STATE OF NEW JERSEY

In the Matter of Edwin Dye, City of Passaic, Department of Engineering	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2021-1516	:	Request for Reconsideration

ISSUED: JULY 2, 2021 (SLK)

The City of Passaic (City), represented by Joseph P. Horan, II, Esq., requests reconsideration of *In the Matter of Edwin Dye* (CSC, decided March 24, 2021). In the alternative, the City requests a stay and remand to the Office of Administrative Law (OAL) for a further hearing.

By way of background, Dye, a Building Maintenance Worker with the City, was removed, effective August 7, 2018, on charges of incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee and other sufficient cause. Specifically, it was alleged that Dye struck a pedestrian with a City-owned vehicle while on-duty. In his initial decision, the Administrative Law Judge (ALJ) found that, while Dye did indeed strike a pedestrian, the charges against him were not sustained. Additionally, the ALJ made several other findings regarding a Last Chance Agreement (LCA) entered into by Dye and the City pursuant to a prior disciplinary matter. Ultimately, the ALJ recommended reversing the removal and, regarding the LCA stated "to just invoke the terms of a [LCA] seems unfair, unjust and an arbitrary and capricious action against a public employee." Upon its review, the Commission disagreed with the ALJ's conclusions. Rather, it indicated that the facts in the record were that Dye was, indeed, found "liable" for the accident. As such, the Commission found that Dye's liability for the accident clearly supported upholding the charge of incompetency or inefficiency. Having found Dye guilty of that charge, the

Commission next had to determine the proper penalty. Initially, the Commission noted that Dye's actions were clearly insufficiently egregious to support the penalty of removal. Nevertheless, the Commission was required to take the LCA into account. Specifically, the LCA stated "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, the Commission determined that it was not reasonable to interpret that term to mean that any future discipline that results in a major disciplinary action, regardless of how that penalty was arrived at by the appointing authority, would result in removal. While a more unfortunate outcome may have occurred based on the misconduct, the incident itself was merely an accident based not on any intentional malfeasance or misconduct by Dye. As such, it did not credit the term in the LCA calling for his removal based on a major discipline. Considering Dye's past disciplinary history, his 24-year record of employment, and the incident in question, the Commission determined that the appropriate penalty was a five working day suspension. Finally, the Commission noted that Dye was still subject to the provisions of the LCA for any future qualifying infraction.

In its request for reconsideration, the City argues that the Commission's decision was arbitrary and capricious and not supported by the evidence. It presents that the City terminated an employee who voluntarily entered into a LCA after he blatantly lied to cover up and/or misrepresent an accident injuring a six-year old civilian. The City states that the Commission's decision is not aligned with legal precedent, provides a windfall of back wages for an employee who lied and concealed his culpability after voluntarily signing a LCA, and its decision punishes the City and its taxpayers. The City indicates that it presented the Commission an abundance of Appellate Division and Supreme Court cases establishing that LCA agreements are generally favored in the public sector. It also presented case law that a public employee who violated motor vehicle law causing an accident that nearly killed a six-year old could be subject to major discipline even if not cited or receiving a summons from the police. The City states that it reasonably relied upon the LCA and the Commission has no regulation or case law to rely upon to indicate that the LCA should be disregarded. Further, it asserts that the City could not anticipate that it would owe $150,000 in back pay where an employee blatantly lied to cover up his misconduct. The City contends that it should not have to guess as to whether it will uphold a LCA.

The City further argues that the Commission failed to consider that Dye purposely lied to it to circumvent discipline. It presents that case law is clear that public employees who lie to their employer to escape discipline should receive major discipline. The City states that it emphasized this point in its exceptions; however, the Commission proffered no finding on this issue. It indicates that Dye offered an after-the-fact report that the child purposely impacted the truck to fake an accident. The City asserts that Dye conjured up this statement to the investigating Police

Officer and he did not testify at the hearing even though it was his burden to prove this patently absurd defense. It states that the only evidence was proffered by the City and Dye's "defense" should be rejected as a matter of law. The City presents a Tort Claims Notice that the child's family served on the City due to the accident[1] and argues that there is no evidence to anything other than the child was an innocent victim. It argues that the Commission's decision sends a terrible message to the public in that you can lie, get away with it, and be rewarded with a $150,000 windfall of wages.

The City presents that the Commission found that Dye was incompetent, and the case law establishes that incompetency is well-established as a basis for removal. It states that the Commission ordered that Dye, who it found incompetent, to operate heavy machinery in and around civilians in a densely populated municipality and then rewarded him with $150,000 back pay. The City contends that case law holds that the application of major discipline and Dye's termination pursuant to the LCA that he voluntarily signed is justified. It states that there is no way that the City can let Dye operate heavy machinery because if he were to injure or kill another civilian, the liability to the City would be astronomical.

The City indicates that it attempted to remand the matter before the matter was decided by the Commission. It understands that during the Commission meeting there was discussion among the members questioning why the investigating Police Officer did not appear and testify before the OAL as per her report, which, in part, formed the basis of its decision. The City states that the report was not the only basis for the discipline. Rather, it contends that Dye's blatant lies, his attempts to conceal his blame for the accident, his conflicting statements from what he told the investigating Police Officer and what he wrote on the Incident Report, his absurd statement that a six-year attempted to stage the accident by jumping in front of his vehicle, and his past disciplinary history also played a role in the City's decision. The City states that Dye's counsel represented that he would testify at the hearing, but then opted not to do so. As such, it indicates that Dye was not cross-examined about his complete disciplinary history and his false statements by predecessor Labor Counsel for the City. It contends that the factual record in this case requires expansion. It cites case law to argue that when a party is "blameless and ha[s] relied upon the presumed competence and good faith of their attorney," that "the sins or faults of an errant attorney should not be visited upon his client absent demonstrable prejudice to the other party." The City presents that the day after the Commission meeting, it filed a letter brief asking that the matter be remanded to the OAL for further development of the record. However, this agency informed it that the Commission already made its decision. Further, it requested an audio or video of the meeting; however, it was advised that the Commission does not audio or video record its meeting. The City presents that *N.J.A.C.* 1:1-18.7 permits an agency head to order remanding a contested case back to the OAL for a hearing on issues or arguments not

[1] The record indicates that the accident victim's family did not actually sue the City.

previously raised or incompetently considered. It indicates that at a hearing, it will present the investigating Police Officer as a witness, introduce Dye's full disciplinary record into the record, and cross-examine Dye as to his lies and fabrication. The City emphasizes that Dye signed two LCAs and then blamed a six-year old rather then accept blame himself.

The City argues that rewarding Dye with $150,000 in back pay would be punitive against it and its taxpayers when the City reasonably based its decision on well-established legal precedence and advice from prior Labor Counsel. It emphasizes that it legitimately believed that it had proper and sufficient grounds to invoke the LCA agreement and remove Dye. Further, the City reasonably relied upon the advice of predecessor legal counsel as well as the LCA that Dye voluntarily signed. It presents the City's Business Administrator sworn certification detailing how the Commission's finding that Dye only be liable for minor discipline will result in a colossal windfall for Dye in approximately $150,000 in back pay, which does not even include the costs to reinstate pension and health care benefits. It contends that based on the facts and legal precedent that that there was no way it could anticipate that Dye would prevail before the Commission. The City reiterates its statement that there is no Commission regulation indicating when a LCA will not be upheld. It asserts that it will have to raise revenues or cut service to meet this unexpected liability. The City notes that it suffered an approximate $1.5 million revenue shortfall due to the pandemic, and therefore, it does not have the ability to just find $150,000.

The City alternatively requests that this matter be stayed until it has been conclusively resolved. It cites that *N.J.A.C.* 1:1-18.6 authorizes a stay of the implementation of an agency decision. The City reiterates the difficulty in paying Dye the awarded back pay and benefits and it states that it should not have to do so unless necessary. It contends that it is highly unlikely that it would recover this money if it paid Dye now and it ultimately prevailed after exhausting its appeal rights. The City states that this matter is over two-and-one-half years old so keeping the status quo a little longer would not unduly prejudice Dye. Further, if Dye ultimately prevails, he will receive additional back pay.

The City states that the New Jersey Administrative Procedures Act requires that the Commission promulgate a regulation on the enforcement of LCAs. The City asserts that it is basic fairness and due process to the regulated community that the State agency promulgate a regulation on the issue so that the regulated community knows and has the ability to protect itself within reason how a given matter will be handled by the State agency and the regulated community should not have to guess as to an outcome and suffer harm if it guesses incorrectly. It asserts that there must be a Commission regulation regarding LCAs and exactly what is required for them to be considered legally valid and binding when they have been entered into a public employer and employee.

The City states that the role of the Commission is to not only protect employees, but it is to protect employers. It presents that its research failed to find support for the unenforceability of LCAs. The City contends that case law indicates that Dye's actions warrants major discipline that would trigger the LCA. It asserts that there is no debate that he lied by conceding fault in an accident that nearly killed a six-year old and then by concocting a story by blaming the six-year for allegedly staging the accident as a "plot." The City states that it had no choice but to terminate Dye under these circumstances when it was faced with a potential lawsuit and Dye, with a substantial disciplinary history, violated the LCA. The City believes that there is ample evidence in the record for the Commission to reconsider its decision and affirm Dye's removal. However, in the alternative, it requests that the matter be remanded to the OAL so that his complete disciplinary history can be made part of the record, and so it can call the investigating Police Officer who documented Dye's fault in the accident. It reiterates its position that the record is undisputed that Dye lied to his superiors and that alone justifies his removal.

The City presents that Dye's employment started in 1994 and his disciplinary history includes:

- 1995 Notice of Minor Disciplinary Action (NMDA) for failing to carry out a job assignment and telling his supervisor to "Shut Up."
- 1994 NMDA for taking 1.5 days beyond his sick leave allotment of 15 days and being placed on sick leave verification.
- 1996 NMDA for insubordination for refusing to perform a task and telling his supervisor that he "did not give a F—about this job" and "if you write me up or if I lose my job I am going to whip you A--, You Mother [F]-----, and you are going to lose your job and your life. If you [are] a man, meet me after work by the building (where we live). As a matter of fact, come right now."
- 1996 NMDA for using 11 of his sick days for 1996 and being placed on sick leave verification again.
- 1998 NMDA for using 15 sick days for 1998 and being placed on sick leave verification again.
- 2000 NMDA for making a personal call on a City telephone after being warned on several occasions not to do so.
- 2000 Verbal Warning after being observed sitting and watching TV in the City's Senior Building while others were working and for making a personal call on-duty.
- 2000 written warning for failing to punch-in or out on the employee time clock.
- 2001 NMDA for insubordination for failing to follow a directive to attend a mandatory safety meeting.
- Three separate written warnings within a month in 2001 for failing to punch-in or out on the employee time clock.

- 2001 NMDA for using all of his sick time in 2000 and 2001.
- 2003 written warning for tardiness in being late to work 39 times from January to September 2003.
- 2007 verbal warning for tardiness in being late to work 39 times from January to September 2003.
- 2007 verbal warning for being absent from his assigned work area for nearly 30 minutes and not completing his assigned tasks.
- 2007 PNDA (Preliminary Notice of Disciplinary Action) for abandoning his jobs duties and being absent from his work area for over an hour.
- 2007 FNDA initially suspending him for 15 days which was reduced to eight days upon settlement.
- 2011 NMDA for appearing at work out-of-uniform.
- 2012 PNDA for an undefined suspension and/or removal for being observed by the Mayor and Business Administrator watching TV in the Senior Center when he should have been working and for being insubordinate and yelling and cursing at the DPW Director when he was reassigned to the Parks Department, so he would no longer be working in the Senior Center. He was also a no call/no show the first day of his new assignment in the Parks Department.
- 2012 FNDA (Final Notice of Disciplinary Action) resulting in his removal, which led to the first LCA. His removal was modified to a 35 day suspension and he was placed in a lower job title. He was also required to obtain a CDL within six months or subject termination. In 2013, the Commission approved the settlement.
- 2014 second LCA because he failed to obtain his CDL where he agreed to a 20 day suspension. The LCA provides that any further infraction which results in major discipline, i.e. a suspension for more than five days, will result in immediate and final termination. The LCA indicated that the determination of the disciplinary penalty of termination for any future infraction was within the sole and absolute discretion of the City, through its Business Administrator.
- 2017 NDMA for confronting a supervisor in the DPW in a hostile, aggressive and confrontational manner. Further, Dye was cautioned about his second LCA and advised that the infraction could have led to a major discipline and his termination. Dye was subjected to a five days suspension, which he accepted by applying accrued vacation time to same.
- 2018 written warning for being absent from work 15 times through 2017.
- 2018 FNDA for violating the second LCA, specifically: "You then began to make a left turn while (2) pedestrians were in the crosswalk. You struck one (1) of the pedestrians, a juvenile, with the vehicle. The juvenile from the scene for medical treatment and the police at the scene opined that you were at fault in the accident."

The City presents that Dye had a below average performance rating in 2016 and took defensive driving courses in 2012 and 2015. It outlines its Vehicle Use Policy which provides that the Business Administrator has sole discretion to determine if the policy has been violated. The City states that most public employees go their entire careers without discipline and some receive discipline early in their careers and learn from it, but Dye has been a problematic employee throughout his career. It asserts that his most recent performance evaluation shows that he is a purposeful slacker. The City presents that the basis for the subject discipline is that Dye failed to yield the right-of-way to a six-year old child who was within a crosswalk, which violated motor vehicle statutes and the City's Vehicle Use Policy. Further, it contends that his lying about the incident is even more egregious. It notes that Dye was previously disciplined after the second LCA went into effect and it exercised restraint and now it believes it is being punished for doing so. The City states that Commission asked why this evidence was not introduced at the initial hearing, and presumably, prior Labor Counsel did not feel it was necessary given the nearly uniform Commission case law supporting the enforcement of LCAs up until this matter. Nevertheless, it asserts that even if prior Labor Counsel was remiss, case law clearly indicates that the shortcomings of counsel should not be held against it. Further, the City states that Dye cannot claim undue prejudice as the information was presented to him during discovery. It argues that Dye's extensive history of "progressive discipline," resulting in two LCAs against him must be considered.

The City asserts that its research found 53 cases where the Commission referenced an LCA and in nearly all cases the LCA was upheld. It cites many cases to illustrate its point. However, the City indicates that these cases do not provide clear principles, standards or criteria explaining when LCAs would not be upheld. It reiterates based on the extensive history of the Commission enforcing LCAs, it reasonably believed that the Commission would uphold the second LCA and it argues that the Commission's decision to not uphold it was arbitrary and capricious.

The City argues that Dye's conduct warrants major discipline and existing Commission case law, his extensive disciplinary history supports the enforcement of the subject LCA, and Dye must be removed. It presents that it did not act rashly in this matter as it waited approximately three and one-half years later to invoke the second LCA. It emphasizes a prior incident after the second LCA where Dye was hostile, aggressive and confrontational to a supervisor where Dye was cautioned, but not removed. He was also written up for using all of his sick leave in 2017. However, in this matter, there was an accident where the investigating Police Officer found Dye at fault for striking a six-year while operating a City dump truck and then he lied about the accident to his supervisor by filing a false incident report. Therefore, it asserts that the second LCA was immediately and properly invoked. The City states that in its exceptions, it presented cases to explain that a summons or conviction in municipality for a moving violation was not necessary to justify major

discipline for misuse of a public vehicle. It asserts that the evidence is stronger in this matter than in other cases and, therefore, it reasonably believed the removal would be upheld. Further, it emphasizes that the Commission did not even consider that Dye lied about the accident on the Incident Report and case law is clear that lying to one's supervisor warrants major discipline.

The City argues that the Commission must consider the tremendously devastating impact on the City if Dye is returned to work. It reiterates that Dye is a chronic, defiant offender who cannot be rehabilitated. Moreover, the City states that the line absolutely must be drawn when it involves the life of a minor child. Further, it asserts that the message must be sent to public employees that last chance means just that.

In response, Dye, represented by Curtiss T. Jameson, Esq., asserts that the City is seeking nothing more than a do-over and it bore the burden of proof in his termination and it failed to meet that burden. He states that the City's unhappiness with the outcome is not grounds for reconsideration and remand. Regarding Dye's disciplinary record, he states that the City has failed to demonstrate whether his disciplinary record was overlooked, and if so, how it would impact the outcome and why it was not previously presented. Instead, Dye claims that the City draws attention to his disciplinary history to disparage him so that the Commission may rethink its order without regard to it having met its burden of proof. He argues that his disciplinary record is not relevant since the LCA indicates that any infraction that was considered major discipline, *i.e.,* a suspension of more than five days, would be automatic removal and not progressive discipline. The ALJ found no discipline was warranted based on a review of the record and the Commission revised it to a five days suspension, which is minor discipline. Consequently, Dye states that his disciplinary history had no bearing on the outcome under the LCA. He presents that this is consistent with the Business Administrator's testimony that his disciplinary history had no bearing on the discipline imposed and he terminated him because he thought Dye's alleged infraction was sufficiently egregious. Additionally, Dye argues that his disciplinary history was already part of the proceeding and does not warrant remand for its inclusion. He also questions why if his disciplinary history was so important that it was not introduced at the hearing. Dye believes that even if his disciplinary history was presented at the hearing, it would not have changed the outcome. Moreover, he asserts that the City failed to provide any justification for why it was not offered which is a vital component for reconsideration.

Concerning the LCA, Dye asserts that the Commission's decision is consistent with the law and applications of LCA's in New Jersey. He presents that the subject LCA indicated that he would be terminated immediately should he commit an infraction that would support a major disciplinary event. As part of the LCA, Dye waived his right to a departmental hearing, but kept his right to appeal to the Commission, which acted as a check against the City for issuing a major discipline

for something otherwise minor. Therefore, he argues that the LCA operated perfectly as while the City believed his workplace incident warranted major discipline, the ALJ recommended that there be no discipline and the Commission modified the ALJ's recommendation to impose minor discipline. Accordingly, the Commission found that the LCA did not warrant termination. He contends that contrary to the City's assertion that the Commission's handling of the situation was "uncharted," this was a standard manner which the Commission properly navigated.

Dye submits that this is the City's fourth bite at the LCA apple. He presents that he initially motioned for summary judgment to avoid a hearing and enforce his termination without review; however, the ALJ rejected its argument. Thereafter, during the hearing, while the ALJ found that the LCA was valid and enforceable, the City had not met its burden in the termination. Thirdly, Dye states that the City raised in exceptions that the LCA supported his termination and this subject reconsideration is the fourth attempt. However, he argues that the City does not meet the standard for reconsidered as it has not presented new or additional evidence regarding the LCA. Dye notes that the case law that the City presents existed during the hearing with the ALJ and while the Commission considered exceptions. Further, he emphasizes that the LCA was presented at the hearing, considered, and eventually denied. Dye indicates that the City has failed to reinstate or pay him back as ordered and failed to comply with the Commission's order. Therefore, Dye seeks that the City comply with the order.

In further reply, the City asserts that Dye cannot be allowed to prevail on an incomplete record as there is too much at stake. It rejects the assertion that it wants a "do-over." The City states that Dye is attempting to exploit an incomplete record and it surmises that prior counsel did not introduce his entire disciplinary record because it thought it was unnecessary given the avalanche of cases enforcing LCAs. It cites cases to indicate that the most important thing is that cases are decided based on all the facts and not just to adjudicate matters quickly and based on procedure.

The City presents *West New York v. Bock*, 38 *N.J.* 500 (1962) which indicates that the Commission should consider an employee's past record in any disciplinary appeal. It argues that that record was skewed favorably for Dye because his past employment record was not presented at the hearing. The City states that it is just seeking to incorporate into the record information that was provided to Dye during discovery, so he is not being ambushed by this record. It asserts that his entire disciplinary record is relevant to these proceeding as it, coupled with the LCA, provides the full story. The City states that his disciplinary history indicates an employee who is a defiant employee given opportunity after opportunity to correct his behavior. Further, there were two LCAs and Dye's negligence nearly resulted in the death of a child who did nothing wrong. Moreover, the City contends Dye should be discharged for lying to his supervisor and blaming a child to shield his incompetence. Finally, the City asserts that Dye concedes the accuracy of its recitation of his past

record, the fact the Commission normally enforces LCAs under prior case law precedent, and case law indicates that when an employer lies to its superiors this normally results in substantial discipline as Dye has not in any way refuted the City's presentation of Dye's disciplinary history or the case law that it has presented.

CONCLUSION

N.J.A.C. 4A:2-1.6(a) provides within 45 days of receipt of a decision, a party to the appeal may petition the Civil Service Commission for reconsideration.

N.J.A.C. 4A:2-1.6(b) provides that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

> 1. The new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or
>
> 2. That a clear material error has occurred.

N.J.A.C. 4A:2-1.4 provides that in appeals concerning major disciplinary action, *N.J.A.C.* 4A:2-2, the burden of proof shall be on the appointing authority.

In this matter, Dye signed a LCA indicating that he would be terminated for any incident that warranted major discipline. In reviewing the record, the Commission cited the findings of the ALJ such as Dye was not driving without authorization, he was not using the vehicle off hours for personal use, he did not leave the scene of the accident to prevent the police from doing the investigation, there was no indication that he was impaired by drugs or alcohol, and there was no finding that he was speeding, reckless or driving carelessly. Therefore, the Commission found that the incident was merely an accident based not on any intentional malfeasance or misconduct by Dye. While the City may disagree with the Commission's decision, based on this background, there is no basis to find that the Commission committed a clear material error when it found that major discipline was not warranted.

However, the Commission noted that while Dye was not cited by police for any motor vehicle infraction, the investigating Police Officer opined that Dye was "liable" for the accident. Consequently, the Commission found that the facts demonstrated that Dye was on-duty and his liability for the accident supports that he was performing his duties in an incompetent or inefficient manner. Regarding the penalty, the Commission considered the past disciplinary history that was in the record; however, it noted that the current infraction was based on different circumstances and misconduct than his prior major disciplinary infractions. Therefore, the Commission found that a five-day suspension was appropriate and

noted that absent those prior disciplines, an even lesser suspension may have been warranted. The City now presents a more complete record of Dye's disciplinary history as grounds for reconsideration of the penalty imposed or to remand that matter to the OAL so that it can submit the more complete disciplinary history in the record. It notes that Dye was previously disciplined after the second LCA went into effect and it exercised restraint and now it believes it is being punished for doing so. Initially, the Commission finds that the City's request to submit a more complete record of Rye's disciplinary history does not meet the standards for reconsideration as this record could have been presented at the hearing at the OAL. Regardless, even if the Commission were to consider this further description of Dye's history of discipline and even if Dye does not dispute it, this would not change the Commission's decision as this does not change that the current infraction was based on an unintentional accident or that the current infraction was based on different circumstance from prior misconduct and does not warrant major discipline.[2] As such, the Commission's decision is not inconsistent with *Bock, supra*, as the Commission did consider the prior disciplinary history that was in the record when it made its decision. Further, even if the Commission were to consider the disciplinary history as the City presents in reconsideration, this would not change the outcome. Additionally, whether the City could have previously imposed major discipline after the second LCA was signed as the City suggests for a prior incident is not relevant as the subject matter does not warrant major discipline for the reasons already cited.

The City also argues that the Commission failed to consider that Dye allegedly purposely lied to the City to circumvent discipline. It asserts that Dye conjured up this statement to the investigating Police Officer, he did not testify at the hearing even though it was "his burden to prove this patently absurd defense," and he did not face cross-examination regarding his alleged lying. It also states that case law indicates that lying to one's superiors to avoid discipline is grounds for substantial discipline and Dye has not disputed this. However, although the City asserts that it is "undisputed" that Dye lied about the incident to avoid discipline, a review of the initial decision does not indicate that there was any testimony about Dye's alleged lying from the City. Further, contrary to the City's argument, there was no obligation for Dye to testify and face cross-examination and as it was the City's burden to prove its case.[3] Moreover, there was no finding by the ALJ that Dye lied to avoid discipline. Finally, a review of the Final Notice of Disciplinary Action does not indicate that one of its charges and specifications for removal was that Dye lied to escape discipline. As such, the Commission rightfully did not consider this allegation in the prior decision and cannot consider it now. *See In the Matter of Matthew Calio,* Docket Nos. A-5183/5189-16T3 (App. Div., December 11, 2018). In other words, an appointing

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[2] A review of the Dye's disciplinary history as presented in this matter indicates that although the there is a long history, most of this history is for either minor discipline and/or warnings, and is conduct that is unrelated to the infraction in this matter that involved an accident where there was no intentional malfeasance or misconduct.

[3] The Commission also notes that it was not precluded from calling Dye to testify at the OAL.

authority cannot present a new theory for discipline after the matter is decided simply because it is unhappy with the outcome.

The City presents that incompetency is for a basis of removal under prior Commission decisions. However, while the Commission could have found that the subject incident warranted major discipline based on Dye's incompetency, it was not mandated, and it did not find it appropriate based on the record. Regarding the City's statement to seek a remand to the OAL before the matter was decided by the Commission, the record indicates that the City sought a remand **after** the Commission's March 24, 2021 meeting, which was after the Commission made its decision. Additionally, even if the remand request had been made before the Commission's decision, nothing has been presented that could potentially change the Commission's decision in this matter and such a request would not have been granted. Moreover, the alleged basis for the remand, in addition to presenting Dye's complete disciplinary history and so that he can face cross-examination, which have already been discussed, was so that the City could have the investigating Police Officer testify. However, the City has not provided any sufficient reason as to why it did not present the investigating Police Officer at the hearing and, therefore, this request does not meet the standard for reconsideration. In other words, the City is not entitled to a second chance to present its case simply because it is unhappy with the Commission's decision. Regardless, as Dye was found "liable" for the accident by the Commission, it would be unnecessary for the Police Officer to testify.

Additionally, the City argues that "rewarding" Dye with $150,000 is punitive against it and the taxpayers and the City made its decision based on well-established legal precedence and advice of prior Labor Counsel. However, while the Commission appreciates the financial hardship that the award of back pay presents the City, especially in light of the loss of revenue due to the pandemic, the Commission cannot make a disciplinary decision based on such hardship. Every award of back pay is a potential financial hardship to an appointing authority. Essentially, the protections that Civil Service employees are afforded would be eliminated because an appointing authority could simply discipline employees without merit, and upon an unfavorable ruling, have these unwarranted disciplines affirmed due to the financial hardship that would otherwise be caused to an appointing authority if the employee's discipline was reversed or modified.

Regarding the City's comments about legal precedence and relying on prior Labor Counsel's advice, there is no legal precedent that supersedes the Commission's authority to determine if the alleged infraction is considered major discipline once the discipline is appealed to the Commission, even if the parties have signed a LCA that calls for immediate termination at the appointing authority's discretion. Further, there is nothing in this matter that is inconsistent with prior Commission decisions. Based on the facts in this case as indicated in the record, the Commission found that the infraction did not warrant major discipline. Additionally, as the

Commission finds there is no basis for reconsideration or a remand to the OAL, there is no basis to stay the decision as the City requests. Further, regarding the City's comments that it is a hardship for it to pay back pay prior to it exhausting its appeal remedies, it is Dye who is facing hardship as he has been inappropriately removed and not been paid for over two and one-half years. Further, there is nothing in the record to indicate that Dye would not reimburse his back pay if the City were ultimately prevail after exhausting all appeal right. Therefore, the Commission reiterates its prior order that Dye be immediately reinstated, the parties engage in a good-faith effort to resolve back pay, and once resolved, for the City to pay Dye the agreed upon amount. *See In the Matter of Betsy Ruggiero* (CSC, decided March 3, 2021) and *See In the Matter of Wilfredo Guzman* (CSC, decided June 17, 2020).

Referencing the City's statements about the New Jersey Administrative Procedures Acts requires the Commission to promulgate a regulation on the enforcement of LCAs, that the Commission's role is also to protect appointing authority's by giving fair notice as to what it can expect from the Commission. and the comments that this matter was "unchartered" territory because it believes that the Commission is not enforcing the subject LCA, which goes against precedent and Dye does not dispute that the non-enforceability of a LCA goes against precedent, the Commission did not find that the subject LCA was not enforceable. Therefore, there is no regulation that the Commission could have promulgated about the enforceability of LCAs that would have been relevant in this matter or given the appointing authority any fair notice about the enforceability of LCAs and there is nothing "unchartered" about the Commission's decision. Instead, the issue in this matter was whether Dye's conduct warranted major discipline and the Commission found that it did not based on the record. Therefore, under the terms of the enforceable LCA, the Commission found that provision for removal under the LCA for major discipline was not applicable. The Commission even noted that had the LCA indicated that he could have been removed for any discipline, it would have likely removed him, and it also noted that he is still under the terms of the LCA should a future infraction occur.

Therefore, a review of the record indicates that the City has not met the grounds reconsideration. The City has not presented any new evidence that would change the Commission's decision. Further, even if it had, it has not provided any sufficient explanation as to why such evidence was not initially presented at the hearing. Moreover, while the City clearly disagrees with the Commission's decision, and notwithstanding its overborn rhetoric and hyperbole, based on the record the Commission finds that it has not made a clear material error in determining that Dye's conduct did not warrant major discipline.

ORDER

Therefore, it is ordered that this request be denied.

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 30TH DAY OF JUNE, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
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