



STATE OF NEW JERSEY

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

In the Matter of Victor Vazquez, *et al.*,
City of Hackensack,
Police Department

Request for Stay

CSC Docket No. 2022-156

ISSUED: SEPTEMBER 7, 2021 (SLK)

The City of Hackensack (Hackensack), represented by Raymond Wiss, Esq., requests a stay of the Civil Service Commission (Commission) decision in *In the Matter of Victor Vazquez, et al.* (CSC, decided July 21, 2021), pending its appeal to the Appellate Division.

By way of background, on May 9, 2017, Hackensack Police Officers Rocco Duardo, Joseph Gonzales, Mark Guterrez, and Victor Vazquez, and Police Sergeant Justin de la Bruyere were served Preliminary Notices of Disciplinary Actions (PNDA) for charges related to a warrantless search of 64 Prospect Avenue and were removed after a departmental hearing. The matter was also reviewed by the Bergen County Prosecutor’s Office (BCPO), which, on July 19, 2017, determined that the facts did not support filing criminal charges against the officers. However, on July 20, 2017, the BCPO advised Hackensack that the officers’ conduct undermined its ability to prosecute pending matters in which they were involved as the conduct undermined their credibility as law enforcement witnesses, which led to the BCPO dismissing eight pending criminal matters against 16 criminal defendants. Further, the BCPO advised that future cases may be impacted. Finally, the BCPO advised that based on *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 45 U.S. 150 (1972), decisions about the officers’ future testimony would be made on a case-by-case basis. Subsequently, on August 15, 2017, Duardo sought relief in Superior Court complaining that the BCPO improperly declared him a “Brady v. Maryland Officer”

without due process. Thereafter, on September 1, 2017, Hackensack issued a second PNDA against the officers seeking their termination based on the BCPO's determination that the pending cases that involved the officers needed to be dismissed and future cases where their testimony would be needed may also be dismissed. On September 8, 2017, Duardo amended his complaint in Superior Court challenging his termination based on the BCPO designating him as a "*Brady* cop." On September 29, 2017, Hackensack amended the first PNDA also charging the officers with illegal seizure at 64 Prospect Avenue.

After the departmental hearing, the officers were terminated, and appealed to the Commission, the matters were transmitted to the Office of Administrative Law (OAL) as contested cases, and the Administrative Law Judge (ALJ) consolidated the Prospect Avenue matters. However, the ALJ denied the officers' motion to consolidate the Prospect Avenue appeals and *Brady* appeals finding that the issues of fact and law in the *Brady* appeals were distinct from the Prospect appeals. On March 26, 2018, the Superior Court denied Duardo's request for injunctive relief and dismissed his second amended complaint on procedural grounds as he could not provide any argument, evidence or law which supported that the BCPO's determination was subject to Superior Court review and it found that the Commission had jurisdiction over the officers' discipline. Thereafter, on July 23, 2018, the Superior Court dismissed his motion for reconsideration and on August 5, 2019, the Appellate Division affirmed the Superior Court's decision. Then, in *In the Matter of Victor Vazquez, et al.* (CSC, decided March 27, 2019), the Commission modified the removals of Victor Vazquez and Rocco Duardo to six-months suspensions and upheld the removals of Mark Gutierrez and Justin de la Bruyere, effective May 9, 2017. The charges against Gonzales were dismissed. Subsequently, Hackensack, Gutierrez, Vazquez, Duardo and de la Bruyere filed appeals with the Appellate Division, which are pending.

The charges from the September 2017 PNDA are the subject matter of this request for a stay. The ALJ recommended that the officers' termination without the ability to contest the BCPO designation that they were *Brady* officers, had deprived them of their employment without due process. Further, the ALJ concluded that Hackensack's filing of subsequent charges and discipline imposed in the Prospect Avenue matter impermissibly amounted to "double jeopardy." In *In the Matter of Victor Vazquez, et al.* (CSC, decided July 21, 2021), the Commission reversed the removals of Victor Vazquez, Mark Gutierrez, Rocco Duardo and Justin de la Bruyere, effective July 20, 2017, although the Commission noted that Gutierrez and de la Bruyere were still removed from the March 27, 2019 decision. On July 27, 2021, Hackensack appealed the Commission's July 21, 2021, decision to the Appellate Division and is now requesting the Commission stay its decision pending the Appellate Division's decision.

In its request for a stay, Hackensack states that it has a clear likelihood of success on the merits. It states that the Commission was mistaken in its belief that

the charges in this matter were brought only after it knew the ALJ's ruling in the Prospect Avenue matter. However, as the Prospect Avenue PNDA was issued on May 9, 2017, Hackensack did not know until July 2017 that the BCPO designated the officers as *Brady* officers, and in August 2017, the BCPO advised Hackensack Prosecutors to dismiss all pending criminal matters where the officers' credibility as law enforcement witnesses were involved and to temporarily refrain from prosecuting any matters involving the Officers. Thereafter, on September 1, 2017, Hackensack issued the second PNDAs regarding the officers being designated as *Brady* officers. Contrary to the Commission's referencing the second PNDA as a "second bite at the apple," Hackensack presents that these charges were not brought after it learned of the Commission's decision in the Prospect Avenue matters, as the Commission issued that decision in March 2019, which is well after Hackensack issued the second PNDA in September 2017. Further, while the Commission indicated during its meeting that "due process" needed to be decided by the Superior Court, Duardo already filed complaints in the Superior Court, which were dismissed by the Superior Court in March 2018. Further, the Superior Court indicated that the Commission has jurisdiction in this matter, which was also affirmed by the Appellate Division. Additionally, the ALJ found that the Prospect Avenue PNDAs and the Brady PNDAs were separate matters. Hackensack argues that the Commission does not have jurisdiction to modify the Officers' *Brady* status as found by the BCPO in its finding that the officers had a "due process" right regarding that determination.

Hackensack also argues that to return the officers to employment status under the circumstances would be "irreparable" harm to it. It notes that the Commission's determination was based on a perceived lack of "due process" and it did not rule that the absence of credibility determined by the BCPO should be overturned or that there was any wrongful conduct by Hackensack. In support of its claims, it presents *In the Matter of Jessenia Jimenez* (CSC, decided October 4, 2017), where the Commission granted a stay of its decision. Hackensack argues that even if the officers are entitled to additional due process, which it disputes, as acknowledged by the Commission, this issue must be addressed by the Appellate Division. On the other hand, it notes that the officers' injuries are monetary, and it proposes to continue to pay the officers their base pay pending its appeal before the Appellate Division. Finally, Hackensack contends that it is in the public's best interest to ensure that substandard police officers are not returned to their job, especially given the determinations of the BCPO.

In response, the officers, represented by Frank C. Cioffi, Esq., assert that Hackensack does not have a clear likelihood of success as it misapplies the Commission's decision. The Commission dismissed the charges against the officers because there was nothing issued by the BCPO that indicated that the officers should be removed as the BCPO clearly stated that the officers' ability to testify in the future would be determined on a case-by-case basis. Therefore, there is nothing that indicates that the officers are incapable of ever testifying again. Further, the officers argue that Hackensack has failed to demonstrate irreparable harm if the officers are reinstated as the BCPO's July 20, 2017 letter clearly indicates that the officers are

capable of continuing their careers as law enforcement officers despite the designation under *Brady* or *Giglio*. Additionally, when the BCPO County Prosecutor became the State's Attorney General, he issued directives indicating that there is no "do not call" list and a *Giglio* determination requires a case-by-case determination regarding the officer's ability to testify. Also, in response to Duardo's Superior Court Order to Show Cause application, the BCPO's opposition stated that a *Brady* designation does not make the Police Officer "useless," and such designation does not mandate that a Police Officer cannot perform his or her job, and the Superior Court ruled that Duardo failed to show how a *Brady* designation would have any detrimental effect on his ability to perform his normal duties as a Police Officer.

Concerning the dismissal of municipal cases by the BCPO, they argue that one of the officers, Gonzales, was exonerated by the Commission on all counts related to the Prospect Avenue charges. However, Gonzales is still designated under *Brady* despite his exoneration. The officers note that Gonzales worked on several cases that the BCPO dismissed. However, the officers assert that the fact that the BCPO prematurely dismissed cases involving an officer who was later found to have committed no wrongdoing, demonstrates how truly baseless the alleged claim of "irreparable harm" is by Hackensack. Also, the officers indicate that there are mechanisms that could be put in place to reduce the so-called risks claimed by Hackensack. For example, law enforcement officers by law are required to wear and operate Body Worn Cameras when responding to emergency calls, which document every word and move of an officer. Finally, the officers present that Duardo and Vazquez have not worked for nearly three and one-half years. The officers contend that having them work would be far more valuable than if they were to remain at home collecting a pay check. The officers argue that Hackensack failed to provide a single reason why a stay should be granted.

CONCLUSION

N.J.A.C. 4A:2-1.2(b) provides that a request for a stay or interim relief shall be in writing, signed by the petitioner or his or her representative and must include supporting information for the request.

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.

In this matter, the Commission finds that Hackensack has not met the criteria for a stay. As indicated in the prior decision, nothing issued by the BCPO regarding the officers' designation under *Brady* called for the removal from employment of the officers. Instead, the BCPO indicated that any future impediment to their functioning as Police Officers would be on a case-by-case basis. In fact, the officers present that the BCPO indicated in response to Duardo's Order to Show Cause in Superior Court, that a *Brady* designation does not affect a police officer's job functions or job duties. Additionally, while Hackensack presents *Jimenez, supra*, in support of its request for a stay, that matter is distinguishable, as the Commission had not made a decision in that matter based on the merits as the ALJ's recommended decision was deemed adopted by the Commission due to a lack of quorum. However, in this matter, the Commission's decision was based on the merits. Moreover, *Jimenez* involved a Working Test Period appeal, where she would have the burden of proof at the Appellate Division, which the Commission noted was substantial, while in this matter Hackensack will have the burden of proof at the Appellate Division. As such, Hackensack has failed to demonstrate a clear likelihood of success on the merits. Additionally, if Duardo and Vazquez are reinstated, there is no harm to Hackensack as their *Brady* designations do not prevent them performing their duties as Police Officers. Further, it is Duardo and Vazquez who are suffering substantial injury as they have been out of work for over three and one-half years even though the Commission ordered them reinstated.¹ Finally, it is in the public's best interest that the Commission's orders be followed.

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.

¹ The Commission notes that Hackensack's offer to continue the officers in pay status is also unpersuasive. In that regard, it is not in the public's interest to pay employees not to work. Moreover, in the unlikely circumstance that Hackensack is successful in the Appellate Division, any such "front pay" would likely have to be paid back by the officers.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF SEPTEMBER, 2021

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