STATE OF NEW JERSEY

In the Matter of Edwin Dye,
City of Passaic, Department of Engineering

CSC DKT. NO. 2019-461
OAL DKT. NO. CSV 13516-18

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 24, 2021 (NFA)

The appeal of Edwin Dye, a Building Maintenance Worker, City of Passaic, Department of Engineering, removal effective August 7, 2018, on charges, was heard by Administrative Law Judge Andrew M. Baron (ALJ), who rendered his initial decision on January 25, 2021. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the exceptions, as well as the ALJ's initial decision reversing the removal, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 24, 2021, did not adopt the recommendation to reverse the removal. Rather, the Commission imposed a five working day suspension.

DISCUSSION

The appellant in this matter was charged with incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee and other sufficient cause. Specifically, the appellant struck a pedestrian with a City-owned vehicle while on-duty.

In his initial decision, the ALJ found that while the appellant did, indeed strike a pedestrian, that the charges against him were not sustained. Additionally, the ALJ made several other findings regarding a "Last Chance Agreement" entered into by the appellant and the City pursuant to a prior disciplinary matter. Ultimately, the ALJ found that:

I **CONCLUDE** that the appointing authority has failed in its burden to prove by way of a preponderance of the evidence that Dye was unable to perform his duties, committed conduct unbecoming a public employee, and/or there was other sufficient cause to justify his termination such that the accident itself should lead to a finding of major discipline by the municipality in violation of the 2014 Last Chance Agreement. By way of example, if Dye without authorization, had been driving the City owned vehicle for personal use on off hours when the accident occurred, that may have constituted conduct unbecoming a public employee. Or, if Dye had left the scene of the accident, to prevent the police from doing the investigation, that would constitute conduct unbecoming a public employee, as well as other violations. Nor is there an indication that Dye's ability to drive the vehicle was impaired, as a result of being under the influence of alcohol or drugs.

Additionally, there is no indication of insubordination, such as Speeding, Reckless or Careless Driving, any of which might be a sign that Dye disregarded his duties as a public employee. Many public employees have accidents while driving City vehicles. But without something more, **I CONCLUDE** to just invoke the terms of a Last Chance Agreement seems unfair, unjust and an arbitrary and capricious action against a public employee. If this type of draconian penalty were allowed to stand, any public employee, who simply did not like an individual working for it, disliked their appearance, their way of speaking, the way they dressed or some other human mannerism, could abuse a supervisor's discretion and fire an employee without valid cause.

Even with the language in the prior Last Chance Agreement, that a penalty may be imposed as major discipline in the sole and absolute discretion of the City Administrator, **I FURTHER CONCLUDE** without some sort of underlying conduct, the termination here, imposed without interviewing the injured parties, without interviewing the officer, with no summons being issued to Dye for violating traffic ordinances, and without visiting the scene, is an indication of an arbitrary and capricious penalty against a public employee of the kind that under the totality of the circumstances the employer has failed to meet its burden justifying the decision to terminate Dye.

Based on the above, the ALJ dismissed the charges and reversed the removal. While the Commission agrees with much of the above, after its *de novo* review of the record in this matter, it does not agree that all of the charges should be dismissed,

nor does it agree that no penalty should be imposed in this matter.

In its exceptions, the appointing authority argues that the ALJ inappropriately dismissed the charges against the appellant as his actions in the incident constituted *per se* violations of the motor vehicle code. It further argues that the police report from the accident that was entered into evidence indicated that the appellant struck the pedestrian while he was in a crosswalk as well as the Police Officers opinion that the appellant was at fault for the accident. It further contends that the fact that the Officer did not issue a motor vehicle citation is not determinative. Finally, it contends that the courts have found that Last Chance Agreements should be construed in its favor an appointing authority.

In reply, the appellant argues that the appointing authority's exceptions in no way challenge the ALJ's determination that the imposition of the disciplinary action was, under the facts and circumstances presented, arbitrary and capricious. He also contends that the appointing authority attempts to introduce evidence not in the record in its exception and the same should be rejected by the Commission.

In this matter, the facts in the record as found by the ALJ show that, while not cited by police for any motor vehicle infraction, the appellant was, indeed, found "liable" for the accident. As such, while the circumstances support that this liability did not constitute conduct unbecoming a public employee as there was no intent and the incident was truly an "accident," the appellant's liability for the accident clearly supports upholding the charge of incompetency or inefficiency. To uphold such a charge, it would not be required that the appellant was cited with a motor vehicle offense, or otherwise engaged in any of the other actions the ALJ listed, such as leaving the scene, *etc.* Rather, the facts demonstrate that the appellant was on-duty and his liability for the accident supports that he was performing his duties in an incompetent or inefficient manner. Having found the appellant guilty of that charge, the Commission must determine the proper penalty as well as the implication of the Last Chance Agreement.

In determining the proper penalty, the Commission's review is also *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some

disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this case, the appellant's actions are clearly insufficiently egregious to support the penalty of removal. Nevertheless, the Commission is required to take the Last Chance Agreement into account. In that regard, the Commission notes that the use of the Last Chance Agreement is solely for the purpose of determining the appropriate penalty. While the Office of Administrative Law and the Commission are not strictly bound by the terms set forth in the agreement, since neither entity was a party to it, the Commission is nonetheless cognizant of the fact that the parties voluntarily agreed to the penalty of removal for any subsequent major disciplinary violation. Consequently, a Last Chance Agreement can be used by the Commission as a significant factor to be considered when determining the appropriate penalty in an appeal. Additionally, Last Chance Agreements are generally construed in favor of appointing authorities because to do otherwise would discourage their use by making their terms meaningless. *See Watson v. City of East Orang*e, 175 *N.J.* 442 (2003) (The Supreme Court found an employee's termination was warranted when that employee did not perform in compliance with a Last Chance Agreement as contemplated by the parties. The Court added that a contrary conclusion would likely chill employers from entering into such agreements to the detriment of future employees); *In the Matter of Phillip Montgomery* (MSB, decided May 9, 2000) (In denying a request for reconsideration of an employee's removal, it was indicated that in addition to the employee's extensive history of infractions and the concept of progressive discipline, it gave significant weight to the fact that the employee signed an agreement acknowledging that further instances of certain infractions would result in further disciplinary action up to and including removal). *See also, In the Matter of Tina Kirk* (CSC, decided January 27, 2010); *In the Matter of Brian Whittle* (MSB, decided May 28, 2003); *In the Matter of Ann Marie Collins-Cole* (MSB, decided December 18, 2002) and *In the Matter of Donald Hickerson* (MSB, decided September 10, 2002).

As indicated by the ALJ, the Last Chance Agreement in this matter states "that any future disciplinary infraction . . . which results in a major disciplinary action . . . irrespective of the nature of the infraction, shall result in Dye's immediate and final termination from the City." However, while this term appears clear, it is still subject to interpretation. Does the term mean that any future discipline that results in a major disciplinary action, *regardless of how that penalty was arrived at by the appointing authority,* will result in removal? In other words, if the appointing authority only imposed a major disciplinary action utilizing progressive discipline for an infraction that otherwise would be considered minor, should the above term be implemented?[1] For the reasons below and after

[1] Also, as indicated, the Commission is not a party to any Last Chance Agreement. Thus, any reference to the implementation and finality of any major disciplinary action in such an agreement is

substantial review, the Commission cannot find that interpretation as reasonable in this matter. To credit that interpretation would essentially provide an appointing authority the unfettered ability to impose a major discipline or removal under a Last Chance Agreement for an infraction that could be considered trivial.[2] Indeed, if such a term in Last Chance Agreements were to be construed as such, they would wholly inappropriately supersede the Commission's statutory authority to impose the **proper** penalty. Thus, while the Commission does generally construe such agreements in favor of an employer, it cannot completely ignore where such agreements are not being implemented in a fair and balanced matter. Accordingly, given the appellant's infraction as sustained above, the Commission cannot find that it is worthy of a major discipline. While a more unfortunate outcome may have occurred, the incident itself was merely an accident based not on any intentional malfeasance or misconduct by the appellant. As such, the Commission cannot credit the term in the Last Chance Agreement calling for the appellant's removal based on a major discipline.

Nevertheless, the Commission is statutorily required to impose an appropriate penalty. To do so in this matter, it must also consider the tenets of progressive discipline. In this regard, the appellant's past disciplinary history includes three minor disciplinary suspensions between 1996 and 2001, an eight working day suspension in 2007, a 35 working day suspension in 2012 and a 20 working day suspension in 2014 (which included the subject Last Chance Agreement). Given the nature of the current infraction, the sustained charges, and the appellant's 24-year record of employment including his somewhat remote past disciplinary history, the Commission finds that the appropriate penalty in this matter is a five working day suspension. While this penalty does not appear "progressive" in nature, the current infraction is based on different circumstances and misconduct than his prior major disciplinary infractions, and absent those prior disciplines, an even lesser suspension may have been warranted. However, the Commission notes that the appellant is still subject to the provisions of the last chance agreement for any future qualifying infraction.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority five working days from the original date of his removal to the actual date of his reinstatement. *See N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all

---

solely under the jurisdiction of the Commission once an employee appeals that action to the Commission.

[2] A more difficult question in this particular matter would be if the subject agreement stated "that **any** future disciplinary infraction will result in Dye's immediate and final termination from the City." Under that term, the Commission would likely be more inclined and constrained to completely construe that term in favor of the employer and uphold the removal, as the employee, by signing that agreement would clearly be on notice that **any** infraction, no matter how trivial or minor, would result in the loss of employment regardless of any other factors.

of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission dismissed some of the charges against the appellant, but it has sustained a charge and imposed discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a five working suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority as specified above. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF MARCH, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers.
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Unit H
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTIAL DECISION
OAL DKT. NO. CSV 13516-18
AGENCY DKT. NO. 2019-461

IN THE MATTER OF EDWIN DYE, CITY OF PASSAIC, DEPARTMENT OF ENGINEERING.

Curtiss T. Jameson, Esq., for appellant Edwin Dye

Eric M Bernstein, Esq., for respondent City of Passaic

Record Closed: January 19, 2020 Decided: January 25, 2021

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Respondent City of Passaic terminated appellant Edwin Dye from his position with the Department of Engineering for Inefficiency, Incompetency, Failure to Perform Duties, Inability to Perform Duties, Conduct Unbecoming a Public Employee and other sufficient cause, arising out of an alleged incident wherein Appellant struck a pedestrian while on duty with a City owned vehicle. The City alleges that the incident constitutes a violation

of the "Last Chance Agreement" the Petitioner previously entered into with the City which warrants termination.

More specifically, the Final Notice of Disciplinary Action, (R-6), alleges the vehicle accident in this case triggers paragraph 7 of the Last Chance Agreement, (R-2), which calls for immediate termination for an infraction that constitutes major disciplinary action of five (5) days or more.

PROCEDURAL HISTORY

On or about August 6, 2018, the City of Passaic served Dye with a Preliminary Notice of Disciplinary Action (PNDA), terminating him as a City employee on August 7, 2018, charging him as set forth above in the Statement of the Case.

Dye appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on September 17, 2018. Discovery was completed on January 9, 2019, and shortly thereafter, the City filed for Summary Decision. Opposition to the Motion was filed on January 25, 2019, which included an objection based on timeliness. The City filed its reply on February 14, 2019. Oral argument was held on April 8,2019. .

The Motion for Summary Disposition was denied and the matter proceeded to hearing. Petitioner did not invoke the one hundred eighty (180) day provision for hearing and concluding cases.

The matter was heard on December 6, 2019. Submissions were filed on January 19, 2020. An extension was filed, which was followed by the declaration of a State of Emergency due to Covid.

DISCUSSION OF TESTIMONY AND FINDINGS OF FACT

The City of Passaic presented its entire case through the testimony of the City Business Administrator Ricardo Fernandez. It is undisputed that Mr. Dye started his employment with the City in 1995, and it is also undisputed that there were at least two prior instances of misconduct resulting in documented suspensions from work. The documents which resulted in his termination were introduced into evidence during Mr. Fernandez's testimony.

In 2012, it is undisputed that Mr. Dye was disciplined for failing to obtain a Commercial Driver's license as well as other offenses.

Also undisputed is that a second infraction resulted in another suspension under a Last Chance Agreement on February 25, 2014

The language within said agreement stipulated that Dye "further agrees and understands that any future disciplinary infraction will result in Dye's immediate and final termination from the City." The determination of the disciplinary penalty of termination for any future infractions by Dye shall be within the sole and absolute discretion of the City, through its business administrator.

Notwithstanding the second Last Chance Agreement, another "incident" occurred. It is undisputed that while on duty, on July 17, 2018, Dye was involved in an accident wherein the City owned vehicle he was operating struck two pedestrians at an intersection within the City of Passaic. No summonses were issued to Dye by the City Police Department. However, the accident report that was filed places Dye at fault for the incident. Relying on the language contained in the accident report, the City issued a Final Notice of Disciplinary Action against Dye and declares that he has no basis to contest the termination.

On the merits itself, Dye's counsel argues that the language of the Last Chance Agreement, still allows for Dye to appeal a determination by the City that he should be terminated.

In support of the termination, the City relied on several documents, including but not limited to the Police report which memorializes the accident in which Dye was involved. Also introduced were the two prior Last Chance Agreements from 2012 and 2014 respectively.

Although the officer who wrote the police report did not see the accident, she determined that Dye was liable, but it is undisputed she does not suggest Dye was either reckless, careless or speeding all of which would suggest Dye was using the City vehicle in an improper manner. Again, while stating that Dye was liable, it is undisputed that no summonses were issued to Dye regarding the manner in which he was operating the City vehicle. According to Mr. Fernandez, the family of the child who was struck by Dye's vehicle, did not seek to file a citizen's complaint, not did they file a lawsuit. (As a precaution, he did recall that a Notice of Tort Claim was filed, but they did not act on it). There is no evidence that Dye was under the influence of alcohol or a narcotic drug while operating the vehicle.

Mr. Fernandez is an experienced municipal administrator who has served in this capacity in Passaic for several years. While he for the most part was a credible witness, **I FIND** there was inconsistency in how he arrived at his final decision to terminate Mr. Dye.

More specifically, Mr. Fernandez seemed to demonstrate at least some concern for the impact on Mr. Dye, as he indicated he took three weeks to arrive at his decision. In fact, he waited for an amendment to the officer's accident report, as it turned out there were some errors in the initial report. In his words, "...as the person making the determination, he felt he owed it to himself and Mr. Dye to give a little bit more thought before he rendered a decision."

Curiously, despite his understanding of the impact on Mr. Dye, Mr. Fernandez stated he did not see fit to interview the officer to ask questions such as why no summons was issued to Mr. Dye. He also testified did not attempt to interview the child's family who was hit by the vehicle to find out if there were any serious or long term injuries sustained.

In the PNDA, the City cites, N.J.A.C. 4A;2-2.3 (a)(1), inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3 (a)(3), Inability to perform duties, N.J.A.C. 4A:2-2.3 (a)(6) conduct unbecoming an employee, and N.J.A.C. 4A:2-2.3 (a)(12) other sufficient cause to justify a finding of major discipline connected to the underlying accident, as grounds for termination under the 2014 Last Chance Agreement.

Mr. Dye is a 24 year veteran employee of the City of Passaic. There is no dispute that he has a prior history of disciplinary charges, one of which involved a 35 day suspension from work. While driving a City issued vehicle during work hours, it is not disputed that an accident occurred in which the vehicle he was operating struck a minor child at the intersection of Grove and Henry Street in the City of Passaic on July 17, 2018.

Although Mr. Fernandez took the time to look up the intersection on Google Maps, he stated he did not interview the officer who wrote the police report, nor did he visit the intersection himself, saying that since he grew up in the City, he had been through that intersection "a million times." **I FIND,** that terminating Dye, without a more thorough investigation by the individual entrusted with the "absolute discretion" referred to in the Last Chance Agreement constitutes an arbitrary and capricious act, and abuse of that discretion.

Before his determination that this incident justified termination of Mr. Dye, Mr. Fernandez indicated he looked at the police report, the public works incident report and the intersection through electronic means. He admits that in Mr. Dye's two prior disciplinary cases, neither involved a motor vehicle accident while on duty. He remembered looking at Mr. Dye's personnel file, but did not recall whether he was aware that Mr. Dye had successfully completed multiple safe driving classes required as a condition of employment.

When asked about his thought process leading to the decision to terminate, Mr. Fernandez stated that he looked upon the accident in which a pedestrian was struck with a City issued vehicle as major discipline without much effort. "My belief is than an incident in which a public employee is 'found guilty' of hitting a pedestrian, to me, as an individual who renders discipline, is a major discipline."

The problem with that statement from a factual standpoint is that Mr. Dye was not found guilty of hitting a pedestrian, no charges were filed against him by the Passaic Police Department, nor was there an appearance in the Passaic Municipal Court to answer for any such charges. **I THEREFORE FIND,** that the administrator exceeded the discretion with which he was entrusted when he determined that the only outcome was to terminate Dye.

The City also took the position that Mr. Dye was not entitled to an internal hearing prior to appealing to the Office of Administrative Law, because under the Last Chance Agreement, he had waived this right to a hearing before the City Administrator.

When asked for any additional factors that led to the termination, Mr. Fernandez also could not recall whether there were any additional incidents in which Mr. Dye was involved from the time the Last Chance Agreement was entered into in February of 2018, and the motor vehicle accident in July 2018 which gave rise to the within matter. It is undisputed that he could not recall any other incidents, nor were any other subsequent incidents referenced in the PNDA which is one of the sources of this case.

According to Mr. Fernandez, Mr. Dye is one of approximately 700 individuals employed by the City of Passaic. He confirmed that other City employees had been involved in motor vehicle accidents while driving City owned vehicles, and that when appropriate, they had been disciplined if found to be "at fault" for the accident. Again here though, while the officer who wrote the report about Mr. Dye's accident determined he was "at fault," there is no summons or municipal court determination to corroborate that finding, and Mr. Fernandez did not deem it necessary to interview the officer to gain more details or information about how the officer made this determination. Explaining further

his rationale for the termination, he explained that he did not believe it was necessary to explore the condition of the accident any further because the accident involved " a right turn on a one-way street where you can only make a right turn, and the pedestrians were on the right in the cross-walk." He confirmed that very often when a City employee, and/or a City owned vehicle is deemed "at fault" in an accident, the City Police Department often does not issue a summons to the City employee.

Mr. Fernandez was then asked for more specific information about the charges filed against Mr. Dye in the PNDA, his interpretation of it, and his rationale for termination. Mr. Dye was charged with Inefficiency, Incompetency and Failure to Perform duties. He went on to explain that the accident itself in his view constituted incompetency, that it is part of Mr. Dye's duties to perform and drive the City vehicle in a non-negligent manner.

He testified that in his mind, getting involved in the accident constituted "Conduct Unbecoming an Employee, and also fell into the category of "Other Sufficient Cause." In his capacity as City Administrator, the accident warranted major discipline, in this case termination of Dye's position with the City.

No other witnesses testified and the hearing was concluded.

Based on the aforementioned Facts, I **FIND,** the City did not meet its burden supporting the determination that Dye should be terminated, as a result of being involved in an accident while operating a City owned vehicle, without any indication that he left the scene, was under the influence of drugs or alcohol, was reckless or careless, or improperly communicated with the civilians. As such, the termination constitutes an **arbitrary** and **capricious** decision and abuse of discretion;

I **FURTHER FIND,** the City did not meet its burden that the termination was consistent with the purpose and intent of the Last Chance Agreement.(R-2). The language of the Last Chance Agreement, states"...Dye further agrees and understands that any future disciplinary infraction, **which could result** in a major disciplinary action will result in Dye's immediate and final termination from the City. The determination of

the disciplinary penalty of termination for any future infractions by Dye, **shall be within the sole and absolute discretion of the City** Business Administrator.

But this presumes, that even with that language, which although it cannot be rewritten, is still subject to interpretation, the Business Administrator will not exercise such discretion in an **arbitrary and capricious manner,** which I **FURTHER FIND**, without something more, such as operating a City owned vehicle during City hours while under the influence of alcohol or drugs, leaving the scene, speeding, reckless or careless driving, none of which are evident here, that simply characterizing a routine accident as major discipline warranting termination within his discretion, is manifestly unjust and unfair.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the executive branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(2), (3), (6), (7), and (12).

In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the

believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Dye was charged with Inefficiency, inability to perform duties, conduct unbecoming a public employee, and other sufficient cause.

N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." Karins v. Atl. City, 152 N.J. 532, 554 (1998). What constitutes conduct unbecoming a public employee is primarily a question of law. Id. at 553.

In 2012, Dye was disciplined for failing to obtain a commercial driver's license, which was a requirement for his position with the City, as a member of the Public Works Department. The matter was resolved with a settlement agreement, which was entered in the case as Exhibit R-1, also known as the First Last Chance Agreement. Essentially, this document arose out of Dye not meeting an essential element of his job, that being, securing a Commercial Driving License, in order to operate City owned maintence vehicles. Under the terms of the agreement, Dye was to take and pass the CDL test by December 24, 2012, and the road exam by March 24, 2013.

Although he did not meet these deadlines, he apparently got a reprieve because the Civil Service Commission rejected the agreement on other grounds, and then on April 17, 2013, thirty (30) days after the last CDL requirement which Dye had agreed to, a revised agreement was approved. (Dye ultimately passed both CDL requirements shortly thereafter.) This resulted in the creation of a new Last Chance Agreement, entered into by the parties on February 25, 2014, under which Dye was able to keep his job, but surrendered twenty (20) days of suspension, by giving up a combination of vacation, sick and personal days.

The provisions of (R-2) were stricter than the first one, including but not limited to immediate termination of employment if he was found to violate any provisions of the agreement, as well as any future disciplinary infraction which constitutes major discipline. The determination of the disciplinary penalty of termination for any future infractions by

Dye shall be within the sole and absolute discretion of the City, through its Business Administrator.

There are a multitude of cases that discuss and uphold the right of a government entity to discharge/terminate an employee pursuant to N.J.A.C. 4A:2-2.2. In re Overton OAL Dkt. No. 8542-07, 2008 N.J. AGEN. LEXIS 525 Final Decision (April 23, 2008) involved a building maintenance worker who was removed from his position due to being convicted of driving a township vehicle while under the influence of alcohol, and where the employee had received several accommodations for alcoholism prior to the termination. See also: In re Dakalis OAL Dkt. No.CSV 6744-07 2008, NJ AGEN. LEXIS 717 Merit System Board Decision (June 11, 2008) And See: In re Griffin-Staples, Dept. of Children & Families, OAL Dkt. No. CSV8810-07, 2008 N.J.AGEN LEXIS 1513 Initial Decision (may 27, 2008), wherein a worker at a residential treatment center was removed for being found to have engaged in inappropriate physical contact with a patient, but since there was no showing that the worker intended to harm the patient, the penalty of removal was determined to be too harsh, and a 60 day suspension was imposed instead.

In each of the aforementioned cases discussed above, there was another intervening act by the employee, significantly different from the situation with Dye, which involved a vehicle accident, where while he was at fault, did not involve any other type of conduct such as reckless or careless driving, speeding, or leaving the scene of an accident or driving under the influence of alcohol or drugs.

Thus, the final determination by the City of termination, seems to violate the spirit of what a Last Chance Agreement stands for, as there is no indication of conduct in this situation that he purposely acted in contravention of his obligations as a City employee. Dye had an accident, which Mr. Fernandez indicated that many of the City's 700 employees are involved in from time to time. No one was hurt. Dye waited for the police to come to the scene. And Dye was not charged with any moving violations. In and of itself,this does not constitute sufficient grounds for removal. **I CONCLUDE** that in terminating Dye, the City Administrator also failed to specify or mention any of the four charges outlined in the PNDA, insubordination, inability to perform duties, conduct unbecoming an amployee, and other sufficient cause, as justification for removal. Even

if he had done so, without something more beyond a routine accident as mentioned above, the penalty of termination is too harsh.

Obviously, there is something in the employer-employee relationship between the City and Dye that led to the existence of two Last Chance Agreements, almost to the point where Dye seemed to have a "target on his back." He did fulfill his obligation to secure a CDL license, which was a necessary component of his job. And he did go more than another four years without an incident, until he was involved in an accident with a pedestrian, while on duty. Nevertheless, that does not give the City unilateral authority to act in an arbitrary and capricious manner terminating Dye, when the basis of the final dismissal is a minor accident, where there was only a minor injury, and no legal action was taken against the City.

On July 17,2018, Dye was on duty driving a City owned truck, and was involved in an accident at the intersection of Grove and Henry Streets in the City of Passaic. Police Officer Karla Salcedo was dispatched to the scene of the accident which involved two pedestrians. Although one of the pedestrians suffered minor injuries, they did not seek compensation or retribution from Dye or the City. Dye remained at the scene of the accident and cooperated when the police arrived, although he gave a different version of the accident in the Incident Report, seeming to blame the pedestrians for walking to the intersection as he turned the vehicle.

I **CONCLUDE** that the appointing authority has failed in its burden to prove by way of a preponderance of the evidence that Dye was unable to perform his duties, committed conduct unbecoming a public employee, and/or there was other sufficient cause to justify his termination such that the accident itself should lead to a finding of major discipline by the municipality in violation of the 2014 Last Chance Agreement. By way of example, if Dye without authorization, had been driving the City owned vehicle for personal use on off hours when the accident occurred, that may have constituted conduct unbecoming a public employee. Or, if Dye had left the scene of the accident, to prevent the police from doing the investigation, that would constitute conduct unbecoming a public employee, as well as other violations. Nor is there an indication that Dye's ability to drive the vehicle was impaired, as a result of being under the influence of alcohol or drugs.

Additionally, there is no indication of insubordination, such as Speeding, Reckless or Careless Driving, any of which might be a sign that Dye disregarded his duties as a public employee. Many public employees have accidents while driving City vehicles. But without something more, **I CONCLUDE** to just invoke the terms of a Last Chance Agreement seems unfair, unjust and an arbitrary and capricious action against a public employee. If this type of draconian penalty were allowed to stand, any public employee, who simply did not like an individual working for it, disliked their appearance, their way of speaking, the way they dressed or some other human mannerism, could abuse a supervisor's discretion and fire an employee without valid cause.

Even with the language in the prior Last Chance Agreement, that a penalty may be imposed as major discipline in the sole and absolute discretion of the City Administrator, **I FURTHER CONCLUDE** without some sort of underlying conduct, the termination here, imposed without interviewing the injured parties, without interviewing the officer, with no summons being issued to Dye for violating traffic ordinances, and without visiting the scene, is an indication of an arbitrary and capricious penalty against a public employee of the kind that under the totality of the circumstances the employer has failed to meet its burden justifying the decision to terminate Dye.

Finally, **I CONCLUDE** that he is entitled to reinstatement to his position, with back pay, retroactive to the last day he received compensation.

ORDER

It is **ORDERED** that the termination of Dye is hereby **REVERSED,** and that pursuant to N.J.A.C. 1:1-14.4, and I **DIRECT** the Clerk to return the matter to the Civil Service Commission for appropriate disposition.

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.

January 25, 2021
DATE

ANREW M. BARON, ALJ

Date Received at Agency: January 25, 2021

Date Mailed to Parties:

mm

APPENDIX

WITNESSES

For Petitioner

None

For Respondent:

EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Settlement Agreement and General Release
R-2 Last Chance Agreement and Police Report
R-3 Police Report
R-4 Supplemental Police Report
R-5 Department of Public Works Incident Report
R-6 Final Notice of Disciplinary Action, 8/6/18