STATE OF NEW JERSEY

In the Matter of Andrew Eckert, Pleasantville, Police Department	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2024-1961	:	Request for Reconsideration

ISSUED: June 12, 2024 **(SLK)**

Andrew Eckert, represented by Stuart J. Alterman, Esq., requests reconsideration of *In the Matter of Andrew Eckert* (CSC, decided February 7, 2024), where the Civil Service Commission (Commission) upheld Eckert's removal from employment, effective January 26, 2022.

By way of background, Eckert, a Police Officer, Pleasantville, Police Department, was removed for using excessive force during an arrest. Eckert appealed his removal to the Commission, and the matter was transmitted to the Office of Administrative Law as a contested case. After a hearing, the Administrative Law Judge (ALJ) recommended that the removal be upheld. The Commission adopted the Findings of Fact as contained in the ALJ's initial decision and the recommendation to uphold the removal. In doing so, the Commission reviewed and addressed the exceptions originally filed by Eckert.

In his request, as argued in his original exceptions, Eckert contends that the ALJ improperly struck his expert's use of force report. He presents that under *N.J.A.C.* 1:1-15.1(c), all relevant evidence is admissible, and it is within a judge's discretion to exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion. Further, Eckert submits caselaw to indicate that the net opinion rules "forbids the admission into evidence of an expert's conclusion that are not supported by factual evidence or other data. The

rule requires that an expert 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Additionally, Eckert indicates that under *N.J.A.C.* 1:1-15.9(b), witness testimony of opinion is admissible if it will assist the judge to understand the evidence or determine a fact in issue and the judge finds that the opinions are based on the facts and data perceived by or made known to the witness at or before the hearing and within the scope of the special knowledge, skill, experience or training possessed by the witness. He asserts that the ALJ barred his use of force expert on the basis of his report being a "net opinion."

Additionally, Eckert states that it is the tendency of courts to permit expert testimony whenever it would help the jury decide the ultimate issue of the case, and he submits case law to support this statement. He asserts that if the ALJ had any questions as to the opinion or methodology of his expert, the appropriate means of testing that opinion would have a hearing under *N.J.R.E.* 104(a) rather than bar the report merely by reading it. Eckert contends that the ALJ could have given whatever weight the ALJ deemed appropriate to the expert's testimony rather than barring it. He highlights that the ALJ is not a police officer who was trained under the State's Attorney General's Use of Force policy and believes that the expert testimony could have assisted the ALJ in "comprehending the evidence and determining the issues of fact." Eckert provides that where there were multiple police officers and lay persons who offered evidence, expert testimony would have helped the ALJ determine the ultimate issue of the appropriateness of the force used to effectuate this lawful arrest, especially since the ALJ is a lay person with respect to use of force. He argues that the barring of his expert's testimony deprived him of his fundamental due process rights. Eckert states that the record indicates that the Internal Affairs (IA) investigators missed injuries on the subject's wrists which demonstrated his attempts to escape, and the fact that a Pleasantville Police Captain agreed that he missed these important images bolsters Eckert's credibility. Moreover, Eckert testified that he attempted to sweep the subject to the ground. However, he never knew what caused him to lose control of the subject and he never saw another officer's body worn camera footage until all discovery was received. Eckert asserts that this body worn camera footage clearly demonstrated that he tripped on the curb and then let go of the subject as he was trying to maintain his balance. While Eckert admitted that he poorly executed the attempted sweep, he did not realize that he tripped on the curb. He states that he was not trying to injure the subject, but just trying to get him to comply. Eckert indicates that the subject was known to carry weapons, and the subject tried to get up from the ground following his arrest. He argues that his expert would have explained these important facts, matched all explanation with the video, and assisted the trier of facts.

Further, Eckert argues that given the fact that he was not charged with untruthfulness, the ALJ's finding that his testimony was "an evolution" and "did not add up" stems from the ALJ's misunderstanding of the events leading up to his testimony. The ALJ found Eckert's testimony to be an evolution of what he had

originally reported during the IA interview and had difficulty reconciling Eckert's version of events with other evidence presented in this matter as well as Eckert's own testimony stating that Eckert's explanation of events do not appear to add up. Eckert presents case law that states to violate a truthfulness standard, there must be an intentional, material misrepresentation which would affect the fact-finding result. However, he notes that he was not charged with untruthfulness. Eckert claims that the ALJ misunderstood what information Eckert had available to him when he testified. He presents that his IA statement was based on his memory. However, after witnessing his own body worn camera footage, he provided testimony based on that viewing. Further, after receiving full discovery and viewing all body worn camera footage, he asserts that, of course, his testimony would evolve from one degree to another. Eckert contends that the evolution of his testimony based on additional information is not nefarious nor does it represent a fundamental change in his testimony in some sort of inconsistent way. Rather, he states it was a natural progression based upon being supplied multiple camera angles and multiple perspectives not made available to him at the time he made his reports or was interviewed by IA. Eckert indicates that he did not maliciously or incredibly change his testimony, and, instead, he added to his testimony as more evidence became available. Eckert argues that either this matter should be remanded to the ALJ so that his expert's testimony could be admitted, or in the alternative, his penalty or removal should be revisited based on the ALJ's misunderstanding of the events leading up to his testimony.

Additionally, Eckert highlights that although the ALJ referred to his expert as a State Police Officer, his expert is actually a Retired State Police Lieutenant. He notes that his expert has successfully and frequently presented in federal court, State court, administrative law court, and in other states. He presents that if the ALJ felt that his expert's quotation of the 1985 Use of Force directive should have been updated, the report could have been updated with the 2020 directive. Eckert provides that although directives change, the basic import stays the same, which is that use of force has to be reasonable based on the officer's subjective and objective belief at the time about the necessity of the use of force. He states that his expert was able to piece apart the relevant images in evidence, including that the subject was attempting to lift himself up and flee, meaning that his wrists were lacerated from attempting to pull and spin out of the handcuffs. He asserts that this is a remarkable observation gleamed from the video and demonstrates Eckert's subjective and objective mindset during the incident. Eckert indicates that while he was able to present specific images in his exceptions to the ALJ's initial decision, he lost his ability to have it explained through an expert. He emphasizes that the incident happened quickly and was chaotic where the subject was breaking into a car, and the initial officer chased the subject down, knocked hm off his bike, and kicked him in the head by using force that was deemed lethal. Eckert emphasizes that while the use of force can be ugly, that does not signify that the force is unnecessary. While Eckert's use of force was awkward, he states that it does not mean he should be found guilty

of excessive force. He contends that his expert could have educated that ALJ in coming to a reasonable opinion as the ALJ is not an expert on the use of force. Further, if the ALJ had concerns that his expert's testimony was net opinion, there could have been a hearing on that issue. Eckert emphasizes that the use of force is very quick and can be awkward and the best training in the world does not guarantee the intended outcome.

In this case, Eckert explains that he attempted a tactical maneuver which failed because he tripped on the curb, which was approximately 12 inches from the fence, which led to him to lose his grip on the subject and the subject plummeting into the fence, which was not intentional. He states that his expert, who had been in the State Police's IA and retired as a Lieutenant, could have explained what occurred from a police tactical standpoint. Whether the ALJ would have accepted all or some of his expert's testimony is a matter for other arguments. However, Eckert indicates that his expert could have explained the how, what, why, when and where questions by someone who has actually done the job. He argues that the fact that his expert quoted from a directive that the ALJ found not be in effect does not signify that his expert's testimony should have been barred, as he could have amended his report as necessary. Instead, the ALJ waited until after the start of the hearing to rule against him. He submits case law where in the middle of case, a Deputy Attorney General requested to be permitted to hire an expert. The judge stopped the case midway, considered the request, asked for a briefing, and based upon the law, granted the request. Eckert asserts that the law favors the use of experts, and the ALJ erred by dismissing applicable law by barring his expert's testimony. He states that the ALJ made no efforts to indicate her expertise or why she was capable of making determinations without expert testimony. Further, Eckert believes that his expert's testimony would have made it easier for the ALJ to correctly rule on his credibility as the ALJ would have understood that Eckert initially reported what he believed what occurred after the incident, then IA interviewed him after only showing him his own body worn camera footage, and, after discovery, after seeing all the evidence, he was able to see what actually happened, which was that he tripped on the curb, lost his balance, which caused him to let the subject go and come in contact with the fence and not that he threw the subject into the fence. He reiterates that the incident was an accident, and his expert could have explained all the important facts. While Eckert acknowledges that the videos in a vacuum look bad to the untrained viewer, he asserts that his expert could have assisted in unraveling the chaotic videos by pulling them apart and explaining everything to support to his case and behavior. Finally, his expert's discussion of *Graham vs. O'Connor*, 490 *U.S.* 386 (1989), was appropriate since this is the pivotal federal case discussing what is reasonable, and his expert would have discussed why Eckert's use of force was reasonable. He states that whether the ALJ would have agreed with his expert is indeterminate, but he contends that because he never got the opportunity to have his expert testimony, this was error.

The appointing authority, represented by Todd J. Gelfand, Esq., states that Eckert suggests that *N.J.A.C.* 1:1-15.1(c) is the only rule for consideration as to the admission of his proffered expert testimony. However, it presents that the specific rule that governs the admission of expert testimony is *N.J.A.C.* 1:1-15.9(b) which sets forth the same considerations as the "net opinion" rule under State and federal rules of evidence. The appointing authority provides that an expert's conclusion is a "net opinion," and therefore inadmissible, when it is bare conclusion that is unsupported by factual evidence. The expert must give the "why and wherefore" of his opinion rather than a mere conclusion, and the expert must articulate an appropriate standard. Applying these standards, the appointing authority presents case law to indicate that the Appellate Division has consistently disallowed expert opinion testimony from "police practice" experts about whether a police officer acted in conformance with or deviated from use of force guidelines or rules and regulation of a police department concerning the use of force, as such testimony "usurps the role of" the fact finder. In this case, the ALJ, and not a jury as in the caselaw presented, was the factfinder, which warrants even more deference to the ALJ's decision that the proffered expert testimony was not needed or helpful, as the ALJ was comfortable reaching reliable conclusions based on the ALJ's common sense, experience, and perceptions.

The appointing authority argues that the ALJ's discretion concerning the inadmissibility of expert opinion was entirely within prevailing judicial decisions and there is no basis to disturb that discretion. It states that an ALJ does not need an expert to determine whether it was unreasonable or excessive force for Eckert to have picked up a seated suspect, handcuffed behind the back, and launch him airborne into a fence, rather than having used some other tactic to keep the suspect from escaping. Additionally, while Eckert claims that the denial of his proffered expert opinion is of constitutional gravity, he cites no authority for a constitutional right to proffer expert testimony in an administrative hearing. Moreover, the appointing authority's research was unable to find such a right in any administrative hearing anywhere in the country, and the issue is at the discretion of the presiding judge or hearing officer. It asserts that if a criminal can lose one's liberty without a constitutional right to proffer expert testimony, there can certainly be no such right in an administrative hearing were employment, but not "freedom," is at stake.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) provides that a request for 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. 1:1-15.9(b) provides that if a witness is testifying as an expert, testimony of that witness in the form of opinions or inferences is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue and the judge finds the opinions are:

1. Based on facts and data perceived by or made known to the witness at or before the hearing; and
2. Within the scope of the special knowledge, skill, experience or training possessed by the witness.

In this matter, the Commission finds that Eckert has not met the standard for reconsideration. Under *N.J.A.C.* 1:1-15.9(b), the ALJ had the discretion to not admit expert testimony if the ALJ found that such testimony would not help the ALJ understand the evidence or determine a fact. In the ALJ's ruling to exclude Eckert's expert's testimony, the ALJ specifically determined that the proffered testimony would not assist her in understanding the evidence or determine a fact in issue, which was within the ALJ's discretion. Further, in the Commission's final decision, it noted that:

> In this regard, the appellant argues that the ALJ erred by not permitting him to present an expert witness. The Commission is not persuaded. The ALJ presented detailed analyses of the testimony of the witnesses in conjunction with her assessment of the sufficiency of the documentary and video evidence. Based on these assessments as well as the standard for the use force, she determined that the appellant's action clearly violated those standards. The Commission agrees.

In other words, it was within the ALJ's discretion to exclude Eckert's expert's testimony, and the Commission found that the ALJ appropriately used her discretion as there was sufficient documentary and video evidence to support her decision.

Concerning Eckert's second grounds for reconsideration, his argument that the ALJ misunderstood the events leading up to his testimony when she labeled his testimony "an evolution" and found his testimony "did not add up," Eckert comments that this point is based on the fact that he was not charged with untruthfulness. However, it is irrelevant that he was not charged with untruthfulness as it was the ALJ's responsibility, as the trier of fact, to determine credibility regardless of the charges. Moreover, the Commission found that the ALJ made her credibility determinations not solely based on Eckert's testimony, but in conjunction with other documentary and video evidence. In this regard, the Commission specifically found that:

> In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or her

findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. Accordingly, upon its review, the Commission finds nothing in the record or the appellant's exceptions to question those determinations or the findings and conclusions made therefrom.

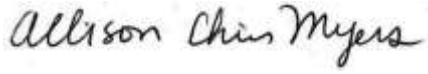
Similarly, the Commission finds nothing presented on reconsideration to indicate that the ALJ's credibility determinations were arbitrary, capricious, unreasonable or otherwise in error. Accordingly, there is no basis to find that the Commission made a clear material error in its decision. Accordingly, Eckert has not met the standard for reconsideration.

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 12TH DAY OF JUNE, 2024



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