

Re: Bhadreshku Patel

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
NOVEMBER 19, 2014



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Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 14102-09

AGENCY DKT. NO. 2010 1449

**IN THE MATTER OF BHADRESHKU
PATEL, DEPARTMENT OF
TRANSPORTATION.**

Frank V. Burke, Esq., for appellant Bhadreshku Patel

Sharon Price-Cates, Deputy Attorney General, for respondent Department of
Transportation (John J. Hoffman, Acting Attorney General of New Jersey,
attorney)

Record Closed: April 14, 2014

Decided: October 14, 2014

BEFORE ROBERT BINGHAM II, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Bhadreshku Patel (appellant or Patel) appeals his termination from his position as Assistant Engineer, Traffic, with the respondent, New Jersey Department of Transportation (NJDOT or DOT), Division of Traffic Engineering and Safety, Bureau of Traffic Engineering and Investigations (Bureau), at the end of his working test period effective October 20, 2009. By letter dated October 21, 2009, appellant requested a hearing to contest the determination and the matter was transmitted to the Office of

Administrative Law (OAL), where it was filed on December 21, 2009, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held on August 22, 2011, and July 15, 2013,¹ and the record remained open for post-hearing submissions. The record closed on April 14, 2014, after extensions for and receipt of post-hearing submissions. Extensions were granted for issuance of this decision, the last being until October 13, 2014.²

FACTUAL DISCUSSION

I **FIND as FACT** the following, which is not in dispute.

On or about June 7, 2008, the DOT hired Patel as a Civil Engineer, Trainee (CET), a twelve-month training position for the title of Assistant Engineer, Traffic (assistant engineer).³ On March 26, 2009, Patel signed a Performance Evaluation System (PES) form (R-2), for a rating-cycle period from April 1, 2009, to March 31, 2010, after reviewing it with his supervisor, Jamie Oplinger. Though Patel was a CET when he signed the PES, he became assistant engineer during the course of the cycle. The March 2009 PES reflects the responsibilities of a CET, which were the same as those for assistant engineer between June and October 2009. Patel's signature on the PES acknowledged that he had reviewed with Oplinger the goals, job responsibilities and standards for satisfactory performance factors attendant to the position and further acknowledged that he was "advised of these PES elements." (R-2.)

The standards for satisfactory performance were listed in the PES next to each of seven individual job responsibilities: (1) conduct traffic engineering investigations; (2) design of traffic control; (3) represent this Bureau at meetings; (4) assignments; (5) utilization of TES job-tracking database; (6) training; (7) adherence to Department and Bureau policies. The PES also listed a number of universal performance factors

¹ After the matter was reassigned to this administrative law judge, a number of adjournments were granted, either due to scheduling conflicts or for medical reasons of appellant's attorney; for those medical reasons, the matter was also listed inactive on October 24, 2012, for three months.

² October 13, 2014, falls on a holiday, making the initial decision due the following day, October 14, 2014.

³ A CET is temporary downward classification for the title of Assistant Engineer.

and examples of satisfactory performance. Further, the March 2009 PES, a copy of which Patel then received, specifically required the completion of fifty assignments per year.⁴ Patel also checked the appropriate box and signed the form a second time, specifically indicating, "I Agree with the elements of this PES." (R-2.)

On June 20, 2009, after serving as CET for twelve months, Patel became an assistant engineer and began a four-month mandatory working test period (WTP). Though the responsibilities of the two positions were essentially the same,⁵ a heightened level of independence is required in the assistant engineer job.

By memorandum dated August 24, 2009, (R-3) regarding the end of a two-month WTP, Oplinger gave Patel an unsatisfactory rating based upon: (1) completion of only two assignments, rather than the required average of four per month, despite discussions about assignment output, (2) chronic lateness, (3) failure to timely enroll in mandatory online training, (4) failure to timely and correctly utilize the TES job-tracking system, and (5) incorrectly sketching aspects of an intersection due to faulty field measurements.⁶ The memo further set forth what would be required to achieve a satisfactory rating in the remaining two months of the WTP, namely, completion of approximately eight assignments and adherence to all Department and Bureau policies. It also recommended the appropriate retention of information previously taught. On August 26, 2009, Patel and Oplinger met and signed a Report on Progress of Probationer (Form PR-84 5/02) indicating Patel's unsatisfactory rating at the end of two months (R-4). They met again on August 28, 2009, when they signed a corrected form (Form PR-84 2/90), as to title, indicating the same unsatisfactory rating. (R-6.)

⁴ "Approximately 50 assignments are to be completed per calendar year unless fewer investigations were assigned during a particular calendar year. All assignments are to be completed in a timely fashion and all 'due dates' are to be met. If the due date cannot be met due to any unforeseen reason, the supervisor must be notified immediately so that appropriate action can be taken. Monitor assignments in tracking system daily." (R-2.)

⁵ Pursuant to civil service job specification 11282, an Assistant Engineer, Traffic, "performs various tasks in traffic engineering surveys, and in the study, designs, installation, maintenance and construction of traffic control systems for the regulation and control of traffic; does other related duties." (R-1.)

⁶ Oplinger attached documentation supporting each point or "bullet" to the memo. The materials relative to each bullet point are designated R-3a through R-3e, respectively.

Oplinger again met with Patel on September 16 and 18, 2009. On October 8, 2009, Oplinger signed a Report on Progress of Probationer (dated September 24, 2009) recommending his release at the end of his four-month WTP (June 20 to October 20, 2009). (R-7.)⁷ Patel did not sign the form, and Oplinger's supervisor, David Martin, signed it and noted that Patel refused to sign. By letter dated October 13, 2009, respondent terminated Patel from his position as assistant engineer based upon an unsatisfactory rating during his WTP. (J-1.)

The factual dispute centers around whether Patel appropriately received adequate training for and during the WTP and whether DOT staff conspired with ill motive to terminate him rather than assist him in correcting any deficiencies.

Testimony

Bhadreshku Patel testified that he was born and educated in India; he came to the United States in 1985, the year he got married, and has become a permanent resident. By way of background, in 1987 he held an engineering job with a private laboratory in Fairfield, New Jersey, and in May 1988 he began working at the NJDOT as a construction and maintenance technician. In May 1997 he went to work for Union County as an engineer technician,⁸ but returned to the NJDOT in June 2008 following interim jobs in New York City's Department of Design and Construction, Middlesex County's engineering office,⁹ and New York State's Department of Transportation,

⁷ The PES is a separate document from the documentation used in conveying information on the WTP. For instance, R-6 and R-7 are progress reports for Patel's WTP, and are a part of the review and communication to him regarding that WTP. R-2, the PES document, indicates the cycle for reporting of PES documents; and R-21 is a related document that was made at the conclusion of the PES cycle. Chronologically, the PES cycle and the WTP are two separate processes.

⁸ According to Patel, his responsibilities as engineer technician for Union County were similar to those that he performed as assistant engineer for NJDOT and included inspection of construction roads, sewer lines, traffic lights, and projects in compliance with County specifications.

⁹ According to Patel, his responsibilities at the Middlesex County's engineering office were also similar to those that he performed as assistant engineer for the NJDOT, and included reviewing design plans for the County's traffic-light projects.

Landscape Department.¹⁰

In June 2008 he was hired at the NJDOT as a CET at a salary of \$46,000. With regard to his job responsibilities, Patel initially stated only that he worked for the Bureau of Traffic Engineering and Investigations.¹¹ He clarified, in part, that he would complete a traffic engineering worksheet form to forward for the construction or installation (of traffic signs and/or devices). Apparently, according to subsequent testimony, his duties included having to repeatedly go to a given work site, discover locations of missing signs, take pictures, enter the locations of missing signs into the computer program, and forward a report.¹² Patel was unable to indicate the average time spent on any one project. Most of his field jobs were in the North Jersey area, but he commuted to the Trenton office from his home in Teterboro, New Jersey, on an average of three days weekly.

Patel testified that during the training period, 2008 to 2009, he had eight jobs in the field, including the areas of Lindhurst, Mahwah, Totowa, and Route 46 in Parsippany.¹³ Oplinger only attended "a couple" jobs with Patel. On one occasion she did attend a major job at Route 17 and Mountainside in Mahwah or Ramsey, that was really three projects in one and took two and a half months. And on the same day she attended two additional projects with him.

¹⁰ Patel testified that at the New York DOT he worked as a senior engineering technician, civil, and was responsible for design and inspection of landscape for highways, sidewalks, curbs and trees.

¹¹ Patel appeared to become confused at the question and he clearly had difficulty in explaining his duties fluently.

¹² He testified, "I go and back, I look in the missing again and I (inaudible) find out then go again and find out missing and then I go by take the pictures and find out on the office by computers and putting on the missing sign, then go to the final existing (inaudible) mark and then send to the report to the TE 9 (inaudible)."

¹³ One job was a sign installation project at Route 17 and Route 34 in Lindhurst, where he investigated and discovered the location of a missing sign and "put the new sign for the installation." Such a job would take three to four weeks without training, but only two weeks with "better" training. Oplinger did not attend the job at Routes 17 and 34.

Patel testified that after June 7, 2008, the only training he received was computer instruction relative to traffic engineering plans, specifically, how to make designs on the computer. He had about eight different classes in all; some provided certificates, but he passed all classes.¹⁴ According to Patel, Oplinger provided a lack of training time to him relative to his assigned projects. For instance, she only trained him in the field once, as compared to his colleague CETs who worked in South and Central New Jersey, whose training was totally different; they were actually instructed and assisted by their supervisor, a principal engineer. But Oplinger was a project engineer who handled everything and did not provide enough time for training. He had observed, by spending a whole day with his colleagues' team, that their supervisor provided "nice" training "properly" on how to handle a project both in the field and for the office work.

In June 2009, Patel received a letter promoting him to assistant engineer and his salary increased to approximately \$53,000. No one had mentioned that he had to do fifty projects per year (or four projects per month); it was only stated on the PES form. He had signed the form but did not realize until he read it later that it required fifty projects in one year. At that point, he could not imagine how he could finish fifty projects per year, as he had only completed two projects in two months and he had been given two more; one was ten years old and left unfinished by another employee.

Admittedly, he did not discuss his predicament with Oplinger, but did share it with colleagues whom he neither identified nor cared to involve in this appeal. He had no complaints with Oplinger; whatever she gave him, he would simply follow her instruction.¹⁵ But during the last couple of months he worried because she gave him "all paper by comments [sic]." He was shocked when she released him on October 20, 2009. He had received all satisfactory ratings for the first twelve months and no one

¹⁴ One class that he passed, related to "Microsoft engineering" and how to apply traffic engineering data, took three days.

¹⁵ On cross-examination, Patel acknowledged that in the past he had required more time and training in order to comprehend material, with specific reference to his education and his college transcript (R-20), but explained that he completed all required courses and, in any event, the DOT had his transcript when he applied for employment. A college degree in civil engineering is required for the position as CET/Assistant Engineer.

had explained any new responsibilities. He did not receive proper training, but how could he complain? Apparently, he was suddenly told his performance was unsatisfactory and he was released a short time later. And terminating him without the proper training was "bad faith on their part."

As to what training he received from Oplinger between August and October 2009, Patel testified that she gave him a project at Route 17 and Pilot Avenue in Lindhurst, and provided an "as-built" plan but no training. He denied having conferences with her, but testified that she gave him memos every day about his lack of job performance, which caused confusion and depression for him during the last couple of months. The lack of training actually prevented him from doing certain things; he thus relied upon and applied the familiar methodology he had used for his projects when he worked in Middlesex County and New York City.

Patel never sensed any language or communication problem between himself and his supervisor. He always understood her and she understood him. Regarding tardiness, he would call whenever he would be late and also use personal time or time off. He was never told that lateness was a problem and his time off was routinely approved. Between July and October 2009, he admittedly was informed that projects were late, but that was because his wife had been ill between late July and early August. Patel's termination caused depression and anxiety because he remains unemployed, despite having children, including a son in college.

On cross-examination, Patel testified that for the period between June 20 and October 20, 2009, when he was assistant engineer he did not receive proper training. He acknowledged receiving a copy of the March 2009 PES (R-2), as well as the memorandum dated August 24, 2009 (R-3), and discussing with Oplinger his work for the two-month period between June 20 and August 20, 2009. Patel agreed that the March 2009 PES that he received required the completion of fifty assignments per year. He further acknowledged being given the opportunity to indicate in writing any disagreement that he had, but he did not write anything, "because she's my boss." He thus did not report any disagreement either to her or to anyone else in the DOT. He further agreed that he did not complain of inadequate training before June 20, 2009,

and did not notify anyone of his belief that he did not receive proper training. And he admittedly discussed with Oplinger the fact that the assistant engineer job required him to work independently. He also acknowledged receiving a copy of his second progress report (R-4) and speaking with Oplinger again. She did conference with him for a formal progress report in October 2009, though he disagreed with it and refused to sign.

Patel acknowledged having access to the Manual on Uniform Traffic Control Devices, but denied being given other aids to assist in carrying out his work. Otherwise, he had been given instructions by Oplinger, but denied that she gave him instructional memos. He did ask colleagues who were senior engineers for assistance, but they said that it was not their job to provide him with training.

Finally, Patel testified that after the August 2009 evaluation by Oplinger, he did complain; then he testified that he did not.

Jaime Oplinger, a project engineer (then acting supervisor engineer) and twelve-year DOT employee,¹⁶ testified that she supervised Patel during the entire time he was at the DOT. As an assistant engineer, his responsibilities included the examples reflected in the civil service job specification, except that he did not "collect[s] traffic data used to prepare speed regulations" or "assist in developing in-house engineering oriented programming." (R-1.) His responsibilities specifically included: (1) conducting traffic engineering studies and documenting them in memos or reports, (2) designing traffic control devices such as traffic signs and pavement markings, (3) completion of fifty assignments annually (or less if fewer were assigned), or four assignments monthly, (4) attending meetings and abiding by department policies, (5) using the job tracking system (TES database), and (6) attending assigned training.

¹⁶ Oplinger received a bachelor of science degree in civil engineering from Bucknell University and a master of science degree in transportation from the New Jersey Institute of Technology, and holds a professional engineer's license in New Jersey and is a certified public manager. She also has been trained at the DOT in the areas of supervision, interviewing, and project-management essentials. Her positions at the DOT have included: civil engineer, trainee; assistant engineer, traffic; and senior engineer.

At the beginning of CET employment in June 2008 Patel received a document similar to the PES, to assure awareness of the assignments and what was required, and when the March 2009 PES was signed Oplinger explained to Patel that he would be expected to work independently as an assistant engineer. On April 1, 2009, Oplinger reviewed with him the 2008 document, as well as his PES effective April 2009; all of those responsibilities were discussed with him and he was given a copy of the documents.

The Bureau of Traffic provided job information for transitioning, and Patel was given the Manual on Uniform Traffic Control Devices (MUTCD),¹⁷ as well as the DOT's traffic engineering handbook, a compilation of samples by employees who had been CETs, designed to assist new CETs with the job. Additionally, Oplinger provided Patel with assistance during his transition. She met with him several times a week, went into the field with him, and asked engineers in their group to help him as much as possible. But despite her efforts to help impart basic traffic engineering principles, the instruction did not seem to get through.

Patel was given assignments in Bergen County where he lived and where Oplinger was assigned. Oplinger described the degree of difficulty of his assignments during the WTP as "four" on a scale of one to ten, and typical of the work given to someone of similar experience who was making the same transition. He nonetheless completed only four assignments during the entire WTP.

His performance rating was unsatisfactory for the first two months. Oplinger met with him to discuss his performance, including the utilization of his time, and informed him of the consequences of an unsatisfactory rating. She thereafter provided a memorandum (R-3) to document his unsatisfactory performance at the end of two months of his the WTP. Among the deficiencies she discussed was the completion of only two assignments between June 20 and August 20, including none in July.

¹⁷ The MUTCD is a manual published by the Federal Highway Administration that has been adopted by the State of New Jersey. It contains all traffic engineering principles, and is the "bible" in traffic engineering.

The Route 17, Mountainside, assignment should have taken approximately two weeks, but it took him about a month and a half to complete.¹⁸ Also, for that period of time, he had a traffic assignment for Route 67 at Main Street, to evaluate traffic-signal timing, but despite week-long assistance from a colleague, he was unable to grasp how to utilize the required program called "Synchro" and the colleague had to complete the assignment, though Patel received the credit. Also, he was unable to complete a project on Route 317 at Palito Avenue, involving a "redlined as-built plan," for completion of a traffic-signal revision, and it had to be assigned to another employee after his termination. In Oplinger's view, that job should not have exceeded one day in the field and two days in the office. Consequently, Oplinger generated a memorandum dated August 27, 2009, regarding her discussion with him, and attached her notes memorializing step-by-step instructions for him. (R-10.)

Prior to August 24, 2009, Oplinger discussed his work with him. She communicated with him her sense that he was not comprehending basic principles of traffic engineering, as she repeatedly reviewed the same things with him, for instance, relative to signs or pavement markings or traffic signals. For example, seemingly simple tasks like utilizing the (computer) system to mark jobs as complete took much too long (two hours rather than five minutes) and required her assistance. (R-3.)

During their meeting of August 24, 2009, relative to his two-month progress, Oplinger told Patel that he had to complete eight assignments during the next two months, but he ultimately failed to do so. Her memorandum dated that day (R-3) outlined major points that she addressed with him at the time. As outlined in the memorandum, her review with him included such topics as: being late to work (bullet #2), failure to take required training (bullet #3), and the need for use of the TES job tracking data system (bullet #4).¹⁹ Oplinger provided him with a copy of the memorandum, as well as the supporting documentation.

¹⁸ Oplinger had created due dates to help him with assignments, but he did not meet the due dates.

¹⁹ Patel was not properly using the system, as he was not forwarding assignments to her when work was completed, despite several instructions by her on use of the system.

His only objection was with regard to having to take online training during the initial two-month period, though he never took the opportunity provided to submit any objection in writing. He nonetheless agreed to take the training prior to the next project, but had difficulty doing so over the next two days. Oplinger tried to help when he said that he had not been shown how to login, only to find that another employee had in fact previously assisted him with logging in and securing a password.

Regarding the second phase of the four-month WTP, Patel had to complete eight assignments between August and October 2009, but completed only two.²⁰ Oplinger had discussions with him prior to their meeting on October 8, 2009, and he did have objections with regard to his final progress report. In particular, he complained that she did not provide any training, though he did not provide specifics. Oplinger felt, however, that she went "above and beyond" with counseling and training. She routinely discussed the work with him and her "door was always open" anytime he or another employee needed assistance. Also, DOT provided computer-training classes throughout the year, and Oplinger recommended to him that he sign up for the classes as they became available. Oplinger was satisfied that she had communicated to him the requirements of the position, as well as the distinction between the TES and assistant engineer positions, namely, the requirement to work independently for the latter. However, he did not demonstrate the ability to work on his own.

For instance, there was the difficulty he encountered with the as-built redlined plan, as well as incorrectly substituting a stop sign for a traffic light. (R-12.) And then there was the issue of whether he knew how to accurately measure using a standard Rolatape. (R-13.) Oplinger spent a great deal of time reviewing with him another assignment, the Route 17 Home Depot entrance, but he never even began work on it and did not ask for assistance. (R-14.) He also failed to grasp how to properly include a handicap-access ramp on a site plan, despite Oplinger's personal instruction to him. (R-15.)

²⁰ The Route 3/Palito Avenue/ ramp project was never completed, despite having a level of difficulty of only three on a one-to-ten scale.

She also discussed with him other issues during the second phase. For instance, he had difficulty denoting the correct designation, per the MUTCD, of the direction of a one-way sign. She also discussed with him his difficulty properly indicating the existence and location of pedestrian crosswalk pushbutton controls. (R-16.)

On October 8, 2009, Oplinger prepared a memorandum outlining the timeline of events leading to Patel's final unsatisfactory rating. (R-8.)²¹ Some of the issues had been outlined previously in her memorandum dated August 24, 2009. (R-3.) This was the first time that Oplinger had to prepare a final WTP unsatisfactory report. She received input from Human Resources (HR) regarding what documentation was needed, and, accordingly, removed references to lateness, a separate unrelated issue, but that had no impact on the rating being unsatisfactory. In summary, ultimately, Patel was terminated as unsatisfactory because: (1) he completed only four assignments during the WTP, rather than sixteen, at the rate of four per month (R-18); (2) he utilized a great deal of time for step-by-step instructions as to how to complete assignments, indicating that he had not learned what had been taught during the civil engineer training period; (3) he had difficulty utilizing the computer system, the traffic engineering job database; (4) he had difficulty logging in to complete mandatory online training; (5) he had difficulty with basic concepts, such as indicating a north arrow on a plan or the direction of an arrow; (6) he would not utilize note taking to aid his recollection; (7) he did not differentiate relevant from irrelevant information in "getting to the task at hand."

Oplinger explained that an employee's failure to complete assignments adversely impacts DOT operations overall by compromising highway safety, for which the DOT is responsible. It also has an adverse impact on other individual bureaus within the department.

²¹ Due to a typographical error, the date on the memorandum is October 7, 2008.

On cross-examination, Oplinger, by then a supervising engineer of construction and maintenance in the Bureau of Roadway Maintenance, Engineering and Operations, testified that she began keeping notes when Patel started under her supervision. After his first twelve months he was automatically promoted by HR, rather than by her; she would not have recommended promotion. Oplinger had expressed her dissatisfaction with his performance to her supervisors, Douglas Bartlett and (later) Dave Martin, but not to HR. She does not recall exactly when she made those complaints, but had communicated by conversing primarily with Martin, who had come on board approximately four months after Patel started. He advised her to keep documentation regarding her dissatisfaction, but she does not recall him having an opinion regarding termination. Ultimately, Oplinger completed the WTP paperwork and someone in HR made the decision to terminate.

Oplinger kept more notes during the four-month WTP because she was aware that Patel had struggled during the training period, and that there was a potential for his performance to be unsatisfactory, but she had not predetermined an unsatisfactory performance. She reiterated that the training included reviewing assignments with him throughout the time she supervised him, or having other engineers accompany him on field visits, meeting with him in the office, and helping him with assignments. Additionally, he had been given training manuals and materials and she reviewed them with him relative to specific projects. However, many times it appeared that he did not understand, although, notwithstanding his language background, he said that he did. And if, on occasion, she did not understand him, she would ask him to repeat what he said and then she would understand it.

When she or other engineers assisted him in the field, she considered it part of training. With regard to the requirement of completing fifty assignments per year, or four per month, she recalls that he failed to complete the sixteen assignments required of him during the WTP. In comparing R-8 and A-1, two versions of the timeline memo she prepared in October 2009 (mistakenly typed 2008), on the last page of A-1 the language "and the quiz I prepared for Bobby" was stricken pursuant to instructions from HR; it thus does not appear in R-8, which was forwarded to HR with the final official documentation. She had received a memo dated October 8, 2009, (A-2) from Dianne

Barretts in HR, instructing her to make the change²²; so, she should have (but did not) also change the date from October 7 to October 8 on her timeline memo (R-8). Oplinger explained that she had once given quizzes to all of the CETs, including Patel, to explore their knowledge, pursuant to HR guidance; however, HR later changed their policy in that regard. Thus, as per the request from HR, A-1 was redacted to remove references to "quiz," resulting in R-8.²³

The final version (R-8) also contains other differences, including the deletion of language relative to lateness, from the original (A-1), which had been provided to HR.²⁴ Oplinger discussed those changes with Dianne Barretts and Dave Martin. Oplinger does not recall ever discussing with Barretts the last sentence of Barretts' email, "I know it's a lot of work, but the means does justify the end in this case." (A-2.) Oplinger interpreted that to merely mean that she had to write a lot of memos and otherwise disregarded it as Barretts' opinion. Oplinger instead focused on following the intent and directive expressed in the first paragraphs. And the persons who were copied on the email, David Martin and Edel McQuaid, would have received Oplinger's reply with an attached revised timeline of events. (R-8.)

Oplinger further explained that she routinely used her diary (standard protocol) to record use of benefit time, by herself or employees, or if there was a particular incident that she wanted to remember, as far as documenting an employee's performance. But

²² She also had a telephone conversation with Barretts, who then told her the same information as is reflected in the memorandum. (A-2.)

²³ Oplinger did not feel as though she had made a "mistake" by initially including references to a quiz, because Barretts had originally indicated that a quiz could be used, but later changed that position. And though she does not recall exactly when she had discussed the quiz issue with Barretts, it had to have been before September 24, 2009, the date of the quiz has indicated in A-1 at page 6. And then on October 8, Barretts instructed her to rectify.

²⁴ The deleted language is highlighted in the exhibit A-3, admitted in evidence only for demonstrative purposes. Oplinger further explained that in A-3 she erroneously highlighted "I returned from the field at," next to the date August 26, 2009, on page 4, as well as "I indicated that he did not seem to be comprehending traffic engineering," as appears in paragraph 6 on page 6. And on the final page, wording was revised: "Bobby cannot retain general engineering concepts" became "Bobby has difficulty retaining general traffic engineering concepts," and "I have reminded Bobby" became "I often have to remind Bobby." Finally, handwriting on the bottom of the last page, "Unable to come up with logical conclusion," is not recognizable to Oplinger.

it also contained other information that was not material to her reports. She further explained that she had done other WTP evaluations before, but this was her first time completing one that was unsatisfactory, hence the assistance from HR. The revisions redacting the memorandum to delete references to a quiz or lateness did not affect her evaluation or the outcome relative to unsatisfactory performance for lack of meeting the job requirements.

David Martin, Supervising Highway Engineer 2, Traffic, and twenty-nine-year DOT employee, testified that he is responsible for overseeing traffic engineers and investigators, and their investigations, relative to determining the need to install or revise traffic control devices, or traffic regulations, on the State highway system. He has served in that position since 2009 and has twenty people under his jurisdiction. He began working at the DOT in July 1984 as a CET, a provisional, "hand-holding position," where staff train the employee with the goal of enabling him or her to independently do the work as a traffic engineer.

Martin knew Patel as having been under the supervision of Oplinger, who reported directly to him. Martin was familiar with the PES process and testified that, in the ordinary course, the responsibilities, goals and expectations of the job are imparted to the CET by the supervisor at the initiation of the process. After meeting with the supervisor, the person would execute the PES form. Next, there is an interim meeting and evaluation, followed by a final meeting and evaluation for the rating cycle.

Martin signed Patel's March 2009 PES (R-2) as reviewer and has no knowledge of any related complaints by Patel. Martin described how CETs receive a lot of "hand holding," or hands-on training during the training period, with a "village-to-raise-a-child" philosophy and practice, and are given the necessary materials, including the ("bible") Manual on Uniform Traffic Control for Streets and Highways, as well as the DOT's traffic engineering handbook. And there was no difference in evaluation standards for PES with respect to anyone with the subject title at that time.

Martin did receive a complaint from Patel expressing that he had received a poor evaluation because of inadequate training. Martin's response, which he wrote on the

PES dated October 9, 2009 (R-21 at 6), was that there are many avenues of training throughout the Bureau, available to anyone at any time; any objections should have been made early on and to his knowledge there were none; Oplinger and her staff put in an incredible amount of time to help Patel succeed; and his complaint was thus unfounded. Martin himself was available and made that known to junior staff. Further, he had no reason to believe that Patel was treated any differently from all of the junior staff.

The distinction between the two relevant positions is such that the year of training as a CET should manifest in the ability of an assistant engineer to perform many jobs independently. And there is no doubt Patel was given the same treatment as the other assistant engineers coming into that position at the same time.

On cross-examination, Martin testified he first met Patel around September 2008 and may have met him a few times since, but Martin does not recall meeting with him one-on-one as part of his duties. Martin explained that his comments, written on Patel's PES (R-21) and regarding "massive time and incredible effort" spent by Oplinger and her staff training Patel, were based upon knowledge gained from supervising her, including conferences with her and reviewing records that she kept. According to Martin, the effort put into training Patel went far beyond that of other trainees in the Bureau at the time, which, of itself is a "massive" amount of time to begin with; so, any additional training time would automatically be "massive" and incredible.

With regard to the firing of Patel, Martin explained that he signed the PES as reviewer, and believed the determination would have to be supported in some form by the department's employee relations staff. Martin acknowledged that he had never before or since become involved with the termination of an employee.

Martin cannot recall whether he had previously seen the email (A-2) from Dianne Barretts, whom he knew to be an employee of the DOT's employee relations group and former secretary in the Bureau of Traffic Engineering, though it was possible he had

received but had not read it in October 2009.²⁵ After reading it to refresh his recollection, he testified that he believes that he has seen it before, but does not recall specifically.

Martin cannot recall whether he had seen Oplinger's original "timeline" document (A-1) before, but he has seen timelines similar in format, for instance in the documentation relative to an outside complaint regarding an investigation. But A-1 appears to be a timeline by Oplinger regarding incidents relative to Patel and A-2 mentions the need to redact references to lateness and a quiz. He did discuss Patel with Oplinger regarding late arrivals and what was or was not getting done relative to specific jobs. Martin does not know whether reliance was placed upon the redacted version of the timeline (R-8) in the decision to terminate. He himself relied upon his conversations with her, the training available, the jobs that were not completed, and the conversation with Patel when he complained of inadequate training. His discussion with Oplinger at that time was to request Patel's evaluation form so that he could add comments. After Martin signed as reviewer, the evaluation was forwarded to the Bureau's executive assistant to be processed and forwarded to employee relations for the division, and then to employee relations for the department. Martin does not recall how soon after completion of his evaluation Patel was terminated.

Summary of testimony

Making factual findings requires a weighing of the credibility of the witnesses, *i.e.*, "an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it 'hangs together' with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted),

²⁵ Martin also identified Edel McQuaid, who was copied on the email, as a DOT employee who works for HR.

certif. denied, 10 N.J. 316 (1952).

Patel presented himself as a hard-working family man who genuinely felt that DOT should have done more to enable him to succeed as assistant engineer. He testified with a noticeably heavy accent and a sincere demeanor; however, his testimony evidenced occasional difficulty, to some degree, with communication and/or comprehension. Moreover, at various times his testimony was also inconsistent, contradictory and unreasonable. It thus was not entirely reliable in terms of credibility. Oplinger testified in a forthright and candid manner and presented as a credible witness. In large measure, her testimony was corroborated by documentary evidence and the testimony of Martin, whom I also found to be credible.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I also **FIND as FACT:**

1. In June 2008 Patel received documentation that assured his awareness of the assignments and requirements of CET employment, and on April 1, 2009, he reviewed that documentation with Oplinger, as well as his PES effective April 2009, which did the same. At that time Oplinger gave him a copy of his PES and discussed with him all of his responsibilities, including: (1) conducting traffic engineering studies and documenting them in memos or reports, (2) designing traffic control devices such as traffic signs and pavement markings, (3) completion of fifty assignments annually (or less if fewer were assigned), or four assignments monthly, (4) attending Bureau meetings and abiding by department policies, (5) using the job tracking system (TES database), and (6) attending assigned training.
2. Over the course of the twelve-month training period between June 2008 and June 2009, DOT trained Patel and other CETs so as to prepare for their transition to the position of Assistant Engineer, Traffic, that involves the same responsibilities but requires the employee to work independently on most assignments.

3. Patel and other CETs were provided job information for transitioning between the two positions, and he was given the MUTCD ("bible" manual), as well as DOT's traffic engineering handbook, an instructional compilation of samples by employees who had been CETs.

4. Oplinger provided Patel with assistance during his transition. She met with him regularly, went into the field with him, and asked other engineers in their group to assist him.

5. During the WTP, further training included Oplinger's reviewing assignments with him, including reviewing with him the training materials relative to specific projects, and assisting him in the field, either personally or by having other engineers accompany him on field visits. Online training was also available (and required) and DOT provided computer-training classes throughout the year; Oplinger had recommended that he sign up for the classes when available.

6. Before August 24, 2009, Oplinger had repetitive reviews with Patel about his work and expressed to him her sense that he was not comprehending basic principles of traffic engineering.

7. During their meeting of August 24, 2009, relative to his two-month progress, Oplinger discussed with Patel his deficiencies, including failure to complete the required number of projects and take required training, as well as the need for use of the TES job tracking data system. Oplinger informed him that he had to complete eight assignments during the next two months, and provided him with her memorandum dated that day that outlined major points that she had just addressed with him. At that time, she also provided handwritten step-by-step instructions to aid him in completion of assignments. His only objection was with regard to having to take online training during the two-month period, but he never took the opportunity provided to submit any objection in writing.

8. Oplinger had additional discussions with Patel during the second phase of the WTP, prior to their meeting on October 8, 2009, specifically regarding: difficulty he encountered with the as-built redlined plan, and incorrectly substituting a stop sign for a traffic light (R-12); the issue of accurate measurement using a standard Rolatape (R-13); the Route 17 Home Depot entrance assignment, that was never begun and for which there was no request for assistance (R-14); his difficulty with proper inclusion of a handicap ramp on a site plan, despite her personal instruction to him (R-15); and difficulty denoting the correct designation of the direction of a one-way sign, and properly indicating the existence and location of pedestrian crosswalk pushbutton controls. (R-16.)

9. Patel was required to complete eight assignments between August and October 2009, but completed only two during that time.

10. Oplinger felt that Patel had shown signs of difficulty even during the twelve-month training period, and she kept notes during the four-month WTP due to her awareness of the potential for an unsatisfactory WTP, but she did not predetermine that he would receive an unsatisfactory performance evaluation.

11. Oplinger had never before prepared an unsatisfactory-WTP report, so she received input from HR regarding what documentation was needed and accordingly redacted her initial timeline report (A-1), which had been provided to HR, to remove references to lateness and a quiz, thus submitting a revised official version (R-8); however, the revision had no impact on her issuance of an unsatisfactory rating due to inadequate job performance. The email to her from Barretts, and its reference to the "means justifying the end," did not influence her final evaluation decision, which was independently reviewed and approved by Martin, her supervisor.

12. Until his termination, Patel did not complain of inadequate training.

13. Patel was ultimately terminated as unsatisfactory because he completed only four rather than sixteen assignments during the WTP and, requiring

repetitive instruction, he demonstrated ongoing difficulty with the comprehension and independent practical execution of the requisite engineering principles germane to adequate performance of the duties of Assistant Engineer, Traffic, within the DOT.

LEGAL ANALYSIS AND CONCLUSION

The purpose of the working test period under the Civil Service system is to enable the appointing authority to evaluate an employee's fitness through observed job performance under actual working conditions. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 89 (App. Div. 1977). On appeal to the Civil Service Commission, the only issue is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of that position. Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351 (App. Div. 1960). Thus, it is up to the employee to demonstrate that the appointing authority has acted in bad faith. N.J.A.C. 4A:2-4.3(b); Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966). Bad faith is "not simply bad judgment or negligence, but implies the conscious doing of a wrong because of dishonest purpose." Brown v. State Dep't of Educ., 97 N.J.A.R.2d (CSV) 537, 541 (citations omitted).

To prove "bad faith" in a WTP case, the employee must prove sinister motive or conscious doing of a wrong because of a dishonest purpose. The fact that the appointing authority's determination was not entirely accurate or even that the facts allow for a determination different than that of the appointing authority is not alone sufficient to prove bad faith. Broughton v. Woodbine Dev'l Ctr., CSV 4179-02, Initial Decision (Oct. 1, 2003), adopted, Merit Sys. Bd. (Nov. 24, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>. Further, an alleged lack of training, in particular, does not amount to a showing of bad faith. Briggs v. N.J. Dep't of Civil Serv., 64 N.J. Super. 351, 355-56 (App. Div. 1960); In re Ansari, Bergen Cnty. Bd. of Soc. Servs., CSV 7808-09, Initial Decision (October 30, 2009), adopted, Civil Serv. Comm'n (December 4, 2009), <<http://njlaw.rutgers.edu/collections/oal/>>.

Here, appellant completed a twelve-month training period as a CET, but struggled and failed to complete the requirements of the WTP for the position of assistant engineer, despite the fact that the responsibilities were the same. The difference, however, was that the latter position required the ability to perform a designated amount of work independently, based upon the training that had been provided. Patel's training included instructional manuals, online training, oversight of assignments by his supervisor and other engineering staff, and assistance on field assignments; indeed, it was adequate. As supervisor, Oplinger assured his awareness of the requirements, routinely met with him during the WTP, and provided feedback on performance, as well as step-by-step instructions and recommendations for improvement. She also furnished him with a copy of interim and final progress reports. He thus received a fair WTP, in accordance with N.J.A.C. 4A:4-5.3. Unfortunately, Patel did not comprehend or fully realize the extent of the work required and otherwise failed to sufficiently execute what was needed to complete it, despite his prior experience. Patel's deficient performance and Oplinger's efforts during the WTP were well documented and were corroborated by Martin, as well. Patel was ultimately terminated for lack of performance rather than any sinister conspiracy against him, improper motive, or bad faith on the part of the DOT.

Therefore, I **CONCLUDE** that appellant has failed to prove by a preponderance of credible evidence that the respondent terminated his employment in bad faith.

DECISION AND ORDER

Accordingly, respondent's termination of appellant from his position as Assistant Engineer, Traffic, is hereby **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.

October 14, 2014
DATE



ROBERT BINGHAM, II, ALJ

Date Received at Agency:

Oct 15, 2014

Date Mailed to Parties:

Oct 15, 2014

/bdt

APPENDIX

WITNESSES

For Appellant:

Bhadreshku Patel

For Respondent:

Jaime Oplinger

David Martin

EXHIBITS

Joint:

- J-1 Letter from E. Fitzpatrick to B. Patel, re: probationary period (WTP), dated October 13, 2009
- J-2 Letter from P. Pologruto to CSC, Division of Merit System Practices and Labor Relations, re: WTP appeal for B. Patel, dated October 21, 2009

For Appellant:

- A-1 NJDOT Memorandum of Record, from Jaime Oplinger, dated October 7, 2008, regarding timeline of events (original)
- A-2 Email from Dianne Barretts to Jaime Oplinger, David Martin and Edel McQuaid, dated October 8, 2009
- A-3 NJDOT Memorandum of Record, from Jaime Oplinger, dated October 7, 2008, with highlights and handwritten notations, regarding timeline of events (demonstrative exhibit, admitted to show deletions)

For Respondent:

- R-1 NJ Civil Service Commission, Job Specification 11282, Assistant Engineer, Traffic

- R-2 State of New Jersey DOT Operations Employee Form, Job Expectations and Evaluation from April 1, 2009, to March 31, 2010
- R-3 Memo, from J. Oplinger to B. Patel, re: End of Two-Month WTP, dated August 24, 2009
- R-3a Documentation for First Bullet, handwritten daily work-completed status, dated June 3, 2009
- R-3b Documentation for Second Bullet, handwritten daily work-completed status, dated June 29, 2009
- R-3c Documentation for Third Bullet, email from J. Oplinger to D. Marquez, re: EEO on-line training course, NJ State Policy Prohibiting Discrimination in the Work Place, dated August 4, 2009
- R-3d Documentation for Fourth Bullet, email from J. Oplinger to B. Patel, re: Route 17 and Mountainside Road, Mahwah Twp., Bergen, job database D, dated August 12, 2009
- R-3e Documentation Fifth Bullet, Field with Bobby re Route 17 Essex Street Bridge Corrective Action Inspection, dated June 18, 2009
- R-4 DOT Report on Progress of Probationer, State of New Jersey, re: B. Patel (handwritten title correction), dated August 7, 2009
- R-5 Email from D. Martin to D. Bartlett, re: Patel's 2-Month review, dated August 27, 2009
- R-6 DOT Report on Progress of Probationer, State of New Jersey, re: B. Patel (typed title correction), dated August 28, 2009
- R-7 DOT Report of Progress of Probationer, State of Jew Jersey, re: B. Patel (release), dated September 24, 2009
- R-8 Memo to file, J. Oplinger, re: Timeline of Events, Justification for 4-Month Working Test Period Unsatisfactory Rating June 20, 2009, to October 20, 2009, Assistant Engineer, Traffic, B. Patel, dated October 7, 2008
- R-9 Memo to file from J. Oplinger re: minutes of meeting held on August 24, 2009, with B. Patel regarding 2-month probationary period for Assistant Engineer
- R-10 Memo to file, from J. Oplinger re: minutes of meeting held on August 24, 2009, with B. Patel regarding preparation of a redlined as-built plan, dated August 27, 2009

- R-11 Memo to file, from J. Oplinger re: minutes of meeting held on August 26, 2009, with B. Patel regarding 2-month WTP, dated August 27, 2009
- R-12 Memo to file, J. Oplinger re: minutes of meeting held on August 26, 2009, with B. Patel regarding preparation of a redlined as-built plan, dated August 27, 2009
- R-13 Memo to file from J. Oplinger re: minutes of meeting held on August 28, 2009, with B. Patel regarding assignment for Route 17 and Polito Avenue, Route 3 Ramp, dated August 29, 2009
- R-14 Memo to file from J. Oplinger re: minutes of meeting held on September 16, 2009, with B. Patel regarding assignment for Route 17 and Home Depot Entrance, dated September 17, 2009
- R-15 Memo to file, J. Oplinger re: minutes of meeting held on September 18, 2009, with B. Patel regarding assignment for Route 17 and Polito Avenue, Route 3 Ramp, dated September 21, 2009
- R-16 Memo to file from J. Oplinger re: minutes of meeting held on October 5, 2009, with B. Patel regarding comments for Route 17 and Polito Avenue, Route 3 Ramp as-built, dated October 7, 2009
- R-17 NJ Department of Personnel student inquiry, B. Patel, classes taken by B. Patel, dated August 24, 2009
- R-18 Jobs completed by B. Patel, from June 20, 2009, through October 20, 2009
- R-20 World Education Services, Inc. Course-by-Course Evaluation Report, dated June 26, 2007
- R-21 PES Interim/Closeout form, through October 9, 2009