SUMMARY
April 4, 2019

2019COA51

No. 17CA2375, *Murr v. City and County of Denver* — Municipal Law — Police — City and County of Denver — Charter of the City and County of Denver — Disciplinary Procedures — Review of Disciplinary Procedures

A division of the court of appeals considers whether, in a police discipline case, the Denver City Charter contains an implicit power possessed by the Manager of Safety to rescind a final order of discipline, reopen the investigation, and enter a new order imposing more severe discipline, all after the time for appeal of the original order has passed, and concludes that there is no basis for the Civil Service Commission's decision that the Manager of Safety has such an implicit power.

COLORADO COURT OF APPEALS **2019COA51**

Court of Appeals No. 17CA2375
City and County of Denver District Court No. 14CV30044
Honorable Ross B.H. Buchanan, Judge

Randy Murr and Devin Sparks,

Plaintiffs-Appellants,

v.

Civil Service Commission of the City and County of Denver and City and County of Denver, a municipal corporation,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE CASEBOLT*
J. Jones and Márquez*, JJ., concur

Announced April 4, 2019

Sean T. Olson, Denver, Colorado, for Plaintiffs-Appellants

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 Appellants, Randy Murr and Devin Sparks, two Denver Police Department (DPD) officers (the Officers) formerly employed by appellee the City and County of Denver (the City) appeal the district court's order upholding their termination from the DPD for committing deceptive acts in connection with an incident involving excessive use of force. They argue that appellee the Civil Service Commission of the City and County of Denver (the Commission) erroneously interpreted the Charter of the City and County of Denver (Charter) to grant the Manager of Safety (MOS) implied authority to reopen their disciplinary matter, rescind the discipline previously imposed, and order more severe penalties, all after the order became final and the time for appealing it had expired. We agree with the Officers.

I. Factual and Procedural History

¶ 2 On April 4, 2009, the Officers arrested two men outside a Denver nightclub late at night. A high activity location observation (HALO) security camera, capable of recording video but not audio, showed M.D., one of the men, talking on his cell phone, standing near where the Officers were arresting the other individual. It also showed that Sparks approached M.D., threw him face first onto the

pavement, and struck him nine to ten times on the leg with a "SAP tool" as he lay in a fetal position. M.D. did not fight back. Sparks then forcefully dragged M.D. to a police car, and M.D. was taken to a hospital and treated for serious injuries caused by Sparks.

¶ 3 A fifteen-month investigation ensued. The Officers justified this use of force in several official statements by claiming that M.D. had aggressively resisted and had been preparing to strike Sparks. Murr averred that he saw M.D. try to punch Sparks. But after being confronted with the HALO camera footage, Murr later said that he had only *assumed* he had seen this alleged act of aggression. Following the investigation, the Deputy Chief of Police recommended that Sparks only be docked three days of pay, and that Murr only be suspended for three days.

¶ 4 Per Charter procedure, the MOS reviewed these recommendations. On July 19, 2010, the MOS issued orders as to both officers. The MOS imposed no discipline against Sparks for his actions in arresting M.D. and did not find that Sparks had used inappropriate force. Instead, the MOS found only a violation of a DPD policy requiring officers to write accurate incident reports. The MOS accepted the Deputy Chief's recommendations as to Sparks,

ordering a "three day fine," payable by working three days without pay or having twenty-four hours deducted from his leave bank. The MOS also accepted the Deputy Chief's recommendation as to Murr (based on the same policy violation), ordering him suspended for three days. Together, these decisions constitute what we will call the "first disciplinary order." Neither Officer chose to appeal the first disciplinary order to the Commission within the ten-day period authorized by the Charter.

¶ 5 Shortly after the decision became public, a local television station obtained a copy of the security camera footage and broadcast a story about the incident, asking eyewitnesses to come forward. Two persons responded; neither had been approached or interviewed by police on the evening of the arrest or at any time thereafter.

¶ 6 When the MOS became aware of these two new witnesses, and without knowing what they had to say, he rescinded the first disciplinary order on August 19, 2010; ordered the DPD investigation reopened based on the possibility of new evidence; and remanded the matter. According to his own later testimony, the MOS did so because, after the HALO camera footage became public,

many of his friends and colleagues across the country criticized the first disciplinary order as too lenient.

¶ 7 The Officers brought an action in the Denver District Court seeking to enjoin the MOS from issuing new disciplinary orders, asserting that the MOS was without authority to rescind a disciplinary order and issue a new one after the deadline for filing an appeal had passed without one being taken. The Denver District Court denied injunctive relief.

¶ 8 The next phase of the DPD investigation lasted approximately nine months. The DPD interviewed the two eyewitnesses, who corroborated what the video showed. The only new evidence they provided was that M.D. had repeatedly screamed, "I'm not resisting" and "You don't have to hit me," or something similar while he was on the ground.

¶ 9 The DPD also re-interviewed Sparks and Murr. Sparks stuck to his previous story, as did Murr, although the latter changed his story on several key details. After the supplemental investigation concluded, the Chief of Police recommended that both Officers be dismissed. A new MOS (the previous one had resigned shortly after rescinding the first disciplinary order) issued new disciplinary

orders (the second disciplinary order) to the Officers, finding that they had both violated a provision of the DPD Rules and Regulations (RR), RR-112.2, "Commission of a Deceptive Act," by claiming that the arrestee had tried to assault Sparks. The MOS also found that Sparks had violated RR-306, "Inappropriate Force." The MOS terminated the employment of both Officers.

¶ 10 The Officers timely appealed the second disciplinary order. They argued that the MOS did not have power, authority, or jurisdiction to rescind the first disciplinary order, reopen the matter, and issue the second disciplinary order. A three-person hearing panel granted their motion for summary judgment, concluding that the first disciplinary order had become final once the ten-day period for appealing it to the Commission had lapsed, and that nothing in the Charter authorized the MOS's reassertion of jurisdiction over the matter.

¶ 11 The MOS appealed to the full Commission. In its "Decision and Final Order" dated April 9, 2012, the Commission reversed the hearing panel, holding that the Charter conferred on the MOS an implied power to "rescind and/or modify a disciplinary order once the ten-day appeal deadline has passed when new and material

evidence justifies such modification." The Commission stated that the MOS's "broad disciplinary authority" over the DPD "necessarily implied" the power to reconsider disciplinary orders. It further held that the MOS could exercise this power for "a reasonable period of time," where "reasonableness" would "turn on the specific circumstances of the case." The Commission articulated a test for determining whether evidence was "new and material" and remanded the case to the hearing panel.

¶ 12 On remand, the hearing panel found that the MOS "had a reasonable basis to rescind in light of some credible new and material evidence obtained." The panel affirmed Sparks's discipline but reversed that of Murr, concluding that the evidence against Murr was insufficient to show that he had committed a deceptive act. One panel member dissented on procedural grounds, asserting that the new witnesses' information was an insufficient reason to reopen the investigation because (1) allowing an incomplete investigation to serve as grounds for such reopening would mean that the "door to completing of an investigation will never be closed" and (2) the new witnesses' information was not material.

¶ 13 The MOS appealed and was granted a stay of that portion of the decision reversing Murr's dismissal. The Officers filed cross-appeals, again maintaining that the MOS lacked authority under the City Charter to rescind the first disciplinary order.

¶ 14 In its December 9, 2013, decision, the Commission reaffirmed its prior decision concluding that the MOS had implied power to rescind the first disciplinary order, and held that the MOS's actions — including the rescission of the first disciplinary order and subsequent promulgation of the second disciplinary order — were "reasonable" because the MOS acted "within a reasonable period of time" and because his actions were properly based on "new and material evidence," in accordance with the test the Commission had articulated in its April 9, 2012, decision. The Commission also upheld the panel's affirmance of Sparks's discipline but reversed the panel's conclusion that Murr had not violated RR-112.2 because he lacked the necessary intent. The Commission then reinstituted Murr's termination.

¶ 15 The Officers sought review in the Denver District Court in a new C.R.C.P. 106(a)(4) action, asserting that (1) the MOS did not have the authority to rescind the first disciplinary order once the

ten-day appeal deadline had passed; (2) even if the MOS had this authority, he did not exercise it reasonably in this case; and (3) the Commission's reinstatement of Murr's termination should be reversed because the Commission abused its discretion by not holding itself bound by the hearing panel's determination that Murr lacked the necessary intent to violate RR-112.2.

¶ 16 On November 29, 2017, in a lengthy order, the district court affirmed the entirety of the Commission's Decision and Final Order, finding that the statutory purpose behind the Charter's "broad delegation" to the MOS of administrative and disciplinary authority over Denver police officers would be contravened by the rigid jurisdictional limitations urged by the Officers. The court further concluded that the Commission acted reasonably when it articulated and applied the four-part "new and material evidence" test to determine that the MOS had properly rescinded his prior disciplinary order. And the court determined that the Commission had a reasonable basis for reinstating Murr's termination.

II. Jurisdiction, Power, and Authority

¶ 17 The Officers contend that the Charter does not expressly or impliedly grant the MOS the power to rescind a disciplinary order

after the order becomes final and the time for appealing that order to the Commission expires. We agree and therefore reverse the second disciplinary order and remand for re-imposition of the first disciplinary order.

A. Standard of Review

¶ 18 On appeal of an action under C.R.C.P. 106(a)(4), "we review the decision of the administrative body itself, and not that of the district court." *Nixon v. City & Cty. of Denver*, 2014 COA 172, ¶ 11; *see also Johnson v. Civil Serv. Comm'n*, 2018 COA 43, ¶ 13 ("We sit in the same position as the district court when reviewing an agency decision . . . .").

¶ 19 Our review is limited to "determin[ing] if the Commission has exceeded its jurisdiction or abused its discretion." Charter § 9.4.15(G); *see Nixon*, ¶ 11. In doing so, we "determine whether the Commission applied the correct legal standard." *Nixon*, ¶ 12. Under C.R.C.P. 106(a)(4), we may reverse the decision of an administrative agency if we conclude that the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously interpreted the law, or exceeded its authority. *Nixon*, ¶ 12.

¶ 20 We interpret a city code "applying ordinary rules of statutory construction." *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 10; *Smith v. City & Cty. of Denver*, 789 P.2d 442, 445 (Colo. App. 1989).

¶ 21 However, we must strictly construe charters, and no powers are to be exercised except those expressly conferred or necessarily implied. *Cook v. City & Cty. of Denver*, 68 P.3d 586, 588 (Colo. App. 2003); *accord City of Central v. Axton*, 150 Colo. 414, 419, 373 P.2d 300, 302-03 (1962); *City of Englewood v. Englewood Career Serv. Bd.*, 793 P.2d 585, 586 (Colo. App. 1989).

¶ 22 We construe a charter according to its plain meaning. *Glenwood Post v. City of Glenwood Springs*, 731 P.2d 761, 762 (Colo. App. 1986). When a charter is unambiguous, we will not alter the plain meaning. *Smith*, 789 P.2d at 445.

¶ 23 We construe charter provisions on the same subject matter together, which allows us to ascertain intent and avoid inconsistency. *Id.* If language can be reconciled using one interpretation, but would conflict under another interpretation, we favor the interpretation allowing for consistency. *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986). We avoid an interpretation

that leads to an absurd or unreasonable result. *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998).

¶ 24 When a charter provision is susceptible of more than one interpretation, the interpretation suggested by the city's executive and legislative bodies should be considered. *Mile High Enters., Inc. v. Dee*, 192 Colo. 326, 330, 558 P.2d 568, 571 (1977).

¶ 25 "As creatures of statutes lacking any independent constitutional pedigree, agencies cannot invoke some kind of inherent authority to justify actions that find no warrant in their enabling legislation." *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo. 2003) (quoting Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 Wm. & Mary L. Rev. 1463, 1498 (2000)).

¶ 26 It is "well-established law that 'agencies possess implied and incidental powers filling the interstices between express powers to effectuate their mandates. Thus, the lawful delegation of power to an administrative agency carries with it the authority to do whatever is reasonable to fulfill its duties.'" *State ex rel. Suthers v. Tulips Invs., LLC*, 2012 COA 206, ¶ 16 (quoting *Hawes*, 65 P.3d at 1016), *aff'd*, 2015 CO 1; *see also Meyerstein v. City of Aspen*, 282

P.3d 456, 467 (Colo. App. 2011) ("[A]gencies possess implied and incidental powers to do all that is necessary to effectuate their express duties.").

¶ 27 However, "no implied powers exist when an agency exceeds its jurisdiction." *Hawes*, 65 P.3d at 1017.

B. Legal Standards

¶ 28 The Charter gives broad authority to the MOS over the DPD. "[The] Department of Safety . . . shall have, subject to the supervision and control of the Mayor, full charge and control of the department[] of . . . police," Charter § 2.6.1, and "[t]he Manager of Safety shall be the officer in full charge of said department, subject to the supervision and control of the Mayor." Charter § 2.6.2.

¶ 29 With respect to police officer discipline, the Charter provides that DPD personnel are "subject to reprimand, discharge, reduction in grade, fine and/or suspension" for any violation of DPD rules and regulations. Charter § 9.4.13. That part of the Charter also vests the MOS with the express authority to review all disciplinary orders of the Chief of Police: "The Chief of Police . . . shall . . . initiate disciplinary action by a written command ordering the specific disciplinary action, which written command shall be submitted to

the Manager of Safety for approval . . . ." Charter § 9.4.14(A). Further, the Charter vests the MOS with the power to "approve, modify or disapprove" disciplinary orders: "The Manager of Safety shall, within fifteen calendar (15) days of the date of the Chief's order, approve, modify or disapprove the written order of disciplinary action. The Manager shall take such action by a written departmental order which shall take effect immediately." Charter § 9.4.14(B).

¶ 30 The MOS must serve the order on the employee. Charter § 9.4.14(C). Within ten days from the date of completion of service of the departmental order of disciplinary action, the employee may file a written appeal requesting review of the discipline. Charter § 9.4.15(A). Any discipline other than a reprimand "shall be subject to review by a Hearing Officer and then the Commission." Charter § 9.4.15. The Hearing Officer makes findings "affirming, reversing, or modifying the disciplinary action in whole or in part," and the decision must be served upon the MOS and the employee. Charter § 9.4.15(D).

¶ 31 The Hearing Officer's decision "may be appealed to either the Commission, or directly to District Court." Charter § 9.4.15(E). In

"deciding the appeal, the Commission shall rely only upon the evidence presented to the Hearing Officer except when the appeal is based on new and material evidence." Charter § 9.4.15(F). The Commission may "affirm, reverse or modify the Hearing Officer's decision provided that the Commission shall not have the authority to impose a level of discipline more severe than that imposed by the Hearing Officer or the Manager of Safety." *Id.*

¶ 32 The employee or the MOS may seek judicial review of the decision of the Commission. Charter § 9.4.15(G). Judicial review proceedings "shall not be extended further than to determine if the Commission has exceeded its jurisdiction or abused its discretion under the provisions of this Charter." *Id.*

C. Discussion

¶ 33 The parties agree that these relevant sections of the Charter do not expressly confer power on the MOS to rescind a disciplinary order after the time for an appeal of an order has passed, direct reopening of an investigation, and later issue a second order imposing greater discipline. And we, too, perceive nothing in the recited Charter provisions that expressly confers such power.

¶ 34 The City and the Commission, however, assert that such authority exists as an implied power under the Charter, noting that the Department of Safety has "full charge and control of the department[] of . . . police," Charter § 2.6.1; "[t]he Manager of Safety shall be the officer in full charge of said department, subject to the supervision and control of the Mayor," Charter § 2.6.2; and the MOS has the final authority to discipline members of the police force, after receiving the recommendation of the Chief of Police and his report, Charter § 9.4.14(A).

¶ 35 But we see nothing in these provisions granting control over officers and their discipline that implies the power to change a MOS order imposing discipline once the order determines all the rights of the parties, especially when no appeal is taken within the time limited by the Charter. Such implied authority is not "reasonable to fulfill . . . duties" of the MOS, *Tulips Invs., LLC*, ¶ 16 (quoting *Hawes*, 65 P.3d at 1016), or "necessary to effectuate [his] express duties," *Meyerstein,* 282 P.3d at 467. The duty of the MOS concerning discipline is to "approve, modify or disapprove the written order of disciplinary action" within fifteen days of the recommendation by the Chief. Charter § 9.4.14(B). The right to

appeal the MOS order is limited to ten days. It is not reasonable or necessary for the MOS to have the implied authority to modify his own order after the time to appeal has expired.

¶ 36 In its April 9, 2012, decision, the Commission relied on *Citizens for Responsible Growth v. RCI Development Partners, Inc.*, 252 P.3d 1104, 1106-07 (Colo. 2011), for the proposition that the MOS has the implied power to reconsider. We acknowledge the court there stated that "although a quasi-judicial decision may completely determine the rights of the parties and end the particular action, the existence of such a final decision, in and of itself, does not bar the quasi-judicial body from reopening the action on its own motion." *Id.* at 1107. But the Commission appears to have ignored the specific caveat that the court employed. The court stated that such a power may exist only "[u]ntil judicial review is initiated or jurisdiction is divested in some other way." *Id.*; *see Cunningham v. Dep't of Highways*, 823 P.2d 1377, 1380 (Colo. App. 1991) ("[I]f an appeal or a request for an extension of time is not filed within the statutory ten-day period, it is generally true that the agency lacks jurisdiction to review the action . . . .").

¶ 37 So even if we assume that the MOS has the implied power to rescind a disciplinary order, the provisions of the Charter and principles of finality and jurisdiction provide that such power and authority exists only until the order becomes final and while the MOS retains jurisdiction of the matter, which ends once the time for appeal of that order expires. *See Cunningham*, 823 P.2d at 1380.

¶ 38 In both judicial and quasi-judicial contexts, courts have characterized a final judgment or decision generally as one that ends the particular action in which it is entered, leaving nothing further to be done to completely determine the rights of the parties. *Id.*; *see also W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2016 COA 103, ¶ 35 (determining agency director's letter was "final" because it "constitute[d] an action by which rights or obligations have been determined or from which legal consequences will flow" (quoting *Chittenden v. Colo. Bd. of Soc. Work Exam'rs*, 2012 COA 150, ¶ 26)); *Brooks v. Raemisch*, 2016 COA 32, ¶ 27 ("An agency's action becomes final when it is complete and there is nothing further for the agency to decide.").

¶ 39 Here, the first disciplinary order of the MOS, served on the Officers on July 20, 2010, was a final order because it determined

the matter in full, imposed legal consequences on the Officers, and left nothing further to be done to determine any party's rights. Absent an appeal to the Commission within the ten days expressly stated in the Charter, the Officers became bound to accept their discipline, and the DPD was required to implement the decision of the MOS. According to section 9.4.14(B) of the Charter, the order took effect "immediately" when issued by the MOS, and nothing in the Charter implicitly authorizes the MOS to rescind or modify the order after that period passed.

¶ 40 To the extent the Commission also justified finding the "implied power" to rescind because of the potential discovery of new, material evidence arising after a disciplinary order is final, such a concern is easily ameliorated by ensuring that a thorough investigation is undertaken, and by the necessarily adversarial proceedings permitting both the DPD and police officers to present their evidence before proposed discipline is tendered to the MOS by the Chief of Police.

¶ 41 The order was also final so as to be subject to appeal under section 9.4.15(A) of the Charter. When the time for appeal of an agency order passes, and no one appeals, that order becomes

immune from challenge in that proceeding. *See Cunningham*, 823 P.2d at 1380; *see also Danielson v. Zoning Bd. of Adjustment*, 807 P.2d 541, 543 (Colo. 1990) ("It is well established that the thirty-day time requirement in C.R.C.P. 106(b) is jurisdictional and a complaint to review the actions of an inferior tribunal will be dismissed if it is not filed within thirty days after final action by that tribunal."). Failure to seek review within the prescribed time is a jurisdictional bar to any review. *Id.*

¶ 42 Thus, within ten days from the completion of service of the MOS's departmental order of disciplinary action, the Officers could have filed a written appeal requesting review of the discipline. Charter § 9.4.15(A). When that did not occur, the first order became final and the MOS lost both authority and jurisdiction to rescind the order. *See id.*, *see also Citizens for Responsible Growth*, 252 P.3d at 1107; *Heier v. N.D. Dep't of Corr. & Rehab.*, 820 N.W.2d 394, 399-400 (N.D. 2012) (considering a statutory administrative process very similar to that in the Charter and concluding that the agency's decision becomes final if the employee chooses not to appeal).

¶ 43 Administrative agencies such as the Department of Safety generally have no jurisdiction or power to set aside a final decision once the aggrieved party has either appealed the decision or the time to appeal has passed. *Colo. State Bd. of Med. Exam'rs v. Lopez-Samayoa*, 887 P.2d 8, 14 (Colo. 1994) (stating that the Board was without jurisdiction to change the substance of the first order once the aggrieved party had filed his notice of appeal from the first order); *State, ex rel. Harpley Builders, Inc. v. City of Akron*, 584 N.E.2d 724, 725 (Ohio 1992) ("An agency retains this jurisdiction to set aside its own decision until a party appeals or the time to file an appeal has passed."); *see also Brown & Root, Inc. v. Indus. Claim Appeals Office*, 833 P.2d 780, 783 (Colo. App. 1991) (stating, in the context of an award of workers' compensation benefits, that "after such an award becomes final by the exhaustion of, or the failure to exhaust, review proceedings, no further proceedings to increase or decrease any such benefits beyond those granted by the order are authorized, unless" the statutory provision for reopening applies, recognizing that an agency order determining a party's rights is "final" when no review is sought and there is no inherent authority to revisit such a final order).

¶ 44 The division's approach in *Brown & Root* is consistent with that of courts around the country that have addressed the issue before us. In the following cases, courts have held that jurisdiction or power to modify or change an order is lost once it becomes final and the time for appeal lapses — that is, no such power is necessarily implied. *E.g.*, *Heap v. City of Los Angeles*, 57 P.2d 1323, 1323-24 (Cal. 1936) (per curiam); *Murdock v. Perkins*, 135 S.E.2d 869, 873-74 (Ga. 1964); *Welch v. Del Monte Corp.*, 915 P.2d 1371, 1372-74 (Idaho 1996); *Burton v. Civil Serv. Comm'n*, 394 N.E.2d 1168, 1169-70 (Ill. 1979); *Clark v. State Emps. Appeals Bd.*, 363 A.2d 735, 736-38 (Me. 1976); *Rowe v. Dep't of Emp't & Econ. Dev.*, 704 N.W.2d 191, 195-96 (Minn. Ct. App. 2005); *Armijo v. Save 'N Gain*, 771 P.2d 989, 993-94 (N.M. Ct. App. 1989); *Heier*, 820 N.W.2d at 399-400; *State ex rel. Borsuk v. City of Cleveland*, 277 N.E.2d 419, 420-21 (Ohio 1972); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-45 (Tex. App. 1986).

¶ 45 These courts have given various reasons for this rule, including the following:

- There is no reason to think a quasi-judicial agency is unable to perform its obligations in the absence of such a power. *Sexton*, 720 S.W.2d at 143-44.
- Such a power is really a new, additional, or entirely different power; it is not one necessarily implied by the power to decide. *Id.* at 137-45; *see Murdock*, 135 S.E.2d at 874; *Clark*, 363 A.2d at 737; *Heier*, 820 N.W.2d at 399-400.
- Such a power would undermine the intended finality of the decision. *Heap*, 57 P.2d at 1324; *Murdock*, 135 S.E.2d at 875; *Clark*, 363 A.2d at 738; *Armijo*, 771 P.2d at 994.
- When the time for an appeal lapses, jurisdiction is lost. *Heap*, 57 P.2d at 1324; *Welch*, 915 P.2d at 1373-74; *Rowe*, 704 N.W.2d at 196; *State ex rel. Borsuk*, 277 N.E.2d at 421.
- It is fundamentally unfair to reopen a final disciplinary decision to increase the punishment when the same misconduct is the sole basis for the reopening. *State, Dep't of Transp. v. State, Career Serv. Comm'n*, 366 So. 2d

473, 474 (Fla. Dist. Ct. App. 1979); *Burton*, 394 N.E.2d at 1170; *Heier*, 820 N.W.2d at 400.

- An employee is entitled to know when the potential for the consequences based on his misconduct is at an end. *Heier*, 820 N.W.2d at 400; *see Messina v. City of Chicago*, 495 N.E.2d 1228, 1233 (Ill. App. Ct. 1986).
- The governing law's silence as to such a power indicates that no such power was intended. *Sexton*, 720 S.W.2d at 141.

¶ 46 The City and the Commission mistakenly rely on *Citizens for Responsible Growth*, 252 P.3d at 1104-07, and *Cook v. City & County of Denver*, 68 P.3d at 588, for the proposition that the MOS had the implied power to rescind the first disciplinary order, even after it became final. As noted previously, it is true that the court in *Citizens for Responsible Growth* said that a quasi-judicial body may reconsider a final decision. But the decision at issue in that case was final only in the sense that it resolved the matter before it. The time for appeal of that determination had not run. The case specifically recognized that the power to reopen a matter is lost

when "judicial review is initiated or jurisdiction is divested in some other way." *Citizens for Responsible Growth*, 252 P.3d at 1107.

¶ 47 *Cook* sheds no light on the issue before us. The issue in that case was whether the Charter provision specifying disciplinary options includes demotion in rank even though that option is not mentioned expressly. The division held that it does because (1) the power to discharge, an option expressed in the Charter, subsumes the power to demote in rank; and (2) "reduction in grade," another option expressed in the Charter, can be construed as meaning demotion in rank. *Cook*, 68 P.3d at 589-90. Here, the issues before us do not implicate either interpretive principle.

¶ 48 The City and the Commission also rely on *Gordon v. Horsley*, 102 Cal. Rptr. 2d 910, 912-13 (Cal. Ct. App. 2001), as an example supporting their argument that no absolute timeframe (such as the ten-day period here) should exist within which a decision must be made to rescind an initial disciplinary order. But the case does not turn upon or analyze that issue at all. It merely quotes portions of an arbitrator's resolution of a "just cause" for demotion issue in which the arbitrator found the demotion was improper on procedural grounds. The arbitrator stated in part that "the

underlying incident was immediately the subject of an internal affairs investigation, resulting in the imposition of a two-day suspension. . . . The decision ten months later to rescind the suspension and impose more severe discipline was an extraordinary delay which raised serious issues of fairness." *Id.* at 913. We fail to see how this case supports the assertion that it is reasonable to imply that the MOS has power to rescind a final disciplinary order. Even to the extent that the case may support the argument that the thirty-day period between the issuance of the first disciplinary order and the MOS's rescission thereof was reasonable, we find it far from dispositive of the issues before us.

¶ 49 *Zavala v. Arizona State Personnel Board*, 766 P.2d 608 (Ariz. Ct. App. 1987), on which the City and the Commission also rely, is not persuasive concerning the issues before us. There, a prison warden suspended the plaintiff correctional officer for eighty hours, discipline which the plaintiff did not grieve or appeal. *Id.* at 611. Eighty days thereafter, a corrections director rescinded the suspension and ordered the plaintiff's dismissal. *Id.* The trial court entered a summary judgment affirming the result. *Id.* at 612. On appeal, however, the court found a due process violation because

the plaintiff had failed to receive a pre-termination hearing. *Id.* at 614.

¶ 50 The City and the Commission assert that the appellate court "apparently found no legal issues with the rescission of the initial discipline eighty days later and after the plaintiff had served the entire suspension." But in its due process analysis, the court noted that the plaintiff had been assured by his supervisor that he need not worry about grieving or appealing the discipline originally imposed, nor had he been aware that a higher authority could change the original discipline. It concluded that the plaintiff reasonably relied "upon the advice of the warden and his superiors to accept his initial suspension without protest and thereby let the matter die." *Id.* at 613.

¶ 51 Here, like in *Zavala*, the Officers chose not to appeal the MOS's first disciplinary order in apparent reliance upon principles of finality. And, nothing in the Charter would have provided notice to the Officers that the MOS could attempt rescission of the first disciplinary order, whereas in *Zavala*, there was specific authority granting the corrections supervisor power to change any warden-

imposed discipline. We simply fail to see how *Zavala* supports the assertion.

¶ 52 The City and the Commission also argue that we should defer to the Commission's conclusion that the MOS had implied power to rescind an order and retain jurisdiction even when the time for appeal had run. It is generally true that, if there is a reasonable basis for the agency's application of the law, the decision may not be set aside on review. *Cruzen v. Career Serv. Bd.*, 899 P.2d 373, 374 (Colo. App. 1995); *see also Mile High Enters., Inc.*, 192 Colo. at 330, 558 P.2d at 571 (stating that when a charter provision is susceptible of more than one interpretation, the interpretation suggested by the city's executive and legislative bodies should be considered). However, we review the Commission's interpretation of law de novo, *Woods v. City & Cty. of Denver*, 122 P.3d 1050, 1053 (Colo. App. 2005), and we do not give deference if "the agency's interpretation is not in accordance with law," *Colo. Consumer Health Initiative v. Colo. Bd. of Health*, 240 P.3d 525, 528 (Colo. App. 2010) (quoting *State, Dep't of Labor & Emp't v. Esser*, 30 P.3d 189, 193 (Colo. 2001)), or "is inconsistent with the [Charter's] clear language or the legislative intent," *id.* We do not perceive that there is a

reasonable legal basis for the Commission's conclusion here, especially because we must strictly construe city charters. *Cook*, 68 P.3d at 588.

¶ 53 Further, we are directed to avoid interpretations that would lead to an absurd result. *AviComm, Inc.*, 955 P.2d at 1031. In our view, finding an implied power to rescind that could be exercised months after the original order was entered, without notice to an aggrieved officer and after the officer has chosen not to appeal the discipline, would be absurd because an officer could never be assured that the disciplinary proceedings were at an end. And precluding an officer's reliance on a final result while allowing the MOS to revise the result "within a reasonable period of time" appears to conflict with the requirement in the Charter that the MOS make a decision within fifteen days of receiving the recommendation by the Chief of Police. It would also appear to allow the MOS sole, unguided discretion to decide what is "reasonable" under the circumstances.

¶ 54 In sum, nothing in the plain meaning of the Charter provisions grants authority to the MOS to modify discipline once an order becomes final. We perceive no ambiguity in the express Charter

provisions noted. We conclude that the Charter cannot be read to grant the MOS jurisdiction, implied power, or authority to rescind his first disciplinary order, remand for further investigation, and then impose the second disciplinary order, all occurring after the first order became final and the time for appeal expired. *See Hawes*, 65 P.3d at 1017 (no implied powers exist when an agency exceeds its jurisdiction). Hence the Commission exceeded its jurisdiction and abused its discretion in concluding that the MOS had the implied authority and power to do so. Because no timely appeal of the first disciplinary order occurred, the Commission lacked jurisdiction and authority.

¶ 55 In light of this disposition, we need not address the parties' remaining contentions.

¶ 56 We are acutely aware that this result means that the Officers essentially escape the consequences of their conduct, a result that is directly contrary to what the facts compel. But agencies and courts must employ just and proper procedures to obtain just and equitable results.

III. Conclusion

¶ 57 The judgment is reversed, and the case is remanded to the district court with directions to remand to the Commission for re-entry of the first disciplinary order.

JUDGE J. JONES and JUDGE MÁRQUEZ concur.