THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBIN HOEY,	)	OEA Matter No. J-0097-08
Employee	)	
	)	Date of Issuance: June 4, 2012
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robin Hoey ("Employee") began his career with the District of Columbia Metropolitan Police Department ("Agency" or "MPD") in 1985 as a police officer. He progressed steadily through the ranks, first becoming a Lieutenant and then being promoted to the rank of Captain on January 16, 2000. From the rank of Captain, Employee was promoted to Inspector. Ultimately, he achieved the rank of Commander of the Sixth District. The promotion to this rank took effect August 1, 2004. Throughout each promotion, Employee's personnel form continued to reflect that he was a Career Service employee.

On April 3, 2007, Cathy Lanier was confirmed as the new Chief of Police. Shortly thereafter, on April 19, 2007, the Chief informed Employee that she was transferring him from the Sixth District to the D.C. Central Cellblock and reducing his rank from Commander to

Captain. Employee appealed his demotion to the Office of Employee Appeals ("OEA"). The OEA Administrative Judge ("AJ") reversed Agency's action demoting Employee.[1]

However, the OEA Board ruled that the demotion was not an adverse action. The Board held that because D.C. Official Code §§ 1-608.01(d-1) and 5-105(a) explicitly permit the Mayor, who delegated personnel authority to the Chief of Police, to return a Commander to the rank of Captain at her discretion, it logically follows that such action should not be considered an adverse action for which there must be cause. Rather, the action was nothing more than a type of personnel action for which the Chief, notwithstanding any other law or regulation, has specific legal authority to exercise.[2]

Employee appealed the case to the Superior Court of the District of Columbia and later the District of Columbia Court of Appeals. While those matters were pending before the courts, Employee filed an appeal with the AJ regarding the reduction in pay that he received as a result of being demoted from Commander to Captain.

Specifically, Employee argued that the reduction in salary was a violation of Agency's policy of allowing those who have held their positions longer than 52 weeks to retain their prior salary after a change in rank, not the result of an adverse action.[3] Employee asserted that section 1141.4 of Chapter 11B of the District Municipal Regulations ("DCMR") provided that "an eligible employee under this section whose existing rate of basic pay exceeds the maximum rate of the grade to which he or she is reduced shall be entitled to a retained rate as provided for in this section." He further contended that section 1141.5 provided that "an employee shall be

[1] *Hoey v. Metropolitan Police Department*, OEA Matter No. 1601-0074-07 (December 14, 2007).
[2] *Hoey v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0074-07, *Opinion and Order on Petition for Review* (June 25, 2008).
[3] *Petition for Appeal of Agency Action*, p. 1 (June 20, 2008).

eligible for a retained rate as provided in § 1141.2 for a period of two (2) years beginning on the effective date of the reduction in grade or salary, if the employee has served for fifty-two (52) consecutive weeks or more in a position on a covered salary or rate schedule at a grade or salary higher than the grade or salary to which reduced."[4] Employee also offered examples of disparate treatment by alleging that another employee, Commander Willie Dandridge, was allowed to retain his salary after being reassigned from Assistant Chief to Commander.[5]

As it pertains to the retained rate, Agency argued that Employee's demotion was not an adverse action, and Chief Lanier was authorized to return him to rank of Captain. It reasoned that the decision whether to pay Employee at the rate of a Captain or to allow him to retain the rate of pay of his prior Commander rank are separate and distinct from the decision to reduce him in grade to the rank of Captain. Agency stated that by denying Employee's request for a retained rate, the Chief of Police was simply refusing to pay him at the rate of Commander after he was reduced in grade to Captain. Because this was not an adverse action, Agency contended that OEA lacked jurisdiction to consider this case.[6]

As for the disparate treatment claim, Agency distinguishes Employee's demotion from that of Assistant Chiefs Willie Dandridge and Brian Jordan. It explained that unlike Employee, Dandridge and Jordan's former positions were eliminated by Chief Lanier in her reorganization of Agency. Because Assistant Chiefs Dandridge and Jordan's positions were eliminated and reclassified at a lower grade, they were granted retained rates under 6 DCMR § 1141.2 (a). Agency asserted that Employee's position was not eliminated from the organizational structure

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[4] *Id.*, 3-4.
[5] *Id.* at 4.
[6] *Respondent Metropolitan Police Department's Memorandum of Points and Authorities in Support of Motion to Dismiss,* p. 2-5 (September 24, 2008) and *Respondent Metropolitan Police Department's Reply Memorandum in Support of Motion to Dismiss,* p. 1-4 (November 3, 2008).

of Agency. Chief Lanier removed him from the position and returned him to the rank of Captain. Because Employee's position was not reclassified, he was not entitled to a retained rate as outlined in the DCMR.[7]

The AJ issued his Initial Decision on December 30, 2008. He held that the case could be dismissed on two grounds. The first is that the decreased pay was decided by the OEA Board's decision which held that Agency did not take an adverse action against Employee. The AJ reasoned that because the issue was pending before the Superior Court of the District of Columbia, if Employee prevailed, then he would automatically receive his former salary. However, if Agency prevailed, then the pay reduction would be settled.[8]

The AJ also held that the appeal should be dismissed for lack of jurisdiction. As the OEA Board provided, the AJ claimed that if the demotion is not an adverse action, then the salary reduction resulting from the Chief's action is also not an adverse action. Accordingly, he dismissed Employee's appeal for lack of jurisdiction.[9]

On February 3, 2009, Employee filed a Petition for Review. He argued that matters related to reductions in grade are within OEA's jurisdiction. It was Employee's position that without recourse to OEA, he would be left with no review of Agency's action regarding his rate. Employee, again, alleged that Agency engaged in disparate treatment by allowing Assistant Chief Dandridge to retain his salary. Therefore, Employee sought for the OEA Board to reinstate him to his position with the salary and benefits of a Commander from April 19, 2007-

[7] *Respondent Metropolitan Police Department's Supplemental Memorandum in Support of Motion to Dismiss,* p. 1-3 (December 4, 2008).
[8] *Initial Decision,* p. 3 (December 30, 2008).
[9] *Id.*, 3-4.

April 19, 2009.[10]

This Board has held this matter in abeyance until a decision was issued by the D.C. Court of Appeals in this matter. A decision was issued on November 3, 2011, regarding several issues raised on appeal in this case. Although the decision rendered did not address the retained rate of pay directly, it provides clear guidance on Employee's request for salary and benefits from April 19, 2007-April 19, 2009.

In *Hilton Burton and Robin Hoey v. Office of Employee Appeals, et al.,* 30 A.2d 789 (D.C. 2011), the Court held that in accordance with D.C. Official Code §§ 1-616.51 and 1-616.52 (2001), a Career Service employee generally cannot be fired, demoted, or suspended without cause. However, D.C. Official Code § 1-608.01(d-1) grants "the Mayor (or his delegee)[11] with explicit discretionary authority to return any officer above the rank of Captain to the rank of Captain . . . ."[12]

D.C. Official Code § 1-608.01(d-1) provides that

> for members of the Metropolitan Police Department and notwithstanding § 1-632.03(1)(B) or any other law or regulation, the Assistant and Deputy Chiefs of Police and inspectors shall be selected from among the captains of the force and shall be returned to the rank of captain when the Mayor so determines.

As the Court held, the language of D.C. Official Code § 1-608.01(d-1) applies to employees *notwithstanding* any other law or regulation (emphasis added). Hence, it supersedes any conflicting regulations in place regarding Career Service protections. The Court noted that although § 1-608.01(d-1) did eliminate the right not to be reduced in rank without cause, it only

[10] *Employee's Petition for Review,* p. 2-6 (February 3, 2009).
[11] In an order issued on May 9, 1997, the Mayor delegated his personnel authority under this provision to the Chief of Police. Mayor's Order 97-88, 44 D.C. Reg. 2959-60 (May 16, 1997). That delegation remains in effect. (quoting *Hilton Burton and Robin Hoey v. Office of Employee Appeals, et al.,* 30 A.2d 789 (D.C. 2011)).
[12] *Id.* at 792.

applies to those positions above Captain. Additionally, MPD employees cannot be terminated or demoted to a rank below Captain.[13]

Moreover, the Court reasoned that Mr. Hoey is not entitled to reinstatement or back pay as a result of his demotion. The Court held that "to trigger due process protection in the area of public employment, an employee must have a legitimate claim of entitlement to the right or benefit" (*Hoey* quoting *Leonard v. District of Columbia,* 794 A.2d 618 (D.C. 2002)). However, an employee cannot have a legitimate claim of entitlement if the continuation of an employment benefit is based on discretion of the employer. Therefore, because § 1-608.01(d-1) provides the Chief of Police with the discretionary authority to return a Commander to Captain, Employee has no legitimate claim or entitlement to the benefits of the Commander position. Additionally, the court ruled the even though Employee lost his increased salary and prestige, the incremental advantages were not protected because they were tied to a position from which he could be removed at the Chief's discretion.[14] This Board must follow the Court's ruling and therefore, deny Employee's request for back pay and benefits from April 19, 2007-April 19, 2009.

Retained Rate

6 DCMR § 1141.2 provides that:

> A retained rate shall be granted to an employee whose rate of basic pay would otherwise be reduced as a result of any of the following:
> (a) A reclassification process;
> (b) Reduction or elimination of a rate or salary schedule;
> (c) Movement of an employee from a position with a special rate or special salary to a position with a different special rate or special salary with a lower rate of basic pay than the former position; or
> (d) The employee no longer meets a specific condition or requirement established by the agency or the Office of Personnel.

[13] *Id.*, 795 and 796.
[14] *Id.* at 798.

Employee argued that the reduction in salary was in violation of Agency's policy of allowing those who have held their positions longer than 52 weeks to retain their prior salary after a change in rank. However, 6 DCMR § 1141.2(a) makes clear that a retained rate can be granted under specific circumstances, none of which are applicable in this case.

Of the four categories that a retained rate applies, Employee argued that he should retain his salary because Agency reclassified his position.[15] However, Agency claimed that Employee's demotion was not the result of a reclassification; he was simply "removed from his Commander position and placed in a Captain position." As the Agency provided, the position of Commander was not reclassified to the rank of Captain.[16] Employee's position was not eliminated from the organizational structure of Agency. Chief Lanier removed him from the position, returned him to the rank of Captain, and reassigned him to the D.C. Central Cellblock.[17] Therefore, because Employee's position was not reclassified, he was not entitled to a retained rate as outlined in the DCMR.[18]

Disparate Treatment

Employee's final argument is that Agency engaged in disparate treatment by offering the retained rate to some officers but not to him. The Court in *O'Donnell v. Associated General Contractors of America,* 645 A.2d 1084 (D.C. 1994) held that to show disparate treatment an

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[15] *Petition for Appeal,* Exhibit A (June 20, 2008).
[16] *Id.,* Exhibit B.
[17] The record clearly shows that Hoey's position was not reclassified. In a document from Chief Lanier dated May 23, 2008, the Chief provides that "Captain Hoey's demotion was not the result of a reclassification. He was removed from his Commander position and placed in a Captain position. The position of Sixth District Commander was not reclassified to the rank of Captain." In another document titled Promotions, Transfers, Assignments, and Organizational Realignments, as it relates to Hoey, the document reads "Commander Robin Hoey transferred from the Sixth District, *reassigned* as Captain, Central Cellblock Corporate Support Group (emphasis added)." *Respondent Metropolitan Police Department's Memorandum of Points and Authorities in Support of Motion to Dismiss,* Exhibits C and D (September 24, 2008).
[18] *Respondent Metropolitan Police Department's Supplemental Memorandum in Support of Motion to Dismiss,* p. 1-3 (December 4, 2008).

employee must show that he worked in the same organizational unit as the comparison employees and that both the petitioner and the comparison employees were disciplined by the same supervisor within the same general time period.[19] Although this case involved a demotion, the reasoning of *O'Donnell* can be applied. However, in the current case, Employee did not offer any evidence to support a finding of disparate treatment.

Agency clearly distinguished Employee's demotion from that of Dandridge and Jordan. Unlike Employee, Dandridge and Jordan's former positions were eliminated by Chief Lanier in her reorganization of Agency. Because Assistant Chiefs Dandridge and Jordan's positions were eliminated and "reclassified" at a lower grade, they were granted retained rates under 6 DCMR § 1141.2 (a). Employee was not similarly situated to Officers Dandridge and Jordan. As previously provided, Employee's position was not eliminated from the organizational structure of Agency. Therefore, Agency did not engage in disparate treatment. Accordingly, Employee's Petition for Review is DENIED.

[19] *See also Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); *Alvin Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Harold Mills v. Department of Public Works*, OEA Matter No. 1601-001-09, *Opinion and Order on Petition for Review* (December 12, 2011); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.