

February 2009 Multi-State Performance Test

1. The test materials include an interoffice assignment memorandum from the law firm partner to the examinee, transcript of the Administrative Hearing, the Police Department Incident Report, and the Police Department Laboratory Report of blood alcohol test results. The library consists of portions of statutes from the Franklin Vehicle Code, the Franklin Code of Regulations, the Franklin Administrative Procedure Act, the Franklin Evidence Code and the full text of three cases, *Pratt*, *Schwartz*, and *Rodriguez*. The interoffice memorandum requests that the examinee draft a persuasive memorandum arguing the following issues: (1) the police officer did not have reasonable suspicion to stop Ms. Ronald ("Ronald"); (2) the administrative law judge cannot rely solely on the blood test report to find that Ronald was driving with a prohibited blood-alcohol concentration; and (3) that in light of all the evidence, the DMV has not met its burden of proving by a preponderance of the evidence that Ronald was driving with a prohibited blood-alcohol concentration.

2. General observations: Most of the examinees followed the call of the question by drafting a memorandum. The test can be divided into three sections corresponding to the three arguments assigned. The majority of the examinees organized the memorandum to correspond with the specific issues assigned. Most examinees addressed the issues in the order presented in the interoffice memorandum.

3. The first issue involves the reasonableness of the stop. The supporting case regarding this issue is *Pratt v. DMV*. Many examinees provided support for the argument that Officer Thompson did not have a reasonable suspicion to stop Ronald.

This issue requires a determination of whether the facts warranted Officer Thompson's stop of Ronald. Good answers began by citing *Pratt* as having rejected a bright line test and holding that the reasonableness of the stop is determined under a totality of the circumstances standard. Many examinees not only cited the ruling in *Pratt*, but also went further and distinguished the specific facts in *Pratt* from the current case. The stronger answers additionally addressed the facts in *Kessler* (which was cited in *Pratt*) and distinguished them from the present case.

To support a finding that the stop was not warranted, many examinees identified the fact that Ronald was only weaving within her lane prior to being stopped. Many examinees addressed the significance (or lack thereof) of the fact that Ronald was observed leaving the restaurant/bar at 1:00 a.m. or about the time bars were closing. Most examinees addressed specific reasons for the stop not being warranted. These included Officer Thompson's "tailgating" or following Ronald very closely and that he had his high beams on at the same time, and that these actions by the officer may have caused her to be afraid and to weave as she drove. The stronger papers not only addressed both of these issues but also pointed out that Ronald was not speeding or committing any other traffic violation.

4. The second issue concerns the sufficiency of the blood test as evidence. There are two areas to be addressed in this section. Both areas bear on the underlying issues that determine whether the ALJ can rely solely on the blood test to find Ronald was driving with a prohibited blood-alcohol concentration, or whether the blood test report can only be used to supplement other evidence to support the charge. Many examinees correctly concluded that the blood test could only be used to supplement other evidence. The more complete answers provided specific reasons why the report could not be the sole basis for a finding that Ronald was driving with a prohibited blood-alcohol level.

In the analysis concerning the use of the blood test report, the examinee should have discussed that Section 121 of the Franklin Code of Regulations requires the report to be signed by a forensic alcohol analyst and certified as authentic by a records custodian in order to be admitted without further foundation. Many examinees who recognized this issue not only correctly pointed out the legal requirement, but also observed that the report was signed by Charlotte Swain, a Senior Laboratory Technician, rather than Daniel Gans, the Forensic Alcohol Analyst, and then concluded that, because the report did not comply with Section 121, it would not be admissible under Sec. 121.

A second aspect of this analysis concerns whether the report is hearsay and, if so, whether a hearsay exception applies. Most examinees reached the conclusion that the report is, in fact, hearsay. In addition, most examinees set forth the three requirements of Section 1280 of the Franklin Evidence Code that sets forth a public-records exception to the hearsay rule. Many of the examinees who identified the public-records exception argued that the test and report do not meet the timeliness requirement set forth in the second factor. More complete answers thereafter provided the conclusion that, because the report is hearsay, and would not be admissible under an exception in a judicial proceeding, it cannot be used as the sole basis to conclude that Ronald was driving with a prohibited blood-alcohol concentration, but that it can only be used to supplement other evidence.

5. The third issue addresses whether the DMV has met its burden of proof. Most examinees correctly argued that the DMV has not met its burden of proof by a preponderance of the evidence, as was suggested in the assignment memorandum. In supporting this conclusion, many examinees compared the evidence presented at the hearing in the current case to the facts and findings in *Rodriguez* and *Schwartz*, noting that the case against Ronald lacks additional factors such as slurred speech or the smell of alcohol to support the license suspension. Many examinees also reasoned that Ronald's difficulties with the field sobriety test were due to Ronald's fatigue and being required to take the test on the shoulder of a busy highway while wearing high heels. Stronger answers included Ronald's explanation for weaving (due to the officer's following her closely with his high beams on) as further support that the DMV did not meet its burden.