



STATE OF NEW JERSEY

In the Matter of Jesse O'Brien,
Jersey City

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

CSC Docket No. 2023-908

Request for Interim Relief

ISSUED: December 21, 2022 (SLK)

Jesse O'Brien, a Police Officer with Jersey City, represented by Jared M. Wichnovitz, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding his immediate suspension.

By way of background, the United States District Attorney Office requested footage from an arrest on July 26, 2022 (arrest). On September 29, 2022, O'Brien's Body-Worn Camera (BWC) was reviewed by Internal Affairs. On October 6, 2022, Jersey City issued a Preliminary Notice of Disciplinary Action (PNDA) to O'Brien indicating that he was immediately suspended for violating departmental and administrative rules due to his BWC revealing that the arrest footage indicated that he used unprofessional and offensive language, the arrest occurred after he had been placed in Jersey City's Early Warning System (EWS) following several other indicators that triggered the need for intensive monitoring¹, and the Police Department received a notification from Human Resources/Equal Employment Office that it had sustained that he had engaged in Workplace Discrimination and Harassment from a previous incident. Upon receiving the PNDA, O'Brien was

¹ Jersey City's response indicates that the EWS received the following early alerts regarding O'Brien: (1) April 6, 2022. Five use of force reports, one special investigation, and once citizen complaint; (2) April 25, 2022. O'Brien used physical force eight separate times. As such, he was entered in the Intensive Supervision Program; (3) May 31, 2022. An additional use of force by O'Brien; (4) July 11, 2022. Three more use of force incidents; (5) July 18, 2022. Another incident involving use of force; and (6) August 26, 2022. Another special investigation.

suspended without pay, he requested a Loudermill² hearing and he was ordered to submit to a Fitness for Duty Examination (Examination) administered by the Institute for Forensic Psychology. O'Brien was examined on October 20, 2022, and October 24, 2022.³ The Loudermill hearing was held on November 2, 2022. Although the hearing officers, which consisted of two superior officers and one Police Officer, recommended that O'Brien be returned and placed on modified duty pending his successful completion of counseling, Jersey City rejected that recommendation and continued his suspension without pay.

In his request, O'Brien requests that his immediate suspension be rescinded, and he be returned to duty and receive back pay due to the Loudermill hearing not occurring as prescribed by law. He asserts that his immediate suspension without pay violates *N.J.A.C. 4A:2-2.5(b)* because he has not been provided a "sufficient opportunity" to review the charges and evidence before a representative of the appointing authority as Jersey City intends to hold the Loudermill hearing nearly a month after his suspension without pay and, in the interim, require him to submit to an Examination. Additionally, Jersey City advised that it will not provide him any evidence as it intends to solely rely on the PNDA. O'Brien also argues that his suspension without pay violated *N.J.S.A. 40A:14-149.1* as he contends that he could only be suspended without pay if he was charged with a crime, which he was not. Further, he claims that the alleged allegations against him are insufficient to warrant an immediate suspension without pay. Moreover, O'Brien submits that the allegations against him are insufficient to support an order compelling him to submit to an Examination as the Institute for Forensic Psychology's guidelines state that unprofessional and/or offensive language are an insufficient basis for an Examination. Therefore, he argues that he will likely succeed on the merits.

Additionally, O'Brien argues that he is in danger of immediate or irreparable harm if his request is not granted as his livelihood has been taken away without appropriate notice as well as a meaningful opportunity to be heard on the issue of his pay status. Further, he asserts that there is an absence of substantial injury to Jersey City if his request is granted as it would not suffer any hardship if it is required to comply with the law and administrative code. Finally, O'Brien argues that his request is in the public interest since he will undoubtedly be successful as there is no justification for violating his rights.

O'Brien additionally requests that Jersey City be ordered to rescind its order to compel him submit to an Examination. He indicates that under Civil Service rules

² See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *N.J.A.C. 4A:2-2.5(b)*.

³ The Summary, Recommendations, and Conclusions prepared by the Licensed Psychologist after the Evaluation found O'Brien psychologically unfit for full duty at present. However, he found O'Brien capable of serving in a non-safety sensitive/modified duty capacity, which would not likely require an emergency response, if such a position was available. He recommended counseling with a fully qualified mental health profession for at least three months. Thereafter, he indicated that O'Brien should be psychologically re-evaluated.

and the Attorney General's Guidelines on Internal Affairs Policy and Procedures (AG Guidelines), a civil servant cannot be compelled to testify against oneself at their own disciplinary hearing, and the AG Guidelines indicate that once an officer has been charged, one cannot be compelled to submit to further questioning by Internal Affairs or forced to testify against himself. O'Brien states that the AG Guidelines indicate that an Examination, which is predicated on alleged misconduct, as is the case here, is part of an Internal Affairs investigation. He presents that Examinations are considered "medical examinations" under the Americans with Disabilities Act and are only lawful when they are job related and consistent with "business necessity," which is when an employee's ability to perform essential job functions will be impaired by a medical condition or when an employee will pose a direct threat due to a medical condition. O'Brien contends that these standards have not been met. He presents case law to indicate that the use of obscene language, *i.e.* unprofessional and offensive language, is insufficient to justify ordering an employee to submit to an Examination. Therefore, O'Brien argues that the order for him to submit to an Examination should be null and void, if he should submit to an Examination that Jersey City may not use the results, Jersey City should be directed to not discipline him for failing to submit to an Examination, and it should be declared that since he has already been charged, he has no obligation to submit to an Examination or otherwise cooperate with Internal Affairs.

In response, Jersey City, represented by James B. Johnston, Assistant Corporation Counsel, states that O'Brien has engaged in improper use of force, concealing an incident where he used improper physical force, incidents documenting serious anger management issues with the public and the Police Department, and blatant insubordination of his female and minority superiors. Therefore, it contends that it is well within its rights to order an Examination. Jersey City presents that between April 6, 2022, and August 16, 2022, O'Brien used physical force against the public eight times. Additionally, he failed to submit a use of force form as required by Attorney General policy, he posted in a group chat an emoticon which referenced a minority female Captain, which translated to "A vagina with a lack of penis equals an angry person," and he looked into his BWC and referred to members who referred him to the EWS as "fuckos" and "c*nts." It highlights that the parties mutually agreed to hold the Loudermill hearing on November 2, 2022, and Jersey City's discovery that it provided to O'Brien included footage from his BWC. Jersey City presents that the initial assessment from O'Brien's Examination indicated that he was presently psychologically unfit, and it was recommended that he receive further evaluation and counseling. It contends that his request for interim relief is an attempt to stop Internal Affairs from investigating his inappropriate behavior.

Jersey City presents that O'Brien is not entitled to injunctive relief because it is only available when the alleged harm cannot be addressed by monetary damages and monetary remedies are available to him. It states that under State and federal law there are mechanisms for litigants seeking monetary damages for alleged

violations of their rights. Additionally, Jersey City states that interim relief is to prevent irreparable harm, which is not the case here. It indicates that it follows the directives from the Attorney General. Further, Jersey City states that as O'Brien agreed to hold the Loudermill hearing on November 2, 2022. Jersey City asserts that his statements that it has not complied with State law is without merit. Further, its use of the EWS is required by the Attorney General. Moreover, the BWC footage supports his suspension. Jersey City argues that it is in the public interest that his request be denied as the public interest favors that a thorough, fair and complete investigation into police misconduct, discrimination, and bias within police ranks be conducted. It asserts that only after a thorough and impartial investigation can an informed decision be made. Further, it states that there is no support for his position that the public interest supports his request for interim relief as it has provided compelling evidence that there is risk of substantial injury if his request is granted. Jersey City states that O'Brien is unfit for duty as he uses his badge to physically and verbally abuse others. It presents that there is nothing subtle about a Caucasian male Police Officer informing an unthreatening individual of color that "he will be meeting God."

Jersey City further argues that O'Brien has failed to meet his burden of proof that he is likely to succeed on the merits. It presents that under Civil Service rules, O'Brien's immediate suspension is warranted as there is an avalanche of compelling evidence that his suspension is necessary to maintain safety, health, order or effective direction of public services. Further, it documented the reasons for the immediate suspension in the PNDA and it held the Loudermill hearing, as mutually agreed upon, within 30 days of the PNDA. It notes that there is no requirement that a Loudermill hearing be required before an Examination. Additionally, Jersey City presents that it has provided O'Brien discovery even though the Loudermill is not a full blown evidentiary hearing. It also submits that *N.J.S.A. 40A:14-149.1* is not applicable because he was not "solely" charged with departmental violations as he was also charged with administrative violations. Moreover, Jersey City asserts that O'Brien's statement, "You are going to meet God," is a corrupt action of moral turpitude. Also, it states that his failure to submit a use of force report, which is an act of dishonesty, is an act of moral turpitude. Additionally, Jersey City asserts that O'Brien's reference to female employees as "c*nts" is an act of bias and moral turpitude.

In reply, O'Brien presents that under the collective bargaining agreement, the Loudermill hearing was presided over by two command officers selected by Jersey City and one which O'Brien selected from his ranks. He presents that although the three officers determined that he should be immediately restored to the payroll, Jersey City has not done so. O'Brien argues that he does not need to establish that the harm he has suffered cannot be adequately redressed by monetary damages. Additionally, he presents that he is suffering extreme financial hardship because of the immediate suspension without pay, he lost his health benefits, he can no longer

make pension contributions, and he was forced to undergo an invasive psychological evaluation for an EEOC violations, which Jersey City now concedes were not true at the Loudermill hearing, and for unprofessional and offensive language, which the Examiner concedes is an insufficient basis to compel an officer to submit to such an evaluation. O'Brien contends that he has already shown that he is likely to succeed on the merits because he "won" the Loudermill hearing, where it was determined that he should be reinstated and returned to the payroll. He argues that the public interest is best served granting his requested relief as the AG Guidelines indicate that a bias investigation should be conducted in a "timely" manner, which is much different from a "rapid" manner, which sacrifices the truth as Jersey City falsely alleged that a sustained EEOC violation had been made. While he agrees that the public interest supports a prompt, thorough, and fair investigation, he claims that this case was a rush to judgment. Moreover, O'Brien provides that Jersey City has not provided that there is a real risk of substantial injury to other parties if his relief is granted as the Examination did not indicate that he is unfit for duty and he "won" the Loudermill hearing. Therefore, he claims that there is not an "avalanche" of compelling evidence as Jersey City claims and he is likely to succeed on the merits. O'Brien states that as there are no criminal charges pending and there has not been a sustained finding by the EEOC, his removal from the payroll is solely based on unprofessional and offensive language, which, at best, is a mere violation of departmental rules. Therefore, he argues that case law indicates that the legislative intent was to protect Police Officers from loss of income unless the charges pending were of special gravity, which they are not. Moreover, as he states that he has not acted fraudulently, corruptly or dishonestly, his actions are not involving moral turpitude.

In further response, Jersey City presents that the hearing officers from the Loudermill hearing only provided a recommendation and the Office of the Director of Public Safety has final discretion on the appropriate disciplinary action. It acknowledges that the hearing officers recommended that O'Brien be placed on modified duty pending his successful completion of counseling, which the Office of the Public Safety Director rejected in light of the egregious nature of his misconduct. As such, O'Brien remains suspended without pay to protect the public and the employees of the department. It asserts that his contention that he "won" the Loudermill hearing is untrue.

In further reply, O'Brien states that Jersey City's reply was untimely and impermissible as it was after the time frame that this agency indicated in its letter to the parties. He states that Jersey City attached a portion of the collective bargaining agreement, which pertained to departmental hearings, and not Loudermill hearings. Additionally, even if the provisions did apply, O'Brien indicates that Jersey City has not submitted any document or writing, which indicates that it rejected the recommendation from the Loudermill hearing. Moreover, even if had, he contends that since Jersey City did not have a record of the Loudermill hearing, that

decision was arbitrary and capricious. Additionally, O'Brien provides that Jersey City has not even made a pretense that the public or Police Department employees need protection from him as he is a highly decorated officer who received commendations for his action in the arrest, and it was his alleged words, and not his conduct, which offended the delicate sensibilities of someone, which is an insufficient basis for a suspension without pay. He asserts that it is unquestionable that Jersey City "lost" the Loudermill hearing as those who heard the evidence did not decide to suspend him without pay. O'Brien states that it is shocking that Jersey City alleges that he has a "documented track record of using excessive force against men of color and...displays a bias against women" as he indicates there is no evidence to support this claim as he has never once been charged or accused of excessive force irrespective of color nor has he ever been found to "display a bias against women." He states that Jersey City's own witness admitted during the Loudermill hearing that it falsely alleged that the EEOC sustained an investigative finding against him and it was forced to withdraw that allegation.

CONCLUSION

N.J.S.A. 40A:14-149.1 provides that notwithstanding any other law to the contrary, whenever any municipal police officer is charged under the law of this State, another state, or the United States, with an offense, said police officer may be suspended from performing his duties, with pay, until the case against said officer is disposed of at trial, until the complaint is dismissed, or until the prosecution is terminated; provided, however, that if a grand jury returns an indictment against said officer, or said officer is charged with an offense which is a high misdemeanor or which involves moral turpitude or dishonesty, said officer may be suspended from his duties, without pay, until the case against him is disposed of at trial, until the complaint is dismissed or until the prosecution is terminated.

N.J.A.C. 4A:2-2.4(b) provides that in local service, the appointing authority may provide that a suspension be with or without pay.

N.J.A.C. 4A:2-2.5(a) provides that an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:

- (1) An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services...However, a PNDA with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

(2) An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. See *N.J.A.C.* 4A:2-2.7.

N.J.A.C. 4A:2-2.5(b) provides that where suspension is immediate under (a)1 and 2 above, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority.

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

Initially, concerning O'Brien's complaint that Jersey City's reply is untimely and impermissible because it was submitted beyond the time frame in this agency's letter, it is noted that the time frames set forth in that letter were neither statutory or regulatory and were presented to guide the proceedings. Moreover, the Commission's goal is to have as full a written record before it. Therefore, this submission is permissible and shall be considered by the Commission.

Further, regarding O'Brien's argument that *N.J.S.A.* 40A:14-149.1 only permits the immediate suspension of a Police Officer without pay when he or she has been charged with a criminal offense, the Commission has determined that Civil Service jurisdictions and their employment practices are governed by both the provisions of Title 40A and Title 11A of the New Jersey Statutes. Since the latter permits the immediate suspension of employees on administrative disciplinary charges in addition to criminal charges, O'Brien could have been suspended without pay under *N.J.A.C.* 4A:2-2.4(b) and *N.J.A.C.* 4A:2-2.5(a)1. See *In the Matter of George Bello* (MSB, decided May 10, 2006).

Concerning O'Brien's immediate suspension under *N.J.A.C.* 4A:2-2.5(a)1, the Commission finds that it was warranted. The PNDA indicates that O'Brien's BWC footage of the arrest revealed that he used "unprofessional and offensive language." Furthermore, the record reveals that the allegations are not mere "unprofessional

and offensive language” as this language included a threat to a member of the public that if he did not accordingly, “You are going to meet God.” Additionally, there is an allegation that O’Brien looked into his BWC and referred to staff members, who referred him to the EWS as “fuckos” and “c*nts.” There is also an allegation that O’Brien posted in a group chat an emoticon which referenced a minority female Captain, which translated to “A vagina with a lack of penis equals an angry person.” Moreover, the PNDA indicates that the arrest took place after he had already been placed in the EWS, and Jersey City presents that between April 6, 2022, and August 16, 2022, O’Brien allegedly used physical force against the public eight times, and he failed to submit a use of force form as required.⁴ Clearly, these charges establish a hazard and his immediate suspension was necessary to maintain the health, order, and effective direction of the police department. *See N.J.A.C. 4A:2-2.5(a)*. Additionally, while O’Brien argues that there was insufficient evidence to compel him to submit an Examination based on the Institute for Forensic Psychology’s guidelines which indicates that “obscene language” does not justify an Examination, it is noted that under Civil Service law and rules, there is nothing that prohibits an appointing authority from requiring an Examination based on legitimate business reasons, which clearly exists as the alleged “unprofessional and offensive language” went beyond “offensive language” as there was a threat against a member of the public and the alleged language against female and minority superiors, including a Captain, potentially undermined the working environment. Further, the alleged actions as indicated in the EWS were also part of the rationale for the Examination. Also, the conclusion from the psychological report that indicated that O’Brien is not presently psychologically fit further justifies that the directive to undergo an Examination and his immediate suspension were warranted. In this regard, the Commission is mindful that O’Brien, as law enforcement officer, is held to a higher standard than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990).

Moreover, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner’s actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such a disciplinary appeal on the written record without a full plenary hearing before an Administrative Law Judge who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record before making an initial decision. Likewise, the Commission cannot make a determination on whether O’Brien’s

⁴ The PNDA also specifies that a notification from Jersey City’s Human Resources/Equal Employment Office notifying the Police Department of a sustained finding for a previous incident of Workplace Discrimination and Harassment was another reason for the immediate suspension. O’Brien indicates that during the Loudermill hearing, Jersey City’s attorney indicated that there was no such finding. However, as indicated above, even without considering this “finding,” there were sufficient grounds for an immediate suspension.

current or future penalty was inappropriate without the benefit of a full hearing record before it.

Additionally, it is noted that the record reflects that Jersey City complied with the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *N.J.A.C. 4A:2-2.5(b)*. In a prior case addressing this issue, *In the Matter of Anthony Recine* (MSB, decided March 10, 1998), it was found that the Township of Hamilton did not provide a proper pretermination hearing since Recine was not made aware of the charges and the general evidence in support of the charges at the time of his suspension. By contrast, here, O'Brien received written charges against him and general evidence in support of the charges at the time of his suspension. Specifically, O'Brien was served with a PNDA at the time he was immediately suspended setting forth the charges and specifications for the charges. It is noted that the specification portion of the PNDA constitutes the general evidence in support of the charges. Moreover, O'Brien was provided with sufficient opportunity to respond to the charges before Jersey City. *See In the Matter of Robert Totten* (MSB, decided August 12, 2003); *In the Matter of Joseph Auer* (MSB, decided October 23, 2002). Additionally, although not required, Jersey City indicates that BWC evidence was provided to O'Brien prior the Loudermill hearing. Regarding O'Brien's claim that he "won" the Loudermill hearing because the hearing officers recommended that he be returned to the payroll, under Civil Service law and rules, neither Jersey City nor the Commission is bound by the hearing officers' recommendations. Concerning O'Brien's complaint about the timing of the Loudermill hearing, there is no specified timing requirement as to when a Loudermill hearing must be held under Civil Service law and rules. In fact, there was no requirement at all that Jersey City provide an oral hearing, as it had the discretion to limit O'Brien's response to the immediate suspension to in writing. *See N.J.A.C. 4A:2-2.5(b)*. Regardless, the record indicates that O'Brien was afforded an oral hearing on November 2, 2022, which was mutually agreed upon by the parties. Additionally, there is nothing under Civil Service law or rules that limits an appointing authority's direction to require an Examination where there is legitimate "business necessity" prior to a Loudermill hearing. Since O'Brien has not conclusively demonstrated that he will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, he has not shown a clear likelihood of success on the merits.

Further, while the Commission is cognizant of O'Brien's financial situation, the harm that he is suffering while awaiting the outcome of the disciplinary process is financial in nature, and as such, can be remedied by the granting of back pay should he prevail in his appeal. Concerning any comments alleging that Jersey City has not followed the AG Guidelines during the disciplinary hearing process, the Commission is not bound by those guidelines. Further, regarding any other allegations procedural allegations against Jersey City, procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the OAL, if necessary. *See Ensslin v. Township of North*

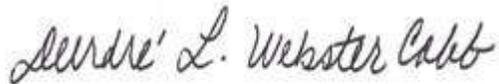
Bergen, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995); *In re Darcy*, 114 N.J. Super. 454 (App. Div. 1971). Regardless, there is nothing in the record that indicates that Jersey City has not conformed with the law and administrative code as O'Brien claims, and given that he is a law enforcement officer who is held to a higher standard, and the charges are serious in nature, Jersey City would be substantially harmed if his request was granted. Finally, the public interest is best served by having an officer facing such serious charges off the job pending the outcome of the disciplinary process.

ORDER

Therefore, it is ordered that Jesse O'Brien's petition for interim relief is 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 21st DAY OF DECEMBER, 2022



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