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**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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April 14, 2004

Honorable Jeffrey B. Miller, Commissioner
Pennsylvania State Police
3rd Floor, Department Headquarters
1800 Elmerton Avenue
Harrisburg, PA 17110

Re: Regulation #17-65 (IRRC #2386)
Pennsylvania State Police
Use of Unmarked Vehicles

Dear Commissioner Miller:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulation review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director
wbg
Enclosure

cc: Honorable Joe Conti, Chairman, Senate Law and Justice Committee
Honorable Sean F. Logan, Minority Chairman, Senate Law and Justice Committee
Honorable Dennis M. O'Brien, Majority Chairman, House Judiciary Committee
Honorable Kevin Blaum, Democratic Chairman, House Judiciary Committee

Comments of the Independent Regulatory Review Commission

on

Pennsylvania State Police Regulation No. 17-65

Use of Unmarked Vehicles

April 14, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Pennsylvania State Police (State Police) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on March 15, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. Section 42.1. Purpose. – Clarity; Implementation procedures.

This section states the following: “This chapter governs the use of unmarked vehicles. It is necessary to establish uniformity in the use of unmarked vehicles for the purpose of law enforcement.” 75 Pa. C.S.A. § 3328, relating to unmarked police vehicles, directs the State Police to “...promulgate regulations for the use of unmarked vehicles by police officers.” More specifically, Subsection (a)(1) directs the State Police to, “establish the procedure to be used by a police officer in an unmarked vehicle when stopping a motorist.”

Does this regulation apply to stops or pursuits relating to traffic violations or all stops or pursuits that involve unmarked vehicles? In the final-form rulemaking, the State Police should clearly indicate the scope of the requirement in its preamble and in Section 42.1 of its regulation.

We note the phrase “permit the use of unmarked vehicles for law enforcement” also appears in Section 42.2 of this rulemaking. If any changes are made to Section 42.1, a similar change should be made to Section 42.2.

2. Section 42.2. Policy and effect. – Statutory authority; Legislative intent; Conflict with statute; Policy decision requiring legislative review.

This section includes the following sentence, “Failure to comply with this chapter does not affect the legality of any arrest or citation, nor will it be grounds for the suppression of evidence.” We have several concerns with this statement.

First, we question whether there is a statutory or constitutional basis for this provision. As regulations have the force and affect of law, a police officer’s failure to comply may raise a question as to the legality of the arrest. Is it the intent of the regulation to prevent a judge from considering the arresting officer’s compliance with the regulations in deciding a suppression motion or allowing a defense to the prosecution?

Second, we believe that Section 42.2 of this regulation conflicts with Act 75's amendment to Section 3733 (c) of the Motor Vehicle Code (75 Pa. C.S.A. § 3733(c)). Section 3733(c), as amended, authorizes a defense to a prosecution based on, among other things, recognition of the police officer's vehicle, the ability to identify the police officer because of his uniform or badge, and "**any other factor considered relevant by the court**" (Emphasis added). Therefore, a court is authorized by law to consider a police officer's "failure to comply" with regulations addressing vehicle identification and uniform requirements.

Third, we question whether Section 42.2 belongs in the regulation. We believe it represents a policy decision of such substantial nature that it requires legislative review. There is nothing in the above-cited statutory provisions relating to unmarked cars that indicates the legislative intent to restrict what may or what may not be entered into evidence. In contrast, whenever the General Assembly intended to address what a court may consider, it did so in clear and unmistakable terms. For instance, the section of the Motor Vehicle Code relating to chemical testing to determine sobriety clearly establishes what may be entered into evidence (75 Pa. C.S.A. § 1547(c)). Likewise, the Crimes Code explicitly establishes what nonconstitutional violations a court may consider in deciding a suppression motion (The Wiretapping and Electronic Surveillance Act, 18 Pa.C.S.A § 5721.1(b)).

3. Section 42.3. Definitions. – Conflict with existing regulations; Clarity.

Light bar assembly

The definition of "light bar assembly" differs from that of the Department of Transportation regulations found at 67 Pa. Code § 173.2. Section 42.22(b) of this rulemaking states that 67 Pa. Code § 173, relating to flashing or revolving lights on emergency and authorized vehicles, shall be utilized when officers stop suspected violators. To avoid confusion, we recommend that the definition of "light bar assembly" be amended to be consistent with the definition found at 67 Pa. Code § 173.2.

Marked police vehicle and unmarked police vehicle

This section defines the terms "marked police vehicle" and "unmarked police vehicle." However, these terms are not used in the body of the regulation. Instead, the terms "marked unit" and "unmarked vehicle" are used throughout the regulation. We recommend using the defined terms "marked police vehicle" and "unmarked police vehicle" in the regulation.

"Unmarked police vehicle" is defined as, "A police vehicle not equipped with a roof mounted light-bar assembly. The vehicle may display graphics, markings or decals identifying the agency or department." The second sentence creates ambiguity in the definition and should be deleted.

Police officer

75 Pa.C.S.A. § 3328, relating to unmarked police vehicles, uses the term "police officer." This rulemaking uses the term "officer." The Preamble to the final-form rulemaking should explain the reason for using the term "officer" instead of "police officer" and note who would fall under the definition of "officer." We also recommend defining the term "officer" and using it throughout the regulation.

4. Section 42.21. Identification and uniform requirements. – Clarity.

Identification

Subsection (a) establishes the procedures to be used by officers when identifying themselves. It states, in part: “If the officer does not carry official identification, the officer **should** not attempt to stop traffic law violators, unless there is immediate threat to public safety.” (Emphasis added.) The term “should” is nonregulatory language, which indicates that this provision is optional. It is inappropriate to include optional provisions in a regulation. We recommend that the term “should” be replaced with the word “shall.”

Uniforms

Subsection (b) establishes uniform requirements for officers using unmarked vehicles. It states, in part, the following: “Markings on alternative attire **should** be visible from the front and back.” (Emphasis added.) Similar to our comment above, we recommend that the term “should” be replaced with the word “shall.”

5. Section 42.22. Vehicle stops and pursuits. – Implementation procedures.

Subsection (b) relates to the use of audible and visual signals while operating an unmarked vehicle. It states that the requirements and standards set forth in 67 Pa. Code § 173 (relating to flashing or revolving lights on emergency and authorized vehicles) shall be used when officers stop suspected violators. 75 Pa. C.S.A. § 3328(a)(2) states that the regulations shall “require the use of audible and visual signals which meet the requirements and standards set forth in this title and in regulations adopted by the department.”

Section 173 of 67 Pa. Code does not address audible signal requirements. What audible standards are the State Police required to use when stopping suspected violators? We recommend the State Police add a citation to the specific regulations governing audible requirements in this section.

Facsimile Cover Sheet

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Pages: 5

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INDEPENDENT REGULATORY REVIEW COMMISSION

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Pennsylvania State Police's regulation #17-65 (IRRC #2386). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *Linda A. Belstangh* Date: 4-14-04