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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3428-20**

**IN THE MATTER OF VICTOR
VASQUEZ, CITY OF
HACKENSACK, POLICE
DEPARTMENT, IN THE MATTER
OF MARK GUTIERREZ, CITY OF
HACKENSACK, POLICE
DEPARTMENT, IN THE MATTER
OF JUSTIN DE LA BRUYERE,
CITY OF HACKENSACK, POLICE
DEPARTMENT, and IN THE
MATTER OF ROCCO DUARDO,
CITY OF HACKENSACK, POLICE
DEPARTMENT.**

Submitted February 14, 2024 - Decided May 23, 2024

Before Judges Currier, Firko and Vanek.

On appeal from the New Jersey Civil Service
Commission, Docket No. 2018-2793.

Wiss & Bouregy, PC, attorneys for appellant City of
Hackensack, Police Department (Raymond R. Wiss, of
counsel and on the briefs; Thomas K. Bouregy, Jr. and
Timothy J. Wiss, on the briefs).

Sciarra & Catrambone, LLC, attorneys for respondents
Victor Vasquez, Rocco Duardo, Mark Gutierrez, and

Justin de la Bruyere (Charles Joseph Sciarra, of counsel and on the brief; Frank Carmen Cioffi, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Civil Service Commission (Donna Arons, Assistant Attorney General, of counsel; Pamela N. Ullman, Deputy Attorney General, on the brief).

PER CURIAM

In this back-to-back appeal, we consider another issue relating to four City of Hackensack Police Department (City or HPD) officers' involvement in a warrantless search of an apartment in 2016. In a prior decision, In re Vazquez, Nos. A-4034-18, A-4035-18 (App. Div. Oct. 21, 2021), and the opinion issued today, In re Vazquez, No. A-4177-19 (App. Div. May 23, 2024), we affirmed the Civil Service Commission's (CSC) conclusion that the officers conducted a warrantless search. We also affirmed the CSC's imposition of a six-month suspension on Officers Rocco Duardo and Victor Vasquez¹ and the termination of Officers Mark Gutierrez and Justin de la Bruyere.

After the City informed the Bergen County Prosecutor's Office (BCPO) of the officers' unlawful entry, the BCPO investigated the events and determined the facts did not warrant the filing of criminal charges. However, in July 2017,

¹ In the prior appeals, Victor Vasquez's surname is misspelled as "Vazquez."

the BCPO advised the HPD that the officers' conduct undermined its "ability to prosecute a number of pending matters in which [the officers] [we]re involved. Simply put, their conduct undermine[d] their credibility as law enforcement witnesses." The BCPO listed eight pending cases involving sixteen different defendants that were dismissed because of the officers' conduct and noted that it was "possible that additional cases may be impacted." The BCPO stated that "any decisions concerning the future testimony of any of the . . . [o]fficers w[ould] be made on a case-by-case basis."

In August 2017, the BCPO informed the Hackensack municipal prosecutor it was compelled to dismiss several Superior Court cases involving the officers under Brady v. Maryland,² and Giglio v. United States,³ that required a prosecutor to disclose all evidence to the defense that could be used to impeach the credibility of the prosecution's witnesses. The BCPO stated it had "serious concerns about [the officers'] credibility as law enforcement witnesses." The BCPO "request[ed] that [the municipal prosecutor] temporarily refrain from prosecuting any matters involving the . . . [o]fficers."

² Brady v. Maryland, 373 U.S. 83 (1963).

³ Giglio v. United States, 405 U.S. 150 (1972).

Duardo filed a verified complaint and order to show cause seeking various forms of relief, including to enjoin the BCPO from designating him as a Brady officer. Thereafter, Duardo filed an amended order to show cause and two amended complaints that were only verified by his counsel. The court dismissed the complaints because Duardo had failed to verify the facts alleged in the complaints and to demonstrate personal knowledge of the allegations as required under Rule 1:6-6. In addition, the court found Duardo failed to meet the Crowe⁴ standard for injunctive relief. Duardo's motions for reconsideration and leave to file a third amended verified complaint were denied. We affirmed. Duardo v. City of Hackensack, Police Dep't, No. A-5555-17 (App. Div. Aug. 5, 2019) (slip op. at 7-8).

In September 2017, the City served Preliminary Notices of Disciplinary Actions (PNDA) on the officers relating to the Brady matter.⁵ The notices informed the officers they were being terminated as of July 20, 2017, resulting from the BCPO's dismissal of pending cases, the possible impact on other present and future cases in which they may be a witness or involved, and the

⁴ Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).

⁵ Separate PNDAs were served on the officers in May 2017 regarding their misconduct in the warrantless search.

directive to the municipal prosecutor not to prosecute any matters involving them. The PNDAs cited violations of a number of departmental rules and regulations and of N.J.A.C. 4A:2-2.3(a)(1), (3) and (12). Final Notices of Disciplinary Action were sent to the officers in March and April 2018 sustaining the charges against them.

The officers appealed to the CSC and a hearing was conducted before the Administrative Law Judge (ALJ) on several dates in 2019. Captain Peter Busciglio, HPD's Internal Affairs officer, testified at the hearing that after learning of the BCPO's statements and actions, he expressed concern to his superiors about whether the officers would be limited in carrying out their duties, and whether the criminal cases that were dismissed could result in civil lawsuits being filed against the City.

City Manager Theodore Ehrenburg testified he met with the prosecutor after receiving the BCPO's August 2017 letter. His understanding was that the officers could not testify in any cases they were involved in. Ehrenburg was concerned the City would be exposed to lawsuits if the officers remained with HPD.

Glenn Miller, a former member of the state police and chief of detectives for the Ocean County Prosecutor's Office, testified as an expert for the City

regarding law enforcement professional standards in New Jersey. He stated that one of the key functions of a police officer is the ability to credibly testify in court. He stated the inability to do so is a form of "legal disability," meaning the officer cannot fully perform their duties.

In his initial decision, the ALJ acknowledged the "justified and understandable" actions of the BCPO "that caused the City . . . to discharge the officers a second time, after they had already been discharged in connection with their conduct itself." However, because the officers' dismissal was "based strictly on a[] determination by a third party that cannot be challenged," the ALJ found the officers' due process rights were violated. The ALJ concluded that this "second termination" of the officers "was arbitrary and capricious and prejudicial to the 'root requirement' of due process that an individual cannot be deprived of a liberty or property interest" such as career and reputation without a hearing.

The ALJ further found that the issue of the officers' ability to effectively do their jobs had already been decided on different grounds in the companion matter, for which they had received punishment. The ALJ stated: "Termination of a public employee in a second proceeding arising out of the same conduct when major misconduct has already been assessed amounts to a civil form of

double jeopardy and violates a longstanding concept of fundamental fairness recognized by the New Jersey Supreme Court." The ALJ reversed the officers' removal from employment with the City based on the Brady designation.

On July 21, 2021, the CSC issued a final decision adopting the ALJ's recommendation to reverse the removals. It stated,

the [p]rosecutor indicated that any future impediment to their functioning as [p]olice [o]fficers would be on a case-by-case basis. Thus, while it is unfortunate that the [officers] may be designated as "tainted" for certain purposes of their positions, and that may have affected certain current matters and may affect certain future matters, it does not render them incapable of performing the essential functions of their positions, on a case-by-case basis. Additionally, this impediment, which apparently served as the basis for the contemporaneous dismissal of certain matters, cannot form a basis to impose disciplinary action. This is the case since in order for discipline to have been imposed for the dismissed matters, it would have to have been established that the [officers] engaged in improprieties in those matters.

The CSC ordered the reinstatement of Gutierrez and Duardo. However, Vasquez and de la Bruyere remained terminated since the CSC had upheld their removals in a separate case.

On appeal, the City contends the CSC did not have subject matter jurisdiction to hear and decide the due process challenge, erred in determining the officers' due process rights were violated because there was no hearing to

challenge the Brady designation, and in concluding the disciplinary charges were barred by the doctrines of double jeopardy and res judicata. The City asserts the Brady designation constituted an independent basis to sustain the discipline charges against the officers.

We begin with the jurisdictional issue. As we have previously stated, an ALJ has the jurisdiction to hear and decide constitutional issues that are necessary to resolve a contested case. Jones v. Dep't of Cmty. Affs., 395 N.J. Super. 632, 636-37 (App. Div. 2007).

Administrative law judges are clothed with ample authority to rule upon such questions, to the extent the issues arise legitimately in the context of the contested case hearing and are necessary for a complete disposition of any genuine issue in the contested case
.....

[Id. at 636].

A court cannot decide the constitutional issues raised in the absence of a fully developed record in an administrative proceeding. Ibid. However, if the constitutional question is not necessary to resolution of the contested case, it should be reserved for the judicial review phase or a separate proceeding. Id. at 637.

Here, the BCPO, the entity that imposed the Brady designation, was not a party to the administrative law case. Therefore, the challenge to the designation

required a separate proceeding and judicial review. As we discuss below, that forum was a hearing in the Superior Court. The ALJ and the CSC were entitled to address the effect the designation had on the officers' constitutional rights, but not the propriety of the designation itself in the absence of a fully developed record regarding the BCPO's determination. Therefore, the CSC and the ALJ did not err in addressing the due process question.

We turn then to a consideration of whether the CSC erred in concluding that the officers' due process rights were violated because of their inability to challenge their Brady designations.

Our review of an agency determination is limited. In re Stallworth, 208 N.J. 182, 194 (2011). An administrative agency's quasi-judicial determination "will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable," was not supported by substantial evidence, or the agency did not follow the law. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). However, a reviewing court is not bound by an agency's interpretation of a strictly legal issue. Id. at 158. Double jeopardy and res judicata issues are such legal questions.

The components of procedural due process "are adequate notice[,]
opportunity for a fair hearing[,]
and availability of appropriate review." State, Dep't of Cmty. Affs. v. Wertheimer, 177 N.J. Super. 595, 599 (App. Div. 1980).
The essence of due process is satisfied when a person is given notice of the case
against them and a meaningful opportunity to meet it before they are "deprived
of any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 378-
79 (1971).

"The principle of substantive due process" is to protect individuals from
the ""arbitrary exercise of the powers of government."" Felicioni v. Admin. Off. of the Cts., 404 N.J. Super. 382, 392 (App. Div. 2008), abrogated in part by Perez v. Zagami, LLC, 218 N.J. 202 (2014) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). It "is reserved for the most egregious governmental
abuses against liberty or property rights, abuses that "shock the conscience or
otherwise offend . . . judicial notions of fairness."" Ibid. (quoting Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366 (1996)).

Under substantive due process analysis, there must have been a
fundamental liberty interest that was violated. Lewis v. Harris, 188 N.J. 415,
435 (2006). Whether such a right exists involves determining whether the
fundamental liberty interest is clearly identified, and whether that interest is

"objectively and deeply rooted in the traditions, history, and conscience of the people of this State." Ibid. "The right to a particular job, unlike the right to work in general, has never been regarded as fundamental." Greenberg v. Kimmelman, 99 N.J. 552, 573 (1985).

In addition, "[a]s a general matter, one does not have a federal constitutionally protected liberty interest in his reputation." Filgueiras v. Newark Pub. Schs., 426 N.J. Super. 449, 471 (App. Div. 2012) (quoting Austin v. Neal, 933 F. Supp. 444, 455 (E.D. Pa. 1996)). To assert a due process violation, "a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest." Id. at 471-72 (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006)). In the public employment context, this test applies "'when an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination,"" even if the employee lacks a property interest in the lost job. Id. at 472 (quoting Hill, 455 F.3d at 236).

The BCPO created the Brady designations of the officers—not the City—and the BCPO was not a party to this contested case. The officers and the CSC provided no legal precedent for the conclusion that the ALJ and the CSC had jurisdiction to hear a due process challenge to a prosecutor's office Brady

designation without the participation of the prosecutor's office. Moreover, there was no record for the ALJ or the CSC to review regarding the BCPO's designation.

However, a police officer does have the opportunity to challenge a Brady designation by a prosecutor's office through the judicial process. In fact, Officer Duardo used that process when he filed a complaint in the Superior Court seeking injunctive relief from the designation. His complaint was later dismissed both on procedural and substantive grounds. None of the other officers sought relief in Superior Court. Because the officers had an avenue available to them to challenge the Brady designation, the CSC erred in concluding the officers were deprived of their due process rights.

We turn to the City's contention that the ALJ, and the CSC in adopting the ALJ's findings, erred in concluding that the doctrine of double jeopardy barred it from issuing PNDAs based on the Brady designations. The City asserts that whether the officers' conduct regarding the warrantless search adversely affected the BCPO's ability to obtain convictions in the future was a separate legal and factual issue from whether that conduct violated departmental rules and administrative regulations.

Under Brady, the prosecution must disclose to the defense in a criminal case any exculpatory evidence in its possession. 373 U.S. at 87. In Giglio, the Supreme Court extended that holding to any evidence that could be used to impeach a prosecution witness, such as evidence that the witness acted dishonestly. 405 U.S. at 154-55. Thus, under Brady/Giglio, a "Brady officer" is an officer who, in the opinion of a prosecutor, has committed dishonest acts that must be disclosed to the defense if the officer is called to testify. See State v. Carter, 69 N.J. 420, 433 (1976) (concluding a State's obligation to disclose is "not limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of a State's witness.") See also Off. of the Att'y Gen., Law Enf't Directive No. 2019-6, Directive Establishing County Policies to Comply with Brady v. Maryland and Giglio v. United States 3-6 (Dec. 4, 2019).

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." State v. Widmaier,

157 N.J. 475, 489-90 (1999). Double jeopardy applies to acquittals of criminal and quasi-criminal actions; it does not apply to civil actions. Id. at 492.

A departmental disciplinary hearing is neither a criminal nor a quasi-criminal proceeding. Sabia v. City of Elizabeth, 132 N.J. Super. 6, 14 (App. Div. 1974). Consequently, the subjects of such a hearing "do not come within the shield of the various constitutional guarantees accorded persons accused of a crime. Departmental disciplinary proceedings are civil in nature; requirements of due process are satisfied so long as proceedings are conducted with fundamental fairness, including adequate procedural safeguards." Ibid.

Furthermore, the City filed two separate and distinct sets of charges. The first PNDAs concerned the illegal conduct of the officers regarding the warrantless search. The second PNDAs addressed the BCPO's determinations that resulted in the officers' inability to perform their jobs effectively. The charges arose out of different factual and legal predicates.⁶

⁶ The Office of Administrative Law denied the officers' application to consolidate the two cases. Both ALJs noted the denial of consolidation in their respective decisions, stating the matters were "distinct" and "two separate issues."

The ALJ and the CSC erred by relying on double jeopardy to bar the officers' dismissal based on their Brady designation. The doctrine was not applicable to these circumstances.

We have affirmed the CSC's conclusion that the officers conducted a warrantless search and were untruthful about it in the ensuing investigation. As a result of these actions, the officers cannot testify in any criminal court without a prosecutorial disclosure of the Brady issue, which reduces their ability to serve as a police officer. This clearly constitutes behavior which adversely affects the morale of the HPD and undermines public respect. The inability of the BCPO to present the officers as a witness in any criminal trial eliminates the officers' ability to perform central functions of their job—making arrests and testifying in court.

We are not saying that a Brady designation, standing alone, can suffice to terminate a police officer's employment in all cases. But here, where the BCPO had already dismissed multiple pending Superior Court cases and directed the municipal prosecutor to refrain from prosecuting any matters in which the officers were involved, there were sufficient grounds to support the City's decision to terminate the officers.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION