STATE OF NEW JERSEY

In the Matter of Anthony Argento and Frank Furfaro, Police Captain (PM1315U), Bloomfield	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2017-4069 2018-125	Examination Appeal

ISSUED: NOVEMBER 20, 2017 (RE)

Anthony Argento and Frank Furfaro appeal their disqualifications from the promotional examination for Police Captain (PM1315U), Bloomfield. These appeals have been consolidated due to common issues.

This was a two-part examination consisting of a multiple-choice portion and an oral portion, and seniority was scored as well. The test was worth 70 percent of the final average and seniority was worth the remaining 30 percent. Of the test weights, 51.7% of the score was the written multiple-choice portion, 32.4% was the technical component and 15.9% was the oral communication component. The oral portion of the subject examination was administered on January 7, 2017 to eight eligible candidates from Bloomfield, and to 145 candidates from other jurisdictions. The resultant eligible list indicated that Mr. Argento ranked third, and Mr. Furfaro ranked fifth.

In order to preserve the security of the oral examination questions, candidates were scheduled in two groups, one in the morning and one in the afternoon. In order to prevent discussions about the examination between those who took the exam and those who did not, the afternoon candidates were scheduled to arrive before the morning candidates would be let out of the holding room. Candidates were tested individually, and the number of candidates tested at a given time depended upon the number of available examination rooms. Thus, due to the need for sequestering, some candidates were tested immediately upon arrival, and others had to wait. Prior to taking the examination, candidates are in the check-in

room for at least 20 minutes where they each signed a security pledge. This pledge reads:

> I affirm that under penalty of law (2C:28-3 Unsworn Falsification to Authorities) I have neither seen nor discussed the contents of the examination I will take today with any previously processed candidate and, in order to safeguard security for purposes of maintaining an equitable environment, I affirm that I will not communicate the content of today's examination with anyone.
>
> Additionally, I affirm not to discuss examination content with any potential makeup candidate prior to his/her examination.
>
> I am aware that if this statement is willfully false, I am subject to punishment.
>
> > 2C:28-3 Unsworn Falsification to Authorities. A person commits a crime of the fourth degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made herein are punishable. A person commits a disorderly persons offense if, with purpose to mislead a public servant in performing his function, he makes any written false statement which he does not believe to be true.

As indicated on the information sheet on the other side of the pledge form, candidates were informed that during the check-in procedure they must read and sign the candidate pledge sheet, and only those who signed the pledge would be permitted to continue with the testing process. Both of the appellants signed this pledge.

After testing and examination review on April 27, 2017, both appellants filed appeals of test content, and in their appeals, they admitted to discussing test content with other candidates. Among other things, Mr. Argento stated,

> Also, I have discussed the scoring with other candidates and it appears some candidates were penalized for not covering certain areas while other candidates were not penalized for covering the same area.

Mr. Furfaro stated,

> In speaking to the other candidates from around the [S]tate and within my department it appears that not everybody was penalized equally based on what they had said and what they did not.

Based on these statements, the Division of Test Development and Analytics disqualified the appellants for violating the security pledge by discussing test content with other candidates.

On appeal, Mr. Argento states that all discussions he participated in with other candidates did not compromise examination security. Specifically, he indicates:

> I was personally involved with discussions with and among all 7 other candidates from the Township of Bloomfield regarding the oral component of the examination during this sequestration.

He claims that most, if not all, candidates within this room were discussing their performance on this examination, including things they said during their 15-minute oral examination, how long they talked, things they forgot to say but wish they said, and areas they think the assessors will be looking for the candidates to mention. Mr. Argento asserts that such discussions were taking place prior to his entering the sequestration room by other candidates who had tested earlier in the day and that the Room Monitors could not possibly have avoided overhearing multiple conversations regarding examination content between candidates. Since these discussions were taking place within earshot of Room Monitors, Mr. Argento claims that he was under the impression that candidates could discuss their responses with each other. He reasoned that they were being sequestered to keep them from discussing this material with anyone who had not yet completed their oral examination. Mr. Argento maintains that the purpose of these the discussions in the squestration was to determine whether or not the exams were scored in a standardized and consistent manner. He also states that he assisted Mr. Furfaro as his union representative.

Additionally, Mr. Argento contends that the test review process was inadequate, that appeal decisions, which include oral examination content, by candidates of previous oral examinations are posted on the Internet by this agency, and that there are multiple police promotional study groups that utilize prior test questions and assist or represent students in their Civil Service appeals of test content. He states that each of these groups incorporates testing material and test questions that they learned from assisting their students in future cycles of their study groups. In this regard, Mr. Argento argues that was the basis for providing make-up candidates with a different examination in *In the Matter of Paterson Police Sergeant (PM3776V), City of Paterson*, 176 *N.J.* 49 (2003). He notes that none of the candidates in *Paterson, supra,* who admitted to discussing or receiving examination material after the tests were administered had been disqualified.[1]

[1] The Court ordered that all currently eligible candidates, including the three make-up exam candidates, could compete in the next examination. *Id* at 67.

Therefore, he presents that these practices, including the posting of Commission decisions regarding prior oral examination test content, compromises test security more than candidates who have taken the same examination entering into a discussion regarding how they answered a question for the purpose of possibly filing an appeal.

Mr. Argento argues that the pledge he signed was not violated and in the event his conduct is deemed a violation, it was unintentional. Initially, he notes that candidates were not given a copy of the pledge to take with them after the test. Further, he states that candidates were advised at the test center that they would be disqualified if they possess cell phone or recording devices in the test building, but no warning was provided to candidates that they would be disqualified if they discuss the content of the examination. Thus, even though he signed the pledge, the phrase in the pledge that reads "prior to his/her examination" gave him the impression that it was not a violation of this affirmation to discuss the exam content with other candidates after their examination. Further, Mr. Argento asserts that the overly vague nature of the pledge is compounded by the fact that candidates may be represented by an attorney or union representative in the appeal process. In this regard, in order to assist or represent a candidate filing an appeal, the representative would necessarily be required to discuss examination content. He also claims that the Commission has not disqualified candidates for participating in certain discussions, like those that occurred in *Paterson, supra.* As such, he maintains that the pledge is overly vague, as it does not specify which discussions are allowed and which discussions are prohibited.

Mr. Argento contends that it is arbitrary, capricious, and unreasanble to disqualify him and permit other candidates who engaged in identical conduct to remain on the list. In support, he provides examples of discussed test content and assessor notes and scores obtained after the examination review period, all of which he states he could not have known unless those candidate shared the information with him. Finally, Mr. Argento asserts that disqualification is an overly harsh punishment and such discussions are common practice.

Mr. Furfaro argues that his disqualification should be reversed so that he can understand his weaknesses as a candidate. If his disqualification is not reversed, he requests permission to discuss the content of the test with an attorney. Mr. Furfaro states that the parameters of the security pledge were not truly defined or explained, and believes that the Commission violates its own policy by discussing test content in reply to appeals when appellants may still file reconsideration or appeal to the Appellate Division of Superior Court. Further, he states that candidates can use Subject Matter Expert (SME) in rebuttal of test content to appeal and that study groups go over the same test questions released in Commission decisions. Mr. Furfaro notes that he discussed test content with Mr. Argento, who is his union representative, in good faith and for the purpose of

preparing his appeal. As to his comment regarding speaking to other candidates from around the State, Mr. Furfaro indicates that the sequestration room was filled to capacity. He states that there are so many candidates in that room that no one could help but hear and participate in discussions regarding test content. As he overheard test content being discussed freely in that room and in front of monitors, Mr. Furfaro thought it was acceptable.

CONCLUSION

At the outset, the Commission has a duty to ensure the security of the examination process and to provide sanctions for a breach of security. *See N.J.S.A.* 11A:4-1(c). In order to carry out this statutory mandate, *N.J.A.C.* 4A:4-2.10 identifies a number of prohibited actions in the conduct or administration of an examination and provides for the disqualification of candidates participating in such actions. The policy of not discussing test content was important enough that all candidates were required to sign a security pledge that they would not discuss the test content with anyone who had taken the test or with anyone who was a potential makeup candidate. This signature also indicated that the candidate was aware that if he or she violated this pledge, he or she would be subject to punishment.

When the appellants filed appeals of scoring of the oral portion of the subject promotional examination, they each stated that they had spoken to multiple other candidates. As such, there is no clearer indication that the appellants violated their pledges then their own admissions that they had done so. For the appellants to argue that they did not violate the security pledge as the test content was open for discussion since they had completed the examination and were waiting in the sequestration room, then because the examination was scored, and the examination reviews had been held, is a gross misinterpretation of the security pledge. This document does not indicate that it is acceptable to discuss test content in the future, once examination reviews are completed. In this respect, examinations or portions of examinations might be used in the future to test makeup candidates. Secondly, any makeup examination will test the same knowledge, skills and abilities (KSAs) as the original, and thus, may include similar scenarios. Therefore, unauthorized dissemination of examination content compromises test confidentiality, and therefore test integrity. In this regard, it must be underscored that the Commission has a constitutional duty to fill civil service jobs on the basis of competitive examination and must ensure that all applicants for an examination are given any equal opportunity to demonstrate their relative merit and fitness. *See N.J.A.C.* 4A:4-2.10(a). The security pledge is one safeguard to ensure that candidates do not disseminate examination contents to unauthorized persons.

The appellants' arguments that they needed to discuss examination content in order to determine whether or not the examinations were scored in a standardized and consistent matter is flawed. All candidates are scored by comparing their responses to a set list of possible courses of action which were developed by the SMEs in response to particular scenarios and the appellants' presentations were not treated differently than any other. Their presentations were not compared to the presentations of other candidates. The appellants' argument that other candidates did not receive the same comments but scored higher is fundamentally flawed. The assessor notes are examples of missed actions and opportunities to provide additional actions; they are not all-inclusive of every missed action.

The record establishes that appellants took the oral portion of the subject examination on January 7, 2017, along with six other candidates. After completing their examination, they were placed in the holding room until all candidates for their session finished the examination. Prior to taking the examination, the appellants signed the security pledge indicating that they would not communicate the content of the examination with anyone. By their own admission, each of them discussed test content in the sequestration room. The appellants maintains that they needed to discuss test content with others in order to formulate an appeal. However, many candidates over the years, both represented and *pro se*, have managed to formulate arguments on appeal regarding their scoring without violating the security pledge.

Moreover, regardless of the fact that the Commission is required to post all of its final administrative decisions, including those involving oral examinations, on its website, the existence of private study groups, or that candidates may be represented should they file an appeal, the security pledge signed by each of the appellants clearly indicates "I affirm that I will not communicate the content of today's examination with anyone." Yet, within a few hours of making this pledge, each appellant admitted to discussing the content of the examination in the sequestration room. Their arguments that they thought it was appropriate based on asserted actions of other candidates is not a reason for the Commission to disregard the appellants' promise not to talk about the examination with *anyone*. Additionally, the appellants have not provided a basis on which to disqualify other candidates on their assertion that the discussed the contents of the examination in the sequestration room. In this regard, the appellants did not provide those candidates with the required notification that they were being made parties to the appellants' appeals in order to provide them with the opportunity to potentially dispute the claim that they discussed examination content in the sequestration room. *See N.J.A.C.* 4A:2-1.1(d)1. Moreover, none of the other six candidates filed appeals admitting that they discussed test content. Therefore, the appellant have not established that the six other candidates discussed the test content in the sequestration room.

At this juncture, it should be noted that on the bottom of the front of the examination booklet is written the following notation:

> Copyright © by N.J. Civil Service Commission. All rights reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the New Jersey Civil Service Commission.

Unless otherwise noted, the Commission is the owner of all examination materials developed by the Commission. Examination scenarios, questions, and responses, and information contained in documentation pertaining to examinations, are proprietary to the Commission. Candidates have no "rights" to this property simply because they were exposed to it in an employment opportunity, and the fact that the Commission is a governmental agency affords candidates no special privilege to misappropriate this property. Remembering test content and calling a study group to report this content so that it may be reproduced or utilized by the study group violates the Commission's copyright. The Commission does not waive its rights of ownership to its intellectual property by administering examinations to candidates, *i.e.*, sharing it on a one-time or recurring basis in order to carry out statutory mandates. In this regard, the circular *Copyright Basics,* United States Copyright Office (May 2012), indicates that copyright protection for works made for hire have a duration of copyright for 95 years from publication, or 120 years from creation, whichever is shorter. As such, test content is the intellectual property of the Commission, which has the authority to reveal it at its discretion. It does so in formal Commission appeal decisions to explain the rationale for its determination. Although test content has been revealed in Commission decisions that are public, specific responses by candidates who have not appealed, and other associated test content, is not in a public forum and dissemination of this information is in violation of the security pledge.

Moreover, in the past the Commission has provided test content in its final administrative decisions to respond to specific scoring issues raised by appellants. In this case, the appellants have indicated that multiple police promotional study groups utilize those decisions, which include oral examination content, and that these groups incorporate testing material and test questions that they learned from assisting their students in future cycles of their study groups. By their own admissions in this appeal, the appellants have highlighted how their almost immediate breach of the security pledge, in conjunction with the test content found in Commission decisions, serve to undermine the overall integrity of the examination process. While the Court in *Paterson, supa,* mandated that make-up examinations contain substantially different questions from those used in the previous examination, in order to ensure a fair, merit bases assessment, the same

KSAs must be tested on the subsequent examination. Thus, regardless of whether a candidate communicates the content of an examination for use by a study group or if detailed examination content is extracted by a study group from Commission decisions, future candidates who have access to this proprietary information will have an unfair advantage in future examinations. As such, as directed by the Court in *Paterson, supra,* the Commission must consider, take and enforce appropriate deterrent measures to ensure against the compromise of test confidentiality.

The Commission is cognizant that the Court has upheld the policy of limited, controlled access to examination materials by appellants is necessary to strike a balance between the provision of information to the candidates and the maintenance of examination security. *See Brady v. Department of Personnel,* 149 *N.J.* 244 (1997). Consistent with this, there is legislative and executive authority that underscore the principle of non-disclosure is necessary to ensure the integrity of the testing process. For example, former Governor Richard Hughes issued Executive Order No. 9 on September 30, 1963, which stated that among the records not deemed to be public records were questions on examinations required to be conducted by any State or local governmental agency. Additionally, former Governor James McGreevy issued Executive Order No. 26, which states that records not to be considered governmental records subject to public access pursuant to *N.J.A.C.* 47:1A-1 *et seq*., include test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment and licensing. Indeed, although not in the area of civil service, *N.J.S.A.* 47:1A-1.1 exempts certain records of higher education institutions from disclosure, such as test questions, scoring keys, and other examination data pertaining to the administration of examination for employment or academic examinations. Accordingly, for all future examination content appeals, the Commission will determine if its published decision can contain limited examination materials necessary to strike a balance between the provision of information to ensure due process in the adjudication of the appeal and the maintenance of examination security.

In this case, both of the appellants are supervisory law enforcement officers. Clearly, the admissions by both of these high-ranking law enforcement officers that they disregarded an affirmation they signed just hours earlier by discussing examination content in the sequestration room cannot be causally ignored by the Commission. In this regard, Police Officers hold highly sensitive positions within the community and the standard for an applicant to higher-level supervisory positions include good character and an image of utmost confidence and trust. The public expects supervisory level Police Officers to project a personal background that exhibits respect for the law and rules. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). Thus, it is disturbing and disappointing that the appellants disregarded their affirmation not to discuss the content of the examination within

hours after making this promise. Accordingly, for the appellants' original test content appeals to processed in light of their admissions of the violation of the security pledge would be intolerable. Their actions directly defy civil service law and regulations and they were appropriately disqualified from the examination process.

A thorough review of appellant's submissions and the test materials indicates that 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
THE 15th DAY OF NOVEMBER, 2017

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