



STATE OF NEW JERSEY

In the Matter of Wayne Hanns, Jr.,
City of Linden, Police Department

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2017-2028
OAL DKT. NO. CSV 00745-17

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ISSUED: SEP 07 2017 (BW)

The appeal of Wayne Hanns, Jr., Police Officer, City of Linden, Police Department, release at the end of the working test period, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on July 28, 2017 permitting the appellant to complete the working test period. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

DISCUSSION

Although the appellant will be permitted to complete his working test period, he has not obtained permanent status as a Police Officer. The appellant must successfully complete a working test period in order to obtain permanent status. Although the appellant has shown his release was not proper, the record does not adequately establish the appellant's satisfactory work performance. Accordingly, the appropriate remedy in this matter is to afford him the opportunity to complete the remainder of his working test period.

In non-disciplinary appeals, such as an appeal of a release at the end of the working test period, the standard for determining whether an appellant is entitled

to back pay or counsel fees is governed by *N.J.A.C. 4A:2-4.3(c)* and *N.J.A.C. 4A:2-1.5(b)*. *N.J.A.C. 4A:2-1.5(b)* provides, in pertinent part, that back pay and counsel fees for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff “may be granted . . . where the Commission finds sufficient cause based on the particular case.” In this case, it was found that the appellant is not entitled to a permanent appointment since he had not successfully completed his working test period. Therefore, sufficient cause has not been demonstrated in this matter to award back pay or counsel fees. See e.g., *In the Matter of Melvin Robinson* (MSB, decided December 21, 2005), *In the Matter of Rocky Rembert* (MSB, decided December 3, 2003).

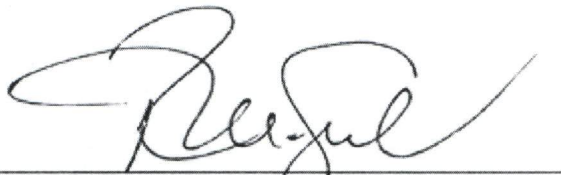
ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was not justified. The Commission therefore reverses that action and orders that Wayne Hanns, Jr., be permitted to complete the remainder of his working test period.

Back pay and counsel fees are denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
SEPTEMBER 6, 2017



Robert M. Czedo, 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

SUMMARY DECISION

OAL DKT. NO. CSV 00745-17

AGENCY DKT. NO. 2017-2028

**IN THE MATTER OF WAYNE HANNS, JR., CITY OF
LINDEN POLICE DEPARTMENT,**

Wolodymyr P. Tyshchenko, Esq. (Caruso Smith Picini, P.C.)

Daniel J. McCarthy, Esq., for respondent

Record Closed: July 17, 2017

Decided: July 28, 2017

BEFORE JOANN LASALA CANDIDO, ALAJ:

Appellant, Wayne Hanns, (Hanns/ appellant) appeals his termination as a police officer by respondent, City of Linden Police Department (Linden/ respondent) at the end of his working test period. Linden hired appellant as a police officer trainee on July 8, 2015, and, after he successfully completed his police academy training on December 14, 2015, he began a twelve-month working test period. According to Linden, on June 4, 2016, and June 21, 2016, appellant received progress reports that "detailed his unsatisfactory performance" and "bad attitude, bad judgment and childish behaviors." On December 15, 2016, Linden terminated appellant for "unsatisfactory performance during the working test period." Appellant subsequently appealed his termination.

According to appellant, he was “involuntarily placed on administrative leave” on July 8, 2016, and remained on administrative leave until he was terminated on December 15, 2016. Appellant argues that Linden acted in bad faith by terminating him at the end of his working test period because Linden “cut off [his] chance to demonstrate that he was worthy of being a police officer by shunting him to the side for a portion of his probationary period and then terminating him at the end of that period.”

Appellant filed the instant appeal in accordance with N.J.A.C. 4A:2-4.1 and N.J.A.C. 4A:4-5.4. On January 18, 2017, the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case. The parties requested that this matter be briefed rather than schedule a hearing date to address the issue of whether appellant was improperly terminated at the end of his working test period on December 15, 2016. Their respective briefs were received on April 26, 2017. On or about June 1, 2017, a telephone conference was conducted and respondent’s attorney requested additional time before I issue a decision.

On July 17, 2017, appellant’s counsel requested that this matter be decided by summary decision. Having received no opposition from defense counsel, that request was granted and the record closed on July 28, 2017.

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'.

[Brill, supra, 142 N.J. at 540 (citations omitted).]

Appellant was employed by Linden as a probationary police officer after graduating from the John H. Stamler Police Academy on or about December 15, 2015. He began a 12 month working test period. On June 4 and June 21, 2016 appellant was given feedback on an observation report from December 2015 through June 20, 2016 which detailed unsatisfactory performance. On or about July 8, 2016 appellant was placed on administrative leave by the respondent. He was thereafter terminated at the end of his twelve month working test period on December 15, 2016.

Pursuant to N.J.A.C. 4A:2-4.3(b), the appellant has the burden of establishing that the action to release him at the end of her working test period was taken in bad faith. Appellant must establish by a preponderance of the competent and credible evidence that the action terminating her at the end of his working test period was done in bad faith. Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966); Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Divine v. Plainfield, 31 N.J. Super. 300, 302-303 (App. Div. 1954); Dodd v. Van Riper, 135 N.J.L. 167 (E. & A. 1946). If bad faith is found, the employee shall be entitled to a new full or shortened working test period and other appropriate remedies. N.J.A.C. 4A:2-4.3(c); see also N.J.A.C. 4A:2-1.5.

The function of the working test period is not for the purpose of providing the employee further training to qualify him for the position. Briggs v. New Jersey Dep't of Civil Serv., 64 N.J. Super. 351, 355 (App. Div. 1960). Stated differently, during the

working test period, the appointing authority is entitled to evaluate the employee's "work performance and conduct . . . in order to determine whether he merits permanent status" and, in turn, the employee "is entitled to a fair opportunity to demonstrate his ability to fulfill the requirements of the position." Vegotsky v. Office of Admin. Law, 92 N.J.A.R.2d (CSV) 162, 167. An employee may also be terminated from service at the end of the working test period for unsatisfactory performance. See N.J.S.A. 11A:2-6(a)(4); N.J.S.A. 11A:4-15(c); N.J.A.C. 4A:2-4, et seq.; N.J.A.C. 4A:4-5.4(a).

Under the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6, "appointments shall be permanent after satisfactory completion of a working test period." N.J.S.A. 11A:4-13. The working test period "not only serves the employer who must evaluate the probationary employee's performance to make a well-founded decision as to whether to retain or release him, but also, the required performance evaluations afford the probationer guidance and an opportunity to improve specified performance deficiencies during the probationary period." In re King, CSV 8062-98, Merit Sys. Bd. (November 30, 1999) <<https://njlaw.rutgers.edu/collections/oal/final/csv8062-98.pdf>>; N.J.S.A. 11A:4-15. For police officers, the working test period is twelve months, and "the appointing authority shall prepare a progress report on the employee at the end of six months and a final report at the conclusion of the working test period." N.J.S.A. 11A:4-15(a); N.J.A.C. 4A:4-5.3(b). An employee who is terminated at the end of a working test period may appeal the appointing authority's decision to the Civil Service Commission. N.J.A.C. 4A:2-4.1. In such an appeal, "[t]he employee has the burden of proof to establish that the action was in bad faith." N.J.A.C. 4A:2-4.3(b). Bad Faith has been defined as:

Generally implying . . . a design to mislead or deceive another . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bath faith is not simply bad judgment or negligence, but implies the conscious doing of a wrong because of a dishonest purpose

[Brown v. State Dep't of Educ., 97 N.J.A.R.2d (CSV) 537, 541.]

Tribunals having jurisdiction over such matters have defined a very strict standard to be applied in determining whether an appointing authority has exercised bad faith in terminating an employee at the end of the working test period. It is been held that good faith is the sole test to be applied in the circumstances; the employer has no burden to prove that the terminated employee is unfit for a job. Rather, it is the burden of the employee to show that his termination was the result of bad faith on the part of the employer. Cianciosi v. County of Passaic, CSV 3553-99, Initial Decision (July 26, 1999), adopted, Merit System Board (September 17, 1999), <<http://lawlibrary.rutgers.edu/collections/oal/search.html>>; Jenkins v Housing Auth. of Atl. City, CSV 841-01, Initial Decision (February 5, 2002), adopted, Merit System Board (April 10, 2002), <<http://lawlibrary.rutgers.edu/collections/oal/search.html>>. "Bad Faith" is defined by Black's Law Dictionary (5th ed. at 127) as follows:

The opposite of "good faith," generally implying or involving actual or constructive fraud, or designed to mislead or deceive another, or a negligent or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. The term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purposes or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

See, e.g., Stath v. Williams, 367 N.E. 2d, 1120, 1124 (1977); see also Memmott v. Dep't of Health, Twp. of Freehold, 95 N.J.A.R.2d (CSV) 118.

If the appointing authority acted in bad faith, "the employee shall be entitled to a new full or shortened working test period and other appropriate remedies." N.J.A.C. 4A:2-4.3(c).

This appears to be a case of first impression insofar as there are no reported decisions in which a probationary employee was involuntarily placed on administrative leave for nearly half of his working test period for purported disciplinary reasons, but

without any formal disciplinary action against him. Nonetheless, there are a few cases that offer guidance in this matter. For example, in In re Bernal, CSV 3154-07, Initial Decision (September 12, 2008), adopted in part, rejected in part, Civil Serv. Comm'n (November 7, 2008) <<https://njlaw.rutgers.edu/collections/oal>>, a probationary employee was given a new working test period in part because his three-month working test period was supposed to last from May 22, 2006 to August 22, 2006, but was interrupted when he was placed on involuntary leave with pay for non-disciplinary reasons from July 1, 2006, to September 11, 2006, and he was only further evaluated from September 11, 2006, until his termination on November 3, 2006. In concluding that the appointing authority acted in bad faith and ordering a new working test period, the ALJ noted that the appointing authority "failed to follow its own procedures, beginning with placing him on a paid involuntary leave, a status for which there is no provision" and that "[h]is WTP was interrupted for a period almost lasting as long as the WTP itself, and instead of starting fresh, [the appointing authority] truncated his WTP, a violation of the fair and full opportunity that should have been afforded to him."

In contrast, in In re Guevara, CSV 9238-14, Initial Decision (June 2, 2015) (no reported final decision) <<https://njlaw.rutgers.edu/collections/oal>>, an appointing authority acted in good faith in terminating a police officer at the end of his working test period "because he completed only two months of his working test period as a consequence of being disarmed and placed on modified duty because of a domestic violence charge." According to the ALJ in that case, the appointing authority's "decision to allow [appellant] to perform modified duty so that he could continue to receive a paycheck rather than suspend him because of an inability to perform his regular duties hardly demonstrates bad faith" and the "opportunity to observe [appellant] performing his regular duties existed for only a very small portion of the working test period through no fault of the [appointing authority]."

Here, Linden acted in bad faith by essentially removing appellant from his position for the last five months of his twelve-month working test period without taking any formal disciplinary action against him. An appointing authority may discipline a

probationary employee during the working test period, but in doing so the appointing authority must follow civil service rules for major discipline and local rules for minor discipline. N.J.A.C. 4A:4-5.4(b). In effect, Linden removed appellant from his position – which constitutes major discipline – without instituting formal disciplinary action against him or affording him a chance to appeal. As a result, Linden deprived appellant of an opportunity to correct any deficiencies in his performance prior to the end of his working test period. Unlike in Guevera, in which the appointing authority had no choice but to place the police officer on modified duty due to the fact he could not carry a weapon, Linden could have taken formal disciplinary action against appellant or allowed him to complete his working test period before terminating him.

I am not satisfied that appellant's working test period was conducted in compliance with the Civil Service rules and regulations. He was not given an opportunity to complete his full working test period. Appellant has not been given an opportunity to receive the benefit of continued progress reports so that he may improve on specified performance deficiencies.

Further, I am not persuaded that respondent has established, by a preponderance of the competent and credible evidence, its position to terminate appellant without giving him an opportunity to improve his performance. Hence, respondent acted in bad faith when determining that appellant's services were unsatisfactory.

I, therefore, **CONCLUDE** that respondent's determination to release appellant at the end of his working test period was not warranted and inappropriate.

ORDER

Based upon the foregoing, appellant's motion for Summary Decision is hereby **GRANTED**. It is hereby **ORDERED** that the appeal filed by appellant be and is hereby **GRANTED** and he will be permitted to complete his working test period.

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.

July 28, 2017
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

July 28, 2017
Lucia Sanders

Date Mailed to Parties:
ljb

JUL 31 2017 _____
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EXHIBITS

For Appellant:

None

For Respondent:

- R-1 Certification of Daniel J. McCarthy, Esq.
- R-2 Daily Observation Reports from December 19, 2015 through July 7, 2016
- R-3 Daily Observation Reports dated March 30, 31, April 13, 14, June 12, 23 and July 6, 2016
- R-4 Notice of Separation from Employment