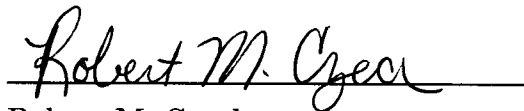




Re: Michael Whelan

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
NOVEMBER 10, 2016

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Nicholas F. Angiulo  
Assistant 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 11498-13  
AGENCY DKT. NO. 2014-155

**IN THE MATTER OF MICHAEL D. WHELAN,  
OFFICE OF THE PUBLIC DEFENDER.**

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**Randolph H. Wolf, Esq.**, for appellant, Michael D. Whelan

**Lillian Brennan**, Deputy Public Defender, for respondent, Office of the Public  
Defender, (Joseph E. Krakola, Public Defender, attorney)

Record Closed: December 23, 2014

Decided: June 20, 2016

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

This matter concerns the termination of the appellant, Michael D. Whelan, from his position of investigator in the Office of Public Defender (OPD). The termination occurred at the end of the appellant's extended work test period for unsatisfactory performance. Whelan filed an appeal and the matter was transmitted to the Office of Administrative Law (OAL), on August 12, 2013, as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I was assigned to handle this matter by letter dated December 9, 2013. The hearing took place on November 21,

2014, December 22, 2014 and December 23, 2014. The record closed on December 23, 2014. Because of my extensive illnesses, the period for the issuance of an Initial Decision was extended several times and the current due date for the Initial Decision is June 20, 2016.

### **FACTUAL DISCUSSION**

I **FIND** the facts in this matter are not in dispute except as noted below.

Whelan testified that he was in the United States Marine Corps between 1977 and 1980; worked in various positions for the Jersey City Police Department between 1981 and 2009; and worked as a civilian security officer between 2009 and 2012 (P-1). As a police officer and sergeant, Whelan did investigations and prepared reports. After he was elevated to lieutenant in 1994, he primarily reviewed reports prepared by others.

Whelan applied for a position as an investigator in the OPD on October 3, 2012 (R-1). He stated that during his interview for the position he indicated that he was familiar with computers. Whelan was offered the investigator position on December 13, 2012 (P-2) and he started to work on December 31, 2012. His supervisor, Cynthia Sessions was out on that day. On the next work day, January 2, 2013, he met with Sessions, but initially did not participate in any formal training program. On January 2, 2013, he was given a copy of the OPD's Policy and Procedures Manual (R-2). At the start of his employment, Whelan specifically asked for computer training but was told a computer program was not available. Later, he considered taking a private after work computer course, but Sessions could not assure him that he would not be required to work overtime on the class dates.

Sessions reviewed with Whelan the responsibilities of an investigator, including how to set up appointments with clients, (children), how to conduct interviews, how to prepare reports of his interviews and how to prepare reports and logs for the office. Whelan went out on several interviews with experienced investigators including Sessions prior to going out for an interview alone.

Whelan stated that he was given some help by Sessions and his fellow employees as to how to do work on a computer. He had to primarily train himself to work on the computer and he admitted that he was slow doing his work for the first several months of his employment because of his lack of computer skills.

In the first progress report regarding his work test period, Whelan got an unsatisfactory rating (P-3, R-3).

Gerald Tempesta, a Manager in the Human Resource Office of the DPD, testified that he supervised the preparation of all progress reports. He stated the reports were based on information obtained about the employee from their supervisors, staff attorneys and others.

After he received the first report, Whelan met with Sessions to discuss the basis for the unsatisfactory evaluation. Sessions testified that Whelan failed to properly schedule appointments and to keep his records up to date; that he failed to get detailed information during his interviews; and that his manner during the interviews was sometimes overbearing. Also, she stated that his reports contained inadequate information regarding the client's home environment and the client.

Paul Fitzpatrick, Chief Investigator for the OPD, testified that he is the statewide manager for OPD investigations and is responsible for the new employee training programs. The formal training program for investigators takes five days and the employees are trained as to all the duties of the position, especially, how to conduct an investigation and the role of staff attorneys. The employees engage in role playing exercises, field interviews with experienced investigators. Whelan was given a templet during the training which listed what was to be in an investigation report; however, Whelan stated that he had gotten a copy of the templet from a fellow employee prior to the training program. Whelan participated in this formal training program in February 2013.

By memorandum, dated March 19, 2013, Sessions informed Whelan about her concern regarding his performance and listed a number of areas that needed to be

improved (P-4). She noted that Whelan needed to use appropriate questions during his interviews to gain more in-depth details regarding the client and his or her environment, and that he had to improve the writing format for his reports. In order to help Whelan, she stated that she would continue to meet with him to review his written reports; that she would accompany him on field visits to monitor his progress with interviewing clients; and would meet with him at least once a week to review his performance.

In the second progress report regarding his work test period, Whelan again was given an unsatisfactory rating (P-5, R-4). By memorandum, dated April 22, 2013, Sessions listed her continued concerns regarding Whelan's performance (P-5). Whelan responded on April 22, 2013. He stated that he initially had no computer skills, was told a course was not available, and that he had to train himself. He stated he also later found out that his laptop computer was not functioning properly and his computer had to be sent out for repair. In the interim, he was working on a desktop computer. Whelan recognized that there was merit to Sessions' criticisms regarding his investigations and reports, but felt that he was improving (P-6).

Sessions felt that there was some improvement during Whelan's initial work test period and the office requested an extension of Whelan's work test period on April 29, 2013 (R-16). The work test period was extended until June 29, 2013 (P-7). On or about June 4, 2013, Sessions wrote a memo to Whelan indicating that his improvement continued to be unsatisfactory. Sessions stated that Whelan continued to have administrative problems scheduling appointments, preparing timely reports and keeping his office logs and reports up to date. Sessions stated that Whelan's reports regarding his interviews continued to be inadequate since he continued to fail to give full details in his reports which were needed by the OPD's attorneys. Also she stated that when she went for an interview with Whelan, he failed to ask sufficient questions to get the details which were needed by the attorneys when they went into court.

Roberta A. Howe, an attorney in the Office of Law Guardians in the OPD, stated it was her job to review files relating to clients' placements. If there appeared to be a problem she would ask for an investigation and a report. These reports are very important since they should contain detailed information regarding the client and his or

her environment. These reports are used by her when she presents the client's case in court. Howe stated that reports prepared by Whelan, such as P-12, did not contain the detailed information she needed for the court. She stated that Whelan's interview style was not effective; was too aggressive; and he would sometimes get into a verbal altercation with the involved adults. She also stated that the clients told her that they felt they were being cross-examined by Whelan. Howe spoke to Whelan and Sessions about her concerns. She stated that Whelan asked for her help and that she spoke to him several times regarding what he should cover in his interviews and what should be in his reports. Howe stated that there was some improvement during the extended work test period especially when Sessions went on an interview with Whelan. However, by the end of the extended work test period, she stated that Whelan's reports were still inadequate.

Stephanie Polaski, an attorney in the Office of Law Guardian in the OPD, also testified as to the importance of the reports of investigations and the fact that Whelan's reports only slightly improved during his extended work test period. She stated that Whelan's reports continuously failed to contain all the detailed information she needed when she went into court. Polaski stated that she did not feel that Whelan understood the purposes for the interview and that he was unable to talk to children and that he was unable get the confidence of the children.

On June 25, 2013, Whelan received an unsatisfactory report for the last period of his extended work test period (P-14), and a notice of his termination (P-15). Whelan was told that there was some improvement as to his use of administrative tools, but that he still did not get adequate information during his interviews and that the attorneys were complaining that his reports did not contain adequate and important information. Fitzpatrick, who prepared the termination memorandum (P-15), stated that on one occasion when Whelan made a home visit, the father of the client stated that he and Whelan had a beer. Whelan denied having a beer and refused to sign the notice of termination (P-15).

The allegation that Whelan had a beer with a client's father was reported by Polaski. She testified that while she was in court the client's father was present along

with his attorney. This attorney told her that the father had had a beer with Whelan during Whelan's interview visit. The father also told her that Whelan had a beer with him. Polaski reported the beer incident to her supervisor and to Whelan's supervisor.

Sessions testified that she believed Whelan when he said he did not have a beer with the client's father.

The only factual dispute in this matter relates to the beer incident. This incident is in the report stating the reasons for Whelan's termination, however, there is only hearsay testimony to support the allegation. I **FIND** that Whelan's testimony is credible and that he did not have a beer with the client's father.

### **APPLICABLE LAW**

The Civil Service Act, N.J.S.A. 11A:1-1 et seq. provides that the work test period is part of the examination process for obtaining a civil service position. This test period gives the employer an opportunity to determine whether the employee can satisfactorily perform the duties of the job. N.J.S.A. 11A:4-15, N.J.A.C. 4A:4-5.1(a). Termination at the end of a work 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). Any employee challenging his or her termination at the end of the work test period has to show that the action was taken in bad faith. N.J.A.C. 4A:2-4.3(b); Briggs v. New Jersey Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960). There is no specific definition as to what constitutes "bad faith." Courts have held that bad faith is established when the employee shows that the employer acted dishonorably or was motivated by ill will or that the employer failed to make sufficient observations in order to form a rational basis for the dissatisfactory position, Schopf v. Dep't of Labor, 96 N.J.A.R.2d (CSV) 853.

### **ARGUMENTS OF THE PARTIES**

Randolph H. Wolf, Esq., on behalf of the appellant, argued that Sessions disliked Whelan, and that he was not treated fairly. He argued that part of Whelan's computer problem was due to a defective lap top computer and that the OPD did not take quick



action to correct the problem. He argued that Whelan tried to adequately perform his duties and sought help in the office and from the attorneys. He noted that Whelan was not given the training program as soon as he started to work.

Wolf argued that the alleged beer incident was not investigated, but was listed as a reason for Whelan's termination.

Wolf argued that the OPD acted in bad faith and cited the decisions in Matter of Martha Washington, CSV 4905-03 (Merit System Bd. decision September 8, 2004) and Samuel Williams v. William Paterson University, CSV 10408-09 (Civil Service Comm. decision July 13, 2011).

Lillian Brennan, Deputy Public Defender, on behalf of the respondent, argued that Whelan's termination was based on an honest and reasonable assessment of his work performance, and that the work test period was extended to give Whelan a longer period to show that he could satisfactorily perform the job duties. She argued that Sessions, the two attorneys and the other witnesses gave credible testimony that there was no bad faith and that the OPD had good and sufficient reasons for Whelan's termination.

### **CONCLUSIONS AND ORDER**

I **CONCLUDE** that the appellant has not shown bad faith as to his termination. I **CONCLUDE** that the OPD has presented credible testimony and evidence that Whelan's work performance was not satisfactory. Whelan was not candid when he was interviewed for the position that he had almost no experience working on a computer and he hoped to get basic computer training after he started to work. When Sessions saw that Whelan had poor computer skills, she and others in the office tried to help him. Although initially there was a problem with a defective computer, the testimony is clear that Whelan still had difficulties even after he got another computer.

The prime responsibility of Whelan was to conduct investigations and interviews and to prepare detailed reports which would be used by the attorneys in court. There

was a substantial amount of testimony and evidence to show that Whelan was given a great deal of help by Sessions, the attorneys and other employees, but that his reports continued to be incomplete and inadequate.

Although Whelan gave persuasive testimony that he tried to improve, it is clear that there was only a small amount of improvement during the extended work test period. Although the beer incident was in the termination notice, there was convincing and credible evidence and testimony that Whelan's removal was based on his poor computer skills, and his failure to conduct interviews and write reports which contained all the information needed by the attorneys.

Therefore, it is hereby **ORDERED** that the determination of the OPD to terminate Whelan at the end of the extended work test period is affirmed.

It is also **ORDERED** that the appeal of Whelan 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.

June 20, 2016  
DATE

  
BEATRICE S. TYLUTKI, ALJ t/a

Date Received at Agency:

6/20/16

Date Mailed to Parties:

6/20/16

BST/vj

**WITNESSES**

**For appellant:**

Michael D. Whelan

**For respondent:**

Gerald Tempesta

Roberta A. Howe

Stephanie Poleski

Paul Fitzpatrick

Cynthia Sessions

**EXHIBITS**

**For appellant:**

- P-1 Resume of Michael D. Whelan
- P-2 Letter to Michael D. Whelan, dated December 13, 2012
- P-3 Memorandum to Cynthia Sessions, dated January 15, 2013
- P-4 Letter Michael Whelan, dated March 19, 2013
- P-5 Letter to Michael Whelan, dated April 22, 2013
- P-6 Letter to Cynthia Sessions, dated April 22, 2013
- P-7 Extension of Work Test Period, dated April 26, 2013
- P-8 Report of Progress of Probationer, dated May 29, 2013
- P-9 Report of Progress of Probationer, dated June 21, 2013
- P-10 Notice to Produce for Hearing prepaid by Randolph H. Wolf, Esq.
- P-11 Investigation Report prepaid by Michael D. Whelan, dated February 7, 2013
- P-12 Investigation Report prepaid by Michael D. Whelan, dated April 15, 2013
- P-13 Investigation Report prepaid by Michael D. Whelan, dated April 17, 2013

- P-14 Report of Progress of Probationer, dated June 21, 2013
- P-15 Notice of Termination at end of working test period, dated June 29, 2013
- P-16 Attendance Report

For respondent:

- R-1 Part of the Application of Michael D. Whelan
- R-2 Acknowledgement signed by Michael D. Whelan of receipt of the Policy and Procedure Manual, dated January 2, 2013
- R-3 Report of Progress of Probationer, dated January 15, 2013
- R-4 Report of Progress of Probationer, dated January 15, 2013
- R-5 Marked for Identification only
- R-6 Marked for Identification only
- R-7 Marked for Identification only
- R-8 Marked for Identification only
- R-9 Report of Progress of Probationer, dated June 21, 2013
- R-10 Marked for Identification only
- R-11 Email from Howe, dated April 25, 2013
- R-12 Marked for Identification only
- R-13 Marked for Identification only
- R-14 Marked for Identification only
- R-15 Marked for Identification only
- R-16 Memorandum to PMIS Unit, dated April 23, 2013