

JAMIE RIVERA, STEPHEN  
DELLAVALLE, RODNY SEVERE,  
CARLOS BERNARD, SEAN LAKE, and  
SUPERIOR OFFICERS'  
ASSOCIATION-NEWARK POLICE  
DEPARTMENT,

Plaintiff;

vs.

CITY OF NEWARK, NEWARK  
POLICE DEPARTMENT, and PUBLIC  
SAFETY DIRECTOR FRITZ FRAGE,  
Defendant.

SUPERIOR COURT OF NEW JERSEY LAW  
DIVISION: ESSEX COUNTY

CIVIL ACTION

DOCKET NO.: ESX-L-4773-23

**ORDER DENYING OSC APPLICATION**

**FOR EMERGENT RELIEF**

**THIS MATTER** being brought before the Court by Plaintiff, by and through their attorneys, the Law Offices of Steven A. Varano, P.C., seeking relief based upon the facts set forth in the Application filed by order to show cause pursuant to R. 4:69-3, requesting *ad interim* relief by way of a stay of certain police disciplinary orders, and other relief as requested; and the cause for said relief having been argued before the Court on January 26, 2024, Steven A. Varano, Esq., appearing for Plaintiff, and Cheyne Scott, Esq., appearing on behalf of the City of Newark, and the Court having considered the arguments of counsel, the papers submitted by the Plaintiff including the Order to Show Cause application, the Complaint and the Amended Complaint and supplemental filings, and the opposition thereto, and for good cause shown,

IT IS on this 14<sup>th</sup> day of February 2024;

**ORDERED** that Plaintiff's application for injunctive relief as set forth in the Order to Show Cause application is DENIED for the reasons set forth herein and on the record; and

**IT IS FURTHER ORDERED** that Plaintiff has not met the requirements necessary to grant relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126, 131 (1982), and

**IT IS FURTHER ORDERED** that Plaintiff has not met the requirements of R. 4:69-5, requiring Plaintiff to have exhausted all administrative remedies before the appropriate administrative agencies prior to seeking relief by way of an action in the Superior Court of New Jersey; and

**IT IS FURTHER ORDERED** the Plaintiff's Amended Complaint shall remain active on the trial calendar of the Law Division, and

**IT IS FURTHER ORDERED** that a copy of this Order shall be served on all parties by filing of same in eCourts, and upon any party not represented by counsel, by certified and regular mail by Applicant herein within 10 days of the date of this Order.

/s/ Bridget A. Stecher

**HON. BRIDGET A. STECHER, J.S.C.**

**STATEMENT OF REASONS****Background:**

Plaintiff, Jamie Rivera, et al., (“Plaintiff” or “Rivera”) filed an Order To Show Cause (“OSC”) and a Verified Complaint (LCV 20232701007), requesting a stay pursuant to R. 4:69-3 of Final Notices of Disciplinary Action (“FNDA”), which emanated from the February 2023 Preliminary Notices of Disciplinary Action (“PNDA”) issued by the City of Newark’s Police Department against Plaintiff, asserting that the disciplinary orders were improperly issued and that the imposition of even a temporary weapon loss would pose a threat to the officers’ safety and security. The PNDAs and FNDA required the officers to serve a suspension period with a relinquishment of their weapons. The OSC also demanded injunctive and other relief as set forth below. During the pendency of the OSC, the Plaintiff officers served their suspension and had their weapons returned. Plaintiff filed an Amended Complaint alleging that all disciplinary orders issued by the Newark Police Department were improperly issued due to the composition of the disciplinary board and now argues that this Court should address the merits of the Complaint and issue injunctive relief on behalf of all police officers disciplined, allegedly in violation of the Consent Orders and General Ordinances governing officer disciplinary matters and demanding injunctive relief.

**Consent Orders and Newark Police Department General Ordinance.**

- a. October 7, 2008 – The Consent Order requires that an Amended General Ordinance be filed which has the following provisions:**
- i. ¶1: Director as a term can also apply to a Deputy Director
  - ii. ¶2: Director is designated as “Appropriate Authority” as per N.J.S.A. 40A:14-118 and that this position is a civilian position without law enforcement authority.
  - iii. ¶12(a): The Chief of Police shall be head of the Police Force and shall be directly responsible to the Appropriate Authority for the efficiency and routine day-to-day operations thereof, and... administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel.
  - iv. ¶18: The Chief of Police or his designee shall assign the officers of command rank to serve on the trial board. General Order 93-2 Disciplinary Process shall be amended as to the terms “Director” and “Chief of Police” to be consistent with all existing laws as well as with this Consent Order. The Chief of Police will issue PNDAs. The Appointing Authority shall issue Final Notices of Disciplinary Action, consistent with the final determination of the Appropriate Authority. The Trial Board shall forward its decisions or outcomes to the Appropriate Authority for his final determination of discipline. In the case of a Trial Board finding of “not guilty” the Appropriate Authority shall apply an “abuse of discretion” standard. His decision shall be subject to the available appeal procedures or remedies outline by applicable law, rule, regulation, or negotiated agreement. Other than the mentioned, herein all PERC decisions, agreements, past practice, and custom shall remain in full force and effect. Nothing herein is intended to amend the terms of any collective bargaining agreement. The City will review its policies on waiver when a matter is waived to the Office of Administrative Law.
  - v. ¶19: The Chief of Police shall be vested with the sole authority to suspend personnel with or without pay, prior to a disciplinary hearing pursuant to applicable law and/or negotiated agreement. The Superior Officer’s Association shall withdraw any Unfair Practice Charge with P.E.R.C. pertaining to this matter.

- b. March 29, 2010, Consent Order vacates the October 7, 2008, Consent Order.**
- i. The October 7, 2008, Consent Order requires that an Amended General Ordinance containing the above provisions be filed and no Amended General Ordinance was ever completed.
  - ii. The March 29, 2010, Consent Order expressly stated, “**The October 7, 2008, Consent Order in this matter is hereby vacated in its entirety due to changed circumstances**...In the event that the City of Newark re-reestablishes the position of Police Chief in the Newark Police Department by the enactment of an appropriate Ordinance, the October 7, 2008, Consent Order would automatically be reinstated upon final adoption of such Ordinance.”
- c. Newark Police Department General Order, re: Suspension Policy, Dated: June 3, 2009**
- i. The immediate suspension of any officer may be objectively determined on a case-by-case basis, in accordance with the laws of the State of New Jersey, specifically, N.J.S.A. 40A:14-149.1 and N.J.A.C. 4-A2:2.5 and 2.7 and may only be authorized by the Police Director.

### **ARGUMENTS:**

#### **Plaintiff’s OSC sought the following relief.**

- a. Declaring that Defendants are in violation of the October 7, 2008 (“2008 Consent Order”) and March 23, 2010 (“2010 Consent Order”) Consent Orders entered in the Superior Court of New Jersey;
- b. Directing Defendants to dismiss the subject Preliminary Notices of Disciplinary Action (“PNDAs”) and disciplinary charges against Plaintiffs;
- c. Prohibiting Defendant Frage from executing and issuing PNDAs;
- d. Compelling Defendants’ compliance with the 2008 Consent Order and 2010 Consent Order;
- e. Prohibiting Defendants from further violations of the 2008 Consent Order and 2010 Consent Order and applicable law;
- f. Awarding Plaintiffs’ attorneys’ fees and costs of suit; and

#### **Defendant’s Opposition to OSC.**

Defendant cites Section VIII of General Order 18-26, which states that the Public Safety Director is tasked with the responsibility for filing charges based on complaints for violations of the internal rules of the Newark Police Department. Defendant cites May 5, 2016, Consent Order which provides that the Director of Public Safety has the authority to direct and ensure appropriate corrective action over incident investigations.

#### **Plaintiff’s Supplemental Filing on December 14, 2023.**

Plaintiff cites an arbitration award entered in favor of FOP Lodge 12 from a dispute between FOP Lodge 12 and the Newark Police Department and the City of Newark. Because this filing was uploaded the day prior to the Order to Show Cause return date of December 15, 2023, the Court was compelled to adjourn the hearing until the opposing party had sufficient time to reply.

#### **Defendant’s Reply to the Supplement Filing**

Defendant filed their reply to the supplemental filing on January 5, 2024.

Defendant argues that the relief sought in Plaintiff’s OSC application is moot as the Plaintiffs have served their respective suspensions and had their weapons returned.

Defendant argues that the Arbitration Award for FOP Lodge 12 is limited to the City’s violation of the

Collective Bargaining Agreement and General Order 93.02. Defendant further argues that the arbitration panel findings are irrelevant as they do not address Plaintiff's concerns as to who has the authority to issue and execute PNDAs, the cited consent orders from 2008 and 2010, or other relief sought in Plaintiff's OSC.

Defendant cites the Supreme Court of New Jersey's finding that the Public Safety Director is ultimately in charge of the imposition of discipline and can direct the initiation of formal disciplinary charges against an officer. *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75, 80 (2020). Defendant further explains that the Arbitration Award which relates to General Order 93-2 is silent as to who must sign off on PNDAs.

## **DECISION**

The Plaintiff filed an application for an Order to Show Cause in September 2023, seeking emergent relief from the February 2023 Preliminary Notices of Disciplinary Action issued by the City of Newark's Police Department. The PNDAs / FNDAs required the officers to serve a period of suspension with a relinquishment of their weapons. The Plaintiff argued that the suspensions were invalid under the 2008 and 2010 Consent Orders and that the officers' personal safety would be risked by the relinquishment of their weapons. The Plaintiff did not exhaust all administrative remedies (Police Department disciplinary appeal process and appellate review) prior to filing their OSC. The Plaintiff also challenged the composition of the disciplinary board and the application of the two Consent Orders to the issuance of disciplinary orders.

The legal standard for an Order to Show Cause seeking emergent relief is the *Crowe v. De Gioia* standard which requires (1) that the plaintiff plead that immediate, irreparable harm will occur if relief is not granted, (2) state a settled underlying claim that has a reasonable probability of success on the merits, and (3) that a balancing of the relative hardships to the parties counsels in favor of granting relief.

This Court set return dates for the OSC arguments, which were adjourned both by the Court and the parties due to supplemental filings. At the January hearing date, the Plaintiff officers had served their suspensions, and their weapons had been returned. Therefore, the first prong of the *Crowe* standard was no longer applicable. There was no pending emergent harm upon which relief could be granted.

Plaintiff argues that the Court should nonetheless consider the merits of the Plaintiff's claims regarding the invalid composition of the disciplinary board. Before this Court can consider the second prong of whether the Plaintiff may succeed on the merits of their claims regarding the composition of the disciplinary board, it must consider whether it has proper jurisdiction over this matter.

This Court finds that the relief sought in the Order to Show Cause is not within the jurisdiction of this Court to grant. This Court cannot find that the Defendants were in violation of the 2008 Consent Order or the 2010 Consent Order due to the conditions imposed by each Consent Order. The 2010 Consent Order renders the 2008 Order moot, with direct language that states, "The October 7, 2008, Consent Order in this matter is hereby vacated in its entirety due to changed circumstances." Plaintiff argues that the 2010 Consent Order provides that if the Chief of Police position is reestablished, then the October 2008 Consent Order would be reinstated, but that reinstatement is subject to certain conditions, and it is unclear as to whether those conditions have been met. This Court also has no authority to prevent Director Fritz Frage from issuing or executing PNDAs. Pursuant to Newark Police General Division Order 18-26, there are other avenues for this relief in the disciplinary matrix that the Newark Police Department utilizes. As per

the Municipal Ordinance for Newark, NJ §2:22-3.3, the Public Safety Director is the Appropriate Authority as defined in N.J.S.A. 40A:14-118. This title includes authority to enforce disciplinary actions, including issuing a PNDA. Thus, this Court cannot find that Defendant Frage was prohibited from signing PNDAs in his capacity as Public Safety Director.

The Plaintiff submitted a decision from a panel of arbitrators in a separate matter, which concluded that Deputy Safety Director, Sharonda Morris, potentially should not have been present as a member of the trial board during a Departmental Hearing for the Plaintiff, amongst other hearings, as her position requires her to report to the Director and she “does not actually function as a Command rank officer” which position is required on the board. *NJSBM No. 23-00992*, Arb. Dec. (¶5, 2023). In the arbitration award, the panel found that Deputy Safety Director Sharonda Morris served in two roles: as the Captain of the Department, a law enforcement role, and as Deputy Safety Director, a civilian role. The panel found that the duality of her role compromised her ability to serve on the trial board and created a conflict of interest because she reported to Safety Director Fritz Frage. However, this Court does not have jurisdiction to mandate the City of Newark overturn the original board findings, nor can it force the City of Newark to hold a new administrative trial based on the findings of an arbitration panel. Without jurisdiction, the consideration of the second and third prongs of the *Crowe* analysis are moot. Further, no party has produced General Order 93-2. This Court finds that it cannot issue the injunctive relief requested in the Plaintiff’s Order to Show Cause.

Plaintiff claims that the *Crowe* factors do not apply under R. 4:69-3 motion for a stay. The rule states: “Upon or after the filing of the complaint, the plaintiff may, by order to show cause or motion supported by affidavit, and with briefs, apply for ad interim relief by way of stay, restraint or otherwise as the interest of justice requires, which relief may be granted by the court with or without terms.”

Under 4:69-3, this Court has held that a preliminary injunction is an “extraordinary remedy,” to be issued “only in the clearest of factual circumstances and for the most compelling of equities.” *Zoning Board of Adj. of Sparta Twp. V. Serv. Elec. Cable Television of New Jersey, Inc.*, 198 N.J. Super. 370, 379 (App. Div. 1985); *Mays v. Penza*, 179 N.J. Super. 175, 179-80 (Law Div. 1980). The Supreme Court of New Jersey has further held that the *Crowe* factors do apply. *Waste Mgmt. of New Jersey, Inc. v. Morris Cty. Mun. Utilities Auth.*, 433 N.J. Super. 445, 451-52 (App. Div. 2013) citing *Crowe v. De Gioia*, 90 N.J. 126, 131 (1982). The same court held that the moving party must demonstrate clearly and convincingly each of the *Crowe* factors.

Plaintiff requests that the Court rule that all PNDAs / FNDAs issued following the reinstatement of the Police Chief position are invalid. However, this Court cannot issue such a blanket ruling on matters not before it. The relief requested in the Plaintiff’s Order to Show Cause cannot be granted. The Order to Show Cause is DENIED. The Amended Complaint shall proceed on the active trial calendar.