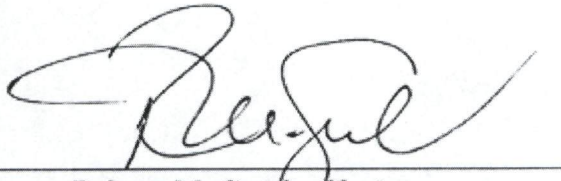


Re: R. Bernard Garner

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05849-13

AGENCY DKT. NO. 2013-2673

**IN THE MATTER OF R. BERNARD GARNER,
MOTOR VEHICLE COMMISSION.**

R. Bernard Garner, appellant, pro se

Marc J. Malfara, Hearing Officer, for respondent Motor Vehicle Commission, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 6, 2014

Decided: June 1, 2017

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

Appellant R. Bernard Garner (Garner) appeals his dismissal from the position of Technician Trainee with the Motor Vehicle Commission (MVC) due to an unsatisfactory rating at the end of a six-month Working Test Period (WTP).

PROCEDURAL HISTORY

On March 13, 2013, the Motor Vehicle Commission advised appellant that he failed to successfully complete his WTP and was terminated as of the close of business on March

24, 2013. On March 18, 2014, appellant filed a notice of appeal concerning the termination with the Civil Service Commission. The MVC transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 29, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Administrative Law Judge John Schuster III held a hearing on May 6, 2014, and closed the record on that date. Twenty-seven extensions were granted to Judge Schuster to allow him to complete the decision, but despite multiple inquiries as to what was needed to allow him to finish all outstanding decisions, Judge Schuster retired on April 1, 2017, without writing the initial decision. An additional extension was granted to allow time to contact the parties pursuant to N.J.A.C. 1:1-14.13, to determine if the parties could settle or wished to relitigate it upon transfer to a new judge. The answer having been in the negative, the undersigned was assigned the case. An additional extension was granted to allow time to listen to the hearing record, read the exhibits, and write the decision.

FACTUAL DISCUSSION AND FINDINGS

Some facts are not disputed. Garner started in June 2012, as a "944 employee," which is an at-will employee limited to 944 annual hours. In that capacity, he solely worked at the information desk. Then, on September 24, 2012, because his supervisor in the prior position was happy with his work and Garner had requested the move, Garner began a working test period in the position of part-time MVC Tech, limited to twenty-four hours per week. In his new position, his duties included working at the reception desk, and serving customers at the individual windows for driver licenses, registrations, renewals, and title documents. The WTP for the position is four months, such that the normal time for a decision on his employment would have ended on January 24, 2013. The MVC had the option to extend the WTP an additional two months with documentation, which it exercised.

Appellant received a two-month evaluation report on November 19, 2012, where he was told by his direct supervisor, Brian DeLuca, and Deborah Vannatten, the facility supervisor, that he would be trained in titles and licenses in the next two months. Garner was also told if he had a problem, he should ask for assistance. The second evaluation report,

dated and signed on January 15, 2013, (R-40) was marked unsatisfactory. The manager at the Lakewood Motor Vehicle Commission agency at which Garner worked, made a determination to extend the probationary period in part due to the extensive operational disruptions caused by Superstorm Sandy, which struck on October 29, 2012. The third and final evaluation report, dated and signed on March 13, 2013, (R-2), also marked unsatisfactory, was the final evaluation preceding his termination.

The evaluation reports identified the rationale for Garner's unsatisfactory ratings. The four-month evaluation stated that Garner continued to make mistakes, including incorrect owners, missing signatures, incorrect make of car, missing lien holder and processing questionable work without consulting a supervisor. (R-40.) The six-month evaluation stated that Garner's performance remained unsatisfactory, his errors were due to his negligence in reviewing forms presented to him, and he made thirty-one errors in the twelve days prior to the report. The errors included missing information on applications, incorrect signatures, work processed for the incorrect owner and improperly answered questions. The evaluation added that Garner took an extended amount of time to process transactions. (R-2.)

The dispute is over whether Garner's performance was unsatisfactory and whether he had an opportunity to understand and learn from his errors, or whether the agency showed bad faith in its treatment of him.

DeLuca, Garner's direct supervisor, testified on behalf of the MVC. On the date of the hearing, DeLuca had served for over three years as the agency manager, with duties including managing the twenty-eight employees at the Lakewood facility.

DeLuca testified that employees at the MVC were encouraged to ask questions of senior technicians or supervisors, and that Garner did in fact ask questions during his employment. DeLuca had many discussions with Garner regarding his performance including the two-, four- and six-month evaluations. During the WTP, Garner was shown the print-out of the errors that he made, and was informed that his performance must improve. DeLuca indicated that employees were expected to login to their work stations and be ready to serve customers at the beginning of their shifts; however, the MVC

provided a grace period of approximately five-minutes. The four-month evaluation stated that Garner was averaging fifteen to twenty minutes to sign onto the computer and process his first transaction and took 30 minutes to sign onto the computer on both November 19 and 21, 2012. (R-40.)

On cross-examination, DeLuca testified that the MVC based the required login time when the employee took possession of the work station, and that it could take an additional thirty seconds to one minute more to log into a camera work station.

Deborah Vannatten, Supervisor 1 at the Lakewood MVC facility since August 2012, was the only supervisor at the facility. Vannatten described Garner's duties, and the hands-on supervision he was provided.

Vannatten testified that there was a discussion with Garner concerning the performance reviews during the WTP, including the errors detailed in the evaluations. During a discussion concerning Garner's six-month review, Vannatten and DeLuca sat down with the appellant, and reviewed all errors with the corresponding dates, as well as photocopies of every document. Garner provided no objections during the performance review. On cross-examination, Vannatten identified the types of transactions referenced in the performance reviews.

Garner testified on his own behalf. At the time he was notified of his termination, DeLuca stated that Garner was always on time; never stretched breaks; was always good to the customers; and worked well with his colleagues. However, Garner testified, DeLuca also said that Garner needed more training to "get the hang of the job."

Garner stated that DeLuca continually told him that he may be terminated, and Garner spoke to Human Resources about DeLuca.

Garner relied upon the December 2012 Performance Assessment Review Model (PAR) on his job performance (A-1) to rebut the unsatisfactory WTP evaluation reports. The report contained a detailed job description for an MVC technician, and the interim evaluation of Garner's performance containing a numbered score for individual tasks

required in the position. The interim evaluation score was nineteen, which fell into the successful category of nineteen to twenty-nine points. The PAR was signed by Garner, DeLuca, and Vannatten.

In Garner's cross-examination of DeLuca, he asked multiple questions concerning the amount of time it took Garner to sign into his work station and service clients. Garner noted that he began many of his shifts at 2:00 p.m., and in many instances needed to wait for an MVC employee to complete a transaction with a customer. Therefore, in those instances, he was unable to login at the beginning of his shifts. Garner also testified that logging into a camera terminal could be difficult, and would take longer to complete his login.

Having heard the testimony of the witnesses and reviewed the documentary evidence I make the following findings of **FACT**:

1. Appellant received copies of all written evaluation reports.
2. Appellant was made aware of the multiple errors he made in the course of his duties during the WTP that were relevant to the unsatisfactory ratings contained in the evaluations.
3. Vannatten and DeLuca personally counseled appellant on the nature of the errors, and attempted to train appellant to remedy his performance.
4. Appellant received sufficient training from Vannatten, DeLuca, and other experienced MVC employees.
5. Appellant was given an additional two-month review process when his termination would have been justified following a four-month evaluation.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee's rights and duties are governed by the Civil Service Act, which has been described as an important inducement to attract qualified personnel to public

service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See, Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972). In ensuring the merit and fitness of public service employees, a candidate for permanent employee status must successfully complete a probationary or working test period. See, N.J.S.A. 11A:4-15; N.J.S.A. 11A:1-2; State-Operated Sch. Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 332 (App. Div. 1998), certif. denied, 156 N.J. 381 (1998).

The primary objective of the working test period is 'to supplement the examining process by providing a means for testing an employee's fitness through observed job performance under actual working conditions.' Dodd v. Van Riper, 135 N.J.L. 167, 171 (E. & A. 1947). The working test period is not to provide the employee with further training to qualify him for the position and "the employee must demonstrate that he is competent to discharge the duties of the position." Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 355-56 (App. Div. 1960).

In an appeal from an employee's termination at the conclusion of a working test period, the employee shoulders the burden of proving that the appointing authority's "action was in bad faith." N.J.A.C. 4A:2-4.3(b). If bad faith is found, the employee is entitled to a new full or shortened working test period and, if appropriate, other remedies. N.J.A.C. 4A:2-4.3(c). The basic test is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position. See, Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 356 (App. Div. 1960); Devine v. Plainfield, 31 N.J. Super. 300, 303-04 (App. Div. 1954); Lingrell v. New Jersey Civil Serv. Comm'n, 131 N.J.L. 461 462 (1944). In general, good faith has been defined as meaning "honesty of purpose and integrity of conduct with respect to a given subject." Smith v. Whitman, 39 N.J. 397, 405 (1963). As stated in Schopf v. New Jersey Department of Labor, 96 N.J.A.R. 2d (CSV) 853, 857:

No set rule may be formulated when attempting to determine whether an employee's termination at the end of the working test period was based on opinions of the appointing authority formed in good or bad faith. If the opinion is formed based upon actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the

employee will be able to satisfactorily and efficiently perform those duties if the appointment becomes permanent, it must be considered to have been made in good faith. If, on the other hand, the decision to terminate is not based upon actual observations of performance, or if it is made based upon dishonest motives, is based on bias, prejudice or self-interest, or is made with ill will toward the employee or because of some furtive design, it must be set aside. The use of the good faith standard also implies that if the employer's decision to terminate is made in good faith, the fact that the Merit System Board may not have decided the question in the same way is of no import. It is only required that the opinion be based on actual observations and that those observations form a rational basis for the opinion.

The preponderance of the evidence established that the appointing authority exercised good faith by evaluating Garner at required intervals over the course of his working test period, by giving him specific feedback on the deficiencies in his job performance, and focusing on numerous errors as well as excessive length of time to sign into his work station and begin servicing customers. Garner did not dispute the specific deficiencies and errors described in his performance evaluations, nor present any evidence that his performance was satisfactory. Appellant did offer an explanation relating to the amount of time required to sign into his work station and serve clients. However, DeLuca's testimony that an employee was given a grace period, which did not begin until the employee took possession of the work station, combined with the instances documented in the performance evaluations, make his argument unpersuasive. Garner's only defense was his 2012 PAR, in which he received an interim evaluation score of nineteen, which fell into the successful category of nineteen to twenty-nine points, and was on the cusp of a successful and unsuccessful score. However, appellant Garner presented no documentary evidence or testimony that his subsequent performance improved enough to merit retaining him in the position.

Therefore, I **CONCLUDE** that the record is insufficient to establish bad faith by the appointing authority. To the contrary, the undisputed evidence demonstrated that Garner's performance ratings were unsatisfactory during the course of his WTP and he offered no evidence to rebut the veracity of the appointing authority's evidence of his deficiencies. The evidence plainly shows that his continued errors validated his unsatisfactory evaluation. Therefore, I **CONCLUDE** that the appointing authority's decision to terminate Garner at the end of his working test period should be affirmed.

ORDER

Based on the foregoing, I **ORDER** that the appointing authority's decision terminating Appellant R. Bernard Garner at the end of his working test period is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 2017

DATE

Laura Sanders

LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

June 1, 2017

Date Mailed to Parties:

June 1, 2017

WITNESSES

For Appellant:

R. Bernard Garner

For Respondent:

Brian DeLuca

Deborah Vannatten

EXHIBITS

For Appellant:

A-1 State of New Jersey, Performance Assessment Review, PAR Model, Motor Vehicle Commission, Agency Services-Employee, Rater: Deborah Vannatten/ Supervisor 1, Motor Vehicle Agency/Lakewood, Rating Period June 1, 2012 through May 31, 2013

For Respondent:

- R-1 Termination Letter, dated March 13, 2013
- R-2 Six-Month Evaluation, MVC Report on Progress of Probationer, dated February 13, 2013
- R-3 Six-Month Evaluation, Conclusion, MVC Report on Progress of Probationer
- R-4 Performance Review, February 20 through March 12, 2013
- R-5 Termination Print-Out, dated February 20, 2013
- R-40 Four-Month Evaluation, MVC Report on Progress of Probationer, dated November 14, 2012