THE CASE

The City of Cleveland (the "City") issued Notices of Pre-Discipline Conference (the "PDC") to Jakimah Dye ("Appellant" or "Ms. Dye") on February 22, 2024, February 28, 2024, March 5, 2024 and March 12, 2024. The final Notice set the date for the PDC as March 27, 2024. The Notice of the PDC made the following Allegations of Misconduct:

> **Civil Service Commission Rules**
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> 9.1(1) Neglect of Duty
> 9.1.12 Negligent or willful damage to public property
> 9.1(13) Wasteful or unauthorized use of City Vehicles, equipment or property
> 9.1(18) For other failure of good behavior which is detrimental to service, and for any other act of misfeasance, malfeasance, or nonfeasance in office.
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> **City of Cleveland Workplace Policies and Procedures**
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> Vehicle Use Policy, C-16
> Commuter Policy, B-16
> Progressive Discipline Program Policy, C-24
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> **Allegation Synopsis**
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> On or about 02/17/24, you were involved in a motor vehicle accident while operating a City of Cleveland vehicle. During the course of the investigation, you admitted you were utilizing the City vehicle for non-work related purposes. It was also discovered that you were transporting several minors and did not possess valid motor vehicle insurance to cover the damages incurred in the accident. *Additionally, it is alleged that you made untruthful, misleading and or deceptive statements during the investigation of this matter.* **(Italicized language does not appear in the first Notice for the PDC)**

The Notice provided that the hearing was to be in person in Room 113, the Operations Conference Room, at City Hall on March 27, 2024. Appellant, a member of the Civil Service Employee's Association, appeared with counsel, Frank T. George. The City was represented at the PDC by Assistant Law Director Michael Arnold. The PDC Hearing Officer was Egdilio Morales,

Assistant Director of HR, who found that Appellant was guilty of violating the above cited Civil Service Rules. He concluded that:

> The position of Assistant Director of Budget and Operations of the Department of Public Safety requires a significant degree of trust and responsibility. AD Dye's actions, particularly her failure to be honest during the investigation, demonstrate that she should not be maintained in a position requiring this level of trust and responsibility. Based on the facts and analysis discussed above, the Hearing Officer recommends to the Appointing Authority that Jakimah R Dye be issued serious discipline, up to and including termination of employment. *City Ex 21*

An appeal of the termination was duly filed. The undersigned was selected as the referee to hear this appeal. The City engaged the law firm of Ogletree Deakins in the persons of Komlavi Atsou and Jazmyn Barrow to represent the City. Ms. Dye was represented by Frank T. George of the McCarthy Lebit firm. The testimony was heard on June 21, June 24 and August 19, 2024 at the offices of Ogletree Deakins. A transcript was taken. Post hearing briefs were filed by the parties on November 8, 2024.

MOTION TO DISMISS

Prior to opening statements, the City made a Motion to Dismiss on the basis that Appellant was an Executive, and, as such, was not covered by Civil Service. The City pointed to the job description (City Ex 4) which says:

> The Cleveland Department of Public Safety is seeking an Assistant Director of Public Safety.

While it was late in these proceedings, the issue of jurisdiction may always be raised. The third page of the job description (City Ex 4, Bates 34) says:

> This is a classified position hired into the Executive Commissioner classification.

Further, Appellant's Oath of Office (City Ex 3) says that she will "discharge the duties of Executive Commissioner of Public Safety Operations". Finally, the Noice of Pre-Disciplinary Hearing (City Ex 17) lists her Classification as "Executive Commissioner (Assistant Director).

The City's own documents do not support the contention that Appellant is not covered by Civil Service. There is no factual basis for the Motion to Dismiss. The Motion should be denied.

THE FACTS

Appellant is a 13-year employee of the City. She has no history of any discipline. She was appointed Executive Commissioner of Public Safety Operations on May 30, 2022. She was a classified employee despite her working title as Assistant Director. She was provided a City owned vehicle (a 2015 Ford Taurus) as she was on call at all times. She had authorization to use the city owned vehicle for commuting purposes. (App Ex H)

The incident that gives rise to this matter occurred at about 12:17 PM on Saturday, February 17, 2024. Appellant had left her home at about 8:00 AM with her son and a nephew, both about age 9, and had driven to them to a basketball tournament.[1] There was a firefighters exam at Public Hall that morning. Appellant testified that it had been her intention to go to the firefighters exam after the tournament. However, a niece, who was supposed to take her son and nephew home from the tournament, called to report that her car was not working. Appellant then agreed to take her niece's two children, along with her son and nephew, home after the tournament.

On her way home after the tournament the vehicle in front of her stopped for a red light. Ms. Dye's vehicle slid into the vehicle in front of her due to slippery road conditions. A Warrensville Heights police officer was a couple of cars behind her. He immediately approached

[1] Whether this was a tournament, a little league, school or recreation department event was not made clear to this Referee. It will be referred to as a tournament throughout this report.

Appellant and the driver of the vehicle she had struck, took information and made a police report of the incident. (City Ex 7). There were no injuries and no citation was issued.

Appellant promptly called her superior, Kerrie Howard, who, at that time, was Director of Public Safety. He told her to call Monique Tabb-Young, an HR Manager, and Keith Larsen. Tabb-Young arranged for breath and urine tests at Concentra Health Services, both of which were negative. Larsen arranged to have Appellant's vehicle towed.[2]

Director Howard, who lives near the scene of the accident, came to the scene. Director Howard saw the four children in Appellant's vehicle who were in plain sight. Howard called Bradford Davy, the Mayor's Chief of Staff, from the accident scene and informed him of the incident.

Appellant sent an email at 12:44 PM on Sunday, February 18 to HR Director Matthew Cole that says it is a "synopsis" of the above incident. This email makes no mention of children being in the vehicle. (City Ex 13, Bates 175). Cole responded at 5:05 PM that day that he wanted a meeting to gather some additional information. Cole testified that he felt Appellant's initial report was "sanitized. (Tr 293.18). Cole spoke with Howard, who provided additional information. He then asked Howard to have Appellant "submit a statement regarding all details of the accident". (Tr 194.6).

The meeting was held on Wednesday, February 21 with Appellant, Dir Cole and Dir Mark Griffin. Cole testified that at this meeting Appellant said there were two children in the vehicle, her son and a nephew, that she had been using the vehicle for personal use at the time of the accident and that it had been her intent to go to the firefighters exam. (Tr 295-6.22). Cole further

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[2] While there is a photo of the 2015 Ford Tarus (City Ex 10) which shows damage to the vehicle's front end, no evidence of the cost of repairs was offered at hearing.

testified that, following that meeting, he obtained a copy of the police report of the accident (City Ex 7). (Tr, 298/13). Seeing that there were four children in the vehicle, not just two, Cole asked Dye for a more detailed explanation. (Tr 299/5).

At 4:36 AM on Thursday, February 22, Appellant responded by email to Cole (City Ex 15, App Ex O) saying that there were four children "each in a seat belt" in the vehicle at the time of the accident and that she now recognized that her personal use of the vehicle on February 17 was improper. At 6:48 AM Cole sent Appellant an email acknowledging receipt of Appellant's email and asking for a clarification as to:

> "exactly what 4 children were in the car. During yesterday's conversation, you mentioned only 2 – your son and nephew". City Ex 15

Appellant confirmed the number was four in an email sent at 12:40 that same day. That evening, Cole sent the first Notice of PDC at 6:24 PM. City Ex 16.

THE CITY'S POSITION

The City asserts that Appellant violated Rules of the Civil Service Commission and City Policies as set forth in the Notice of the PDC.

Ms. Dye is guilty of violating the Vehicle Use Policy in that she used the vehicle for personal use and she transported persons who were not city employees (her child, nephews and a niece). Further, that this use on February 17 constituted a violation of the Commuter Policy and that termination was justified under the Progressive Discipline Policy as "Employees who occupy a supervisory or management position are held to a higher standard of conduct commensurate with the level of leadership required of them." (City Ex 29, Bates 226).

The City cites Mr. Morales' findings at the PDC that Central to the City's charges is that Appellant was dishonest in her report of the February 17, 2024 accident. The City outlines the dishonesty in its post hearing brief as follows:

> Ms. Dye's initial email on February 18, 2024 to Mr. Cole did not state that there were any children in the city vehicle. (COC Ex. 13). Then, in her February 21, 2024 meeting with Mr. Cole and Mr. Griffin, Ms. Dye reported that there were only two minor children (her son and her nephew) in the City vehicle at the time of the accident. With Ms. Dye's February 22, 2024 e-mail, she provided the true number of minor children that were in the City vehicle at the time of the accident but still failed to provide their identities. (COC Ex. 15). Ms. Dye also signed a Motor Vehicle Accident Report, which all employees are required to complete after an accident, where she failed to report all of the occupants of the other vehicle involved in the accident. (COC Ex. 12).

The original Notice of the PDC is dated February 22, 2024 and scheduled the PDC for February 26. There were three subsequent Notices of the PDC to allow for the parties' schedules and to allow the Motor Vehicle Accident Committee to review the accident, which it did on March 19. It determined Appellant was at fault and that the accident was preventable.

Considering the factors which the City's Progressive Discipline Policy deems as aggravating, Mr. Morales' findings at the PDC cites the following:

> That Ms. Dye's actions led to a preventable car accident and significant damage to a City owned vehicle. That, as a person in leadership, the serious offenses that Ms. Dye committed work to erode public trust in the city and its employees. That Ms. Dye held a high ranking position in the Department of Public Safety as an Assistant Director. That Ms. Dye's actions jeopardized the safety of four children in the City owned vehicle, as well as those individuals in the vehicle that she struck. And finally that "AD. Dye's honesty or veracity has been brought into question". (City Ex 21, Bates 5318).

APPELLANT'S POSTION

Appellant argues that she promptly, fully and correctly reported the accident to her immediate superior, that the City was aware of all the facts surrounding this incident, particularly in that Dir Howard had been called to the scene and had viewed the children in the vehicle, that the initial notice of the PDC makes no mention of dishonesty, that she was not properly notified she was under investigation so was denied her right to obtain counsel, that she is being subject to disparate treatment and that her termination was a ruse designed to open budget space so another person could be hired in her department.

Appellant was authorized **long term use** of the 2015 Ford Taurus pursuant to the City's Commuter Policy §16-1. See Authorization, App Ex H. On February 17, 2024 she used that vehicle to transport her son and a nephew to a Saturday basketball tournament. It was Ms. Dye's intention to go to Public Hall after the tournament to observe the firefighters exam that was being given that morning. A niece was supposed to take Appellant's son and nephew home along with the niece's own two children but the niece notified Appellant that her car had broken down and asked Ms. Dye to take all four children home.

While taking the four children home, Appellant was involved in the accident when she slid on the slippery road into the vehicle in front of her which had stopped at a stop light. The damage to the vehicle she struck was slight. The damage to the City vehicle's grill and hood are obvious. (See City Ex 10).

Appellant immediately followed the steps required by the Motor Vehicle Accident Procedure. She called her boss, Director Howard, who happens to live nearby. Dir Howard came to the scene, observed the children in Appellant's car and the child in the car that had been struck.

A Warrensville Heights police officer was a couple of cars behind Appellant when the accident occurred. Appellant gave all relevant information to the police officer and to Dir Howard. The police did not issue a citation to Ms. Dye.

Dir Howard testified that he knew Ms. Dye would be transporting her son and a nephew to the tournament and that she intended to go to the firefighters exam. Further that he had specifically told her this was authorized by him. (Tr. 392-393).

Next, Appellant argues that her rights under City Ordinance 171.53 were violated when she was not given her right to have counsel present during the investigative meeting of February 21 with Dir Cole and Dir Griffin.

Appellant argues that Ms. Dye can be disciplined only for a violation of Civil Rule 9.10 and that Rule does not mention "dishonesty" as a ground for discipline. Appellant further argues that there was no dishonesty. She was open and forthcoming about all facts in this incident. Her boss, Dir Howard, was at the accident scene and saw everything. She answered all questions asked of her directly and correctly. At the February 21 meeting with Dirs Cole and Griffin, she says that she was asked how many children were in the car when she left her home to go to the basketball tournament. She properly answered the number was two. There is no transcript or recording of this meeting.

While the City points to the absence of any mention of children being in the City owned vehicle driven by Ms. Dye in the Motor Vehicle Driver Accident Report taken by Keith Larsen (City Ex 12), Appellant points out that this version of that Report does not ask who was in the car driven by the City employee. It only asks for 'Occupants of the other vehicle". Ms. Dye testified

that she was unaware that there was a child in the other vehicle. Later, an updated version of this report that asked for the number of passengers in the City owned vehicle was properly filled out.

Not only does the discipline imposed fail to follow the City's Progressive Discipline Policy, it is far more harsh than discipline imposed in other recent cases including the fact that Dir Drummond, who failed to report a preventable accident and attempted to conceal that fact, was only issued a non-disciplinary letter of reinstruction.

Lastly, Appellant argues that her termination was carried out in order to make room under the department's budget to hire one Phil McHugh, allegedly a friend of the mayor who had been offered aaplace in the Department of Public Safety back in December.

FINDINGS

This is a discipline case. The burden of proof is on the employer. As stated in the classic work on labor arbitration, *How Arbitration Works* by *Elkouri and Elkouri*:

> Concerning the quantum of required proof, most arbitrators apply the "preponderance of the evidence" standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher standard of proof, typically a "clear and convincing evidence" standard, with some arbitrators imposing the "beyond a reasonable doubt" standard. *Id. 6th edition pg. 950.*

As this matter does not involve either criminal or stigmatizing behavior, the quantum of proof required will be a preponderance of the evidence.

Counsel for the city, in his opening statement, precisely and accurately stated what this case is about:

> This case can be resumed to one word, dishonesty. It's all about dishonesty. The fact (sic) themselves are very straightforward based on Ms. Dye's own admissions.

> On February 17, 2024 she used the city vehicle for a non-work related event. She had four kids in the vehicle with her. She stated that she was coming from and to a baseball (sic) game. She got involved into an accident.
>
> She actually rear ended another vehicle. She followed the procedure for reporting the accident. **This is where the dishonesty comes in. When she reported the accident, she omitted to disclose to the city that she had kids in the vehicle.** *Emphasis added*
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> **She met with the law director and director of HR and failed to disclose the number of kids she had in the vehicle. Dishonesty.** It was not until she had no more room left to conceal the facts that she came forward with about having four kids in the car. *Emphasis added.* (Tr.13.13 through 14.8).

The factual basis for the City's claims that Ms. Dye was dishonest are the two instances counsel mentioned in his opening statement. First, that in her initial statement to the City (her email to Dir Cole on February 18 at 12:44 PM stating that it was a "synopsis" of the accident. (City Ex 13, Bates 175)) she failed to disclose that there were children in the vehicle.

While this "synopsis" does not refer to any occupants of the vehicle, Ms. Dye had called her boss, Kerric Howard, the Director of Public Safety who personally came to the scene of the accident and observed the four children in Ms. Dye's car. Dir Howard then called Chief of Staff Davy. While there is dispute as to what was said between those two, there is no dispute that Dir Howard instructed Ms. Dye as to how to report the incident. In fact, there are no false statements in Ms. Dye's "synopsis".

However, Dir Cole felt the synopsis was "sanitized". He notified Ms. Dye that he wanted a meeting to get a further explanation of the incident. This is the meeting held on February 21 with Appellant, Cole and Dir Griffin. At this meeting, Ms. Dye testified she was asked about the

number of children that were in her car when she left her home on the morning of February 17. She says she answered that there were two children at that time.[3]

Later that same day, Dir Cole obtained a copy of the Warrensville Heights police report of the accident which shows the names and ages of the occupants of both vehicles involved in this accident. As Dir Cole testified, subsequent to receiving the police report, he sent Ms. Dye an email requesting that she confirm that there were four children in the car and that she identify them because, at the meeting, she had only mentioned that there were two children in the car. (Tr 300.6). Thus, Dir Cole knew and had confirmed that there were four, not two children in Ms. Dye's vehicle at the time of the accident. However, Ms. Dye did not provide the identities of all four children. Based on the initial discrepancy in the number of children and the failure to state their names, the original Notice of PDC was prepared. (City Ex 17). However, the original Notice does not allege dishonesty as one of the allegations of misconduct.

Within hours of the meeting with Dir Cole and Dir Griffin, Ms. Dye had given a full and complete statement that fleshed out the details of the accident. (City Ex 15). The only item missing was the identity of three of the children. Cole said he knew the fourth was Dye's son.

Ms. Dye followed advice about what she should say about the accident. That advice was given to her at the accident scene by the Director of her department. She made a supplemental disclosure of the accident within hours of her meeting with Dirs Cole and Griffin. There was no lie nor did she make any deliberately untruthful statement. Her sin, if it be a sin, was one of omission, not commission.

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[3] The meeting with Dir Cole, Dir Griffin and Ms. Dye was not recorded nor were any notes from that meeting produced at hearing.

Does this constitute "dishonesty"? The Progressive Discipline Program (City Ex 29, App Ex LL) contains a non-exclusive list of infractions that would lead to removal of the employee. Among that list is the following:

> Type of conduct – Dishonesty
>
> - The falsification of employment records or other city records in a manual or automated systems, (sic) including falsification of stated reasons for the use of leave (e g. abuse of sick leave or using sick leave for unauthorized purposes.)
> - Unauthorized punching, signing or altering other employees timecards or timesheets.
> - Unauthorized altering of one's own time card or sheet.
> Making false claims or misrepresentations in an attempt to obtain any city benefits (e.g. health benefits, promotion, paid leave of absence, etc.)

Ms. Dye's actions, while they lacked candor, do not appear to violate any of the Types of Conduct listed above. The charge of "dishonesty" is not supported by the facts in this matter.[4]

However, Ms. Dye's actions violate:

> Civil Service Commission rule 9.1(12) - damage to the city owned vehicle.
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> Civil Service Commission rule 9.1(13) – Unauthorized use of a City Vehicle.
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> Commuter Policy II A – Personal use of a city owned vehicle
>
> Vehicle Use Policy I D – Comply with all laws concerning the operation of vehicles.
>
> Vehicle Use Policy I H – Transporting a person not a City employee.

RECOMMENDATION

The penalty of termination should be denied as it is not supported by the facts. However, the facts do support the other violations cited above. The Progressive Discipline Policy says that

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[4] Having found that Ms. Dye's actions do not constitute "dishonesty", I have not considered Appellant's arguments that the penalty of termination constituted disparate treatment, nor have I considered the claim that her termination was a ruse to make space for another person in her Department.

"all inappropriate conduct shall be evaluated on a case-by-case basis". Among the factors to be considered in such an evaluation the policy states:

> Employees who occupy a supervisory or management position are held to a higher standard of conduct commensurate with the level of leadership required of them.

Giving consideration to all relevant factors, including Ms. Dye's unblemished 13 year history with the City, I would recommend a 30 day suspension.

Robert M. Lustig
Hearing Referee
November 22, 2024