



STATE OF NEW JERSEY

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

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

CSC Docket No. 2022-404

Request for Stay

**ISSUED: SEPTEMBER 24, 2021
(SLK)**

The City of Passaic (City), represented by Joseph P. Horan, II, Esq., requests a stay of the Civil Service Commission (Commission) decisions in *In the Matter of Edwin Dye* (CSC, decided March 24, 2021) and *In the Matter of Edwin Dye* (CSC, decided June 30, 2021), pending its appeal to the Appellate Division.

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 in *In the Matter of Edwin Dye* (CSC, decided March 24, 2021), 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. Thereafter, in *In the Matter of Edwin Dye* (CSC, decided June 30, 2021), the Commission denied Dye's request for reconsideration. Additionally, the Commission denied the City's alternative request for a stay and a remand to the Office of Administrative Law (OAL) for a further hearing.

In this request for a stay, the City presents that it has filed an appeal of the subject Commission decisions with the Appellate Division pursuant to *N.J.A.C. 4A:2-1.2* and the subject request to stay to the Commission pursuant to *N.J. Court Rules 2:9-7*. It argues that it has a clear likelihood of success on the merits. The City cites case law indicating that the Courts have upheld the use of LCAs by public employers and that they should be construed in favor of employers. It reiterates that upon reconsideration, it cited cases where the Commission upheld the use of LCAs and how the Commission was required, but failed to give adequate notice on when an LCA will be enforced. The City argues that the Commission's decision on reconsideration proves its point that it did not receive adequate notice about the enforcement of the subject LCA as the Commission did not cite any case or regulation on where or when it would not uphold an LCA. Therefore, it believes it has been unfairly prejudiced.

The City contends that the Commission, in its decisions, made numerous errors. It states that statutes enacted by the Legislature are the State's public policy and Dye violated statutes that were designed to protect pedestrians in a crosswalk from a motor vehicle. The City reiterates that the investigating Police Officer found Dye "at fault." Therefore, it believes the appellant deserves major discipline, especially as a Commercial Driver's License holder. The City emphasizes that it cited cases in its exceptions where the Commission imposed major discipline on public employees who are at fault for causing accidents. It contends, for inexplicable and unknown reasons, the Commission gave Dye only minor discipline for not following the Motor Vehicle Code, where a six-year old boy could have easily been killed. Finally, the City argues that Dye blatantly lied in the Incident Report trying to blame

the six-year old by claiming it was a “staged plot” and that eyewitnesses would support his version of events, when the opposite was the case.

The City presents that it requested a remand back to the OAL because some of the Commission members expressed concern that the investigating Police Officer was not called as a witness. Further, it wished to submit Dye’s full disciplinary/employment record into the case. It explained that it had new Labor Counsel and normally errors of prior counsel can be corrected if there is no prejudice to the other party, which is the case here, since Dye would receive back pay if he prevailed. It believes that the Commission’s ruling denying its request was improper since case law indicates that an employee’s full record should be considered by the Commission on a disciplinary appeal. Additionally, the City cites cases where the Commission indicated that it needs the full employment record to properly decide a disciplinary appeal. It also cites cases to indicate that an employee’s incompetence is a well-established basis for removal even more so under the circumstances at hand.

The City asserts that it is in danger of immediate irreparable harm if its request is not granted. It reiterates the certification of its Business Administration that was presented during the Motion for Reconsideration where he explained that it relied upon the advice of prior Labor Counsel that it had grounds to remove Dye based on his conduct in this matter, his prior disciplinary history and the LCA. The City contends that the Commission’s decision sets a dangerous precedent to other employees who engage in misconduct, voluntarily signs a LCA, and/or lie about their role in an accident involving a civilian. It notes that the back pay award shall cost the City \$150,000 plus benefits and it believes that it could not have reasonably anticipated having to pay this award based on Dye’s disciplinary history, two voluntarily signed LCAs, the factual record and legal precedence. The City emphasizes that the Supreme Court favors LCAs, there is no regulation indicating when the Commission will uphold a LCA, and it had no warning that the LCA in question would not be upheld. It states that the back wages award will cause a burden to the City and taxpayers where revenue will either need to be raised or services will need to be cut. Moreover, it doubts that it will recover the money if it prevails on appeal, and, therefore, it believes it should be granted a stay pending the appeal.

The City argues that there is an absence of substantial injury to Dye if the request is granted as he will recover back pay if he prevails. Further, as Dye is required to mitigate his back pay, it assumes that he is currently employed elsewhere and/or collecting public assistance, such as unemployment benefits. The City cites cases where the Commission indicated that a contention by an employee of a loss of wages is not a legitimate factor to be considered in regard to a stay since the employee is not suffering a substantial injury if since the employee will be restored to his prior position and receive back pay should the employee prevail in his appeal. Therefore, it believes that Dye will not suffer “substantial injury” if a stay is entered.

The City believes that the public interest weighs in favor of its application. It states that Dye has an abysmal record and has proven to be a problematic employee from almost day one. It presents that this record compelled him to sign a LCA and the City invoked it given the circumstances at issue. The City asserts that Dye does not value his public position and argues that returning Dye to work pending the appeal sends a wrong message to employees who do their job and follow the rules. Moreover, it states that it cannot permit Dye to operate a City vehicle due to safety concerns, which is one of his primary duties, as it is one of the most densely populated cities in the country. It contends that it is not a matter of if Dye will do something improper again, but when. Further, the City asserts that case law generally reflects that the purpose of a stay, if warranted, is to maintain the status quo between the parties pending the appeal.

Although given the opportunity, Dye, represented by Curtiss T. Jameson, Esq., did not respond to this matter.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-1.2(c), the standards to be considered regarding a petition for a stay are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
- and
4. The public interest.

N.J.A.C. 4A:2-1.2(f) provides that following a final administrative decision by the Commission, and upon the filing of an appeal from that decision to the Appellate Division of Superior Court, a party to the appeal may petition the Commission for a stay or other relief pending a decision by the Court in accordance with the procedures and standards in (b) and (c) above.

N.J. Court Rules 2:9-7 provide that on or after the filing with the Appellate Division of a notice of appeal or of a notice of motion for leave to appeal from a state administrative agency or officer, a motion for interim relief or for a stay of the decision, action or rule under review shall be made in the first instance to the agency whose order is appealed from and, if denied, to the Appellate Division.

Initially, the Commission notes that the City was not required to file this stay request before it could proceed with its appeal to the Appellate Division. *See In the Matter of Betsy Ruggiero* (CSC, decided March 3, 2021). In the City's request for reconsideration, in the alternative, it requested that the matter be stayed and remanded to the OAL for a hearing. However, in the Commission's June 30, 2021 decision, it denied both the City's request for reconsideration and the alternative request for a stay. Therefore, while the Commission did not specifically review the

matter under the standards for a stay under *N.J.A.C. 4A:2-1.2(c)*, it already rejected the City's request for a stay and found that it had not met the standards.

Regardless, the Commission, for the third and final time, rejects the City's arguments as the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. The City largely presents the same arguments. Mainly, the City argues that the Commission failed to uphold the subject LCA. This is inaccurate. Rather, the Commission found that it was not applicable *under its terms* because Dye's actions did not warrant major discipline, which was required under the LCA. As such, there was not superior judicial authority that the Commission did not follow as the City believes. Additionally, the City contends that Dye's action warrants major discipline based on the incident itself and it alleges that he lied about it in his report. However, the Commission found that Dye committed an unintentional act that did not warrant major discipline. Further, the Commission found that the record did not indicate that there was any testimony about his alleged lying from the City. Moreover, regarding the City's comments that the Commission did not provide adequate notice as to when it would not uphold LCAs as demonstrated by its lack of citing case law or regulation in support of its decision, the Commission reiterates that there is no regulation that could have been adopted that would have provided any notice to the City. Instead, the determination as to whether conduct warrants major discipline is based on the unique facts of the case, and in this matter, the Commission found that the subject unintentional act did not warrant it.

The City also presents that it requested that the matter be remanded to the OAL for a hearing so that it could submit his complete discipline record and have the investigating officer called as a witness. It asserts that its prior counsel's failures should not be held against it. However, the Commission found that the City did not meet the standards for reconsideration because it could have presented a more complete record at the hearing. Further, even considering a further description of his disciplinary history, the Commission found that the current infraction was an unintentional act that was based on different circumstances from prior misconduct, which therefore did not warrant major discipline. Moreover, the investigating officer already found Dye "liable" for the accident, so it was unnecessary for him to testify.

The City also asserts that it will suffer irreparable harm due to the financial hardship that it will be caused if it pays the back pay as ordered. However, the Commission already explained that every back pay award is a potential financial hardship to an appointing authority and to not make such an award based on these concerns would essentially eliminate the protections Civil Service employees are afforded. Also, there is nothing in the record about Dye's inability to reimburse the City should it prevail on appeal. Moreover, the cases the City cites involve employee petitioners who requested stays where the Commission found that their loss of income was not a basis for a stay. However, this matter is distinguishable as it is the appointing authority, and not the prevailing employee, who is requesting the stay.

Therefore, it is Dye who is suffering substantial injury for not receiving back pay which has already been awarded.

Finally, it is in the public's interest that the Commission's orders be followed. While the City claims that Dye does not value his public position, it cannot let him operate a motor vehicle, and it is only a matter of time until Dye does something improper again, the record indicates that the subject incident was an unintentional act. As such, none of those arguments are persuasive. Additionally, the Commission reiterates that Dye is still subject to the LCA in question, and if he engages in conduct that warrants major discipline, the City shall have the right to terminate him.

ORDER

Therefore, it is ordered that this request be denied. The Commission further orders that all of its previous orders be immediately complied with.

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 22 DAY OF SEPTEMBER, 2021

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