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**STATE OF NEW JERSEY**

In the Matter of Terrance Ray  
New Jersey State Prison,  
Department of Corrections  
  
CSC DKT. NO. 2014-883  
OAL DKT. NO. CSV 15310-13

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

**ISSUED: AUGUST 24, 2015      BW**

The appeal of Terrance Ray, Correction Sergeant, New Jersey State Prison, return to his formerly held permanent title at the end of the working test period, effective September 4, 2013, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on July 10, 2015. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 19, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

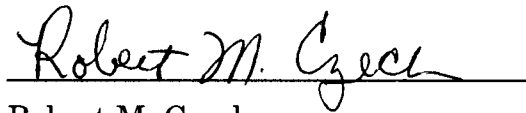
**ORDER**

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 Terrance Ray.

Re: Terrance Ray

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  
AUGUST 19, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a solid 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 15310-13

AGENCY DKT. NO. 2014-883

**IN THE MATTER OF TERRANCE RAY,  
NEW JERSEY STATE PRISON,  
DEPARTMENT OF CORRECTIONS.**

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**Kevin D. Jarvis, Esq.**, for appellant Terrance Ray (O'Brien, Belland and Bushinsky, LLC, attorneys)

**Kathleen Asher**, Legal Specialist, for respondent New Jersey State Prison and Kenneth Green pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 28, 2014

Decided: July 10, 2015

BEFORE **ELIA A. PELIOS**, ALJ:

**STATEMENT OF THE CASE**

Terrance Ray (appellant) contends that the New Jersey State Prison and Department of Corrections (respondent) acted in bad faith when it determined that he had not successfully completed his working test period (WTP), and returned him to his previously held position. Appellant seeks reinstatement and another WTP. Respondent denies that it acted improperly and contends that the appellant's case must be dismissed.

## **PROCEDURAL HISTORY**

On September 3, 2013 the respondent notified the appellant that he had not satisfactorily completed his WTP in the position of Correction Lieutenant, and returned him to his previously held position of Correction Sergeant. On September 19, 2013 appellant requested a hearing. On October 24, 2013 the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL) where it was filed as a contested case. The matter was scheduled to be heard on July 16, 2014. The matter was heard on that date and the record was left open to permit the parties to submit post-hearing briefs. The record was closed on August 28, 2014. Orders of extension were entered to extend the time for filing the initial decision in this matter.

## **STATEMENT OF FACTS**

The state presented the testimony of Major Salvatore D'Amico ("Major" or "D'Amico"). Maj. D'Amico is employed by New Jersey State Prison. He has served as the facility's Administrative Major since November of 2012. The Major is responsible for discipline, overtime and paperwork for New Jersey State Prison. It is a maximum-security facility. The Major has had twenty years' experience with the Department of Corrections and he is familiar with Sgt. Ray (appellant) who was assigned to the facility.

On July 19, 2013 the Major was on duty from 7:00 a.m. to 3:30 p.m. He entered the facility to have lunch in the officer's dining room in the West Compound. Appellant was assigned as a Lieutenant for the West Compound. After D'Amico finished his meal he came out of the dining room and was delayed by a mass movement of inmates who were walking through a rotunda. The Major waited until they passed and then he walked through the rotunda down the West Compound ramp.

As he came down the ramp he looked into the supervisor's office. There he saw appellant sitting in a chair with his head against the wall and his mouth wide open. His uniform cap and his glasses were on the desk. The Major was about fifteen feet away (he measured the distance on the tiles after the fact). The Major continued to stare at appellant in disbelief. He noticed that appellant's head bobbed forward with his eyes

still closed. He nodded forward a second time about two minutes after the Major had begun watching him. Appellant woke-up around 1:45 p.m. as the shift change was occurring at 2:00 p.m. A lot of staff was gathering near the exit to the compound for the shift change. The Major heard banging on the wall from assembled workers which his beliefs served to wake-up appellant. The Major submitted a report immediately thereafter.

D'Amico does not recall if he knew at the time that appellant was in a working test period. He learned this as it came up in an investigation. However this was not the first incident between the D'Amico and appellant.

The Major had his report submitted by 2:25 p.m. on the date of the incident. Since he was the sole witness to the matter he was not able to conduct the investigation. It was assigned to another Major.

The Major also recounted an earlier event on May 7, 2013. This was appellant's second day of his working test period. Appellant was joined by three new sergeants in D'Amico's office as it was the Major's custom to host a meet and greet. During that session appellant closed his eyes and dropped his head during the Major's speech. D'Amico stopped the speech and stared directly at appellant as did the other three sergeants. Appellant woke and D'Amico asked him if he was okay and if he was boring appellant. Appellant said that he was processing what D'Amico had just said. D'Amico filed a report and asked the three sergeants who were also in the meeting to do the same. He recommended an investigation which he was thereafter was assigned to conduct.

As a result of his investigation the Major learned that the appellant had once earlier been disciplined after an incident that started as a sleeping on duty charge which was later amended to a charge of neglect of duty with a five working day suspension imposed as penalty. Given that the May 7, 2013 incident was not the first similar incident and that it was appellant's second day on a new job the Major was very disturbed. The Major sought a five day suspension for the appellant at that time but

after a frank discussion with the appellant and his union representative D'Amico was convinced that this would not happen again and agreed to amend the penalty to a letter of counseling. He decided to give the benefit of the doubt to appellant and to give him a second chance in the new job.

The letter of counseling (P-2) was intentionally strongly worded as D'Amico felt it was important to note that he was amending the originally sought discipline. After the incident D'Amico felt it was going to be appropriate to extend the appellant's probationary period. The first progress report is due after two months and a second progress report two months thereafter. Human resources informed D'Amico that it was not appropriate to extend the probationary period until after the second progress report. Therefore appellant received a passing first progress report with the notation of the May 7, 2013 charge. After the July 19, 2013 incident D'Amico was no longer interested in extending the probation period and intended instead to fail appellant.

D'Amico also tried to pursue a thirty day suspension against appellant. He did not draft the charges as a different major was assigned that task. The charges were not brought within forty-five days and therefore had to be dismissed. While this would not affect the ability to extend or fail the probation the disciplinary charges were dropped. Appellant was demoted to Sergeant in September.

On September 4, 2013 D'Amico caused to be sent to appellant by certified mail a notice of demotion which is implemented pursuant to an unsatisfactory performance. Both incidents were stated as reasons for demotion. D'Amico was not aware of any medical condition ever brought-up so no consideration was given on that score.

Appellant is now the special needs Sergeant for the facility. D'Amico and appellant work the same schedule and see each other at work. The Major has no objection to appellant's performance in his current role. He has in fact been recognized for his performance and received a letter from the mental health team that he is a pleasure to work with and is well regarded by his coworkers. D'Amico sees appellant as gifted in de-escalating incidents and considers appellant to be a big improvement over the

previous holder of that position.

On cross-examination D'Amico did note that it did not cross his mind to bring over other witnesses to observe the incident. He spoke to the Sergeant who had been overseeing the employees gathered outside but the Sergeant was not able to tell him why there was banging on the wall. The Sergeant was not aware of any banging but D'Amico did hear it. He believed that the workers had no idea what he was doing or what he was staring at based on their line of sight. He acknowledged that he never spoke with appellant about the incident, indicating that they made eye contact and that his look said it all. D'Amico received no apology or explanation from appellant nor did he ever receive an apology for the first incident. Appellant had the opportunity but never did submit a rebuttal to the initial letter of counseling.

D'Amico issued and signed first progress report however noted that it was not signed by the appellant. D'Amico had no recollection of speaking with appellant. He stated that the first incident did not make him angry but that he was concerned. However when he found out that there was nothing wrong with appellant he did feel disrespected because the appellant fell asleep in front of other employees.

Appellant testified on his own behalf. He has been an employee of the Department of Corrections for twenty-four years. May 4, 2013 was his first day on the job at the New Jersey State Prison. He was reassigned there after being promoted to Lieutenant.

He does recall the May 7, 2013 incident. Maj. D'Amico did give him the letter of counseling in that matter and told him that it would interfere with his probationary period. Appellant never acknowledged that his head nodded during the meet-and-greet meeting. He did acknowledge receiving his first probationary report - which he signed - indicating satisfactory progress. He has no recollection of ever seeing Maj. D'Amico staring at him on July 19, 2013. The Major never spoke to him about any incidents he was never advised of any jeopardy to his probationary period or that it could be extended. Appellant started a weeklong vacation on August 30, 2013. Before he left he had received no indication that there was any potential that he would fail his working

test period.

On the day before he was to return to work he got a call at home from Maj. D'Amico and was told that he had been demoted and to report the next day in a Sergeant's uniform. That phone call, on September 6, 2013, was the first indication he had that a problem existed. He received certified mail documents on September 7, 2013. Those documents included the charges. He has never received the September 3, 2013 Notice of Progress (R-1) and he has no memory of any incident of looking-up and seeing the Major shaking his head at him. He never received any indication that there was a problem until the investigation was conducted. He did recall that he found Maj. D'Amico's demeanor on May 7, 2013 to be odd. The Major told him that he had checked-up on petitioner with previous employers prior to his starting work at the facility and that he had heard nothing good about the appellant.

### **FINDINGS OF FACT**

At issue are the performance and evaluations of the appellant. D'Amico testified as to appellant's poor performance, and appellant testified to the contrary. Therefore, the credibility of the witnesses must be determined.

When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). The term has been defined as testimony, which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see, also, Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does



not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950).

The testimony of each witness was consistent and there was nothing inherently unbelievable about any testimony provided. Each witness answered questions directly and calmly. D'Amico repeatedly testified as to appellant's thriving in his current position. Appellant's testimony was sincere and he clearly believed he was doing a good job. However, his statement that he was unaware of any issues with his performance is not credible given his acknowledgement of the letter of counseling and his failure to rebut it, as well as the report issued and aborted attempt to file charges pursuant to the second incident.

Although the appellant sincerely believed his own testimony, and while nothing he testified to, beyond not being aware of any dissatisfaction with his performance, was inherently unbelievable, when balancing the respective interests in their testimony appellant appears to have more to gain or lose by this proceeding. Coupled with the fact that a person who is observed sleeping or merely sitting with their eyes closed, even momentarily, may not be aware that they are being observed, I **FIND** that the testimony of Major D'Amico is to be given more weight and is more likely credible.

Therefore, I **FIND** that Major D'Amico did observe appellant sleeping, or at least reclining with his eyes closed while at his desk, after he had already been on notice for such an issue both in the position at issue and his prior position. I further **FIND** that the respondent approached evaluation of appellant's working test period in good faith and had legitimate concerns as to the appellant's performance. I finally **FIND** that there was no credible competent evidence produced that the respondent acted in bad faith or with bias toward the appellant.

### **CONCLUSIONS OF LAW**

The purpose of the working test period is to permit an appointing authority time to determine whether an employee satisfactorily performs the duties of a title. N.J.S.A.

11A:4-15 and N.J.A.C. 4A:4-5.1(a). For State positions, the working test period shall be for four months and may be extended an additional two months. N.J.A.C. 4A:4-5.2(b). N.J.A.C. 4A:4-5.4 provides that an employee may be terminated for unsatisfactory performance at the end of the working test period. A party may appeal the termination, but the employee has the burden to establish that the separation was a result of bad faith. N.J.A.C. 4A:2-4.3(b). In Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954), it was made clear that a probationary employee who is terminated should be given a hearing to present evidence as to the limited issue of bad faith by the appointing authority. In Briggs v. New Jersey Dep't of Civil Serv., 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 the employee was not competent to perform satisfactorily the duties of the position.

There are no reported decisions in a case involving termination at the end of a working test period where the courts have specifically defined what is meant by good faith. In Smith v. Whitman, 39 N.J. 397 (1963), a non-civil service case, the New Jersey Supreme Court defined good faith as meaning honesty of purpose and integrity of conduct with respect to a given subject. In Lustrelon, Inc. v. Prutscher, 178 N.J. Super. 128, 144 (App. Div. 1981), it was observed that "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 of ill-will. See O'Connor v. Health Services Ctr. of Camden County, 91 N.J.A.R. 2d (CSV) 23.

If the evaluations and determination are based upon actual observations of the employee's performance of the duties of the position, and are honest assessments of whether the employee is capable of satisfactorily and efficiently performing those duties should appointment become permanent, it must be considered to have been made in good faith. If, on the other hand, the decision to terminate is not based upon actual observations of performance, or if it is made based upon dishonest motives, is based on bias, prejudice or self-interest, or is made with ill-will toward the employee, it must be set aside.

The appellant has not shown by a preponderance of the competent and credible evidence that respondent's returning appellant to his previously held position at the end of his working test period was made in bad faith. No evidence was offered as to bad faith except for appellant's own verbal contradiction of respondent's assertions. The evidence reveals that the appellant is a good, capable and competent employee, who had difficulty adjusting to the job of Corrections Lieutenant and appropriately meeting the responsibilities required of that position. The record does not show any bad faith, bias or improper motives by the respondent.

**ORDER**


I **ORDER** the appellant's appeal be **DISMISSED**, and that respondent's action returning appellant to his previously held position be **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 10, 2015  
DATE

  
\_\_\_\_\_  
ELIA A. PELIOS, ALJ

Date Received at Agency:

July 10, 2015

Date Mailed to Parties:

July 10, 2015

EAP/mel

**WITNESSES**

For appellant:

Sergeant Terrance Ray

For respondent:

Major Salvatore D'Amico

**EXHIBITS**

For appellant:

- P-1 Report on Progress of Probationer dated June 24, 2013
- P-2 Letter of Counseling dated June 21, 2013

For respondent:

- R-1 Report on Progress of Probationer dated September 3, 2013
- R-2 Letter to Appellant from Human Resources
- R-3 Preliminary Notice of Disciplinary Action
- R-4 Special Custody Report
- R-5 Investigation Conducted by Major Wayne Sanderson
- R-6 Admitted as Appellant's Exhibit P-2
- R-7 Page 24 of Human Resources Bulletin 84-17, as amended
- R-8 Appellant's Disciplinary History