is sequentially for the way that a photo lineup is conducted, this is not the way the sample form was completed." The Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 2001) (Guidelines) provide, "When possible, photo or live lineup identification procedures should be conducted sequentially, *i.e.*, showing one photo or one person at a time to the witness, rather than simultaneously." The Guidelines, under the section entitled, "Conducting the Identification Procedure," state:

> B. **Sequential Photo Lineup**: When presenting a sequential photo lineup, the lineup administrator or investigator should:
>
> 1. Provide viewing instructions to the witness as outlined in subsection I B, above.
>
> 2. Provide the following additional viewing instructions to the witness:
>   a. Individual photographs will be ***viewed one at a time.***
>   b. The photos are in ***random order.***
>   c. Take as much time as needed in making a decision about each photo before moving to the next one.
>   d. All photos will be shown, even if an identification is made prior to viewing all photos; or the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).
>
> (emphasis added)

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[58] Item 15 of the Worksheet provides:

Photos were presented: sequentially ☐ simultaneously ☐

The Narrative provides, in part:

attendance I was responsible for administering the identification procedure. In
order to preserve the "blind" nature of the process, Lt. Paterson chose the photos
to be used in addition to the suspect. The photos were placed in a folder and I
presented them randomly, one at a time, to the witness. I was not aware which of
the photos was of the suspect.

Thus, the description provided in the Narrative reflects the definition and procedure presented in the Guidelines for a sequential photo lineup. As such, 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 19TH DAY OF OCTOBER, 2016

Robert M. Czech
Chairperson
Civil Service Commission

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and
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c: William Martin (2016-2816)
Daniel Pleskonko (2016-2727)
Anthony Litterio (2016-2633)
Julio Lopez (2016-2696)
Jannor Navarro (2016-2667)
Daniel Niekrasz (2016-2693)
Luca Piscitelli (2016-2636)
Richard Herbe (2016-2620)
Philip Kanka (2016-2663)
Eduardo Santana (2016-2580 and 2016-2924)
Samuel DellaSala (2016-2669 and 2016-3085)
Robert Flynn (2016-2645)
George Resetar (2016-2692)
Noah Schaffer (2016-2651)
Andrew Slota (2016-2630)
Dimitri Tsarnas (2016-2916)
Kenneth Schilling (2016-2666)
Erik Nolte (2016-2914)
James Harper (2016-2622)
Clifford Spencer (2016-2690)
Jason Appello (2016-2646)
Todd Stowe (2016-2652)
Peter Fabiani (2016-2660)
Raymond Kern (2016-2726)
Alan Hill (2016-2920)
James Richie (2016-2648 and 2016-2922)
Mark Burton (2016-2721)
James DeHart (2016-2725)
David Hoffman (2016-2724)
Erik Lewis (2016-2723)
Michael Rebecca (2016-2722)
Gene Sulzbach (2016-2691)
Michael Johnson
Records Center