



STATE OF NEW JERSEY

In the Matter of Jesse O'Brien,
Jersey City

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

CSC Docket No. 2024-523

Enforcement

ISSUED: November 1, 2023 (SLK)

Jesse O'Brien, a Police Officer with Jersey City, represented by Jared M. Wichnovitz, Esq., requests enforcement of *In the Matter of Jesse O'Brien* (CSC, May 24, 2023).

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 monitoring, 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 suspended without pay, he requested a Loudermill 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. 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 Thereafter, O'Brien requested interim relief to have his immediate suspension rescinded, and to be returned to duty and receive back pay due to the Loudermill hearing not occurring as prescribed by law.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 have been 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.

Thereafter, in his second request for interim relief, O'Brien indicated 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 upon the completion of the investigation. Therefore, O'Brien, argued that his charges should be dismissed because Jersey City failed to hold a departmental hearing in a timely manner as required under *N.J.A.C. 4A:2-2.5(d)*. In *In the Matter of Jesse O'Brien* (CSC, decided May 24, 2023), the Commission found that Jersey City's reasons for not scheduling a departmental hearing were unpersuasive as the need to further investigate or an alleged noncompliance with its order was not a valid basis to delay administrative proceedings under *N.J.A.C. 4A:2-2.5(d)*. It stated that 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 at PNDA at that time. It 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, the Commission found that 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 days from when he requested a departmental hearing on December 15, 2022, allowing for the maximum time for the departmental hearing process to be completed. Accordingly, the Commission ordered that O'Brien's immediate suspension beginning on October 6, 2022, was to be considered without pay through February 3, 2023, and thereafter with pay until he was either reinstated or a departmental hearing on the merits was held and the disposition of a FNDA sustaining the charges was issued. The Commission also ordered that any departmental hearing must be commenced no later than 20 days from the issuance of its decision. Further, Jersey City was to provide O'Brien back pay from February 3, 2023, until his reinstatement or issuance of a Final Notice of Disciplinary Action (FNDA). Finally, the Commission warned Jersey City that if it failed 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*.

In the current request, O'Brien presents that although the parties mutually agreed to adjourn the June 12, 2023, hearing, he asserts that he did not waive any

other aspect of the prior Commission order. O'Brien notes that while discussions proceeded, he requested on four separate occasions that he be reinstated to the payroll and issued back pay. He states that Jersey City has refused to comply with the order and has advised him that it has no intention of abiding by the order. O'Brien states that he is suffering ongoing and irreparable harm and it is in the public interest that Jersey City follow the Commission's orders. Therefore, he requests back pay from February 3, 2023, and to be reinstated to the payroll.

In response, Jersey City, represented by Christopher M. Kurek, Esq., states that it did not receive a copy of O'Brien's initial submission directly from O'Brien in the present request. Therefore, it believes that this request should be dismissed. Concerning the merits, Jersey City presents that it attempted to schedule the departmental hearing on June 12, 2023. It states that O'Brien's counsel was not available on that date. Additionally, the parties engaged in discussions to resolve the matter, which would have included O'Brien resigning. Jersey City indicates that these negotiations took place throughout June, July and August 2023. Further, it provides that it attempted to schedule the hearing for August 17, 2023, but O'Brien's counsel was not available. Jersey City notes that the hearing commenced on September 6, 2023, continued on September 21, 2023, and is expected to conclude soon. It asserts that O'Brien should not be returned to pay status because if his termination is upheld, his termination will relate back to his initial date of suspension, October 6, 2023. Further Jersey City notes that if O'Brien is successful on appeal, he is entitled to back pay. However, it argues, that if it is ordered to pay back pay now, and O'Brien's termination is upheld, it will incur additional expenses to recoup the money received by him. Jersey City states that now that the departmental hearing has commenced, O'Brien is attempting to draw the matter out by calling 93 witnesses, when more than 90 of those witnesses do not have relevant knowledge. It believes that O'Brien seeks to leverage his current application with a long and drawn out local hearing, knowing full well that his misconduct will result in termination and he will abscond taxpayer money, which he will never pay back to Jersey City.

In reply, O'Brien presents that when counsel files submissions with the Commission, this agency always provides the respondent notice as was the case here. Therefore, Jersey City had sufficient notice in this matter and there is no basis to dismiss this matter because of an alleged lack of notice. Referencing the adjournment of the June 12, 2023, hearing date, O'Brien was only provided discovery on June 6, 2023, which consisted of somewhere between 30 and 60 gigabytes of data, despite the fact that he had been requesting this data since October 2022. Further, he received additional discovery on September 27, 2023, even though the departmental hearing commenced on September 6, 2023. O'Brien reiterates that while he agreed to adjourn the June 12, 2023, hearing, the adjournment was necessary because six days was insufficient to review the extensive material he received, prepare supplemental discovery demands, and prepare for the hearing. He highlights that Jersey City has

not contended that the Commission's order is invalid. O'Brien states that while Jersey City indicates that the hearing will soon conclude, it has yet to conclude the testimony of their first witness, which involves four PNDAs with approximately 75 charges.

O'Brien contends that Jersey City is ignoring the Commission's order because it plans to retroactively terminate him even though the order commands his reinstatement to the payroll as of February 2023. Therefore, he asserts that he is being deprived of the relief that the Commission ordered, which has forced him to take legal action at every juncture in this matter. O'Brien believes that this is a straightforward matter where the Commission ordered him to receive back pay, which is now seven months overdue, and to reinstate him. Moreover, he asserts that Jersey City intends to deprive him of a fair departmental hearing as it has predetermined to terminate him.¹ Additionally, O'Brien states that Jersey City is attempting to "muddy the waters" with the Commission by indicating that the departmental hearing was to conclude on September 21, 2023, when it was impossible for the hearing to conclude on that date. He argues that Jersey City is not above the law, and therefore, not only should his requested relief be granted, but it should be sanctioned with any penalty that the Commission thinks is appropriate.

CONCLUSION

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 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.

Initially, concerning Jersey City's comments about not being initially copied directly by O'Brien when he submitted the present matter, the Commission notes that it received a copy of O'Brien's request when this agency acknowledged receipt. Therefore, the Commission finds that Jersey City had sufficient notice, and there is no basis to dismiss this matter on these grounds.

Regarding the merits, in its May 24, 2023, decision, the Commission ordered Jersey City to schedule the departmental hearing within 20 days of that decision. The record indicates that Jersey City initially scheduled the departmental hearing on June 12, 2023, which was within 20 days. Further, the record indicates that the parties mutually agreed to postpone the hearing, Jersey City attempted to reschedule the hearing thereafter, and the hearing commenced on September 6, 2023. Therefore, the Commission finds that Jersey City is in substantial compliance with the Commission's May 24, 2023, decision as there is nothing in the record that suggests

¹ It is noted that an employee may choose to waive a departmental hearing and appeal directly to the Commission upon issuance of a FNDA.

that the delay in holding the departmental hearing after June 12, 2023, was due to bad faith by Jersey City. Under *N.J.A.C. 4A:2-2.6(d)*, the FNDA was to be issued within 20 days of the hearing. The Commission notes that if the departmental hearing was concluded on June 12, 2023, Jersey City would have had to issue the FNDA by July 2, 2023. Therefore, as the hearing adjournments were not solely attributable to Jersey City, the Commission finds that pursuant to the May 24, 2023, order, O'Brien is to receive back pay from February 3, 2023, through July 2, 2023, which is to be paid to O'Brien within 30 days of this order. He is not entitled to back pay after that date unless he prevails at his departmental hearing or upon subsequent appeal to the Commission.

Concerning any arguments that Jersey City has that it should not have to pay back now since he could be terminated, and it would incur expenses and difficulties in trying to recoup this money, it is noted that this back pay award is **irrespective** of the final determination of O'Brien disciplinary matter. Instead, this award is due because Jersey City failed to comply with the Civil Service regulations regarding holding a timely departmental hearing as indicated in the prior decision. Even if O'Brien is terminated and his termination is upheld on appeal, O'Brien would not need to pay back this award. Regarding any claim that O'Brien is making that he should receive back pay for the time period subsequent to July 2, 2023, the Commission notes that contrary to O'Brien's statement, the Commission did not order his reinstatement as the prior order awarded back pay until a FNDA was issued **or** reinstatement. However, as indicated above, as the Commission finds that Jersey City is in substantial compliance with the Commission's May 24, 2023, order, and as O'Brien is mutually responsible for the subsequent delay in holding of the departmental hearing, there is no basis to award him additional back pay at this time.

ORDER

Therefore, it is ordered that Jesse O'Brien's petition for enforcement is granted in part. O'Brien shall be awarded back pay from February 3, 2023, through July 2, 2023. Jersey City shall pay this back pay award to O'Brien within 30 days of this decision. All other requests are 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 1ST DAY OF NOVEMBER, 2023

Allison Chris Myers

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