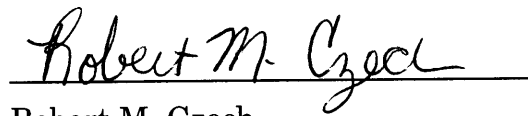


Re: Aldo Guevara

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
JUNE 17, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
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 09238-14

AGENCY DKT. NO. 2014-3265

**IN THE MATTER OF ALDO GUEVARA,
UNION CITY DEPARTMENT OF
PUBLIC SAFETY.**

Thomas McKinney, Esq., for appellant Aldo Guevara (Castronovo & McKinney,
Attorneys)

Kenneth B. Goodman, Esq., for respondent Union City Department of Public
Safety (O'Toole Fernandez Weiner Van Lieu, Attorneys)

Record Closed: May 20, 2015

Decided: June 2, 2015

BEFORE **JESSE H. STRAUSS, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Union City Department of Public Safety (Department) terminated the employment of Police Officer Aldo Guevara at the conclusion of his twelve-month working test period because he completed only two months of his working test period as a consequence of being disarmed and placed on modified duty because of a domestic violence charge.

Following a timely appeal, the Division of Appeals and Regulatory Affairs of the Civil Service Commission, transmitted the matter to the Office of Administrative Law (OAL). The OAL filed the matter as a contested case on July 2, 2014, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I delayed the matter at the request of Guevara as he sought to have his weapon restored. I heard the matter on May 6, 2014, and closed the record on May 20, 2015, upon the receipt of a brief from each party.

FACTUAL DISCUSSION

The essential facts are not in his dispute. I **FIND** the following **FACTS** in this matter.

Guevara participated in the Bergen County Police Training Academy from January 18, 2013, until his satisfactory completion of the Basic Course for Police Officers on June 13, 2013. (R-1.) He then began a one-year working test period (WTP) commencing on June 15, 2013. As with other recruits, the Department assigned Guevara to the 4:00 p.m. to midnight tour in the patrol division. Recruits initially accompany a field training officer in a patrol car for eighteen to twenty weeks, whereafter they patrol alone. They are trained to respond to calls for service, perform investigations, and execute arrests.

In order to perform his duties as a police officer, the Department required Guevara to purchase and carry a service weapon. Guevara purchased a Glock Model 19 weapon and secured a permit to carry it.

On August 12, 2013, less than two months into his working test period, Guevara was arrested for simple assault and endangering the welfare of a juvenile. More specifically, the charge was related to an alleged domestic violence incident where he allegedly struck the victim about the face and pushed her to the ground while she was holding a child. A Domestic Violence Civil Complaint and Temporary Restraining Order (TRO) also issued on August 12, 2013. It reflects that Guevara's duty weapon was

seized at that time. The TRO provided as follows: "Prohibition Against Possession of Weapons: You are prohibited from possessing any and all firearms or other weapons and must immediately surrender these firearms, weapons, permit(s) to carry . . . to the officer serving this Court Order." (R-2.)

There is in effect an Attorney General Guideline requiring the seizure of weapons from law enforcement officers involved in domestic violence incidents. In accordance with the Attorney General Guidelines (R-7), the Department confiscated Guevara's weapon and delivered it to the Hudson County Prosecutor's Office.

After the confiscation of Guevara's service weapon, Police Chief Richard Molinari placed Guevara on modified duty so that he could continue to receive a pay check while the charges were pending and his weapon remained unavailable. Although there is nothing in the Attorney General Guideline prohibiting an unarmed officer from going out in the field, Molinari emphatically would never allow Guevara or any unarmed officer to respond to service calls where his life, the life of fellow officers, or the safety of the public could be at risk. With the modified-duty assignment, because of the weapon ban, Guevara could not perform the typical duties of a police officer. Moreover, the Department's Rules and Regulations require the carrying of a loaded weapon while on duty.¹

The modified-duty assignment was to perform the duties of a dispatcher in the Department's Communication Center. Guevara would receive 911 calls and dispatch officers. This is typically a civilian job under the title Telecommunications Operator. Although Guevara never requested this assignment, he never refused it. At all times Guevara properly performed the duties assigned to him in the Communication Center,

¹ Since Guevara raised for the first time at the hearing the issue of whether a police officer is required to carry a weapon, I am allowing the record to be supplemented to include the Union City Police Department's Rules and Regulations which provide in relevant part that an officer, while on duty and in uniform or in civilian clothes, shall always carry a firearm and ammunition. (See Certif. of Counsel, para. 3:3.5 E and 3.3.6 B.) Additionally, paragraph 3:9.3 provides that police officers shall carry their weapons fully loaded and in a serviceable, operating condition so that they may be prepared when called upon to carry out a police duty, service, function, or responsibility.

but did not perform the normal duties of a police officer of going out on patrols, performing investigations, and making arrests.

As a result of Chief Molinari's inquiries as to the status of Guevara's weapon, Assistant Prosecutor Peter H. Stoma informed the Chief on January 8, 2015, that Guevara's duty weapon remained in the possession of his office pending a re-arming decision. (R-4.)

During the time that Guevara was on modified duty, Lt. Anthony Facchini met with him for counseling sessions in January, February, March, April, and May 2014 to determine the status of his situation. Guevara informed Facchini on each occasion until May 12, 2014, that his criminal charges were still pending. On each occasion Facchini reminded Guevara that he had only completed approximately two months of his working test period; that he could not be evaluated as a police officer if he remained unarmed due to his legal issues; and that the lack of completion could impact his future employment with the Department. (R-3.) On May 23, Guevara told Facchini that the criminal charges had been dropped. Facchini repeated the problem of the Department having had only two months to evaluate him as a police officer, a problem that would continue if Guevara remained unarmed.

The criminal complaint against Guevara remained pending until May 9, 2014, when it was dismissed. (A-1.) However, Guevara remained on modified duty until the end of his working test period on June 15, 2014, because the Prosecutor's Office never restored his weapon until after the conclusion of the working test period. In accordance with the above Attorney General Guideline, the recommendation or determination whether the confiscated weapon in a domestic violence situation should be returned rests with the County Prosecutor and not the victim or the law enforcement agency where the officer is employed. (R-7, section III-F.)

On June 9, 2014, Chief Molinari notified Guevara of his termination for failure to satisfactorily complete his working test period. The reason given was that he was only

able to complete approximately two months of his working test period as a result of his arrest, his being disarmed, and his being placed on modified duty.

ANALYSIS AND LEGAL CONCLUSIONS

The Civil Service Act (Act), N.J.S.A. 11A:1 to 9, reflects the public policy of the State of New Jersey to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance. N.J.S.A. 11A:1-2(c). In furtherance of this public policy, the Act and the regulations of the Civil Service Commission place an obligation on the appointing authority to monitor a probationary employee during a working test period as part of the examination process. It is designed to permit an appointing authority to determine whether the employee can satisfactorily perform the duties of the title. N.J.S.A. 11A:4-15; N.J.A.C. 4A:4-5.1(a). The purpose of a working test period is to furnish an additional test of efficiency. Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954). As found in Dodd v. Van Riper, 135 N.J.L. 167, 171 (E. & A. 1947), "a basic condition of permanent 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." Termination at the end of the working test period may occur for unsatisfactory performance. N.J.S.A. 11A:2-6(a)(4); N.J.A.C. 4A:2-4 and 4A:4-5.4(a).

The issue present here is whether the Department acted in bad faith when it terminated Guevara at the end of his working test period. Police officers serve a twelve-month probationary period. N.J.A.C. 4A:4-5.2(b)(2). The Department fulfilled its obligation to prepare periodic progress reports for Guevara during his probationary period, unfortunately most of which was while he was compelled to perform modified duty.

An employee who seeks to challenge his termination at the end of a working test period faces a heavy burden of proof. He must establish that "the action was in bad faith." N.J.A.C. 4A:2-4.3(b); Dodd, supra, 135 N.J.L. at 172. In Briggs v. N.J. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), the court stated

that the only issue in such a case is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position.

Although the courts have not defined “good faith” or “bad faith” specifically in the context of a working test period case, “good faith” has generally been defined as meaning honesty of purpose and integrity of conduct with respect to a given subject. Smith v. Whitman, 39 N.J. 397, 405 (1963). Hence, if the decision to terminate an employee at the end of the working test period lacks integrity of conduct, then the decision must fall as having been rendered in bad faith. “Bad faith” is the antithesis of good faith and must be a thing done dishonestly, and contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. Schopf v. Dep’t of Labor, 96 N.J.A.R.2d (CSV) 853, 857. To withstand a challenge, it is only required that the employer’s opinion be based on actual observations and that those observations form a rational basis for the opinion. In re Villecca, CSV 2978-06, Initial Decision (April 18, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>.

I **CONCLUDE** that Guevara has not met his burden of proving that the action taken by the Department was in bad faith. Notwithstanding that the domestic violence-related criminal charges were ultimately dismissed without an adjudication of guilt or innocence, by their very filing and pendency the Department was compelled by the Attorney General Guidelines to divest Guevara of his service weapon. Although Guevara argues that there was nothing in the Guidelines that compelled Chief Molinari to prevent a weaponless officer from performing the regular duties of that position, I agree with the Chief that it would have been improvident for safety reasons regarding Guevara, his colleagues, and the public to allow him to respond to service calls without the ability to use a service weapon if necessary. Moreover, Guevara would have violated the Department’s Rules and Regulations had he attempted to conduct police business without a weapon. Such a position by the Chief hardly demonstrates bad faith. The Chief’s decision to allow Guevara to perform modified duty so that he could continue to receive a paycheck rather than suspend him because of an inability to perform his regular duties hardly demonstrates bad faith. It is unfortunate that Guevara

was unable to secure the dismissal of the criminal charges more expeditiously and consequently have the Prosecutor's Office return his weapon to him before the expiration of his working test period. However, the timing and the decisions were not within the control of the Department. The duties of a police officer are complex. Because of the heavy responsibilities placed upon police officers, it is important that an appointing authority have an adequate opportunity to evaluate a probationary employee's mental, emotional and physical acuity, demeanor, and skill level. Indeed, the Civil Service Commission has recognized the need for an enhanced evaluation period for a probationary law enforcement officer by requiring a twelve-month working test period as opposed to the three- or four-month period for civilians. See N.J.A.C. 4A:4-5.2. This opportunity to observe Guevara performing his regular duties existed for only a very small portion of the working test period through no fault of the Department. Under the circumstances, there is no bad faith shown by the Department's exercise of its discretion not to extend Guevara's WTP, particularly when it could not control when his weapon would be returned.

ORDER

It is hereby **ORDERED** that the determination by the Department to terminate Aldo Guevara at the conclusion of his working test period is **AFFIRMED**.

It is further **ORDERED** that the appeal of Aldo Guevara 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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 2015
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

Heera Pruthi
CH. DIRECTOR AND JUDGE
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

JUN - 4 2015

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APPENDIX

LIST OF WITNESSES

For Appellant:

Aldo Guevara

For Respondent:

Anthony Facchini

Richard Molinari

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Administrative Dismissal of Guevara Criminal Charges, May 10, 2014

For Respondent:

R-1 Guevara Diploma from Bergen County Police Training Academy, June 13, 2013

R-2 Temporary Restraining Order and Criminal Complaints, August 12, 2013

R-3 Memos, Facchini to Molinari re: Guevara Counseling Sessions

R-4 Letter, Stoma to Molinari, January 8, 2015

R-5 Notice of Termination to Guevara, June 9, 2014

R-6 Memo, Facchini to Molinari, June 9, 2014

R-7 Attorney General Guideline, September 19, 2000

Certification of Kenneth B. Goodman, May 19, 2015