



STATE OF NEW JERSEY

In the Matter of Jason Oswald
 Cumberland County, Department of
 Public Works

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2020-984
 OAL DKT. NO. CSV 15107-19

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ISSUED: JANUARY 22, 2021 BW

The appeal of Jason Oswald, Laborer 1, Cumberland County, Department of Public Works, of his release at the end of the working test period effective September 24, 2019, was heard by Administrative Law Judge Elaine B. Frick, who rendered her initial decision on December 7, 2020. 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 January 20, 2021, 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 releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Jason Oswald.

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 20TH DAY OF JANUARY, 2021

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Christopher S. Myers
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 15107-19

AGENCY DKT. NO. CSC 2020-984

**IN THE MATTER OF JASON OSWALD,
CUMBERLAND COUNTY, DEPARTMENT
OF PUBLIC WORKS.**

Jason Oswald, appellant, pro se

Melissa Strickland, Esq., Assistant County Counsel, for respondent Cumberland County, Department of Public Works (John D. Carr, County Counsel, Cumberland County)

Record Closed: November 25, 2020

Decided: December 7, 2020

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

Respondent, Cumberland County (the County), released appellant, Jason Oswald, from his position as Laborer 1, having determined that his performance during his working test period was unsatisfactory. Appellant challenges his release and seeks to be reinstated to the position.

PROCEDURAL HISTORY

The County issued a letter of termination, dated September 24, 2019, releasing appellant from his employment at the end of his working test period. Appellant submitted an appeal letter dated October 1, 2019. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 24, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to 14B-15 and N.J.S.A. 52:14F-1 to 14F-13. The hearing was conducted via Zoom remote platform on August 28, 2020, because in person proceedings at the OAL have been suspended due to the COVID-19 pandemic and Executive Orders issued by the Governor of the State of New Jersey. The parties submitted post-hearing summation briefs and the record closed on November 25, 2020.

FACTUAL DISCUSSION AND FINDINGS

The parties completed a written and executed "Statement of Stipulated Facts" (J-1). Since the facts outlined therein have been stipulated and are undisputed, I **FIND** them as **FACTS** and set them forth verbatim as follows:

1. That appellant's first day of employment with the County was June 17, 2019.
2. That appellant was hired as a Laborer I in respondent's Department of Public Works (DPW), Mosquito Control Division (MCD).
3. It is stipulated that, at all times relevant to the instant matter, appellant's rate of pay was \$28,287 per year or \$13.55 per hour.
4. It is also stipulated that appellant's last day working for respondent was September 24, 2019.
5. It is further stipulated that appellant was terminated on September 24, 2019.

(J-1.)

TESTIMONY

Heather Lomberk is the Superintendent of the MCD, which is under the DPW for the County. She testified for the County. She has been employed nineteen years with the County, beginning as an entomologist and then was promoted to the position of Superintendent. She is responsible for the daily operations of the MCD, including general management of the operations of the MCD; ensuring their division complies with all regulations; and supervising employees within the MCD.

Superintendent Lomberk's supervisor, James Neher, Assistant Director of the County's DPW, hired Mr. Oswald for the full time position of Laborer 1 for the MCD. As supervisor of Mr. Oswald, Superintendent Lomberk was the individual responsible to complete Mr. Oswald's sixty-day and ninety-day evaluations during his working test period. (R-2; R-3.)

There are three programs within the MCD. It is within Superintendent Lomberk's discretion to assign the Laborer 1 to any of those three programs. She assigned Mr. Oswald to work in the surveillance program, in which biologist, John Betz, served in a supervisory role to train and oversee Mr. Oswald's work.

The surveillance program has three main components which are the laborer's responsibility to complete. Those components are collecting mosquitos from fixed light traps throughout the county and vector surveillance sites that vary throughout the season; checking rain gauges which are located at the light trap spots; and completing landing counts at specified locations throughout the county.

Superintendent Lomberk was familiar with the tasks required to be completed by the Laborer 1, as she previously completed such tasks when she first worked for the County. The primary tasks associated with the collection of mosquitos is to collect them from the traps, test the traps to ensure they are working properly, perform routine maintenance on those traps, and record data. The mosquitos and recorded data are returned to the lab. The collection of mosquitos at the light traps is done approximately three times per week, which data assists with determining the adult mosquito population

and species in the area. The collection of mosquitos and data from the other locations is done to follow the "hot spot" location of the mosquito population and test the mosquitos for viruses such as West Nile Virus and Eastern Equine Encephalitis (EEE). Mosquitos collected in the traps must be separated from the bi-catch, which is every other beetle, moth, insect or item that collects in the trap.

Rain gauge checking requires the laborer to go to the gauge, which is a cylindrical tube with markings on the side; read the measurement of the amount of water collected in the gauge; record the results and other pertinent data about the time and date of the reading on a form; and dump the water from the gauge so that it is empty. Landing counts require the laborer to go to a designated area and count the number of mosquitos observed to land on the individual's arms and legs for a specific period of time. The information is recorded and returned to the lab. These tasks are completed independently by the laborer, except for when they are getting trained, at which time the laborer will be accompanied by the trainer employee.

Everything done in the MCD is data and science driven. The mosquitos are analyzed at the lab by the biologist and the data is forwarded to the appropriate State agency and Rutgers University. The State and the County rely upon the data. If the data is wrong, it impacts the County's MCD operations. The data is relied upon to make daily decisions regarding the MCD operations, such as what control measures are going to be implemented, for example, whether blanket truck spraying is done or spraying is contained to pocket locations, to control the mosquito population.

Mr. Oswald began his working test period on June 17, 2019. He was trained by Biologist Betz. Although Mr. Oswald had no prior experience in this field of work, Superintendent Lomberk initially found him to be enthusiastic. She explained to him that if he had questions about his job duties, he needed to ask them, and he should take notes during his training. Biologist Betz reported to Superintendent Lomberk that Mr. Oswald was at first doing okay, but then did not appear to understand his tasks. She had several discussions with Biologist Betz and Mr. Oswald that Mr. Oswald needed to ask questions and asked if he wanted more training. Mr. Oswald did not come to her during his working test period with any concerns or questions.

During the first sixty days of the working test period, a DPW employee, Jayme Hyson, reported to Biologist Betz that he had seen Mr. Oswald sitting in his truck at the DPW Port Norris yard location, but Mr. Oswald did not exit the truck to take a landing count. This information was relayed to Superintendent Lomberk by Biologist Betz. She directed Biologist Betz to do back checks on Mr. Oswald's work, to ensure he was properly completing his required work tasks.

Superintendent Lomberk reviewed Mr. Oswald's data sheets with Biologist Betz. They could see from the data that Mr. Oswald was not doing landing rates and rain gauge checking. Biologist Betz reported to her that during his back checking of Mr. Oswald's work, he found rain gauges that were filled with rainwater. They supposedly had been read and recorded by Mr. Oswald either earlier in the day or at a time shortly after there had been rainfall. They had not been emptied. Mr. Oswald allegedly completed the rain measurements as zero. They backtracked the weather conditions, saw that it had rained, and determined the measurement should have been taken by Mr. Oswald and he should have dumped out the rainwater that had collected in the gauge.

She found the data recorded by Ms. Oswald to be unreliable and lost confidence in his collection of data. She was familiar with the data collection and reporting process, and familiar as to the general trends seen from prior years. The data Mr. Oswald had recorded did not appear reliable because it did not follow usual trends. The accuracy of the data was questionable, and she suspected the data was not being collected and the recorded information was false.

Superintendent Lomberk completed Mr. Oswald's sixty day evaluation based upon information provided to her by Biologist Betz and the information she reviewed with him. (R-3.) The evaluation form consists of four columns. The first column, titled "General Factors" contains eleven numbered areas of job skills and performance to be assessed, such as quality, productivity, reliability, and independence. (R-3.) The second column, entitled "Rating" is where the evaluator enters a letter code for each area being evaluated. Examples of some of the letter codes are "U" for unsatisfactory, "BE" for below expectation, and "EE" for exceeds expectations. (R-3.) The third column is entitled

"Points" which is a computer generated score on a scale of one being lowest, to a high of one hundred. The points correlate with the letter code that is input by the evaluator. For example, a "U" letter code represents a score of 50 while a BE letter code represents a score of 65. The final column, entitled "Supporting Details" is an area for the evaluator to input their comments regarding the general factors which have been assessed.

Below the assessment area on the evaluation form are questions to be completed by the evaluator; an area for the employee's comments; signature lines for the employee and evaluator; and the date the evaluation is reviewed with the employee. (R-3.) Superintendent Lomberk completed Mr. Oswald's sixty day evaluation and reviewed it with him on August 30, 2019. (Id.) Overall, she found his performance to be unsatisfactory. She rated him unsatisfactory in several areas, such as for "Quality" where she reported that "paperwork is not accurate." (Id.) His reliability was unsatisfactory, as he had not completed tasks assigned to him, with no explanation until he was confronted by supervisors. She evaluated his ability to work independently as unsatisfactory, detailing that "since trust has been broken, increased supervision is necessary." (Id.) Regarding his adherence to policy, she noted "Jason has lied to his supervisor and falsified documents." His judgment was also unsatisfactory, which she noted "instead of being honest with supervision about not completing a task, he has lied." (Id.) Superintendent Lomberk explained that she was referring to the unread gauges and false information recorded by Mr. Oswald including false reporting of landing counts when he had not exited his vehicle to take the counts.

Three areas of Mr. Oswald's skills were rated as below expectation, by Superintendent Lomberk, with an acknowledgement that since Mr. Oswald was brand new to mosquito control, it was expected that his creativity would be low. His interpersonal relationships needed to improve as he was found to become combative at times when confronted about his work. (R-3.) He was graded as exceeding expectations for his availability and being punctual. Specific areas of improvement were noted as:

Jason needs to communicate better, make better decisions, and be honest with supervision. He should pay more attention when being trained and stop making excuses for unacceptable behavior.

(R-3.)

Superintendent Lomberk also reported that Mr. Oswald needed to ask more questions when he was unsure how to complete a task and needed to be honest if he had not completed a task. He needed to ask for more training if he felt deficient in his knowledge. (R-3.)

Superintendent Lomberk reviewed the evaluation with Mr. Oswald. He handwrote in "I vow and promise to do better." (R-3.) He signed the evaluation.

Thereafter, there was slight improvement in his handwriting and documentation, but his accuracy in collecting data continued to be suspect. He did not improve in his overall job performance. Superintendent Lomberk completed Mr. Oswald's ninety-day evaluation. (R-2.) All of his tasks were assessed as below expectations or unsatisfactory, except for availability, which was graded again as exceeded expectations. (R-2.) Trust continued to be an issue. Mr. Oswald continued to struggle with verbal and written communications. Superintendent Lomberk did not trust his explanations as to why tasks were not being completed because back checks of his work did not support his explanations. She believed he continued to be dishonest. (R-2.)

Superintendent Lomberk did not have time to sign or date the evaluation. She was called to appear immediately in Assistant Director Neher's office on September 24, 2019, where they met with Mr. Oswald and he was terminated. They reviewed the evaluation with Mr. Oswald, but he refused to sign it and took a copy with him. Mr. Neher issued a termination letter to Mr. Oswald on that date. (R-1.) Mr. Oswald was released at the end of his working test period for unsatisfactory job performance.

Jayme Hyson testified for the County. He is a road supervisor in the County's DPW and is assigned to the Port Norris yard. He was familiar with the some of the tasks to be completed by the Laborer 1 employee in the MCD because his son had filled that position before Mr. Oswald. His son resigned from the position and is currently employed elsewhere.

Mr. Hyson was aware from previous observations that an MCD employee completes landing counts on the grounds of the Port Norris yard, in the approximate two acre marshy area behind the yard. Mr. Hyson was aware that the MCD employee would walk approximately fifty to eighty feet into the marsh area to take the landing count.

Mr. Hyson observed Mr. Oswald drive into the yard on approximately three occasions in the MCD truck. On one occasion, Mr. Oswald never exited the vehicle to take the landing counts. He then drove away. Mr. Hyson also observed Mr. Oswald on a few occasions drive up to the Port Norris yard, enter the building to utilize the bathroom facility, and then leave without walking out on the grounds to take the landing count. He could not give a time frame for when he made the observations of Mr. Oswald.

Mr. Hyson spoke to Biologist Betz. He advised biologist Betz that he saw Mr. Oswald drive up to the property but never got out of the truck to take the landing counts.

Mr. Hyson did acknowledge that the county purchased the building at the Port Norris yard. Prior to the purchase, there were surveyors on the property on occasion. He could not recall when they were there. He could not recall if they were present during the times he observed Mr. Oswald drive up to the property and not exit his truck.

John Betz testified on behalf of the County. He has been employed for approximately seven years as a biologist for the County in the MCD. His primary responsibilities require him to identify mosquito species collected throughout the county and test them. He is not a supervisor, but fills a supervisory role of staff in the MCD, such as the Laborer 1 position. He cannot take corrective action regarding a staff member, such as issuing a write up. He must bring the information to the attention of Superintendent Lomberk.

Biologist Betz is familiar with the job duties of the Laborer 1 position. He had performed the tasks for the first three to four years of his employment. The County then started hiring a part time seasonal person, until the position of Laborer 1 became a

permanent position approximately two years ago. He has trained approximately five employees, including Mr. Oswald, for the Laborer 1 position.

Mr. Oswald's job performance had a great impact on the MCD operations. An accurate count of mosquitos from the collections was required to determine if there were any spikes in the mosquito population. If the collection was not done properly, the MCD could be missing treating breeding areas. The collections from the vector surveillance sites was critical to determine if there were viruses present in the county, such as West Nile or EEE. The data being collected by Mr. Oswald was critical to address the county's needs.

Initially, Mr. Oswald was very open and willing to learn during his training. He did ask some questions but struggled with some tasks, such as sorting the mosquitos from the bi-catch. Biologist Betz has the trainees bring the bi-catch back to the lab so that he can review it to determine if the Laborer is missing sorting mosquitos from the bi-catch before discarding the bi-catch. Mr. Oswald was missing sorting all mosquitos from the bi-catch.

Mr. Oswald was not given all his duties at the start of his employment. Duties would be added during the training so as not to overwhelm him. At approximately one and a half to two months into his employment, Mr. Oswald had been given all his job responsibilities. He was trained, allowed to work independently, then needed some additional training. Biologist Betz observed that Mr. Oswald had difficulty setting up traps and struggled with the collection and sorting of mosquitos. He could tell because some of the traps were set up and maintained without a problem, while others were not. The bi-catch was not sorted properly.

Biologist Betz drove the truck with Mr. Oswald on his first day and thereafter sat as a silent passenger a few days to observe Mr. Oswald driving to each site and watching him check the traps, collect the mosquitos, and do landing counts. When Mr. Oswald started doing his tasks independently, Biologist Betz initially thought he was alright and

would improve, but Mr. Oswald did not get better with the light traps and collecting and sorting.

On or about August 6, 2019, Jayme Hyson, a DPW employee, approached Biologist Betz in the parking lot and told him that he saw Mr. Oswald drive into the yard, but Mr. Oswald did not get out of his truck. Biologist Betz back checked Mr. Oswald's work and saw that there were counts recorded. This was suspect because he was aware of past recordings where there can be multiple times with zero landings. He opined the data was thus suspect because Mr. Oswald overlooked doing the count and just put numbers in for the day.

Biologist Betz questioned Mr. Oswald via text messaging about the landing counts. (R-9.) Text messaging was a common form of communication because cellular service is spotty in areas of the county where Mr. Oswald would be required to go for his work duties. Biologist Betz advised Mr. Oswald on August 7, 2019, to "Make sure you do your land accounts [landing counts] today, I'm getting reports they are not getting done[.]" (R-9 at County 043.) Mr. Oswald's response was "And where are these reports coming from???" to which biologist Betz replied "Eyes in the county[.]" (R-9 at County 044.) Mr. Oswald responded, asking whether "they need glasses or an eye exam" and that "People aren't gon [gonna] lie on me[.]" (R-9 at County 045.) Biologist Betz responded "I am making sure that you're doing your landing counts. You missed several of them when I went with you. I have to be sure you were doing your job. If you're not doing it then I have to take correct of [corrective] actions to make sure[.]" (R-9 at County 046.)

Mr. Oswald questioned Biologist Betz via text "how come u told on me to heather [Heather Lomberk] about missing mosquitos I'm trying my best I never did this before[?]" (R-9 at County 048.) Biologist Betz responded "I told on you? She is my supervisor, she is supposed to know what is going on...And your [sic] doing fine..just keep working it." (Id.) The text communications thereafter included several exchanges with Biologist Betz questioning Mr. Oswald about some of his tasks regarding collections, recordings, and maintenance he had done. Mr. Oswald would generally respond indicating what he had or had not done, and would acknowledge or apologize if he missed something or had not completed something properly. (R-9.) Biologist Betz indicated that he wanted to give Mr.

Oswald the “heads up” about not doing tasks properly, yet he felt they would butt heads by Mr. Oswald questioning him as to whom said things about him and that others were making things up about him.

Biologist Betz believed his relationship with Mr. Oswald was friendly and cordial at the start of his employment. Biologist Betz recalled Mr. Oswald asking him to let him know what he was doing wrong or right, and was enthusiastic about the job. As the days and weeks progressed, he felt Mr. Oswald become “standoffish” and his job performance of tasks remained the same or got worse. For example, he believed they initially had a congenial working relationship. On one occasion it was raining, and Biologist Betz went out to Mr. Oswald’s car to close the windows. He advised Mr. Oswald by text on August 14, 2019, that he put the windows up and asked if the child car seat should be secured facing backwards. (R-6 at County 031.) The two engaged in text messages back and forth regarding the car seat, with Mr. Oswald indicating his wife put the seat in that way and that they had arguments over it. Biologist Betz forwarded links to information about the law in the state of New Jersey about car seats and information about a mirror to purchase and install to see a child in a rear facing car seat. (R-6.) Biologist Betz believed this to be a cordial exchange.

Overall, Biologist Betz found Mr. Oswald’s job performance to be below mediocre. Mr. Oswald would become argumentative when questioned about job tasks and would tell Biologist Betz that Betz was wrong. Towards the end of his working test period, Mr. Oswald would brush off Biologist Betz and Betz sensed that their relationship had changed. Biologist Betz found Mr. Oswald to be struggling with his work tasks, whether he did not understand what he needed to do or was not taking the job seriously. He did not seem to appreciate the importance of his job tasks and the importance of doing his job properly. Biologist Betz asserted that Mr. Oswald’s job performance was unsatisfactory.

Jason Oswald testified on his own behalf. He had no prior experience or knowledge regarding mosquitos and the tasks required for the job of Laborer 1 in the MCD. Biologist Betz trained him for two to three days driving together in the truck. He only sat with Mr. Oswald one day to do the picking out of mosquitos from the bi-catch.

There are so many types of mosquitos and Mr. Oswald was just learning them. He asserted he had to learn as he went along, and it should be expected that he would make mistakes. He is a slow learner and admittedly was not perfect.

Mr. Oswald acknowledged he made mistakes during his working test period. He contends he was penalized for working at his own pace. He got in trouble for not learning fast enough. He admittedly did not complete landing counts properly, having recorded information for a landing count, yet never exited his truck to complete the task. He acknowledged he should have documented that he was unable to do the count because he was unable to access the area when surveyors were there. He further acknowledged that he had difficulty completing the sorting of bi-catch and that was difficult for him to do. He admitted he may have missed things. He admittedly recalled at least one occasion when he missed taking a rain gauge reading. He contended that when mistakes were brought to his attention, he corrected his actions thereafter.

Mr. Oswald believes his termination was for "personal" reasons and not based upon his job performance. He felt he was "stuck" and could not ask questions of Biologist Betz or Superintendent Lomberk. He believed that Biologist Betz was his union shop steward and he could not talk to him. He assumed that if he said anything to Superintendent Lomberk, she would only believe what Biologist Betz told her because they had a close relationship. He acknowledged he never went to Mr. Neher, Assistant Director of the County DPW with any concerns, asserting that he thought he had to stay within the chain of command.

He believes he was not trained enough for the position. He confirmed he did not ask for more training or assistance. Mr. Oswald was disturbed that Biologist Betz, who was "nothing" to him because he was not his supervisor, was the individual giving him orders and training him. Biologist Betz was just the biologist and therefore just another employee. He exhibited the attitude that he always had to be the smartest person in the room, which made Mr. Oswald feel "downgraded." Mr. Oswald did not want to ask him questions, because he thought his questions would be considered dumb. He acknowledged that when he did ask Biologist Betz questions, Betz would answer. His

answers were clear, but Mr. Oswald was still afraid to ask questions because he would be perceived as “dumb” by biologist Betz.

He denied having a friendly relationship with Biologist Betz. Another county employee told Mr. Oswald that he had issues with Betz. The other employee and Biologist Betz “didn’t care for each other.” Mr. Oswald asserted that if Biologist Betz had to train five people over seven years for the job, that demonstrates that Betz was hard to work with. The son of Jayme Hyson left the job and it must have been because of Biologist Betz, since the son went to work elsewhere, instead of staying in the county job.

Mr. Oswald did not like that Biologist Betz had gone into his personal car when it was raining and put the windows up. Mr. Oswald felt he was being attacked about the child car seat issue in the text messaging exchange he had with Biologist Betz. He did not think it was appropriate that Biologist Betz was essentially telling him how to raise his daughter. He candidly remarked he did have a conversation with his wife about how his wife had positioned the car seat, but it was not a big drawn out argument. When Biologist Betz brought up the topic in the text message, Mr. Oswald knew the car seat was in wrong, but it did not reflect that Biologist Betz was right in addressing the issue with him. The text messages were not work related, and to Mr. Oswald, did not demonstrate that he and Betz had a friendly relationship.

Mr. Oswald asserted his release was “personal” and not due to unsatisfactory job performance. Mr. Oswald’s father is employed by the County. His father stopped in Superintendent Lomberk’s office and asked how Mr. Oswald was doing and was told okay. Mr. Oswald was told by “others” that he must be doing a good job because they saw that he brought the collection traps in. He conceded the others did not see him sorting the bi-catch and mosquitos so those others would not know how he performed that task. He was told by Biologist Betz, through text messaging, that he was doing a good job.

Mr. Oswald confirmed he received the evaluations completed by Superintendent Lomberk. (R-2, R-3.) She was his supervisor, yet she never issued a work order to him. She never told him what to do. She never saw him work, and just sat in her office. He

did not understand how she could be the one evaluating him, when she was listening to other people about his job performance, and got her information by word of mouth from Biologist Betz.

Mr. Oswald admittedly wrote on his evaluation of August 30, 2019, that he vowed and promised to get better at his job. He was "not perfect" and it should be expected that when you start a new job there are areas you can do better. When he vowed to do better, he meant that he would try harder and do better, not that he would be perfect. He tried "a hell of a lot" harder and maintained that by the end of the working test period he "had it all down." He remarked that he was more focused then, and perhaps trying too hard.

Mr. Oswald believes towards the end of his working test period that Biologist Betz was messing up his work. Mr. Oswald had set up a trap and approximately ten minutes later, Biologist Betz was there checking on his work. He asserted maybe Betz was there to go behind his back and change the trap or dump out a rain gauge. Mr. Oswald videotaped one of his traps and apparently sent the video, presumably to Biologist Betz or Superintendent Lomberk on a Friday and then he was released on the next Tuesday. He claimed they must have figured out that he was on to them, so they got rid of him.

The mosquito season begins in approximately April or May and ends in September. Since it was the end of the season, Mr. Oswald asserted the County wanted to get rid of him and that is why he was terminated at the end of September.

Mr. Oswald confirmed he received the termination letter on September 24, 2019. (R-1.) He contends he should not have been released because it was due to "personal" reasons, not his job performance. He maintains that he should be reinstated to his former position of Laborer 1.

Credibility

A fact finder is obligated to weigh the credibility of witnesses. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the fact finder. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). Credibility is the value that a fact finder

gives to a witness' testimony. It is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950), (citations omitted).

A credibility determination requires an overall assessment of the witness' story "in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The fact finder should also consider the witness' interest in the outcome, or any motive or bias. The fact finder may reject testimony because it is inherently incredible, improbable, inconsistent with common experience, contradicted by other testimony, or it is overborne by other testimony. Conleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I deem the testimony of Heather Lomberk as credible. She testified in a forthright and candid manner. She acknowledged she was relying upon information provided to her by Biologist Betz, in addition to her conversations with Biologist Betz and with Mr. Oswald to complete her evaluations. She did not embellish or exaggerate circumstances, and described what she relied upon to complete the evaluations. The information recorded in the evaluations was supported by the testimony of other witnesses. She candidly acknowledged it was an oversight that she herself did not sign the final evaluation and described the circumstances that quickly transpired on the date of Mr. Oswald's termination. I did not detect any malice or ill intent to motivate Superintendent Lomberk to terminate Mr. Oswald for "personal" reasons. She expressed concern that the data collected by Mr. Oswald had to be accurate, since it was crucial for the County to rely upon accurate data to take appropriate measures for mosquito control for the health and safety of county residents.

I deem the testimony of John Betz as credible. He described Mr. Oswald's deficiencies, yet I sensed he was holding back more critical comments regarding Mr. Oswald while testifying in his presence, as if to protect Mr. Oswald's feelings when hearing critical remarks. His "fatherly" advice for Mr. Oswald and the tone of the text

messaging, regarding the car seat, I find was intended to be friendly and cordial, and supported by the written responses by Mr. Oswald with "lol" references. He acknowledged Mr. Oswald's initial enthusiasm, efforts, and candidly noted some improvement and credit given for a task that was well done. He detected the change in Mr. Oswald's attitude, temperament, and friendliness, when Mr. Oswald was confronted with performance issues or questioned about his job performance. This was the same demeanor change detected during Mr. Oswald's own testimony, when he testified after hearing Biologist Betz testify. I did not detect from Biologist Betz's testimony any personal animus towards Mr. Oswald, nor any motivation of a personal stake in the outcome. He, like Superintendent Lomberk, expressed concern and emphasized the importance of the data collection and tasks completed by the Laborer 1 individual to be accurate, for the mosquito control efforts for the health and welfare of county residents.

I deem the testimony of Jayme Hyson as credible. He appeared somewhat uncomfortable in having to testify against a former employee, but was otherwise forthright and assured in his testimony. He acknowledged immediately when he could not recall specific dates, times, or events, and would not guess. Although his son previously occupied the position in which Mr. Oswald had been appointed, there was nothing in his description of his son's employment circumstances to suggest he was motivated to testify against Mr. Oswald because of his son's past employment.

Mr. Oswald's testimony was credible, and he appeared sincere, when he candidly acknowledged that he made mistakes and recognized that he was a slow learner. However, his demeanor and tone would become more forceful and accusatory when pressed for specifics about circumstances. His answers and own direct testimony became evasive, by beginning to answer or address a topic, then abruptly changing course to express excuses for his mistakes and actions, or otherwise accuse others for making his termination "personal." Although he repeatedly indicated his belief that his release from employment was "personal" he never described a specific personal motive of anyone to have him terminated, except for Biologist Betz wanting to be the smartest person in the room. His assertion of feeling "attacked" during the text exchange about the car seat is not supported by the tone of the messages he authored. His text messages appeared lighthearted. Upon later reflection after his termination, he did not appreciate

the “fatherly” advice of Biologist Betz and instead utilized the exchange to demonstrate Biologist Betz engaging in demeaning communications with him, which was not supported by the tone and text itself.

His testimony was contradictory by admitting he made mistakes, vowing to do better after the sixty day evaluation, finding some aspects of the job to be difficult, yet then asserted his confidence that he had all the job duties down at the ninety day mark and was performing well. The belief that his performance was good is overborn by the testimony of others. It is also recognized that he is motivated to characterize his job performance as stellar since he wants to be returned to his former employment.

Based upon a review of the documentary evidence, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND**, in addition to the stipulated facts, above, the following as further **FACTS** in this matter: The main job responsibilities to be completed by the Laborer 1 employee for the MCD were to collect mosquitos from fixed light traps and vector surveillance sites throughout the county; sort the mosquitos from the bi-catch; maintain and set traps; check rain gauges by taking measurements of the gauge, recording the data, and dumping the water from the gauge when completed; and conduct landing counts of mosquitos at specified locations throughout the county, requiring the Laborer 1 to stand at the location for a specific amount of time and count the number of mosquitos that land on their arms and legs during that time. The data collected by the Laborer 1 would be analyzed and utilized by the MCD to determine methods to utilize to best address the needs of the county in controlling the mosquito population.

Superintendent Lomberk authored Mr. Oswald’s sixty-day evaluation. (R-3.) She reviewed the evaluation with Mr. Oswald on August 30, 2019. He handwrote in “I vow and promise to do better.” He signed the evaluation. He received a copy of the evaluation.

Superintendent Lomberk’s overall assessment of Mr. Oswald’s job performance after sixty days was unsatisfactory. She rated him as unsatisfactory or below expectations for nine out of eleven factors assessed, in the areas of quality of work, job

knowledge, reliability, independence, creativity, initiative, adherence to policy, inter-personal relationships, and judgment. Her assessment was based upon observations of Mr. Oswald's job performance by Biologist Betz, her communications with Mr. Betz and Mr. Oswald, her review of documentation completed by Mr. Oswald, and Biologist Betz's back checking of Mr. Oswald's job duties.

Mr. Oswald's ninety day evaluation was completed by Superintendent Lomberk. (R-2.) She reviewed the evaluation with Mr. Oswald on September 24, 2019, during a meeting with Mr. Oswald and Mr. Neher. Mr. Oswald received a copy of the evaluation.

Superintendent Lomberk's overall assessment of Mr. Oswald's job performance after ninety days was unsatisfactory. She rated him as unsatisfactory or below expectations for ten out of eleven factors assessed, in the areas of quality of work, productivity, job knowledge, reliability, independence, creativity, initiative, adherence to policy, inter-personal relationships, and judgment. She believed he was continuing to be dishonest about why he was not completing tasks, his work product was suspect, and she did not trust his explanations as to why he was not completing tasks. His explanations were not supported by back checks completed by Biologist Betz. Her assessment was based upon observations of Mr. Oswald's job performance by Biologist Betz, her communications with Mr. Betz and Mr. Oswald, her review of documentation completed by Mr. Oswald, and Biologist Betz's back checking of Mr. Oswald's job duties.

Mr. Oswald admitted to having made mistakes. He admitted to missing checking a rain gauge. He admitted difficulty with the task of sorting mosquitos from bi-catch. He admitted he remained in his truck and did not complete landing counts required, yet recorded a result on his data sheet.

Mr. Oswald was released from his employment on September 24, 2019, and received a copy of the termination letter by Mr. Neher on that date.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified individuals to public service positions, and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Service Association v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972), citing Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 145, 147 (1965).

When an individual is hired for a civil service position, there is a working test period, designed to be part of the examination process for an appointing authority employer "to determine whether the employee can satisfactorily perform the duties of the title." N.J.A.C. 4A:4-5.1(a). During the working test period, the employee shall perform the duties of the title for which they were hired. N.J.A.C. 4A:4-5.1(c). This enables the employer to evaluate the employee's fitness through observed job performance under actual working conditions. Cipriano v. Department of Civil Service, 151 N.J. Super. 86, 89 (App. Div. 1977).

For local service employment, such as for the County here, the length of the working test period is three months (90 days). N.J.A.C. 4A:4-5.2(b). The employer is required to prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period. N.J.A.C. 4A:5-5.3(a). The employer is required to furnish a copy of the reports to the employee. N.J.A.C. 4A:5-5.3(c). By providing such reports during the working test period, the employer is furnishing guidance and advice to an employee, and notifying the employee of any deficiencies in the employee's performance. Sokolowsky v. Twp. of Freehold, 92 N.J.A.R. 2d (CSV) 155, 157; Davis v. Newark Free Public Library, 9 N.J.A.R. (CSV) 84, 87-88. Such progress reports provide an employee the opportunity to improve specific performance deficiencies during the working test period so that they can attain permanent employment.

At the end of the working test period, an employer may release the employee from their position due to unsatisfactory performance of their job duties. N.J.A.C. 4A:5-5.4(a).

An employee terminated at the conclusion of the working test period shall be given written notice by the employer. N.J.A.C. 4A:2-4.1(a). The notice shall advise the employee of the right to appeal the release from employment within twenty days of receipt of the notice. N.J.A.C. 4A:2-4.1(b) The notice shall be served in person or by certified mail upon the employee not more than five working days prior to, or five working days following the last day of employee's working test period. N.J.A.C. 4A:2-4.1(c). The employee shall provide written notice of appeal to the Civil Service Commission no later than twenty days after receipt of the notice of release from the employer. N.J.A.C. 4A:2-4.2(a).

An employee who appeals their release from employment during their working test period has the burden of proof to establish that the employer's action was done in bad faith. N.J.A.C. 4A:2-4.3(b). If bad faith is found, the employee shall be entitled to a new working test period and other appropriate remedies. N.J.A.C. 4A:2-4.3(c). Hence, the appointing authority employer must have exercised good faith when it determined that the employee was not competent to satisfactorily perform the duties of the position. Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), citing Devine v. Plainfield, 31 N.J. Super. 300, 303 (App. Div. 1954) and Lingrell v. Civil Service Commission, 131 N.J.L. 461, 462 (Sup. Ct. 1944).

The New Jersey Supreme Court has identified that "good faith" generally relates to "honesty of purpose and integrity of conduct" regarding a given subject. Smith v. Whitman, 39 N.J. 397, 405 (1963). As such, "bad faith" has been regarded as the antithesis of good faith, meaning that something has been done dishonestly, and an individual has acted with a state of mind having "furtive design" or motive of ill will. Lustrelon, Inc. v. Prutscher, 178 N.J. Super. 128, 144 (App. Div. 1981).

There is no set rule to determine whether an employee's termination at the end of the working test period was based upon an opinion formed in good or bad faith by the employer. "If the opinion is formed 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." Schopf v. New Jersey Department of Labor, 96 N.J.A.R.2d (CSV) 853, 857.

Conversely, if “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 or because of some furtive design, it must be set aside.” *Id.* The employer’s determination that the employee cannot satisfactorily perform the duties of the job shall be based upon actual observations and those such observations form a rational basis for the employer’s opinion of the employee’s abilities. *Id.* “Good faith in this context means that the appointing authority has actually observed the probationer’s performance and found it to be unsatisfactory.” Davis v. Newark Free Public Library, 9 N.J.A.R. (CSV) 84, 87.

In this matter, the County determined that Mr. Oswald had not performed his job duties in a satisfactory manner, and released him from his position of Laborer 1 at the end of his working test period. Documented evaluations of Mr. Oswald’s job performance were completed after sixty days and at the end of the ninety day working test period. The evaluations were completed based upon actual observations of his work performance, communications with him about his job performance, and back checks of the work he performed, including review of documentation he provided. Mr. Oswald admittedly made mistakes, missed doing tasks, and admittedly recorded data for tasks that he did not complete.

Mr. Oswald asserts that although he made mistakes, his job performance was not the reason for his release. He has made broad assertions of personality conflicts or “personal” motivation of his co-workers and supervisor in terminating him. He has not demonstrated anything specific to show that the County’s assessment of his job performance was motivated by dishonesty, ill will, or prejudice. He has not demonstrated that the County employees acted dishonestly when they observed his work duties, reviewed his documentation, and completed back checks of his work. Although Mr. Oswald generally asserted he thought Biologist Betz may have been “messing” with his work, he could not describe exactly what action he believed was done to sabotage his work.

Mr. Oswald received his sixty day evaluation, which was completed by fair and adequate observations of his work. The evaluation afforded him the opportunity to

improve upon the deficiencies that were noted, and he vowed to improve. There was some improvement noted, yet he was still observed to be unable to properly complete the basic tasks required for the job, such as accurately reading rain gauges, completing landing counts, and sorting mosquitos from bi-catch. His recorded data was suspect and untrustworthy. I **CONCLUDE** the County exercised good faith when it determined that Mr. Oswald was unsatisfactory in the performance of the duties of the position of Laborer 1 for the MCD. I thus **CONCLUDE** that Mr. Oswald's job performance was unsatisfactory.

There was no ill will or dishonesty detected from the County's witnesses regarding appellant. There was nothing presented to demonstrate the evaluations were completed dishonestly or with bias or prejudice. I **CONCLUDE** appellant has failed to demonstrate the County acted in bad faith when it released him from his employment at the end of his working test period, for unsatisfactory job performance. I thus **CONCLUDE** that the County acted appropriately in releasing Mr. Oswald.

ORDER

It is **ORDERED** that the County's decision to release appellant at the end of his working test period is **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.



December 7, 2020
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency:

Date Mailed to Parties:

/dm

APPENDIX

LIST OF WITNESSES

For appellant:

Jason Oswald

For respondent:

Heather Lomberk

Jayme Hyson

John Betz

LIST OF EXHIBITS

Joint Exhibits:

J-1 Statement of Stipulated Facts

For appellant:

None

For respondent:

R-1 Termination letter

R-2 Evaluation (90 day)

R-3 Evaluation (60 day)

R-4 PRE-MARKED, NOT USED

- R-5 PRE-MARKED, NOT USED
- R-6 text message screen shots printed via email (Bates Stamp County 031-County 037)
- R-7 PRE-MARKED, NOT USED
- R-8 PRE-MARKED, NOT USED
- R-9 text message screen shots printed via email (Bates Stamp County 043-County 078)
- R-10 PRE-MARKED, NOT USED
- R-11 PRE-MARKED, NOT USED
- R-12 PRE-MARKED, NOT USED
- R-13 PRE-MARKED, NOT USED
- R-14 PRE-MARKED, NOT USED