



STATE OF NEW JERSEY

In the Matter of Jesse O'Brien,
Jersey City

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

CSC Docket No. 2023-1911

Request for Interim Relief

ISSUED: May 24, 2023 (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's 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 its 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 indicated 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. Thereafter, O'Brien requested interim relief to have his immediate suspension rescinded, and he be returned to duty and receive back pay due to the Loudermill hearing not occurring as prescribed by law. He also argued that he should not be compelled to undergo an Examination as ordered by Jersey City. In *In the Matter of Jesse O'Brien* (CSC, decided December 21, 2022), the Commission denied his request.

In this second request for interim relief, O'Brien argues that he has a clear likelihood of success on the merits. He states that he requested a departmental hearing on at least four separate occasions, December 15, 2022, December 23, 2022, January 9, 2023, and January 17, 2023, and Jersey City advised on January 18, 2023, that its investigation was still ongoing, and the departmental hearing would be scheduled on upon the completion of the investigation. Therefore, O'Brien argues that his due process rights are being violated for not following Civil Service law and rules and other applicable authority. Additionally, he reiterates his arguments that his immediate suspension without pay was improper and he should not be compelled to submit to an Examination. O'Brien argues that he is in danger of immediate or irreparable harm if his request is not granted because Jersey City's refusal to hold a departmental hearing allows it to put his life on hold for an indefinite period of time due to its "ongoing" investigation and it has no reason to conclude its investigation if his request is not granted. Further, he asserts that there is an absence of substantial injury to Jersey City if his request is granted as he is requesting that Jersey City conform to Civil Service law and rules. Similarly, O'Brien contends that it is in the public interest that Jersey City be compelled to comply with Civil Service law and rules. Finally, O'Brien argues that his charges should be dismissed because Jersey City has failed to hold a departmental hearing in a timely manner as required under *N.J.A.C. 4A:2-2.5(d)*. He states that Jersey City should have never issued a PNDA if it was not prepared to go forward and comply with this rule.

In response, Jersey City, represented by Lindiwe Ashton, Esq., states that at present, a licensed psychologist determined that O'Brien is unfit for duty and the

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.

psychologist provided him with a recommended treatment plan that could potentially lead to his re-evaluation and re-instatement, but he failed to comply with the plan. Further, it indicates that it has discovered a staggering number of incidents involving O'Brien that document that his approach to his work as a Police Officer is unacceptable. Jersey City contends that O'Brien's second request for interim relief is a rehashing of the same arguments that the Commission has already rejected, and this request should be rejected on the grounds of collateral estoppel. Jersey City notes that O'Brien has now filed an appeal to the Appellate Division regarding this matter. It highlights a matter where the Appellate Division found that O'Brien's testimony was not credible concerning an arrest. Jersey City forwarded the issues involving O'Brien to the Hudson County Prosecutor's Office and the United States Attorney's Office for *Brady/Giglio* concerns and to see if it wished to launch a criminal investigation and it indicated that it did not. Jersey City presents that it first learned on January 18, 2023, that O'Brien was not complying with the recommended treatment plan. It states that it has informed him that its investigation is ongoing and a departmental hearing would be scheduled upon its conclusion. Jersey City outlines 18 additional incidents regarding O'Brien's behavior that it is investigating.

Jersey City argues that O'Brien has not met the standard for interim relief. It refers to its submissions in the prior matter. Jersey City emphasizes that O'Brien is not suffering irreparable harm since his financial situation can be remedied by the granting of back pay should he prevail. It reiterates that O'Brien has not complied with the recommended treatment plan and all the incidents that involve him warrant its investigation. Jersey City asserts that the public interest is best served by denying his request as the public is best served if there is a thorough and fair completion of investigations into alleged police misconduct. It presents that there is also a strong policy against discrimination in the workplace and against bias within the police ranks. Jersey City notes the EEO complaint and the "Going to meet God" incident which triggered the PNDA and the additional 18 incidents which have since been discovered during its investigation. Regarding, *N.J.A.C. 4A:2-2.5(d)* which references the right to a hearing within 30 days of the PNDA being issued, this does not mean that each time an employee requests a disciplinary hearing he gets an extra 30 days. It simply means he is entitled to a hearing within 30 days of the PNDA and nothing more. Jersey City states that while O'Brien suggests that the first time he was informed that there was an ongoing investigation was at the Loudermill Hearing, it informed him of this as early as its October 31, 2022, response to his first request for interim relief. It asserts that O'Brien does not get to dictate the pace of the investigation and the scale of the incidents involved warrants a thorough investigation. Jersey City argues that there is a substantial risk to others if his request is granted as he is unfit for duty and he has ignored following the treatment plan which could eventually lead to his reinstatement. Further, it believes that O'Brien's rights have not been violated as it has complied with the Commission's order and he has not followed the recommended treatment plan. Moreover, for the reasons as addressed in the first request for interim relief, O'Brien does not have a

clear likelihood of success. Jersey City asserts that these issues have already been litigated and he can pursue these previously decided matters in the Appellate Division, which he has done.

In reply, O'Brien indicates that he did continue to engage with telephonic treatment with the psychologist; however, the psychologist has now indicated that the treatment provider updates are to go directly to Jersey City, and he has complied with the psychologist's treatment plan. He asserts that while Jersey City now indicates that its investigation is ongoing, this is contrary to its representation in the first proceeding where it indicated that its investigation was completed and subject to a Loudermill hearing. Further, this matter involves the denial of his administrative and legal right to a hearing. He notes that after filing his second petition, the investigation was completed, with new charging documents with an alleged substantial finding of the allegations made in October 2022. O'Brien argues that collateral estoppel is not appropriate as his rights are continuously being violated as he is being suspended without pay in perpetuity. Similarly, he contends that he is suffering irreparable harm for ignoring his requests for a hearing. O'Brien believes that it is in the public interest to dismiss his charges for Jersey City's lackadaisical approach to the investigation and its failure to hold a departmental hearing within 30 days of issuance of the PNDA as required under *N.J.A.C. 4A:2-2.5(d)*. He states that he never asked for the time for the hearing to be extended as Jersey City indicates and now it has issued three additional PNDAs that set forth some of the exact charges from the original PNDA. O'Brien asserts that Jersey City provided misleading evidence alleging that there is a very real risk of substantial injury if his request is granted. He highlights that the Examination found him fit for modified duty, and now, without a reevaluation, he is found unfit. He states that he has complied with the recommended treatment plan.

CONCLUSION

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.

N.J.A.C. 4A:2-2.5(d) provides that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or a later date as agreed to by the parties.

N.J.A.C. 4A:2-2.6(d) provides that within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action (FNDA). *See N.J.A.C.* 4A:2-2.13 for the issuance of a Final Notice in removal appeals by certain law enforcement officers and firefighters.

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, it is noted that most of the issues in this second request for interim relief were considered in the first request and the Commission will not address such matters that have already been decided. Any disagreement that O'Brien has with the first request can be addressed in the Appellate Division.

Nonetheless, the Commission finds that there is one new matter that needs to be addressed. In the first request, O'Brien did not allege that Jersey City did not comply with *N.J.A.C.* 4A:2-2.5(d). In fact, although the PNDA was issued on October 6, 2022, the record indicates that O'Brien did not request a department hearing until December 15, 2022. In response, Jersey City indicated that its investigation was ongoing, and it would schedule the departmental hearing upon the completion of investigation. Jersey City also alleges that O'Brien failed to comply with the recommendation from the treatment plan after his Examination. However, the Commission finds that Jersey City's reasons for not scheduling a departmental hearing are unpersuasive as the need to further investigate or an alleged non-compliance with its order is not a valid basis to delay administrative proceedings under *N.J.A.C.* 4A:2-2.5(d). If Jersey City was not prepared to hold a hearing based on the charges set forth on the PNDA issued on October 6, 2022, it should not have issued a PNDA at that time. It is also noted that the issuance of a PNDA and even holding a department hearing, would not have prohibited Jersey City from continuing its investigation regarding additional allegations which could have potentially led to an amended PNDA. Therefore, pursuant to *N.J.A.C.* 4A:2-2.5(a)1, *N.J.A.C.* 4A:2-2.5(d) and *N.J.A.C.* 4A:2-2.6(d), O'Brien's immediate suspension without pay could only span 50 days⁴ from when he requested a departmental hearing on December 15, 2022, allowing for the maximum time for the departmental hearing process to be

⁴ This is calculated as 30 days from when O'Brien requested the departmental hearing and 20 days thereafter to issue a FNDA.

completed. Accordingly, in this case, given the procedural due process violations committed by Jersey City, the Commission orders that O'Brien's immediate suspension beginning on October 6, 2022, shall be considered without pay through February 3, 2023, and thereafter with pay until he is either reinstated or a departmental hearing on the merits is held and the disposition of a FNDA sustaining the charges is issued. The Commission orders that any departmental hearing must be commenced no later than 20 days from the issuance of this decision. Further, Jersey City is to provide O'Brien back pay from February 3, 2023, until his reinstatement or issuance of a FNDA. Finally, the Commission warns Jersey City that if it fails to commence a departmental hearing within the specified time frame, upon the Commission finding that Jersey City has not complied with this order, the Commission may impose fines up to \$10,000 pursuant to *N.J.A.C. 4A:10-2.1*.

ORDER

Therefore, it is ordered that Jesse O'Brien's petition for interim relief is granted in part. Within 20 days of the issuance date of this decision, Jersey City shall commence a departmental hearing on the merits of the charges. Further, O'Brien shall be awarded back pay from February 3, 2023, until his reinstatement or issuance of a Final Notice of Disciplinary Action.

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 24TH DAY OF MAY, 2023



Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Jesse O'Brien
Jared M. Wichnovitz, Esq.
John Metro
Lindiwe Ashton, Esq.
James B. Johnston, Assistant Corporation Counsel
Division of Agency Services
Records Center