

CSC
B-95



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Matthew Sailey,
Department of Transportation

Request for Reconsideration

CSC Docket No. 2014-2937

ISSUED: FEB 05 2015 (HS)

Matthew Sailey requests reconsideration of the attached final decision rendered on April 9, 2014, which upheld the petitioner's return to his formerly held permanent title of Assistant Crew Supervisor, Mechanics with the Department of Transportation, at the end of his working test period.

By way of background, the petitioner received a regular appointment as a Crew Supervisor, Mechanics, effective May 24, 2012, with the Department of Transportation. The appointing authority returned the petitioner to his formerly held permanent title of Assistant Crew Supervisor, Mechanics at the end of his extended working test period, effective December 30, 2012. Specifically, the appointing authority asserted that the petitioner had difficulty following directions; displayed poor communication and organizational skills; provided inaccurate information or was unable to provide requested information; and failed to keep accurate records.

Upon the petitioner's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. After a hearing, the Administrative Law Judge (ALJ) found that the petitioner served as a Crew Supervisor, Mechanics at the appointing authority's Cherry Hill garage, the busiest of three garages in the appointing authority's Region South operations that repairs State vehicles and equipment used in the upkeep of State highways. The ALJ also found that the petitioner's four-month working test period was extended by two months as the petitioner had not performed his duties to the satisfaction of his supervisor, Richard Shaw, a Regional Equipment Supervisor, Transportation.

Shaw testified that the petitioner was rated as unsatisfactory during his first review on August 30, 2012. According to Shaw, the petitioner failed to follow directions or had to have directions repeated several times prior to the petitioner's compliance. For example, the petitioner made insufficient progress toward a goal set at a June 2012 meeting for the repair of snow equipment, causing Shaw to direct the petitioner to work only on snow equipment and leaving limited staff available for other work. Shaw stated that the petitioner displayed poor communication skills and, at times, provided inaccurate information in response to inquiries. Shaw also stated that the petitioner regularly failed to meet deadlines. Shaw further stated that the appellant failed to keep accurate records in the fleet management system. For example, Shaw cited an instance where a generator, which had not been signed out, went missing. The petitioner could not recall when the generator was picked up or by whom, resulting in the filing of a "Loss, Theft and Vandalism" report. Shaw also observed that the petitioner was unorganized. Based on the foregoing, Shaw rated the petitioner unsatisfactory for his first rating period and provided the petitioner with a development plan.

Shaw testified that on the petitioner's second progress report, dated October 22, 2012, he rated the petitioner unsatisfactory but requested that the working test period be extended to six months to allow the petitioner to develop and attain a satisfactory level of performance. Shaw stated that he had advised the petitioner that it was the petitioner's responsibility to handle reports, Performance Assessment Reviews (PARs), emails, paperwork and computer work and that the petitioner's assistant should handle day-to-day operations. However, the petitioner's assistant continued to handle the majority of the paperwork and computer work. Shaw stated that at the petitioner's interim PAR meeting, the petitioner could not answer questions about outstanding repairs. Shaw further stated that the petitioner did not bring completed PARs for the petitioner's staff to a PAR review meeting with Shaw as instructed and did not communicate to Shaw, ahead of time, the reason that he could not do so. Shaw reiterated that the petitioner displayed poor communication skills, had difficulty following directions, and, at times, provided inaccurate information in response to inquiries. Shaw also reiterated that the petitioner's recordkeeping remained a problem. For example, Shaw noted that on a recent status report, he observed at least 40 work orders that appeared to be done but not closed and old work orders that had been closed but later reopened with current dates. Based on the foregoing, Shaw rated the petitioner unsatisfactory for his second rating period, extended the working test period an additional two months and again provided the petitioner with a development plan.

Shaw further testified that he rated the petitioner unsatisfactory at the sixth month of the working test period and documented his concerns in a memorandum dated December 11, 2012. Shaw stated that the petitioner needed to be more proactive about safety. For example, Shaw cited an instance of a potential gas leak

that the petitioner did not act upon until Shaw told the petitioner to report it. Shaw stated that the petitioner's recordkeeping continued to be a problem and that he submitted inaccurate reports. Shaw also stated that the petitioner continued to display poor communication skills. For example, Shaw cited the petitioner's assigned duty to prepare weekly equipment status emails for his crews. The petitioner did not prepare these emails regularly and, when he did prepare them, wrote them in a sarcastic or unprofessional manner. In addition, Shaw stated that the petitioner took unauthorized time off, citing an instance when the petitioner suggested to Shaw that he might be off on a particular day, took off that day, and did not request leave time for that day. Shaw also stated that the petitioner continued to display poor organizational skills. Therefore, based on the foregoing, Shaw did not believe that the petitioner could adequately perform the job for which he was hired and so, on January 4, 2013, the petitioner was notified that his performance during his working test period had been rated as unsatisfactory and he was being returned to his formerly held permanent title of Assistant Crew Supervisor, Mechanics. The ALJ noted that the petitioner was given a development plan and an opportunity to improve at each of his evaluations as well as an extension of the working test period. The ALJ also noted that the petitioner's responses to Shaw in several emails could be interpreted as sarcastic or even inappropriate. Accordingly, the ALJ found that based on the record, the appointing authority's decision to return the petitioner to his formerly held permanent title at the end of his working test period was appropriate and that the petitioner had not established that the appointing authority's determination was made in bad faith. No exceptions to the initial decision were filed. Upon its *de novo* review of the record, the Civil Service Commission (Commission) agreed with the ALJ's determination to uphold the petitioner's return to his formerly held permanent title at the end of the working test period.

In his request for reconsideration, the petitioner argues that the use of "court room procedures" allowed statements to be taken out of context by manipulating questioning and that situations were not elaborated upon in order to present the whole picture. The petitioner states that since he has worked with the parties involved for some time, his communications have a "personal flair" and may seem less professional. The petitioner argues that Shaw's progress reports failed to show that complaints regarding equipment complications or poor communication were also made against other employees. The petitioner also notes that interviews for his former position of Assistant Crew Supervisor, Mechanics at Cherry Hill were held one hour before the meeting at which he was informed that he had not passed his working test period. The petitioner argues that since his working test period had not yet been completed when the interviews for Assistant Crew Supervisor, Mechanics were held, bad faith is evidenced in the timing of the interviews. In support of his request, the petitioner submits several work-related emails. These emails consist primarily of correspondence between the petitioner and Shaw. For example, Shaw states in one email that he did not mark certain of the petitioner's

previously approved vacation dates on his calendar. The petitioner also submits an affidavit of V.C., Crew Supervisor, Mechanics. V.C. stated in the affidavit that on October 4, 2011, Shaw mentioned at a meeting that he did not want to hire the petitioner for the position of Crew Supervisor, Mechanics.¹

In response, the appointing authority, represented by Nonee Lee Wagner, Deputy Attorney General, argues that the petitioner's additional evidence does not provide a basis to grant reconsideration. The appointing authority argues that V.C.'s affidavit is not dispositive. Specifically, it states that the October 4, 2011 meeting took place several months before the petitioner's regular appointment to the title of Crew Supervisor, Mechanics. It asserts that the petitioner ultimately was promoted and given every opportunity to pass the working test period and that Shaw's alleged statement on October 4, 2011 is not relevant to whether the petitioner proved capable of keeping the position at issue. The appointing authority also maintains that bad faith is not evidenced in the timing of the interviews for the Assistant Crew Supervisor, Mechanics position. It argues that the petitioner was not eligible for the position since, at the time of the interviews, he was serving in the higher-level title of Crew Supervisor, Mechanics.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record in the instant matter reveals that reconsideration is not justified.

In the instant matter, the petitioner does not present new evidence or additional information that would change the outcome of his case, nor has he shown that a clear material error occurred. The petitioner presents that Shaw expressed his reluctance to hire the petitioner on October 4, 2011. Regardless, agency records indicate that the petitioner received a provisional appointment to the title of Crew Supervisor, Mechanics on October 22, 2011. Moreover, Shaw's alleged statement was made several months before the petitioner received a regular appointment to the title of Crew Supervisor, Mechanics. Thus, Shaw's alleged October 4, 2011 statement is not indicative of bad faith in the conduct of the petitioner's working test period. The ALJ found Shaw to be credible and found no evidence that his evaluations of the petitioner were based on an improper motive.

¹ It is noted that the petitioner also argues that his representation in connection with the OAL proceeding was inadequate. However, there is no indication that the petitioner raised this issue at the OAL. Furthermore, the Commission lacks jurisdiction to address any complaint the petitioner may have regarding the quality of the representation provided by his union representative in the OAL proceeding.

In that regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of witnesses. See *Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” See *In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ’s decision if it is not supported by the credible evidence or was otherwise arbitrary. See N.J.S.A. 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, after its review, the Commission found nothing in the record which convinced the Commission that the ALJ’s assessment of the credibility of the witnesses or her findings and conclusions based on those assessments were in error.

Therefore, the Commission agrees with the ALJ and the prior decision that the petitioner failed to establish that his return to his formerly held permanent title was in bad faith. The Commission emphasizes that nothing in the record indicates that the appointing authority’s determination was made for any reason other than his unsatisfactory job performance. See e.g., *Briggs v. Department of Civil Service*, 64 N.J. Super. 351 (App. Div. 1960) (The only issue in a working test period appeal is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position). See also, *In the Matter of Anne G. Schopf* (MSB, decided August 6, 1996); *In the Matter of Nick Cianciosi* (MSB, decided August 31, 1999). Accordingly, under the circumstances presented, the Commission finds no grounds on which to grant reconsideration of the prior decision.

ORDER

Therefore, it is ordered that this request for reconsideration be 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 ON
THE 4TH DAY OF FEBRUARY, 2015

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312

Attachment

- c. Matthew Sailey
Nonee Lee Wagner, DAG
Michele Shapiro
Joseph Gambino

A-11



STATE OF NEW JERSEY

**In the Matter of Matthew Sailey
Department of Transportation**

**CSC DKT. NO. 2013-1867
OAL DKT. NO. CSV 1082-13**

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

ISSUED: APRIL 9, 2014 BW

The appeal of Matthew Sailey, Crew Supervisor, Department of Transportation, returned to his formerly held permanent title at the end of the working test period effective December 31, 2012, was heard by Administrative Law Judge Linda M. Kassekert, who rendered her initial decision on March 7, 2014. No exceptions.

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, at its meeting on April 9, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

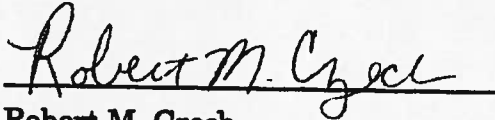
ORDER

The Civil Service Commission finds that the action of the appointing authority in returning appellant to his formerly held permanent title at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Matthew Sailey.

Re: Matthew Sailey

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
APRIL 9, 2014**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals and Regulatory Affairs
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Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312**

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 1082-13

AGENCY DKT. NO. 2013-1867

**IN THE MATTER OF MATTHEW SAILEY,
NEW JERSEY DEPARTMENT OF
TRANSPORTATION.**

**Albert Hernandez, CWA Union Representative, appearing pursuant to N.J.A.C.
1:1-5.4(a)(6) for appellant Matthew Sailey**

**Nonee Lee Wagner, Deputy Attorney General, appearing for respondent New
Jersey Department of Transportation (John J. Hoffman, Acting Attorney
General of New Jersey, attorney)**

Record Closed: January 24, 2014

Decided: March 7, 2014

BEFORE LINDA M. KASSEKERT, ALJ:

STATEMENT OF THE CASE

Appellant, Matthew Sailey, appeals his return to a previously held title at the end of a working test period, effective December 31, 2012, by respondent, the New Jersey Department of Transportation (DOT). The respondent contends that the appellant's job performance during the working test period was unsatisfactory. The appellant argues that the respondent acted in bad faith in returning him to his permanent title.

PROCEDURAL HISTORY

Appellant served as an assistant crew manager, mechanics, in respondent's Cherry Hill garage. After his supervisor left, he became acting crew manager on October 2, 2011, and ultimately took the promotional examination for the crew manager, mechanics, position at the same garage. He passed the examination and was selected for the position. He began his working test period on May 24, 2012. Respondent evaluated appellant for the four-month working test period as required by N.J.A.C. 4A:4-5.1 at two months and at four months. At the end of the four months, respondent requested that the working test period be extended to six months. At the end of the six-month period, respondent determined that the appellant failed to perform satisfactorily and returned him to his previous permanent title of assistant crew supervisor, mechanics, effective December 31, 2012. Appellant filed an appeal of this action on January 23, 2013.

This matter was transmitted to the Office of Administrative Law for determination as a contested case on January 28, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was scheduled for July 30, 2013, but was adjourned at the request of both parties because the appellant did not receive notice. A hearing was held on January 24, 2014, and the record closed on that date.

TESTIMONY

For Respondent

Richard J. Shaw

Mr. Shaw is the regional equipment supervisor of the Department's Region South operations. He oversees three garages and three crews in each of the garages, as well as three stockrooms. These garages make repairs to equipment used in the upkeep of State highways and repairs to State vehicles. The Cherry Hill garage is the

busiest garage of the three locations. Mr. Shaw testified that the appellant worked under him for approximately eight years, including when the appellant had the title of assistant crew manager, mechanics. Richard Lawrence, who had previously held the crew manager position, was transferred to Trenton, and the appellant assumed responsibilities as the crew manager in an acting capacity for about a year until the promotional examination was held. He testified that the appellant passed the promotional examination and began his working test period.

Mr. Shaw testified that he was responsible for evaluating the appellant. The first two-month evaluation period ran from June 30, 2012, to August 30, 2012. Mr. Shaw testified that during this period he found the appellant's work to be unsatisfactory. He documented this on Form PR-84, which is the Report on Progress of Probationer (R-1 at DOT0019) and in a memorandum to the appellant dated August 30, 2012, (R-1 at DOT0020-0021). Mr. Shaw cited the following areas in the memorandum:¹

Matt, unfortunately I am unable to report you as satisfactory on your 2-month progress probation report. The following is the justification and development plan which you must satisfy in order to receive a final (4-month) satisfactory progress probation report;

- **At the regional equipment staff meeting held in June 2012 at the Vineland garage, in which you were in attendance. You along with the other garages were given direction that Snow Equipment was to be the number 1 priority and that we must be at a minimum of 90% ready with snow equipment by October 01, 2012. Each garage was given a number of snow equipment pieces that would need to be completed each week in order to accomplish this goal. Due to your lack of progress reaching this goal I have now had to direct you to only work on snow equipment in order to try to meet the deadline, leaving you only 1 mechanic to take care of your other work. Originally my plan called for 6 of your 9 mechanics to be dedicated to repairing snow equipment. This would have allowed more of your other work to get**

¹ All excerpts of memos, letters and other documents have been typed verbatim into this decision. It should be assumed that any typographical, grammatical and spelling errors are the products of the respective authors of these materials. Therefore, terms such as sic have not been utilized.

done. While it is understood that you have a busy garage, you must follow direction given.

- You have failed to follow other directions and/or the directions have had to be repeated several times before you complied. (e.g. failure to follow up on equipment statuses, failure to submit required reports on time)

- Communication skills are poor; I have to repeat my directions several times in order to get what I need. Also, when asked questions, there are times that you provide wrong/inaccurate information. Recently, I inquired about the status of a loader mounted snow blower in Mt. Laurel yard and you responded that you did not know of any problems with this unit. After a little more research on my part, I found that I had inspected this unit in May and wrote it up for a "no-start" condition. You had received copies of this report. Either you forget, or ignore the reports that are given to you.

- You fail to meet deadlines regularly. Recently on 8/23/12 at 11:28 a.m. I sent an email requesting information. I needed this information back to me right away by 2:00 p.m. as I stated in the email and I did not receive your response until 8/27/12 at 9:44 a.m.

- Maintaining accuracy in the fleet system remains. I have spoken with you several times on this subject and it seems as though you pass that off to your assistant. While you may do this, ultimately the responsibility is still yours. On one occasion a generator was picked up from the Cherry Hill garage and nobody had signed it out (a system that was developed and implemented when R. Lawrence was still there due to similar problems of small equipment disappearing) and the generator went missing. You cannot remember who or when it was picked up and now an LTV (Loss, Theft and Vandalism) report had to be submitted. On another occasion a message board was somewhat misplaced. You had an open work order on this unit and parts were charged out to it, but no work was ever performed and the unit had left and again the work order was never suspended or closed. Furthermore, you stated in an e-mail that you

would like to see these units once a year. You cannot set or change policy regarding P.M. scheduling.

- Ultimately, you seem to be unorganized and this has an overall negative affect on your work performance.

Mr. Shaw testified that he provided the following development plan for the appellant (R-1 at DOT0021):

- You must follow directions as given, meeting the objectives set for you within the allotted timeframes.
- You need to be aware of the work being performed in your garage, and at vendors with approximate completion dates and you need to record and communicate this information in the fleet management system and with the end user of the equipment.
- You must schedule your work accordingly to its priority level.
- Information you provide must be accurate and correct and on time.
- You must review, respond, and act upon the information/reports/emails that are given to you within the specified timeframes.
- When you have an open work order in the fleet management system, that unit is your responsibility until such time as the work order is closed or suspended.
- You need to improve your communications skills, as your communication is not always clear and at other times you do not seem to understand the directions that you are given whether they are written or verbal. If you do not understand what you need to do, ask for clarification.
- You need to do follow ups in order to know equipment repair statuses, adjust anticipated completion dates, etc., on a routine basis.

In closing I believe you need to be much more organized as most (if not all) of these problems stem from your lack of organization. I also suggest that your assistant should be running the day-to-day operation of the garage while you will oversee it. Your assistant should be reporting things back to you. You need to handle the reports, paperwork, and more of the administrative duties of running the garage and not be distracted by things your assistant could and should be handling.

In addition to the probationary reviews, Mr. Shaw also cited two e-mails of concern. The first, dated August 30, 2012, (R-1 at DOT0012) dealt with mechanic training. In it Mr. Shaw writes to the appellant:

I was in Mt. Laurel earlier and Mr. Siciliano expressed his interest in attending the mechanics training next week. He told me that he mentioned it to you, but was unsure of any response. I'm not telling you who to send, but if you wanted to send him, feel free. If the follow up inspections are interfering, let me know and I'll have it rescheduled

The appellant responds to the email as follows:

If you want to get out of doing these inspections, you have my permission. Yet to decide who is going. (Have my own problems at the moment.)

Mr. Shaw responds:

Matt, as we discussed earlier today, one of the things you need to improve on is your communication skills. This is an example of poor communication. I have no idea of what you're trying to communicate to me

The appellant responds:

We must be from two different planets.

Mr. Shaw noted that he did not understand whether the appellant was being sarcastic or just had poor communication skills.

The second e-mail, dated September 11, 2012, (R-1 at DOT0011) dealt with the status of a trailer which was recorded in the fleet management system as being in service for a minor repair and major preventive maintenance. Mr. Shaw testified that he had asked the appellant about the status and was told the work was completed. When he asked the appellant again, presenting the status in the fleet management system, the appellant responded, "Sorry, Rich Grimsley told me that it was done. I'll double check what exactly that meant." Mr. Shaw stated that this response suggested that the appellant did not know what was going on with the vehicle and did not know what his people were doing.

Mr. Shaw testified that the appellant was next scheduled for a four-month review. He stated that the appellant's work was again unsatisfactory and that he requested that appellant's working test period be extended to six months. Mr. Shaw documented this on Form PR-84, Report on Progress of Probationer, dated October 22, 2012, (R-1 at DOT0008) and provided appellant with a Memorandum dated October 11, 2012, (R-1 at DOT0009-0010) which stated:

Matt, unfortunately I am unable to report you as satisfactory on your 4-month progress probation report. I am extending your probation to 6 months to allow you more time to develop and hopefully reach a satisfactory level of performance for a final (6-month) progress probation report. Another report will be done in one month (at 5 months) and the final at 6 months. You must reach a satisfactory rating by the end of 6 months.

The following are area's where you are deficient and need be corrected in order to receive a satisfactory rating;

- **On October 02, 2012, we met along with your assistant and I explained that you need to take the roll as the lead person in the garage. Your assistant should handle the day-to-day operations and you should be directing him. You should be handling the reports, PAR/PES, e-mails and paper/computer work**

in general. I also emphasized the importance of good communication between you and your assistant. However, that has yet to happen as it appears that your assistant continues to handle the majority of paper/computer work.

- While doing your interim PAR today you were unable to answer questions about vehicles/equipment at vendors and you replied that you didn't think you needed to know about these pieces for your review. The pieces I questioned you about have been long outstanding repairs and you should be able to answer questions about any outstanding jobs in the Cherry Hill garage and should have a good idea about any of the equipment down in the garage.

- While we met on October 02, you said you were busy preparing PAR reviews and you were unable to review the status reports due to this. When I set up the PAR review schedule, I informed everyone to bring their peoples' PAR's with them for my review. You did, but they were not complete as you had stated that you wanted me to review them before you met with your people, therefore, essentially they were not done. I understand that you may have wanted me to review them as you may be somewhat unfamiliar with doing them, but this is something that you should have communicated with me prior to the date that I was to sign off on them. You need to have better communication with me.

- Communication skills are poor; I have to repeat or clarify my directions in order to get what I need. Also, when asked questions, there are times that you provide wrong/inaccurate information. I inquired about the status of the loader mounted snow blower in Mt. Laurel yard to see if it had been moved to Pomona and you responded that you did not know. You responded that you will let me know, but you never got back to me. I believe that you forget. Write notes so you remember what you need to do.

- Maintaining accuracy in the fleet system remains a problem. I asked you about some old work orders showing equipment needing P.M.'s that have not been done or at least not according to Fleet. You responded that you believed them to be done, but one of your mechanics may not have reported it as

being done, which seems to be an ongoing problem that you have not effectively addressed. Also on the most recent status report I have found at least 40 work orders that appeared to be done, but not closed and old work orders have been closed and re-opened with recent dates, which may appear as falsifying records. These are a few examples of why you must review/correct your status reports on a weekly basis.

Mr. Shaw testified that he had provided the appellant with a development plan, (R-1 at DOT0010) as follows:

- You must follow directions as given, meeting the objectives set for you within the allotted timeframes.
- You need to be aware of the work being performed in your garage, and at vendors with approximate completion dates and you need to record and communicate this information in the fleet management system and with the end user of the equipment.
- You must schedule your work according to its priority level. (Snow Equipment, SSP vehicles, Electrical equipment, P.M.'s, and any work over 90 days old)
- Information you provide must be accurate and correct and on time.
- You must review, respond, and act upon the information/reports/emails that are given to you with the specified time frames.
- When you have an open work order in the fleet management system, that unit is your responsibility until such time as the work order is closed or suspended.
- You need to improve you communication skills, as your communication is not always clear and at other times you do not seem to understand the directions that you are given whether they are written or verbal. If you do not understand what you need to do, ask for clarification.

- You need to do follow ups in order to know equipment repair statutes, adjust anticipated completion dates, etc., on a routine basis.
- You need to anticipate and answer questions you may be asked regarding anything within your control. In other words, you need to ask the question, before I ask it, so you will have answer.

In closing, I believe you still need to be much more organized as most of these problems stem from lack of organization and communication. You need to handle the reports, paperwork, and more of the administrative duties of running the garage and not be distracted by things your assistant could and should be handling.

On October 24, 2012, the director of Human Resources for the respondent, Jeanne M. Victor, approved the request to extend the appellant's working test period for an additional two months, or until December 30, 2012. The Director informed the appellant by letter that if he did not pass his working test period as of December 30, 2012, he would be demoted to his prior-held title of assistant crew supervisor, mechanics. (R-1 at DOT0006).

Mr. Shaw next stated that the appellant was due for his five-month evaluation. It was required that the form be completed no later than November 23, 2012. Because the form was not completed on time, the appellant was given a satisfactory rating. (R-1 at DOT0005.) Mr. Shaw testified that had the form been filed timely, the appellant would have continued to receive an unsatisfactory rating, but because the respondent was late in filing the form, a satisfactory rating had to be given.

Mr. Shaw produced a November 29, 2012, email sent by the appellant to William Kingsland, who is the director of operations for the respondent, regarding his vehicle (R-1 at DOT0073). The email stated:

Bill, Your vehicle has a burn valve in cylinder #6. Since it is under warranty, I have no control over time frame. I don't believe it will be longer than two weeks. There was a witty comment about drag racing, but I lost my sense of humor

when I was made aware of your view on our pick ups. I actually thought we meant more than that to you. I see your point on how many calls we actually get. You don't realize that we are good for more than that. If you get a complaint about something that a single individual can handle, and can't get a hold of the proper people, we could take care of it. Whether it be moving a limb out of the road, or just pacifying the general public. To be in this position, we have to have a decent mentality. We could go to the scene, evaluate, pacify then report back to you until the proper people are available. Another aspect is the addition of the FLEET System to our jobs. In the private sector, most businesses have one or two people handling that. When it was first presented to us, they said eventually someone is going to be hired to perform this function, I'm still waiting. I no longer have that "Fringe Benefit" on my W-2. Giving us our trucks back would just be an easy way of saying Thank You.

Mr. Shaw testified that he believed that the appellant's personal comments were unprofessional.

Mr. Shaw also cited a Vehicle Accident Report dated December 10, 2012, (R-1 at DOT0075-76), where the appellant signed the form in the area reserved for the fleet manager liaison. Mr. Shaw noted that the appellant was not the fleet manager liaison and should not be signing as such.

Mr. Shaw testified that at the sixth month in appellant's working test period, he made the determination that appellant's work was unsatisfactory and that he should be returned to his previous permanent title of assistant crew manager, mechanics. He documented this in a memorandum dated December 11, 2012, (R-1 at DOT0003 and 0004), which stated:

Mr. Sailey has been running the Cherry Hill garage essentially for over a year, since R. Lawrence left for his promotion. He was acting crew supervisor, passed the test and was given the position as Crew Supervisor Mechanics. During this time Mr. Sailey has received a great deal of guidance and direction. His 4 month probation was extended to 6 months and he continues to have problems effectively running the Cherry Hill garage.

The following along with attached documentation shows that Mr. Sailey lacks the knowledge and ability required to successfully pass his probation period as Crew Supervisor Mechanics, in the Cherry Hill garage.

1. Mr. Sailey needs to have a better sense of urgency in order to protect the people he is responsible for when there is a potential problem. On 12/6/12 I went to the Cherry Hill garage to drop off R. Meng in order for him to get his vehicle from the garage. When walking into the garage, there was a strong smell of natural gas and I asked R. Meng if he smelled it, to which he replied that he did. I went into the garage and asked M. Sailey what was going on about the gas leak and he said that a few other people had said something to him about it, but he didn't smell anything. He then sent a mechanic out with a spray bottle to spray soapy water around the gas main to which no leak was found. I had to direct M. Sailey to call Buildings & Grounds supervisor S. Mooney and/or PSE&G to report a gas leak. Later in the day I followed up with M. Sailey and he stated that PSE&G was there and they did not find a leak. He said that PSE&G did tell him that the meter/diaphragm that is there will sometimes purge some gas into the air. In the end there was not a problem, but, I should not have to tell him to report a leak. He needs to be proactive in regards to the safety of his people and the facility.

2. M. Sailey has not maintained Fleet records accurately after being told to do so on several occasions including his previous probation report meetings;

- Work orders are closed when the work is not done and then reopened. When questioned, he has stated that the job was done, but then more problems occur. This indicates that work is leaving that was not properly done and/or not completed in the first place.

- Mr. Sailey has been directed to complete all needed repairs to the vehicle/equipment prior to it leaving the garage.

- There are work orders that lack notes to explain what was or needs to be done and then there are other work orders that are marked as done and closed when there is no labor or parts charged to it. He has stated that sometimes his people fix things without charging time on the work order. He was directed that this practice is unacceptable and he needed to correct it. This problem continues.

3. Inaccurate reports are submitted. There were errors on a recent overtime report which I was copied on. I directed Al Stell and Matt Sailey to correct the errors. They were unable to find the errors. I had to tell them that where the errors were, which I found to be obvious. The overtime that was reported as snow work was actually for Hurricane Sandy.

- Mr. Sailey has been directed that he needs to oversee the operation of the garage and to handle the majority of the paperwork and his assistant should handle the day-to-day operation of the garage.

4. Mr. Sailey has been directed to send e-mails out to his respective crews weekly to update the crews as to the status of their vehicles/equipment that are down at the garage. He is to base his report on the weekly regional status report. These are not and/or have not been done regularly and when he does them, they are sarcastic. The caption in his e-mails have read "For what it's worth", then after I let him know I did not find that acceptable, he changed to "Highly important material within" or "The wait is over" or "Do not delete". I suggested the phrase "See attached equipment status update" to which he replied that he did not wish to be redundant. These phrases indicate that his report has no validation and/or credit to it. Mr. Sailey has been directed on several occasions and at each of his probationary report meetings as well as his PAR (2-month, 4-month, 5-month) as well as his PAR that he needs to develop his communication skills and to keep his communication professional.

5. Mr. Sailey has taken time off without authorization. He had sent an e-mail to me on 11/21/12 stating that "There is a good possibility I will be off on Friday." I was off that day and had no way of knowing if he was at work or not. I followed up with him on the phone the following week and he said that he was off that day. I then followed up with an e-mail stating that what he had sent I did not consider a request for time off. That in the future if he wanted time off, he needs to request it and when approved he can take off. I also added that if he requested time off and did not use it, he would not be charged benefit time, but at least he had it approved. He responded "Rick, The time used was actually 6AL hours and 2XP like the E-mail states. I was under the impression that only multiple days needed approval and single days, as long as Al is here, were ok. That has occurred many times in the past, thus establishing Status-Quo". I have no idea how many times this has happened in the past or where he would get an idea like that. He obviously does not know policy regarding the use of benefit time. Also, on 10/3/12, I had responded to a different request of his stating that "I cannot approve a "maybe" request."

6. Mr. Sailey is unable to effectively schedule work, P.M.'s, priorities and address old work that has never been addressed. Some of the work is several months old. Mr. Sailey has been directed on several occasions and at each of his probationary report meetings (2-month, 4-month, and 5-month) as well as his PAR that he needs to improve his organizational skills.

To summarize it, Mr. Sailey lacks the communication and organizational skills needed to get his assigned tasks done on time. He also lacks knowledge of policy & procedure and has little sense of urgency. He fails to follow-up on his assignments and he is rigid and inflexible to change.

On January 4, 2013, Michele A. Shapiro, manager of human resources for the respondent, notified the appellant that his job performance during his probationary period (working test) in the title of crew supervisor, mechanics, was unsatisfactory and that his appointment had been discontinued as of the close of business on December 30, 2012, and he was returned to his permanent title of assistant crew supervisor, mechanics, effective December 31, 2012. (R-1 at DOT0001.)

On cross-examination, Mr. Shaw stated that there were other areas in which the appellant was "more than satisfactory," that he was a good mechanic, and that he was personable. He agreed that the appellant had a commendable rating on his PAR evaluation, but noted that the appellant's rating was at the low end of the category and that he failed in the areas of timeliness, customer service, flexibility and oral communication.

Scott Oplinger

Mr. Oplinger is the manager of maintenance for Region South. He is responsible for twenty maintenance crews with ten employees in each crew, three garages, and the general maintenance of the State roads. He supervises Mr. Shaw. He has worked for over twenty-five years for the Department of Transportation. He has a master's degree and a professional engineer's license, and he is a public manager.

Mr. Oplinger stated that he does not have direct supervision over the appellant, but dealt with him as a customer with respect to his State vehicle and did talk to the appellant when the appellant didn't want to talk to Mr. Shaw. With respect to appellant's working test period, Mr. Oplinger stated that he was second in the line of review and Mr. Shaw was the appellant's direct supervisor. Mr. Oplinger signed off on Mr. Shaw's probationary reviews of the appellant.

Mr. Oplinger stated that the appellant was given every chance to succeed and remain in the crew supervisor, mechanic, position. A development plan was initiated for the appellant, and his working test period was extended, and Mr. Oplinger stated that these were efforts to ensure that the appellant succeeded. Mr. Oplinger said that he believed that the appellant lacked the skills to keep things moving and that the appellant was "unorganized."

Mr. Oplinger stated that he found appellant's email giving the equipment report, entitled "for what it's worth," and the succeeding emails entitled "highly important

material within," "the wait is over" and "do not delete," to be unprofessional and unacceptable. He also found unacceptable the email regarding appellant's time off, as well as appellant's response to Mr. Shaw that his way of requesting leave time was in conformance with the "status quo"; he said that was not the proper way to take a day off.

Mr. Oplinger stated that the appellant had problems with Mr. Shaw because Mr. Shaw did everything "by the books." He identified an email chain dated December 5, 2012, (R-1 at DOT0088) regarding the appellant taking time off. In it, Mr. Oplinger responds to the appellant's use of the term "status quo" as follows:

Scott Oplinger:

Matt, for scheduling purposes as a crew supervisor, if you know in advance you are possibility taking off, request it to Rich. It is much better communication and makes Rich's life easier. thanks scott.

Matthew Sailey:

Will do. Although he did establish "Status Quo" by never saying anything for the multiple single days I've taken off in the past, which is legally binding. You know Rick, if he has a problem with something, he lets me know. Now that he is "head hunting" it's a different story. Of course, I would never take off leaving the garage unsupervised. I'm with you Scott, but I am being pushed to my limits.

Scott Oplinger:

Matt, head hunting and pushed to your limits are not anywhere close to what I said in my email. I asked that as a crew supervisor, you give adequate communication to your supervisor. Don't say I might do something, leaving the communication hanging. say I would like to request off. That is effective communication, and what I need from you.

Matthew Sailey:

Scott, I'm sorry if you thought I was referring to you. Like I said, I'm on board with you. I have a job to do and that's what I am here for.

Scott Oplinger:

Matt, I am in your corner and really want you to succeed. If I could add 1 comment that you really need to address. Please Communicate as thoroughly as possible and in a professional manner as is expected of supervisors. The added comments, the sarcasm, the this is the way we always did it, the vague responses, the defensive reactions, all add up poor communication. When you communicate, please think of this first, and it will go a long way. Thanks Scott.

On cross-examination, Mr. Oplinger was asked if the appellant received any training for his new position. Mr. Oplinger responded that he knew that training was available but did not know if the appellant received training. He stated that there was no professional education requirement for the job. He agreed that the appellant received a "commendable" on his PARs.

For Appellant

Phillip Kern

Mr. Kern is a mechanic employed by the respondent. He has worked for the DOT for twenty years at the Cherry Hill garage. He has known Mr. Shaw for about ten years and generally has a good opinion of him. He testified that he recalled a conversation he, Mr. Shaw, and another worker had on September 20, 2012, before lunch, when Mr. Shaw stated that the appellant was "not going to make it as the supervisor" in the Cherry Hill garage. Mr. Kern testified that he did not ask why Mr. Shaw thought that the appellant was not going to be appointed. Mr. Kern also stated that he believed things ran well when the appellant was in charge of the Cherry

Hill garage and that things were not running as well after the appellant was demoted and moved to the Vineland garage.

Matthew Sailey

The appellant testified that he had worked for the respondent for about twenty-six years as a road mechanic, a mechanic, an assistant crew supervisor and a crew supervisor. He never had an unsatisfactory evaluation. He stated that his working test period ran from June 30, 2012, to December 30, 2012. He felt that his relationship with Mr. Shaw and Mr. Oplinger was a positive one.

With respect to the Vehicle Accident Report (R-1 at DOT0075-0076), the appellant testified that he was told to sign the form by someone in Trenton; he believes this person's name was Dawn.

The appellant stated that he believes that Mr. Shaw was "after" him. He stated that Cherry Hill was the busiest garage, and not only did he have to run it, he had to train his new assistant crew supervisor, Mr. Stell. The appellant stated that he does not believe he was treated fairly and that he was scrutinized harder than any of the other crew supervisors. He stated that it was hard to keep up with all the reports, and that the reports are never 100 percent accurate because they constantly changed. He stated that he believed that the odor of natural gas that was noticed on December 6, 2012, was because of tanks being filled up rather than a gas leak.

Appellant produced two Performance Evaluation System (PES) forms, one for the rating cycle of April 1, 2010, to March 31, 2011, (P-1) and another for the rating cycle of April 1, 2009, to March 31, 2010, (P-2). Each evaluation was completed by Richard Lawrence, who was the appellant's supervisor, and covered the time period that the appellant was serving as assistant crew supervisor, mechanics. In each case the appellant was given a satisfactory rating. Appellant also produced an email dated April 20, 2012, from Jeannine Savage to Mr. Shaw and Mr. Oplinger (P-3) which stated:

As a side note, I would like to mention that Matt did an excellent job on his PES ratings. He took the time to both encourage the employees, point out their strengths, and suggest constructive ways to improve, without using any of the stock statements I tend to see. His comments were frank but appropriate, and were some of the best I've seen, including supervisors that have been completing PES for many years.

Please take into consideration when completing his PES.

Great job Matt.

FINDINGS OF FACT

Based on the testimony and the reports and statements submitted, I **FIND** that the following occurred:

1. Appellant was serving in the title of assistant crew supervisor, mechanics, when he assumed the title of crew supervisor, mechanics, in an acting capacity on October 2, 2011. His supervisor at the time, R. Lawrence, was promoted to another position in Trenton.
2. The appellant took the promotional examination for the crew supervisor, mechanics, title, and began his working test period on June 30, 2012.
3. As required during a working test period, appellant was evaluated by his supervisor, Richard Shaw, at the end of two months and four months. Both evaluations rated appellant's performance as unsatisfactory. In each evaluation appellant was given a development plan.
4. On October 24, 2012, respondent's request to extend appellant's working test period for an additional two months was approved. Appellant's working test period was extended through December 30, 2012.

5. Appellant's evaluation at the end of five months rated his performance as satisfactory. However, this was because respondent did not submit the form by November 23, 2012, as required by the Civil Service Commission, and thus had to give a rating of satisfactory.

6. Appellant's evaluation at the end of six months rated his performance as unsatisfactory. His supervisor indicated that the appellant "lacks the communication and organizational skills needed to get his assigned tasks done on time. He also lacks knowledge of policy & procedure and has little sense of urgency. He fails to follow-up on his assignments and he is rigid and inflexible to change." (R-1 at DOT0004.)

7. Appellant was returned to his permanent title of assistant crew supervisor, mechanics, effective December 31, 2012.

LEGAL DISCUSSION

The purpose of the probationary or working test period under the civil service system is to enable the appointing authority to evaluate an employee's work performance and conduct in order to determine whether the employee merits permanent status. N.J.A.C. 4A:1-1.3; N.J.A.C. 4A:4-5.1. A basic condition of permanent or absolute appointment to any civil service position is a favorable opinion of the employee's fitness as formed by the appointing authority during the working test period. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86 (App. Div. 1977).

The working test period is not a period during which a probationary employee is to be given further training to qualify himself or herself for a position; rather, it is part of the testing process, given in addition to the examination conducted by the Civil Service Commission. During that period, the employee must demonstrate that he or she is competent to discharge the duties of the position. Briggs v. N.J. Dep't of Civil Serv., 64 N.J. Super. 351, 355 (App. Div. 1960).

In Briggs, the court stated that the only issue in a case where the appointing authority has declined to make a permanent appointment at the end of the probationary period is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position. Id. at 356. Under N.J.A.C. 4A:2-4.3(b), the employee has the burden of establishing by a preponderance of the competent and credible evidence that the action to release him at the end of his working test period was in bad faith. If bad faith is found, the employee is entitled to a new full or shortened working test period and other appropriate remedies. N.J.A.C. 4A:2-4.3(c).

There are no reported decisions involving termination at the end of a working test period where the courts have specifically defined "good faith." In Smith v. Whitman, 39 N.J. 397, 405 (1963), a non-civil service case, the Court defined "good faith" as meaning honesty of purpose and integrity of conduct with respect to a given subject. The court in Lustrelon, Inc. v. Prutscher, 178 N.J. Super. 128, 144 (App. Div. 1981) (citations omitted), noted that "bad faith" is the "antithesis" of good faith, and "must be 'a thing done when it is in fact done dishonestly'"; "[i]t 'contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will.'"

There appears to be no standard for determining whether an employee's termination at the end of a working test period was based on opinions of the appointing authority formed in good or bad faith. However, if the decision to terminate is based upon actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the employee will be able to satisfactorily and efficiently perform those duties if the appointment becomes permanent, it must be considered to have been made in good faith. If, on the other hand, the decision to terminate is based not upon actual observations of performance, or if it is based upon dishonest motives, or is based on bias, prejudice, or self-interest, or is made with ill will toward the employee or because of some furtive design, it must be considered to have been made in bad faith. See In re Villecca, CSV 2978-06, Initial Decision (April 18, 2008), adopted, MSB (June 25, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>.

I am satisfied from the record in the within matter that appellant's working test period was conducted in compliance with the civil service rules and regulations. Appellant has not established by a preponderance of the competent and credible evidence that there was any bad faith involved in the formulating of respondent's opinion that his services were unsatisfactory. Appellant was given a development plan at each of his evaluations and the opportunity to improve. The appointing authority even agreed to extend the duration of the working test period so as to afford appellant all possible opportunities to succeed. Appellant argued that he was not given proper training. However, as previously stated, the working test is not a period during which a probationer is to be given further training to qualify him for a position, but is rather part of the testing process. Appellant argues that the conversation between Mr. Shaw and Mr. Kern in which Mr. Shaw stated that the appellant was "not going to make it" as crew supervisor illustrated that Mr. Shaw was acting in bad faith. This is not evidence of bad faith. Moreover, the appellant's responses to Mr. Shaw in a number of emails exchanged between the two in which his comments could be construed to be sarcastic and even inappropriate certainly are an indication that the determination that appellant should be returned to his previously held title was appropriate.

Whether respondent's judgment concerning appellant's performance is totally accurate is not the issue for determination herein. Rather, the only determination to be made is whether appellant has shown by a preponderance of the competent and credible evidence that respondent's determination returning him to his previous title at the end of the working test period was made in bad faith. I see no evidence of bad faith in the instant matter and, as a result, I **CONCLUDE** that respondent's determination releasing appellant at the end of his working test period was warranted and appropriate under the circumstances.

ORDER

Based on the foregoing, I **CONCLUDE** that the appellant failed to show by a preponderance of the competent and credible evidence that his return to his previously held title at the end of the working test period was motivated by bad faith and that

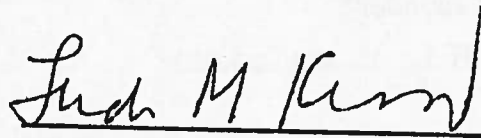
respondent's action was appropriate and warranted. Accordingly, I hereby ORDER that appellant's appeal be **DISMISSED**.

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.

March 7, 2014
DATE


LINDA M. KASSEKERT, ALJ

Date Received at Agency:

3/7/14

Date Mailed to Parties:

3/10/14

/lam

LIST OF WITNESSES

For Appellant:

**Phillip Kern
Matthew Sailey**

For Respondent:

**Richard J. Shaw
Scott Oplinger**

LIST OF EXHIBITS

For Appellant:

- P-1 Performance Evaluation System form for Matthew Sailey, Rating Cycle
4/1/10–3/31/11**
- P-2 Performance Evaluation System form for Matthew Sailey, Rating Cycle
4/1/09–3/31/10**
- P-3 Email, dated April 20, 2012**

For Respondent:

- R-1 Hearing packet**