

*In the Matter of Philip Beesley, et al., Forensic Scientist 3,
Department of Law and Public Safety (PS1164P),
Division of State Police*

DOP Docket Nos. 2005-1095, 2005-1090, 2005-930, 2005-988, 2005-998,
2005-949, 2005-934, 2005-999, 2005-1000, 2005-947, 2005-946,
2005-1094, 2005-944, 2005-891, 2005-1091, 2005-943, 2005-945,
2005-931, 2005-967, and 2005-1067

(Merit System Board, decided April 6, 2005)

Philip Beesley, George Chin, Sharon Freck-Tootell, Michael Kennedy, Raymond Klama, Michael Koval, LisaAnn Ligato, Jacki Mancilla, Karin Menser, Evelyn Moses, Thomas Nizolek, Antoinette Pettincki, Joseph Pino, Patricia Prusak, Tracey Pursell, Michele Roberts, Gail Tighe, James Toner, and Laura Tramontin appeal their scores on the promotional examination for Forensic Scientist 3, Department of Law and Public Safety (DLPS) (PS1164P), Division of State Police. These appeals have been consolidated due to common issues presented.

The subject promotional examination was announced open to employees who had an aggregate of one year of continuous permanent service as of the February 21, 2004 closing date in the Forensic Scientist 2, DLPS title. A total of 53 employees applied for the subject examination that resulted in an employment roster of 45 eligibles with an expiration date of August 25, 2006. It is noted that no permanent appointment has been made from the subject list.

Mr. Beesley earned a final average score of 78.360 and ranked 24th on the employment roster. Mr. Chin and Ms. Freck-Tootell earned final average scores of 78.980 and ranked 19th on the employment roster. Mr. Kennedy earned a final average score of 76.950 and ranked 41st on the employment roster. Mr. Klama earned a final average score of 82.720 and ranked 5th on the employment roster. Mr. Koval earned a final average score of 79.170 and ranked 16th on the employment roster. Ms. Ligato earned a final average score of 76.560 and ranked 44th on the employment roster. Ms. Mancilla earned a final average score of 80.340 and ranked 9th on the employment roster. Ms. Menser earned a final average score of 79.230 and ranked 15th on the employment roster. Ms. Moses earned a final average score of 77.120 and ranked 40th on the employment roster. Mr. Nizolek and Ms. Pettincki earned final average scores of 77.740 and ranked 32nd on the employment roster. Mr. Pino earned a final average score of 77.430 and ranked 40A on the employment roster. Ms. Prusak earned a final average score of 78.550 and ranked 22nd on the employment roster. Ms. Pursell earned a final average score of 79.040 and ranked 18th on the employment roster. Ms. Roberts

earned a final average score of 80.160 and ranked 10th on the employment roster. Ms. Tighe earned a final average score of 77.990 and ranked 30th on the employment roster. Mr. Toner earned a final average score of 78.300 and ranked 26th on the employment roster. Ms. Tramontin earned a final average score of 78.350 and ranked 25th on the employment roster.

The subject promotional examination was conducted in two parts. The first part of the examination was conducted utilizing the Supervisory Test Battery (STB). The STB utilizes multiple-choice test questions that are presented to candidates on a computer concerning issues, tasks and situations associated with their role as a supervisor in a fictitious organization. Candidates are required to achieve a raw score of at least 67.8 in order to pass the examination with a percentage average score of 70. The second part of the examination was processed as a “ranked unassembled” examination involving the evaluation of education and experience as set forth on the candidates’ examination applications. Each portion of the examination was weighted at 50%. The candidate’s seniority score and PES credit were then added to the combined weighted score in order to achieve a final average score. However, candidates were required to pass both portions of the examination in order to be placed on the eligible list.

The unassembled examination scoring standard gave credit for up to 10 years of appropriate experience. The scoring criteria provided that full credit be awarded for all experience in performing comprehensive testing procedures to be utilized in conducting various types of chemical testing, retesting, analytical examination and analyses of bio-hazardous, organic and inorganic compounds and other matter conducted in a modern scientific, pharmaceutical, medical, forensic chemistry or DNA testing laboratory in a supervisory capacity. Half credit was awarded for all of the above noted experience that was performed in a non-supervisory capacity. Candidates who possessed a Master’s degree from an accredited college or university in Forensic Science, Chemistry, Biology, Bio-Chemistry or a related physical science area of study were awarded two points and candidates who possessed a Doctorate in one of these areas were awarded an additional two points.

Candidates for the subject examination who had one year of continuous permanent service in the Forensic Scientist 2, DLPS title were admitted to the examination based on their service in the announced title and received a base score of 70.000 for the unassembled portion of the examination. However, in order to earn additional credit, candidates were required to demonstrate that they met the open competitive requirements for the Forensic Scientist 3, DLPS title. In this regard, it is noted that the open competitive requirements for the Forensic Scientist 3, DLPS title are graduation from an accredited college or university with a *Master’s degree* in

Forensic Science, Chemistry, Biology, Bio-Chemistry or in related areas of biological or chemical science that contain a minimum of 24 science semester hour credits in any combination of the above noted fields, and three years of experience in performing comprehensive testing procedures utilized in conducting various types of chemical testing, retesting, analytical examination and analyses of bio-hazards, organic and inorganic compounds, and other matter conducted in a modern scientific, pharmaceutical, medical, forensic chemistry, or DNA testing laboratory, one year of which shall have been in a supervisory capacity. Candidates who did not possess the required Master's degree, but who possessed a Bachelor's degree in one of the four areas listed above, *or* who possessed a Bachelor's degree that included a minimum of 24 science semester hour credits in the four areas listed, could substitute one additional year of non-supervisory experience as indicated. Candidates who possessed a Doctorate in one of the four areas listed could substitute it for two years of non-supervisory experience. Therefore, all candidates were required to have one of the specified Master's degrees and three years of experience *or* a Bachelor's degree and four years of experience *and* all candidates must have demonstrated one year of supervisory experience in order for their experience to be evaluated for scoring credit.

On appeal, Mr. Beesley asserts that the top seven candidates on the list had supervisory experience at another job before they started to work for the State and questions how private sector supervisory experience is verified. He also states that if this experience was gained more than 10 years prior to the closing date, it would not be applicable to forensic science. Mr. Beesley also questions why his supervisory experience in his current position was not evaluated. In this regard, he notes that his supervisor retired in February 2002 and he replaced him as the Biochemistry Unit Head. He presents that "although I was not a [Forensic Scientist 3, DLPS] and unable to write PAR[s], I performed all the duties of a supervisor as stated in my application. I was not give[n] credit for this experience." He also questions why he did not receive credit for his six graduate credits. With respect to the STB, Mr. Beesley states that the examination was scheduled for 6:00 p.m. and other candidates were given the opportunity to take the test during the day, not after work. As such, he reasons that the candidates who participated in the test during the day had an unfair advantage over those who took it in the evening. Moreover, Mr. Beesley maintains that after working for the State for 24 years, it is unfair to base his ability to supervise on a three hour reading comprehension test and that the examination eliminated one of the best scientists in the State from having an opportunity to supervise. Mr. Beesley argues that "the Laboratory Directors should have more say in who would be a better supervisor than a three hour reading comprehension test," that the test should be thrown out, and that personnel in the Forensic Laboratory System should determine who is qualified to supervise.

Mr. Chin questions how his unassembled examination score was derived and if the PAR/PES rating counts toward the final score. Further, he questions if supervisory experience is credited toward the final score if it is gained more than 10 years prior to the closing date. In this regard, Mr. Chin notes that a number of candidates who ranked at the head of the list had prior supervisory experience, but that experience was gained anywhere from 14 to 24 years ago. Given this, he questions why some individuals received a "base score of 80" while the majority of candidates were only awarded a base score of 70. Moreover, Mr. Chin states that he has served provisionally in the Forensic Scientist 3 (DPLS) title since October 2003, completed PAR/PES for up to six subordinates, and questions if he was awarded any credit for this provisional service. Mr. Chin also states that supervisors in the private sector do not always generate evaluations for their subordinates and asks if the DOP verifies private sector supervisory experience. Additionally, he asserts that there are candidates who have the same exact experience as he, have similar PAR/PES scores, who scored lower on the STB, but ranked higher than him on the list.

Ms. Freck-Tootell asserts that there are individuals who ranked higher on the list that either possess the same or lesser qualifications than herself. Specifically, she notes that according to the "Office of Forensic Scientist directives, the title of Forensic Scientist 3, (DPLS) is the only title allowed to perform supervisory duties such as being assigned staff to supervise and perform PES" for subordinate personnel. Given that she has been serving provisionally in the title under test since August 2003, Ms. Freck-Tootell questions why her application indicated that she "lacks 5 months [supervisory experience]" when she clearly indicated performing the required supervisory duties. Moreover, Ms. Freck-Tootell states that she is a Lieutenant Colonel in the Army National Guard, a senior level supervisory position, and argues that this should be considered applicable supervisory experience. Notwithstanding the fact that this supervisory experience is not based in a forensic science setting, she asserts that the STB is not based on a forensic laboratory setting and supervisory skills can be applied to any work environment. Thus, she states that any supervisory experience should be taken into account and evaluated.

Mr. Kennedy states that the STB was given on different dates and at different times of the day and that the group of employees who had the opportunity to take the examination in the morning instead of after a full day of work had an unfair advantage. He also claims that the content of the examination may have been shared with members of the second group by members of the first group. Mr. Kennedy also presents that computer-based tests may not be fair to all candidates and contends that candidates should have the option to take a paper based examination, as some candidates may

feel stressed or may not be comfortable with a computer based examination. Moreover, Mr. Kennedy questions the validity of the STB, stating that he does not “understand how questions about cleaning coffee pots and covering the office lunch break are important” for the Forensic Scientist 3, DPLS title. As such, Mr. Kennedy requests that the STB portion of the examination be discarded and the examination be based on education and experience with interviews conducted by the Director.

Mr. Klama asserts that he was not given any credit for his graduate courses.

Mr. Koval presents that at least three applicants finished with an STB score lower than his, but who ranked higher than him on the employment roster. He reasons that although non-supervisory experience is not credited beyond 10 years, it appeared that supervisory experience gained more than 10 years prior to the closing date was credited and this is unfair. Further, Mr. Koval questions the supervisory claims of some of the applicants, stating that his position has involved supervision of scientists for training purposes, much like a teaching assistant, and that due to this fact, he was awarded half credit for supervision on the Principal Forensic Scientist (now, Forensic Scientist 3, DPLS) examination. Mr. Koval alleges that some applicants were awarded supervisory credits for working as teaching assistants while other received no credit for “assisting in the teaching” of forensic scientists. Mr. Koval also notes that he was required to take the STB after working a full day while other candidates were scheduled to take it during regular work hours.

Ms. Ligato claims that from September 2002 to October 2003, she carried out the duties of Unit Supervisor. She states that these duties included assignment of cases, maintenance of log books, peer and administrative review of completed laboratory reports, testifying as an expert witness, responding to technical and procedural questions, supervising scientists during their “on the job training”, co-signing reports, and evaluating work progress. Ms. Ligato notes a number of training courses she completed to enhance her supervisory skills and provides a supplemental resume with her appeal.

Ms. Mancilla questions if supervisory experience gained prior to the 10-year cut-off is considered relevant, as it was not for prior examinations. Moreover, she notes that writing performance reviews for employees is necessary to establish supervisory experience in State employment and questions if applicants are required to submit similar proof for supervisory experience claimed in the private sector. Ms. Mancilla argues that the lack of such proof could provide some candidates with an unfair advantage in the

testing process. Ms. Mancilla also states that she should have been awarded five months of pro-rated supervisory experience for her provisional service in the title under test and that she has 23 credits toward her Master's degree.

Ms. Menser provides a copy of an attachment that includes additional experience that she claims was missing from her original application. Ms. Menser also states that she was unable to determine how any of her credit was awarded.

Ms. Moses highlights her supervisory experience in a provisional capacity and states that many Forensic Scientists 2 (DLPS) who were eligible for the test had no supervisory experience that included preparing subordinate performance evaluations. At the time of the announcement, Ms. Moses states she had been supervising for four months, and the closing date for the completed application could have amounted to any length of time, even eight months later. Thus, she questions how she could lack supervisory experience that she was never allowed to gain. In this regard, she notes that had the application indicated "did you ever in your work history supervise individuals," she would have included additional employment information on her application, as it appears that supervisory experience gained more than 10 years prior to the closing date was credited. Ms. Moses highlights her extensive experience on appeal and notes several inequities in the scoring of the examination, including candidates who do not possess Master's degrees but who scored higher than candidates who do and that any employee hired after 1994 should not have full seniority. Further, she questions if she received full credit for her college degree, including the 24 specialized credits, the meaning of a notation on her application "needs 4y, has____.", and how it was determined that she lacked seven months of supervisory experience. In this regard, she notes that she supervised as a Forensic Scientist 2 in the absence of the regular supervisor and that individuals who ranked higher on the list had no supervisory experience.

Mr. Nizolek states that provisional appointees to the title under test have an unfair advantage over other candidates as they can be credited with supervisory experience. He also states that supervisory experience gained outside of State employment should not be counted, as it cannot be proven. Additionally, Mr. Nizolek asserts that most candidates had to take the STB after work but some were permitted to take the test during the day. He maintains that "since performance levels on test[s] decrease in the evening when people are tired," this gives an unfair advantage to those who took the test during the day.

Ms. Pettincki asserts that an error is evident in the scoring of the examination since several candidates received credit for supervision for

experience gained prior to the 10-year cut-off. She also maintains that sections of the applications seemed to have been ignored or skimmed over and questions why it is necessary to fill out such a lengthy application. Ms. Pettnicki argues that the combination of the unassembled examination and the STB is flawed and notes that as a Forensic Scientist 2, DLPS, she is permitted to train personnel, which involves supervision, and that she has been in charge of the unit in the absence of her supervisor. Given that the authority to compose PAR/PES is the determinative factor in establishing supervisory responsibilities, she questions how an incumbent in the Forensic Scientist 2, DLPS title can gain that experience. Further, Ms. Pettnicki questions the validity of the STB and reiterates her concerns that some candidates were required to take the STB after work, while others were granted permission to take the test during the workday.

Mr. Pino highlights his responsibilities as “rotating stand in supervisor” and states that he more than satisfies the requirement of supervision. He also states that he has nine Master degree credits and that it was difficult to interpret the scant comments noted on his application. Mr. Pino also notes that he was initially misinformed about his score by a staff member of the Department of Personnel (DOP) and asserts that the totality of this misinformation makes it difficult for him to make an informed appeal or to verify the accuracy of his final average score.

Ms. Prusak states that she did not receive any additional points for her Master’s degree, additional schools and training, or certificates that she listed on her application. She also states that it was unclear how she was awarded credit and that she should have received supervisory credit for her experience as an Adjunct Lecturer outside of State employment. Ms. Prusak also raises concerns about the resulting ranking of eligibles based on the test mode used for this examination.

Ms. Pursell asserts that some candidates received credit for supervisory experience gained prior to the 10-year cut-off. She also questions why PAR/PES responsibility is required to establish supervisory experience in State service, but no such proof is required to be awarded supervisory experience for private sector experience.

Ms. Roberts states that based upon her review of her application materials, there was no way to calculate how her final average score was determined. Thus, she requests an explanation of her score. Moreover, she questions how one unnamed individual received a base score of 80 and how this was determined. Further, she presents that it appears that some candidates were awarded experience for supervision that was gained over 10 years from the announced closing date from private employment, which

cannot be substantiated. In this regard, Ms. Roberts notes that the only candidates who should have received supervisory experience were those who were provisionally serving in the title under test.

Ms. Tighe maintains that, given the title under test is the first level supervisory title, State career employees who entered State service after college are penalized over someone who may have supervisory experience from another job and notes that there is no definition of supervision for non-State positions. She also states that incumbents in the Forensic Scientist 2, DLPS title supervise lower level staff, but are not credited with supervisory experience. As a provisional incumbent in the title under test, as well as a Senior Forensic Scientist, Ms. Tighe states that she has supervised lower level staff for over 19 years. She also “challenges the top 7 rankings on their supervisory experience.” Further, Ms. Tighe asserts that the STB was unfair since some candidates were scheduled to take it during normal work hours while others had to take it after working all day. She also argues that the STB should not be weighted at 50% of the total. In this regard, she notes that a three hour test should not decide the ranking of an individual for a supervisory position and states that oral interviews and recommendations by supervisors should be a larger part of the scoring process for supervisory positions. Ms. Tighe also states that the appointing authority should have a larger voice in determining what type of examination should be conducted since they are most familiar with the qualifications necessary for the job.

Mr. Toner states that he does not believe his Master’s degree was incorporated into his score and notes that he has served provisionally in the title under test since October 2003, supervising nine staff members. He also states that some candidates who ranked higher than him have not written performance evaluations or supervised. Mr. Toner submits a copy of his Master’s degree transcript with his appeal.

Ms. Tramontin asserts that she should have been awarded supervisory experience based on her service with RWJ Pharmaceutical Research from January 1991 through February 1997. She maintains that this should be considered relevant experience and that she should be awarded two points for her Master’s degree.

Appellants Beesley, Chin, Kennedy, Mancilla, Menser, Nizolek, Pettincki, Pursell, Roberts, Toner, Tighe and Sally Ertle, James Meehan, Desiree Reid, Susan Toner, and Paul Verdino request that the results of the STB of Mr. Thomas Lesniak be removed from consideration for his ranking. The appellants present that Mr. Lesniak is one of the most qualified individuals in the Office of Forensic Science for the title under test and state that the STB does not adequately reflect his leadership abilities,

interpersonal skills, and vast forensic knowledge. The appellants explain that Mr. Lesniak was the key to overseeing the layout and installation of laboratory equipment in the new Forensic Science laboratory that was recently accredited by the American Society of Crime Laboratory Directors. The appellants highlight Mr. Lesniak's extensive professional accomplishments and state that he truly deserves the position of Forensic Scientist 3, DLPS. Thus, the appellants request that Mr. Lesniak be ranked for the subject examination based solely on his education and experience.¹

CONCLUSION

At the outset, at its meeting on October 23, 2002, the Merit System Board (Board) recorded changes in the Classification and Compensation Plan that involved a restructuring of the Forensic Scientist title series in the Division of State Police. It was determined that restructuring was necessary based on legislative mandates that increased the quantity and scope of DNA testing, to keep pace with changes in forensic science, and to attract and *retain* qualified staff in the highly complex area of forensic science. The action involved the restructuring of non-managerial levels, elimination of the entry level of the titles series, a title verbiage change for all levels, an increase in the education requirement from a specific Bachelor's degree to a specific Master's degree, and the upward movement of non-managerial staff. Germane to this appeal, the former title Senior Forensic Scientist (P25) was changed to Forensic Scientist 1, DLPS (P25); Principal Forensic Scientist (R28) was changed to Forensic Scientist 2, DLPS (R28); and the former title Supervising Forensic Scientist (S30) was changed to Forensic Scientist 3, DLPS (S30). As part of this action, incumbents in the former Senior Forensic Scientist (P25) title were moved to the Forensic Scientist 2, DLPS (R28) title. This action impacted the majority of the candidates for the subject examination, as most were permanent in the Senior Forensic Scientist title and their titles were changed to Forensic Scientist 2, DLPS effective August 2001.

It must be underscored that although the education requirements were changed to require possession of a Master's degree for all levels of the Forensic Scientist title series, the minimum one year of required supervisory experience to establish examination eligibility did not change when the Supervising Forensic Scientist title was changed to Forensic Scientist 3, DLPS.

With respect to the unassembled examination portion of the examination, it is noted that out of the 53 applicants who applied for the examination, 45 candidates only received the base eligibility score of 70.00

¹ Mr. Lesniak did not achieve a passing score on the STB portion of the examination.

and 7 actually received credit based on their education and experience.² In accordance with longstanding policy, education and experience are not evaluated for additional credit above the base score of 70.00 when the candidate is admitted to the examination based solely on permanent service in a title to which the exam is open, but who does not satisfy the complete open competitive requirements (Flat 70 Rule).³ *See In the Matter of Linda Berezny et al.* (MSB, decided May 22, 2001) (It was proper to score candidates with a base passing score of 70.00 because they were admitted to examination based on service in titles to which the examination was open, but they did not possess the required supervisory and professional experience). In this case, all of the applicants were admitted to this examination based on their permanent service in the Forensic Scientist 2, DLPS title, *not* their education and experience. Essentially, this means that 45 candidates, or approximately 85% of the candidates, did not satisfy the open competitive requirements for the examination and did not receive any additional credit based on their experience gained within 10 years of the announced closing date. Further, every candidate who did not satisfy the open competitive requirements for the examination lacked the required one year of supervisory experience. Although the majority of this number did not possess the required completed Master's degree in one of the specified fields, all were able to substitute the specified additional experience per the substitution clause for education.

On the other hand, of the 7 candidates who were awarded scoring credit for their experience gained within 10 years of the announced closing date, 5 candidates established that they satisfied the required supervisory experience for eligibility purposes based on experience gained outside of State service and more than 10 years prior to the announced closing date.⁴ Thus, these candidates were not, as a number of the appellants argue, awarded additional scoring credit for their supervisory experience gained more than 10 years prior to the closing date. Rather, because they established that they satisfied the open competitive requirements for eligibility to the Forensic Scientist 3, DLPS title, their 10 most recent years of experience were credited. In this regard, it is noted that the 10-year rule only applies to scoring unassembled examinations, *not* eligibility determinations. *See In the Matter of Rene Clevenger* (MSB, decided March 13, 2001).

² One candidate was a no-show for the STB.

³ This practice is explained in the "Candidate Review Form, Unassembled Examination Scoring System" that was available to all candidates who reviewed their test papers.

⁴ The other 2 candidates who established the required supervisory experience, Harry Corey and Nancy Swec, were provisionally appointed to the Forensic Scientist 3, DLPS title in August 2003. However, Mr. Corey indicated on his application that he served in the title from October 2002 and Ms. Swec indicated on her application that she served in the title from July 2002.

Thus, an applicant's experience gained prior to the 10-year cut-off for the scoring of an unassembled examination is in fact applicable to establish eligibility to participate in the examination. For example, if a candidate possessed no creditable experience for scoring purposes during the 10 years prior to the closing date of an unassembled examination, but did in fact have applicable experience prior to the 10-year cut-off date that satisfied the announced requirements, that candidate would be admitted to the examination and receive a base passing score of 70.000. This process recognizes both candidates who have applicable experience but who might not have exercised those skills in the previous 10 years and credits those candidates who utilize the relevant skills within the established time frame. Therefore, the utilization of the 10-year rule for additional scoring above the base score of 70.000, as well as accepting all relevant experience to establish eligibility that a candidate has gained over his or her working career, insures that the dual purposes of the Merit System, which are to ensure efficient public service for State government and to provide appointment opportunities based on merit and fitness, are satisfied. As such, utilization of the 10-year cut-off for additional scoring for those candidates who satisfy the open competitive requirements for a title is not arbitrary since all eligible candidates could be considered for appointment. *See In the Matter of Robert Scott* (MSB, decided November 4, 2004).

Nevertheless, the Board is troubled for a number of reasons by the use of a flat passing score for this particular ranked unassembled examination. As indicated earlier, 85% of the candidates did not receive any additional scoring credit for their experience because they did not satisfy the complete open competitive requirements for the examination, specifically, the one year of required supervisory experience. However, 48 (91%) of the applicants had at least (and in most cases much more than) 10 years of applicable professional experience in the field of forensic science in the Forensic Scientist title series with the State. With respect to the unassembled examination process, the Board has consistently determined that there are so many changes in the methods and/or equipment in performing tasks in every area of employment that only experience gained within the 10-year time period immediately prior to the closing date of the examination would be evaluated for credit. In *In the Matter of Peter Smith* (Civil Service Commission, decided April 23, 1984), it was determined that "there are sound reasons for limiting the evaluation to experience gained within the past 10 years since rapid changes in certain fields make recent experience a more valid indicator of current knowledge than experience gained many years ago." The Commission further concluded that "the utilization of the 10-year cut-off in grading the E&E examination . . . is neither arbitrary nor discriminatory." *See also, In the Matter of John Gerolstein* (Commissioner of Personnel, decided October 24, 1996). In this case, the determinative factor that

triggered an evaluation of recent experience was in part based on supervisory experience gained by 5 candidates more than 10 years prior to the closing date. Given the restructuring of the Forensic Scientist title series, which was in large part due to keeping pace with the changes in forensic science, an examination instrument that essentially disregards a candidate's 10 most recent years of forensic science experience is not consistent with the rationale elucidated in *Smith* and *Gerolstein, supra*. It is difficult to argue that the many changes in methods and/or equipment in a highly specialized area of employment only warrant an evaluation of the 10 most recent years of experience, and then to disregard this experience based on a practice that excludes 85% of the pool of eligibles from such an evaluation. It is axiomatic that the field of forensic science, as indicated by restructuring of the title series, is a highly technical and specialized profession, and a meaningful evaluation of each candidate's 10 most recent years of technical experience is necessary to maintain the validity of the unassembled examination process, given the unique circumstances surrounding this particular pool of candidates.

According to the job specification for Forensic Scientist 3, DLPS, incumbents primarily supervise the technical operation of a component within a Regional Forensic Laboratory, or oversee designated research projects within the Forensic Science Bureau. It is classified as an "S", or higher level supervisory title. Further, a review of the Promotional Job Analysis conducted in support of this examination demonstrates that up to 75% of an incumbent's tasks revolve around the performance of supervisory level duties. In conjunction with the fact that the sole impediment to the vast majority of candidates not receiving additional scoring credit for their experience was the lack of the required one year of supervisory experience, it is evident that the other essential knowledge, skill, and abilities (KSAs) to be evaluated for this title are supervisory in nature. Indeed, given that 91% of the pool of candidates had 10 or more years of the required highly specialized professional experience in lower level related titles, it is clear that the level of that experience, be it as an independent worker, lead worker, or supervisor, should also be evaluated. In this regard, it is noted that the issue of the assignment of supervisory duties among staff in the Forensic Scientist title series has a contentious history with respect to the selection process, and has been the subject of several appeals to the Board. See *In the Matter of Nancy Amin, et al. and Michael Koval, et al., Principal Forensic Scientist (PS7076P)* (MSB, decided December 7, 1993), *In the Matter of Philip Beesley, et al., Principal Forensic Scientist (PS8587P)* (MSB, decided March 27, 2001), *In the Matter of Cynthia McSweeney et al., Principal Forensic Scientist (PS8587P)* (MSB, decided September 25, 2001), and *In the Matter of Anthony*

Pankiewicz, Principal Forensic Scientist (PS8587P) (MSB, decided January 29, 2003).⁵

Essentially, over the years a number of candidates have argued on appeal or presented on their applications that they supervise staff, take charge in the absence of the regular supervisor, oversee the training of junior staff or the performance of similar types of duties, and maintained that this should be equivalent to supervisory experience notwithstanding that the DOP requires an individual to have formal performance review authority over subordinate staff. A number of candidates in the past have also alleged that their colleagues embellished their supervisory experience on their applications, resulting in the Board ordering the rescoring of the Principal Forensic Scientist (PS8578P) list. *See Beesley and McSweeney, supra.* In the instant appeal, several appellants now raise concerns with respect to how supervisory experience gained outside of State service is verified. In each of the Board's previous decisions, it was noted that supervisory duties were either "not necessarily out-of-title work" or "permissive" for incumbents in the former Senior Forensic Scientist title series. Indeed, it is evident that many of the candidates for this examination did in fact perform "lead worker" duties. In *In the Matter of Elizabeth Dowd, et al.* (MSB, decided February 9, 2005), the Board noted that lead worker duties are akin to that of a supervisor in many respects, absent the responsibility for formal performance evaluations that can lead to the effective hiring, firing, or demotion of a subordinate. In this connection, as noted earlier, incumbents in the Senior Forensic Scientist title were moved to the Forensic Scientist 2, DLPS title in August 2001. The Forensic Scientist 2, DLPS title is classified as an "R", or primary level supervisory title, but the specific language of the job specification delineates that supervisory responsibilities are permissive.⁶ This is appropriate, given that the next higher in-line title, the title under appeal, requires one year of supervisory experience to establish eligibility. As such, given that the Forensic Scientist 2, DLPS title is primarily "lead worker" in nature, the examination instrument utilized to evaluate a candidate's abilities for the next higher in-series title should also necessarily focus on supervision. This is underscored by the fact that the majority of the candidates do not meet the open competitive requirements.

⁵ Apparently, in an effort to lay to rest the ongoing issues regarding supervisory responsibilities, the Director, Forensic Science Laboratory Bureau, in correspondence dated March 24, 2004 to the Division of Selection Services requested to participate, and did so, in the ranking process of the unassembled portion of the subject examination in order to evaluate such things as claimed supervisory experience and performance evaluation responsibility.

⁶ This is further reinforced by several of the appellants as they indicated that DLPS policy only permitted Forensic Scientist 3, DLPS to have subordinate performance evaluation authority.

The STB is an examination that focuses on supervision. Specifically, the STB utilizes multiple-choice test questions that are presented to candidates on a computer concerning issues, tasks and situations associated with their role as a supervisor in a fictitious organization. It is designed to measure common supervisory skills and abilities such as Analysis and Judgment, Employee Evaluation and Development, Interpersonal Skills, Written Communication Skills, Leadership and Decision Making. Generally, the STB is the *sole* selection instrument administered unless it is determined that candidates for the announcement have not been tested or evaluated sufficiently in prior positions for other important worker characteristics not measured by this examination. In the matter at hand, all of the evidence demonstrates that the most important characteristic that should be measured in this particular examination is the candidate's supervisory abilities. Moreover, the unassembled examination portion of this test, given the unique circumstances surrounding this particular pool of candidates, effectively did not measure the majority of the candidates' most recent technical experience. This is another important worker characteristics required for this title. As such, given the restructuring of the title series and the resulting upward movement of the majority of candidates for this examination to the Forensic Scientist 2, DLPS title, as well as the use of the STB to assess a candidate's supervisory abilities, it is appropriate under these limited circumstances not to utilize the "Flat 70 Rule" so that these candidates' 10 most recent years of technical experience can be evaluated in the unassembled examination process. Accordingly, this portion of the test is to be remanded to the Division of Selection Services so that it can develop an unassembled scoring standard and rank the candidates consistent with this decision. However, this relief is unique to the facts presented in this case and shall not be used as precedent in any other proceeding.

At this juncture, it is unnecessary for the Board to address each of the appellant's specific scoring concerns as it relates to their education or experience on the unassembled examination portion of the examination. However, it must be underscored that a review of the unassembled portion of this examination demonstrates that initially, the Division of Selection Services correctly scored all of the candidates' experience in accordance with controlling policy and the Board recognizes that it was proactive in its efforts by including the appointing authority in the review of this examination. Further, the Board recognizes that an unassembled examination combined with an STB, employing the "Flat 70 Rule" would not necessarily be invalid in the future if, for example, the pool of candidates had varying lengths and degrees of experience less than 10 years and the majority satisfied the open

competitive requirements. Evaluation of such experience would result in an actual crediting and meaningful ranking of recent experience.⁷

However, in an effort to “clear the air,” the Board will address the issue of what constitutes supervisory and lead worker duties. It has been well established in prior Board decisions that the essential component of supervision is the responsibility for the administration of formal performance reviews or local equivalent performance evaluations for subordinate staff. Supervisory duties also include ensuring that assigned tasks are performed efficiently on a day-to-day basis and the training of subordinates. However, intermittently taking charge in the absence of the regular supervisor, instructing staff, training, and ensuring performance of assigned tasks, *without the responsibility for employee performance evaluations that enable the effective hiring, firing, promoting, or disciplining of subordinates*, would be considered duties of a lead worker. See *In the Matter of Diane Epps and Lisa Sallad* (MSB, decided May 15, 2002) and *In the Matter of Martha Grimm* (MSB, decided August 14, 2001). Supervising, training, and monitoring a program would not be considered supervisory experience unless the applicant had both performance evaluation responsibility for subordinate staff and supervised subordinate staff on a daily basis. See *In the Matter of Timothy Teel* (MSB, decided November 16, 2001) and *In the Matter of Charles Zingrone* (MSB, decided August 11, 2004). In short, regardless if they are employed by the State or in the private sector, supervisors have the authority to recommend hiring, firing, and disciplining employees. See *In the Matter of Susan Simon and William Gardiner* (Commissioner of Personnel, decided September 10, 1997).

Several appellants raise the issue of verification of supervisory experience gained outside of State service. The DOP does not verify the responses of every candidate in the application or unassembled examination process. However, the process provides a number of checks and balances in an effort to select qualified personnel. For example, the DOP has a restriction on the use of out-of-title work in order to establish eligibility in a promotional examination, State personnel records are verified in the selection and appointment process, and appointing authorities may contact references to verify work experience and specialized credentials. Additionally, the working test period is designed as part of the examination process to permit an appointing authority to determine if an employee can satisfactorily perform the duties of a title. It is not feasible for the DOP to verify the responses of every candidate; however, by working in conjunction with Human Resources offices of the various State appointing authorities, every

⁷ The Board notes for the record that all candidates for PS1164P are to be provided a copy of the determination in this matter since it will impact the ranking of all eligibles. See *Pankiewicz, supra*.

reasonable effort is made to ensure the veracity of applicant information. *See In the Matter of Carol Brozosky* (MSB, decided March 27, 2002). Moreover, candidates are not precluded from challenging the credentials and experience of their colleagues through the appeal process. *See McSweeney, supra*.

Nevertheless, it is clear that the Division of Selection Services did everything reasonably possible to ensure the veracity of the information provided by the candidates in the scoring of the unassembled examination portion of the examination. Indeed, given the ongoing questions and concerns regarding the issue of supervision with this particular pool of candidates, the Division of Selection Services was amenable to the request that senior level management representatives from the Forensic Science Laboratory Bureau verify the level and scope of supervisory duties claimed by a number of candidates. Thus, claimed supervisory experience in State service Forensic titles was verified by senior level management of the appellants. Further, the appointing authority is not precluded from contacting a candidate's private sector employer to verify the level and scope of any supervisory experience claimed as part of its selection and appointment process. The overall selection process contemplates appointing authority verification of a candidate's background prior to permanently appointment as evidenced by the rules surrounding the removal of names from an eligible list. More importantly, had conflicting information surfaced during this process and an eligible was determined not to have the appropriate experience, be it supervisory or professional, Merit System rules and law permit an appointing authority to remove an eligible from the list because he or she lacks the job requirements or makes a false statement of material fact. *See N.J.A.C. 4A:4-4.7 and 4A:4-6.1*.

With respect to the challenges regarding the validity of the STB, the questions and weighted answers to this examination were developed by Subject Matter Experts (SMEs), individuals proficient in the fields of supervision and management. Specifically, three teams of SMEs reviewed the questions and the weighted answers. The first team developed the weightings and the second and third teams reviewed the weightings previously assigned in order to ensure that the weightings were not the result of either faulty reasoning or were biased as a result of too small of an expert pool. A total of 30 SMEs participated in this process.

The STB is designed to be used for primary and higher level supervisory titles. Additionally, any eligible list that is generated as a result of the STB has a duration of two years. The test score is banked for two years for possible future use. Specifically, candidates who apply and are determined eligible for an announcement involving another supervisory title some time within two years of the date of their initial examination will have their STB

score applied for that announcement. However, candidates may retake the STB after one year in response to future announcements for which they may be eligible. If a candidate elects to take the STB after one year, the new score will be used even if it is lower than the one it replaces. The tolling period for banking test scores begins on the day the initial STB examination is administered. The score will be applied as of the examination administration date of any future announcement to which a candidate is deemed eligible. Additionally, due to the reuse of this examination, no review of examination questions or keyed answers is permitted. See *In the Matter of Supervisory Test Battery Lists* (MSB, decided December 19, 2000).

The computer is utilized for this examination and permits the candidate to get an instant score report immediately after completing the examination. Aside from the immediate feedback, the use of the computer also permits controlled presentation of the test material to the candidate and prevents subsequent questions from providing clues to the answers to previous questions. Due to this feature, candidates *are not permitted to return to previously answered questions or to vary the order of the questions*. The nature of the questions is frequently “what would you do” or “what would you say,” therefore, the context of the questions require immediate action. Decisiveness has been identified in the job analysis as being important to the supervisor’s job. As such, the examination requires candidates to be decisive when presented with situations.

At the beginning of the examination, candidates are provided with background information relevant to the examination. The scenario is designed to provide a context in which supervisory skills are demonstrated. One of the packages of information that is given to the candidate is an in-basket consisting of materials that the candidate will have to address during the course of the examination. Candidates are given 50 minutes to review the contents of the packages prior to beginning the exam and once this time has elapsed, candidates are encouraged to move to the computer and begin the timed portion of the examination. All candidates were informed that the test consisted of a total of 120 questions and that they would receive automatic messages on the computer when they completed 25%, 50% and 75% of the examination. Thus, when these messages are received, a candidate knows that he/she has 90, 60 and 30 questions remaining, respectively. A “count-down” timer is also present on the computer screen at all times so that candidates are always aware of the remaining time to finish the test. The countdown timer runs continuously and generally cannot be paused for any reason. This makes it possible for candidates to judge the pace by which they are moving through the test material. However, it is noted that the countdown timer can be paused by the monitor in specific situations where an accommodation has been requested and approved. By

design, the STB is not a “speed” test with highly restrictive time limits. A candidate’s sense of “self-pace,” using the parameters mentioned, appears to be more than adequate for budgeting one’s time wisely. This is reflected by the fact that 92% - 93% of all candidates finish the examination.

As indicated earlier, the Forensic Scientist 3, DLPS title is classified as a higher level supervisory title with a class code of 30. A review of the job specification demonstrates that incumbents in the title perform supervisory duties, including the responsibility for evaluating employee performance. *N.J.A.C. 4A:4-2.2* provides considerable discretion to the Department of Personnel in the determination of appropriate test modes. The STB is the sole selection instrument for primary and higher level supervisory titles and, as indicated earlier, given that the majority of the candidates do not satisfy the open competitive requirements for the title, it is necessary to assess supervisory abilities utilizing the STB. Although several appellants question the veracity of an examination that deals with such things as “cleaning coffee pots and covering the office during lunch breaks,” the examination is designed to evaluate common supervisory skills. Thus, candidates for the Forensic Scientist 3, DLPS title are required to be tested utilizing the STB. As such, it was appropriate to utilize the STB for this portion of the examination.

In response to the STB scheduling issues raised by several appellants, it is noted that all 53 candidates were initially scheduled for the evening. However, 5 candidates requested and were granted make-ups. Regardless, given the number of candidates who apply for promotional examinations each year, the DOP literally conducts tens of thousands of examinations each year. In order to meet this challenge, the DOP strives to provide convenient test times as well as a comfortable testing environment free from extraneous distractions. Further, the DOP uses examination centers throughout the State. These centers have been chosen for both their suitability as test sites and their location near transportation routes. Thus, examinations are scheduled in various locations around the State throughout the year, both in the evening after normal work hours as well as on Saturdays, to ensure all candidates are provided with an opportunity to demonstrate their relative merit and fitness in a competitive environment.

Germane to the matter at hand, the appellants have not demonstrated how their taking a test after work adversely impacted their performance in comparison to those candidates who were granted make-ups and scheduled to take the examination during the day. Although the appellants present, essentially, that they may not be at their optimal test taking ability after working, these candidates were issued notice of the examination on June 24, 2004, over four weeks prior to the test date. In *In the Matter of Gerri Calvin* (MSB, decided July 31, 2002), a candidate participating in the STB after

work argued that the test should not have been scheduled for 5:00 p.m. since she had worked all day and was required to drive from Warren County to her place of employment in Mercer County. In *Calvin*, the Board determined that all candidates participating in the examination were allotted the same amount of time in which to complete the examination and the appellant was not precluded from adjusting her schedule or making particular arrangements so as to adequately meet personal test preparation needs. Moreover, in *In the Matter of Charles Hargrove* (Commissioner of Personnel, decided March 26, 1997), the appellant argued that his test performance was adversely affected by his fatigue after having worked a full day prior to the lengthy test. The Commissioner noted that although the DOP strives to provide standardized conditions for test administration, extraneous variables over which the Department has no control, such as candidate fatigue or anxiety, may influence test performance. However, the Commissioner determined that no remedy can be fashioned for such occurrences and stated that it is each candidate's responsibility to insure that he or she is prepared for testing. Similarly, in the matter at hand, the record evidences that the appellants were afforded timely notice of the examination and they were not precluded from making arrangements to meet their particular test taking needs, which could have included scheduling leave time on the day of the examinations.

Several appellants argue that a three hour test should not decide the ranking of an individual for a supervisory position, that oral interviews and recommendations by supervisors should be larger part of the scoring process for supervisory positions, that the appointing authority should have a larger voice in determining what type of examination should be conducted since they are most familiar with the qualifications necessary for the job, and that the Forensic Science Bureau should determine who is qualified to supervise. The Board notes that the dual purpose of the Merit System is to ensure efficient public service for State government and to provide appointment and advancement opportunities to Merit System employees based on their merit and abilities. These interests are best served when more, rather than fewer, individuals are presented with employment opportunities that a promotional examination confers. See *Communications Workers of America v. New Jersey Department of Personnel*, 154 N.J. 121 (1998). Essentially, while the appellants suggest that "just passing this test" is not enough to warrant promotion to the title under test, N.J.A.C. 4A:4-2.2(a) charges the Commissioner of the Department of Personnel to administer examinations for appointment in the competitive division of the career service, which may include performance tests, such as the STB. See also, *In the Matter of Jennifer Napoli* (MSB, decided February 25, 2004) (All prospective candidates for State employment are required to be determined eligible for and pass a competitive examination and be certified in order to be considered

for permanent employment in the competitive division of the career service). As the appellants point out, employment decisions are not solely based on an individual's score on a promotional examination. Merit System rules and procedures contemplate appointing authority discretion in the selection process through the "rule of three." See *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3. Additionally, appointing authorities are not precluded by Merit System rule or law from considering additional experience and education in the interview process in order to select the most qualified candidate. See *In the Matter of Araceli Cabral* (MSB, decided August 11, 2004).

In response to the concern about placing employees provisionally in a title prior to an examination, *N.J.A.C.* 4A:4-1.5(a) provides that an appointing authority may make a provisional appointment if, among other reasons, failure to do so will seriously impair its work and there is no complete list of eligibles in existence. Thus, in order to ensure that the work of an appointing authority will not be adversely impacted by the absence of a list of interested eligibles for a specific position, the rules provide for provisional appointments until a competitive examination and employment roster can be promulgated. This approach balances both the immediate needs of an appointing authority to staff critical positions with the underlying purpose of the Merit System to ensure that permanent appointments are made on the basis of merit and fitness.

With respect to the appellants who request Mr. Lesniak's STB score be disregarded and he be ranked based on his education and experience, it does not appear from their submission that these individuals have been authorized to appeal on his behalf. Additionally, a party in an appeal may only be represented by an attorney, authorized union representative or authorized appointing authority representative. See *N.J.A.C.* 4A:2-1.1(e). As such, the appellants lack standing to appeal on behalf of Mr. Lesniak. Nevertheless, it is well settled that, as part of the process of selection and appointment, a candidate must establish eligibility by demonstrating possession of the applicable experience and/or education requirement *and* pass an examination. In the matter at hand, it was clearly appropriate to utilize the STB in a two-part examination given that it measures common supervisory dimensions. Indeed, it would be contrary to the underlying purpose of the Merit System to permit one candidate, who failed an examination, not to be evaluated utilizing the same standard as the other candidates who passed the examination for the same position.

ORDER

Therefore, it is ordered that the unassembled examination portion of the subject examination be remanded to the Division of Selection Services to

develop a scoring standard consistent with this opinion and to re-score the candidates' examinations to include their 10 most recent years of technical experience for those candidates who satisfy the non-supervisory portion of the open competitive requirements. It is also ordered that all certification activity, if any, be stayed, until the subject list is rescored and re-ranked. It is further ordered that the remainder of the appeals and the request to invalidate Mr. Lesniak's STB score be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.