

the District schools were closed in October and November 2012 following Hurricane Sandy (6 days) and the appellant took personal illness and personal days in September, October, and November 2012 (16 days). On October 2, 2012, the appellant received a Performance Report which rated her as unsatisfactory in eight of the nine areas evaluated. On that same day, the District contacted this agency regarding the recording of vacation time and was advised that it would be recorded as a leave of absence that would automatically extend the working test period. As such, the District extended the appellant's working test period to November 5, 2012 in order to give the appellant's supervisor the opportunity to evaluate her in light of the vacation time she took. Subsequently, on November 28, 2012, the District advised the appellant that her 60-day and 90-day performance appraisals were unacceptable and she was returned to her prior held title effective November 28, 2012.

The ALJ noted that the parties requested that the hearing be conducted on the papers in lieu of presenting live testimony. As such, she determined that since the appellant's working test period began on June 22, 2012, she would have been entitled to a written 60-day progress report on or around August 22, 2012, but did not receive it until October 2, 2012. Therefore, since the appellant was not provided with a timely progress report, the ALJ found that there was a presumption of bad faith. However, since the appellant had taken a significant number of vacation days during that time, the ALJ indicated that this may have extended the working test period. Therefore, given that the appointing authority expressed concern and confusion to this agency about appropriately documenting the appellant's approved absences during the working test period, the ALJ concluded that the employer's treatment of the appellant's absences was unclear. Further, it was not clear if the appellant's performance evaluations were timely conducted within the appropriate working test period. Under these circumstances, the ALJ recommended granting the appellant a new working test period so she would have the opportunity to be properly and timely evaluated.

In her exceptions, the appellant asserts that the ALJ misinterpreted *N.J.A.C. 4A:4-5.2* in holding that her vacation and compensatory days were approved leaves of absences which extended her working test period. Specifically, the appellant argues that in accordance with *In the Matter of Barbara Wilczynski*, Docket No. A-4927-94T2 (App. Div. February 6, 1996), use of vacation and personal days does not extend the working test period. Regardless, even if the vacation days constituted an approved leave of absence, the appellant contends that the District did not comply with the time requirements as her working test period would have ended on November 1, 2012 but she did not receive her 90-day evaluation until November 19, 2012. Thus, since the timeliness requirements for working test period evaluations are intended to ensure that the employee receives a fair evaluation, and the failure of the appointing authority to provide them in a timely manner creates a

presumption of bad faith which, in this case, has not been overcome, she argues that she should be considered permanent as a Clerk 2.

In response, the appointing authority states that the appellant's working test period was first extended to November 5, 2012 and then extended to November 30, 2012. It also argues that since the appellant did not accumulate 60 days of active service until on or about November 2, 2012, it properly issued her a 60-day evaluation on that date. Moreover, the appointing authority maintains that the appellant's leaves extended her working test period and that it properly provided her the 90-day evaluation on November 19, 2012. Accordingly, since the appellant was properly afforded the benefit of a total of three months of active service upon which to evaluate her performance, the appointing authority argues that she should not be provided a new three month working test period.

In reply, the appellant reiterates that use of her vacation and personal days did not extend her working test period and, if it did, the District's failure to provide her with timely progress reports created a presumption of bad faith that has not been rebutted. Therefore, the appellant maintains that she successfully completed the working test period and should be considered permanent as a Clerk 2.

In response, the appointing authority argues that the ALJ did not misinterpret *N.J.A.C. 4A:4-5.2* and that *Wilczynski, supra*, is distinguishable from this matter. Therefore, since it complied with the working test period time requirements, the appointing authority maintains that the appellant should not be afforded a new working test period.

Upon its *de novo* review, the Commission does not agree with the ALJ's determination that the appellant should be afforded a new three month working test period and finds that the return to her prior held title of Clerk 1 was proper. Although the appellant argues that use of vacation and personal leave does not extend the working test period, *N.J.A.C. 4A:4-5.2(e)* expressly provides that an approved leave of absence shall extend the completion of the working test period for a period of time equal to that leave. Essentially, the appellant's working test period was extended in accordance with this regulation. The provision of an automatic extension of an employee's working test period in the event of an approved leave of absence ensures that the employee is afforded an adequate opportunity to demonstrate his or her ability to perform the job satisfactorily and to correct any deficiencies in job performance in a timely manner. To make a distinction between a formally requested and granted leave of absence and a period of extended and approved vacation, personal and sick leave would amount to putting form over substance. See *In the Matter of Christopher Lorenc* (MSB, decided January 31, 2007). The fact is that the appellant's job performance would not have been evaluated for a full three months of active service as she could only utilize her vacation leave when school was not in session during July and August but she

started her working test period on June 22, 2012. This resulted in the appellant being out on leave for 29 work days, which spanned most of the month of July 2012 and more than half of the month of August 2012. Significantly, the appellant was also out on leave for five workdays in September 2012 (10, 11, 12, 13, and 14). Therefore, as of the initial ending date of September 22, 2012, the appellant could only have been evaluated on a maximum of 27 work days in that particular time period. Moreover, the appellant was out for additional week long periods in October and November 2012, which further extended the completion of her working test period.

N.J.S.A. 11A:4-15 provides, in pertinent part, that the purpose of the working test period is to permit an appointing authority to determine whether an employee satisfactorily performs the duties of a title. In this case, the appellant fundamentally argues that her performance should be evaluated for less than half of the statutorily required working test period because *N.J.A.C. 4A:4-5.2(e)* does not include vacation and/or personal time utilized during the working test period. The Commission disagrees. As stated above, the absence of a formally requested and approved leave of absence is not determinative to the extension of a working test period under *N.J.A.C. 4A:4-5.2(e)*. Further, *Wilczynski, supra*, is clearly distinguishable from the present matter, as the Appellate Division adopted with approval the ALJ's finding that vacation and compensatory time are elective and that their use did not amount to competent medical proof of illness rendering Wilczynski's absence unavoidable. Moreover, the record in that matter did not address the ALJ's finding that the appointing authority did not act in bad faith. In the present matter, it is evident that the appellant was *required* to use her vacation leave during the July and August. Further, the only evidence in the record regarding the appellant's actual work performance is the uncontested performance evaluation that she was rated as unsatisfactory in eight of the nine areas reviewed. In this regard, the appellant did not substantively challenge her evaluations which showed that she performed unsatisfactorily. Therefore, the facts in this case are not similar to those in *Wilczynski* and it was appropriate to extend the appellant's working test period for the time she was on vacation, sick, and personal leave as well as when the school was closed as a result of Hurricane Sandy.

Regarding the appellant's argument that she was not timely provided with her performance evaluations, the record indicates that she was provided a performance appraisal on October 2, 2012 which indicated that her overall evaluation was unsatisfactory. The appellant signed this evaluation on October 2, 2012. Therefore, given that it was appropriate to extend her working test period, which was initially scheduled to end on September 22, 2012, the appellant was timely apprised of her performance issues on October 2, 2012. Moreover, the appellant signed her final evaluation on November 19, 2012 indicating that her

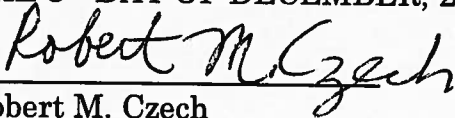
performance was not satisfactory and had not met the expectations of a Clerk 2.¹ When considering the additional sick and personal days she utilized and the District closing in October and November, this further extended the time frame for her to complete the working test period. Additionally, while she was formally advised that she was to be returned to her prior title effective November 28, 2012, the service of notice of an employee's release at the end of her working test period earlier or more than five days after the end of her working test period, in and of itself, does not provide evidence of bad faith.² In this case, the appellant was not prejudiced based on the service of the notice, since she was informed of her deficiencies on numerous occasions and was provided ample opportunity to correct his actions, but failed to do so. *In the Matter of Andre Soltes*, Docket No. A-0699-03T2 (App. Div. March 17, 2005); *In the Matter of Elaine Watson* (MSB, decided September 10, 2002); *See also, Township of Millburn, supra*. Moreover, she has not challenged the substance of the evaluations, and thus, has not satisfied her burden of proof. *See N.J.A.C. 4A:2-4.3(b)*. Accordingly, the appellant has had the benefit of a complete working test period and there is no basis on which to grant her a new working test period.

ORDER

The Civil Service Commission finds that the action of the appointing authority in returning the appellant to the prior held title of Clerk 1 was justified and dismisses the appeal of Ramkumarie Ramcharan.

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
THE 3rd DAY OF DECEMBER, 2014



Robert M. Czech
Chairperson
Civil Service Commission

¹ The Commission notes that the untimely presentation of progress reports is not necessarily determinative. So long as an employee is apprised of and aware of his or her performance during the working test period, even the absence of any formal progress reports issued by an appointing authority can be overcome. *See Township of Millburn v. John C. Esposito*, Docket No. A-6477-97T5 (App. Div. November 18, 1999).

² The Commission's calculation, which is based on extending the working test period 51 work days, indicates that the appellant's working test period should have concluded on November 26, 2012, which would make her notification of her release on November 28, 2012 timely under *N.J.A.C. 4A:2-4.1(c)*.

**Inquiries
and
Correspondence**

**Henry Maurer
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 00588-13

AGENCY DKT. NO. 2013-1645

**IN THE MATTER OF RAMKUMARIE RAMCHARAN,
CITY OF JERSEY CITY SCHOOL DISTRICT.**

Samuel Wenocur, Esq., for appellant Ramkumarie Ramcharan (Oxford Cohen, PC,
attorneys)

Jenna A. Rottenberg, for respondent City of Jersey City School District (Florio,
Perrucci, Steinhardt & Fader, LLC, attorneys)

Record Closed: September 8, 2014

Decided: October 6, 2014

BEFORE MUMTAZ BARI-BROWN, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Ramkumarie Ramcharan appeals the determination of the appointing authority, City of Jersey City School District (District), to not grant appellant permanent status in the title of Clerk 2(B) upon completion of a "working test period."

On January 9, 2013, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The hearing was scheduled for September 8, 2014. The parties requested that the hearing be conducted

on the papers in lieu of presenting live testimony. Appellant submitted certifications of Ramkumarie Ramcharan, Rafael Augusto and Samuel Wenocur. The District submitted the certification of Mirna Weglarz. The record closed on September 8, 2014.

FINDINGS OF FACT

Based on review of the filed submissions I **FIND** as **FACT**:

1. Effective August 27, 2001, the Jersey City Public School District hired appellant Ramkumarie Ramcharan in the position of Clerk 1; she was assigned to in the Central Office. (District Ex. G.)
2. Effective June 22, 2012, Ramcharan was promoted to the position of Clerk 2(B) and assigned to school PS 38.
3. Ramcharan's position of Clerk 2 was subject to a working test period, in order to assess her performance and ability in the new position.
4. Ramcharan's working test period in the position of Clerk 2 was scheduled to begin on June 22, 2012, and end on September 22, 2012. (Certification of Mirna Weglarz.¹)
5. A probationary Clerk 2 receives a "60-Day Performance Report" and a "90-Day Performance Report." If the Board does not demote the Clerk 2 to the former Clerk 1 title at the completion of the working test period, the employee becomes a permanent Clerk 2. (Certification of Rafael Augusto.²)
6. Ramcharan is a member of the Secretaries Education Association (Association) and earns twenty-two vacation days each school year, July 1 to June 30.

¹ Mirna Weglarz is employed as a special assistant in the Human Resources Department for the District.

² Rafael Augusto, president of the Jersey City Secretaries Education Association, is employed with the District. He is responsible for the enforcement of the collective negotiated agreement between the Association and the District.

7. The Association members who work in the Central Office are permitted to take their vacations at any time during the school year, except two weeks before and after June 30.
8. Association members who work in school buildings cannot take vacations during the school year; they can only take their vacation days during the summer, in July and August. (Augusto Cert.)
9. For school year 2012-2013, Ramcharan was approved to use all of her allotted vacation days on July 5, 6, 11, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, and 31, and August 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, and 17, 2012.
10. The District's schools were closed on October 29, 30, and 31, and November 1, 2, and 5, 2012, following Hurricane Sandy. (Weglarz Cert.)
11. Ramcharan took personal-illness leaves on September 10, 11, 12, 13, and 14, October 10, 11, and 12, and November 8, 9, 14, 15, and 16, 2012, and personal-business days on October 9, and November 7 and 13, 2012. (District Ex. I)
12. On September 27, 2012, Ramcharan requested a transfer from PS 38 to the Central Office or PS 23; her request was denied.
13. On October 2, 2012, Sandra Jones, principal of PS 38, completed the 90-day working-test-period evaluation in the areas of "Job Understanding, Job Performance, Job Productivity, Dependability, Cooperation, Initiative and Flexibility, Appearance, Punctuality and Attendance, Work Environment and Safety." Ramcharan received a rating of "unsatisfactory" in all areas except "Appearance," in which she received a rating of "satisfactory."
14. Also on October 2, 2012, District employee Kimberly Hood contacted Saheed Olushi at the Civil Service Commission and inquired, "Can you tell me

how to input someone's vacation time? This is regarding Ramkumarie Ramcharan."

15. Olushi directed Hood as follows: "Select '09—Leave of Absence,' enter employee ID and effective date."

16. On October 5, 2012, Mirna Weglarz forwarded the following statement to Olushi, "In a conversation with Kim Hood I was informed that the 'vacation time' is entered into [the time-keeping system] as 'leaves of absence.' For record purposes that does not sound right and is not an accurate entry. This entry is especially a problem because we are extending the [working test period] for a clerk." (District Ex. F.)

17. The District extended Ramcharan's working test period to November 5, 2012, "in order to give [her supervisor] an opportunity to evaluate [Ramcharan] and in light of Ms. Ramcharan's thirty (30) days of vacation." (Weglarz Cert.)

18. Correspondence between the District and the Civil Service Commission reveal that the District was concerned over recording Ramcharan's vacation time as a leave of absence. The documents state in part:

From Mirna Weglarz to Saheed:

October 5, 2012

[W]e have another problem. It seems that whenever we place people on [leave of absence] in [the time-keeping system] we have difficulties returning them to work.

Olushi replied:

Pure semantics—I agree.

If you enter a [leave of absence] for an employee within a working test period, I was informed that [the time-keeping system] was set up to automatically extend the [working test

period]. We do not have to do anything else. If need be, comments may be entered to indicate that the vacation occurred during the [working test period]. Documentation in the employee file should substantiate whatever records exist in [the time-keeping system].

[District Exhibit F.]

19. On November 28, 2012, the District informed Ramcharan that her 60-day and 90-day performance appraisals were unacceptable to grant her permanent status in the title of Clerk 2(B), and, thus, she must return to her former position, effective November 28, 2012. (Weglarz Cert., District Ex. K.)

ISSUE

The pivotal issue turns on the dates appellant completed the 60-day and 90-day test periods.

Positions of the parties:

Appellant contends that her working test period was completed on September 22, 2012, on which date she became permanent in the position of Clerk 2. Thus, the District's action on November 28, 2012, to demote her position from Clerk 2 to Clerk 1 was illegal because she had already attained the status of a permanent Clerk 2. Therefore, she does not have to demonstrate that the District acted in bad faith. Although appellant takes no position on the merits of the District's decision to demote her, she asserts, "Even if such a legitimate reason did exist, the demotion was in bad faith since the District violated the timing requirements for conducting progress reports during her probationary period." Accordingly, appellant urges this tribunal to reverse the District's demotion and reinstate her to the position of Clerk 2 with back pay and other damages.

The District argues that Ramcharan did not attain permanent status in the position of Clerk 2 on September 22, 2012, because her working test period tolled in order to effectively evaluate her performance. Specifically, at the beginning of her

working test period, Ramcharan took leave time. Consequently, the District believed she could not, "in good faith," receive a fair evaluation. Therefore, the District extended Ramcharan's working test period.

DISCUSSION

One of the objectives of the civil service laws and regulations is to ensure the merit and fitness of public-service employees. See N.J.S.A. 11A:1-2; State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 332 (App. Div.), certif. denied, 156 N.J. 381 (1998). Toward this end, a candidate for permanent employee status must successfully complete a probationary or working test period. N.J.S.A. 11A:4-15. The working test period is considered part of the examination process and is designed to enable an appointing authority to evaluate whether an employee can satisfactorily perform the duties of the title, meriting permanent status. N.J.S.A. 11A:4-15; N.J.A.C. 4A:4-5.1(a). It is intended "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). "[A] basic condition of permanent or absolute appointment for any Civil Service employee is the favorable opinion of the employee's fitness as formed by the appointing authority during the probationary period." Id. at 171. "[T]he sole test is an opinion formed by observation of the employee's work, "which opinion must be 'formed in good faith.'" Lingrell v. N.J. Civil Serv. Comm'n, 131 N.J.L. 461, 462 (Sup. Ct. 1944). 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. Dep't of Civil Serv., 64 N.J. Super. 351, 355 (App. Div. 1960). Rather, the purpose of the probationary period is "to further test a probationer's qualifications," and "the employee must demonstrate that he is competent to discharge the duties of the position" during this period. Id. at 356, 355. Moreover, 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:2-4.1, et seq.; N.J.A.C. 4A:4-5.4(a). Generally, the length of the working test period is three months commencing on the date of regular appointment. N.J.S.A. 11A:4-15(a); N.J.A.C. 4A:4-5.2(a); N.J.A.C. 4A:4-5.2(b)(1). The appointing authority is required to make progress reports during the working test period and provide the reports to the employee. N.J.S.A. 11A:4-15(b). The rules direct that “[t]he appointing authority shall prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period,” and must furnish the employee with a copy of all reports. N.J.A.C. 4A:4-5.3(a) and (c)(3).

The pivotal question is whether the appointing authority extended appellant’s working test period. Thus, I have considered carefully the positions of the parties. The duration of a working test period is “three months of active service, which may not be extended.” N.J.A.C. 4A:4-5.2(b)(1). However, an exception to the rule extends the duration of the working test period when the probationer is on an approved leave of absence, which extends the completion of the working test period for a period of time equal to the leave of absence. N.J.A.C. 4A:4-5.2(e). A probationer’s use of vacation time only qualifies as an “approved leave of absence” when the appointing authority approves the requested leave. See In re Wilczynski, 96 N.J.A.R.2d (CSV) 300; Regrut v. Warren Cnty., 95 N.J.A.R.2d (CSV) 460. In Regrut v. Warren County, 95 N.J.A.R.2d (CSV) 460, the Merit System Board concluded that a probationer’s working test period was extended due to an “approved leave of absence” when the probationer requested and used sick, vacation, and bereavement time. The Board reasoned that despite the probationer requesting the time off, the employer approved the probationer’s request for sick, vacation, and bereavement leave and therefore the probationer was entitled to an extension. Notably, in In re Salva, CSV 941-09, Initial Decision (November 9, 2009), adopted, CSC (January 29, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>, the Civil Service Commission (Commission) “emphasized that there is no regulatory requirement that an employee be notified of an extension of a working test period due to a leave of absence.” Moreover, an employer may place a probationer on “involuntary leave of absence with pay,” which entitles her to an extension of her working test period. In re

Bernal, City of Newark, CSV 03154-07, Initial Decision (September 12, 2008), adopted in part, modified in part, CSC (November 7, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>. In In re Bernal, the Commission agreed with the administrative law judge's decision that a probationer who was placed on an "involuntary leave with pay" was entitled to have her working test period extended under N.J.A.C. 4A:4-5.2(e). The Commission also agreed that "since the involuntary leave was foisted upon the [probationer], it would be unfair to toll [the] time as it was almost equal to the total length of the working test period itself."

Here, appellant's working test period began on June 22, 2012. Thus, appellant would have been entitled to a written progress report on or around August 22. See N.J.A.C. 4A:4-5.3. However, appellant did not receive her "60-Day Performance Report" until October 2. Therefore, the District failed to provide appellant with a timely progress report "at the end of two months" during her working test period. See *ibid.* Consequently, a presumption of bad faith exists. However, it appears that appellant's approved absences during her working test period constituted an "approved leave of absence" under N.J.A.C. 4A:4-5.2(e). Additionally, the approved absences may have extended the test working period. Although Appellant did not request a formal leave of absence, she requested permission to take vacation days in July and August, as well as subsequent illness leaves in September, October and November, and also personal-business days in October and November. The school Principal, Sandra Jones granted Appellant's request.

The communications between the appointing authority and the Department of Personnel resulted in recording appellant's approved vacation leave as a leave of absence. Notably, the appointing authority expressed concern and confusion about appropriately documenting the approved vacation during the test working period. While it is reasonable that appellant's approved absence might toll her test working period, the employer's treatment of appellant's absences remains muddled and unclear. Moreover, the confusion, as evidenced by the internal memos, raises questions as to whether appellant's evaluations were timely conducted within the appropriate working test period. Under the circumstances presented here it is reasonable to grant the probationer a new working test period. "The appointing authority is entitled to evaluate

the [probationer's] work performance and conduct during the working test period in order to determine whether he merits permanent status and the [probationer] is entitled to a fair opportunity to demonstrate his ability to fulfill the requirements of the position." In re Vegotsky, supra, 92 N.J.A.R.2d (CSV) 162). Consequently, the remaining issues raised by the parties need not be addressed.

CONCLUSIONS

Based on the whole of the evidence submitted by the parties, I **CONCLUDE** that the appropriate remedy is to grant appellant a new working test period, so that appellant may have the opportunity to be properly and timely evaluated as to whether she merits permanent status.

ORDER

I **ORDER** that the appointing authority appoint appellant Ramkumarie Ramcharan to the position of Clerk 2, subject to a working test period of three months in order to assess her performance and ability in the position.

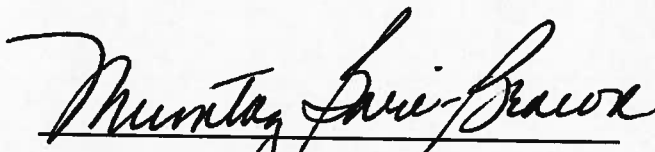
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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 6, 2014

DATE


MUMTAZ BARI BROWN, ALJ

Date Received at Agency:

October 6, 2014

Date Mailed to Parties:

dr
