THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WILBERTO FLORES, Employee	
v.	OEA Matter No.: 1601-0131-11
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: March 29, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Wilberto Flores ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency" or "MPD"). On October 31, 2010, Agency issued Employee a Notice of Proposed Adverse Action based on charges of conviction of a criminal offense ("Charge No. 1") and conduct unbecoming of an officer ("Charge No. 2").[1] Employee elected to have an evidentiary hearing before Agency's Adverse Action Panel ("Panel") on March 8, 2011. The Panel found that Employee was guilty of Charge No. 1; however, the Panel's finding on Charge No. 2 was "Insufficient Facts."

[1] *Agency Answer to Petition for Appeal*, Tab 3 (August 18, 2011). On October 5, 2010, Employee was found guilty of Indecent Exposure. A Class 1 Misdemeanor in the General District Court for Caroline County, Virginia. He received a thirty (30) day incarceration, suspended for a period of three years, contingent upon keeping the peace, obeying the court order, and paying court costs and fees. The Notice of Proposed Adverse Action recommended that Employee be terminated because of his criminal conviction and conduct unbecoming of an officer.

After reviewing the evidence, the Panel recommended that Employee's penalty be reduced from termination to a suspension of sixty (60) days.[2]

On May 18, 2011, Agency issued a Final Notice of Adverse Action to Employee. In the notice, Director of MPD's Department of Human Resources Management Division, Diana Haines-Walton, stated that she disagreed with the Panel's decision regarding Charge No. 2. She found that Employee was guilty of conduct unbecoming of an officer and concluded that he should be terminated, effective June 20, 2011.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 14, 2011. On August 18, 2011, Agency filed its answer to Employee's Petition for Appeal. On August 18, 2014, the AJ issued an Initial Decision ("ID"). In her analysis, she held that there was substantial evidence in the record establish that Agency had cause to take adverse action against Employee. However, the AJ reversed Agency's action of terminating Employee from his position as a Police Officer. She ordered that the Adverse Action Panel's proposed penalty of a sixty (60) day suspension be re-instituted "with the recognition that Employee has served such suspension while appealing Agency's termination."[4] She further ordered Agency to reimburse Employee all back-pay and benefits lost as a result of his termination, which included adjustments for the suspension.[5] As discussed herein, the AJ examined whether the provisions of 6A DCMR § 1001.5 applied to police officers hired after January 1, 1980.[6] After reviewing the record, she determined that Director Haines-Walton lacked the statutory

[2] *Id*. at Tab 3.
[3] *Id*. at Tab 8.
[4] *Initial Decision* (August 18, 2014).
[5] *Id*. at 21.
[6] *Id.*

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.

authority to impose the original proposed penalty of termination after the Panel determined that Employee was only guilty of Charge No. 1 and should only be subject to a sixty (60) day penalty.[7]

Agency filed a Petition for Review with OEA's Board on September 22, 2014. It argues that the ID was based on an erroneous interpretation of the law because DCMR § 1001.5 cannot be applied to Police Officers hired after January 1, 1980. It is Agency's contention that the Director acted in accordance with General Order ("GO") 120.212, Part IV (K)(8), which allows the Director to impose the same penalty that was recommended in the proposed notice, notwithstanding the sixty (60) day penalty that was recommended by the Adverse Action Panel.[8] Agency, therefore, requests that this Board grant its Petition for Review and reverse the Initial Decision.

Employee filed a Brief in Opposition to Agency's Petition for Review on October 27, 2014. He argues that the due process procedures provided for in 6A DCMR § 1001.5 apply to all police officers hired after January 1, 1980. Employee further contends that Agency's General Order 120.21 is inconsistent with DCMR § 1601 *et seq*. because § 1613 precludes a deciding official from increasing a Panel's recommended penalty.[9] According to Employee, the AJ provided a thorough and correct legal analysis in support of her decision to reverse Agency's termination action. As such, he asks that Agency's Petition for Review be denied and that the Initial Decision be upheld.

The Applicability of 6-A DCMR § 1001 to Police Officers Hired After January 1, 1980

"The starting point in every case involving construction of a statute is the language itself."[10] In 1906, The United States Congress enacted a statute establishing trial boards for the purpose of hearing

[7] *Id*. at 19.
[8] *Petition for Review*, p. 3 (September 22, 2014).
[9] *Employee Answer to Petition for Review* at 11.
[10] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975).

charges…against members of the Metropolitan Police Department.[11] This statute is presently codified in D.C. Official Code § 5-133.06 ("Trial Boards"). However, the enactment of the Comprehensive Merit Personnel Act ("CMPA") in 1979 made a number of statutes, including D.C. Code § 5-133.06, inapplicable "to police officers and firefighters appointed after" January 1, 1980. The CMPA also directed the District of Columbia mayor to issue rules and regulations for the purpose of establishing a disciplinary system under D.C. Official Code §l-616.51. The mayor delegated his rulemaking authority under the CMPA to the director of the Office of Personnel and the chief of police by way of Mayor's Order 2000-83.

The Director of the Office of Personnel and the chief of police subsequently adopted Chapter 16 of the D.C. Municipal Regulations ("DCMR").[12] The "General Discipline and Grievances" regulations include DCMR § 1601.5(a), which provides:

> Any procedures for handling corrective or adverse actions involving uniformed members of the Metropolitan Police Department, or the Fire and Emergency Medical Services Department (FEMSD) at the rank of Captain or below provided by law, or by regulations of the respective departments in effect on the effective date of these regulations, including but not limited to procedures involving trial boards, shall take precedence over the provisions of this chapter to the extent there is a difference.

Agency argues that DCMR § 1001.5 no longer applied to Employee or any police officers hired after January 1, 1980 because it was repealed by D.C. Official Code § 5-133.03. In reviewing the relevant statutes, regulations, and legislative history, this Board agrees with the AJ's finding that, while D.C. Official Code § 1-632(a)(1)(z) repealed D.C. Official Code § 5-133.06 for police officers hired after January 1, 1980, there is no statutory language that expressly repealed the provisions of DCMR §

[11] 34 Stat. 221 (1906).
[12] 47 D.C. Reg. 7024 (September 1, 2000).

1001.5.[13] DCMR § 1001 *et seq*. was originally enacted by Congress in 1972 for the purpose of setting regulations regarding Rules of Procedures Before Trial Boards and Investigation and Findings. This section was subsequently amended on November 21, 1980.[14] While the CMPA was subsequently enacted in March of 1979, there is no clear evidence that the aforementioned procedures relate to the procedures for Trial Boards as identified in D.C. Official Code § 5-133.06.[15]

Moreover, as the AJ correctly noted, "D.C. Code § 1-632(a)(1)(z) does not specifically state that 6A DCMR § 1001.5, or any section of the DCMR Chapter 10 no longer applies to police officers…The fact that D.C. Code § 5-133.06 was repealed for police officers hired after 1980 does not necessarily mean that this repealed or eliminated 6A DCMR §§1000, 1001."[16] It is undisputed that DCMR § 1001.5 is still a current regulation, as it was amended in 1980, approximately one year after the CMPA was enacted. In the absence of any express language to the contrary, this Board concludes that the provisions of DCMR § 1001.5 are still applicable to police officers, including Employee.

It should be noted that the applicability of DCMR § 1001.5 has previously been addressed by the D.C. Public Employee Relations Board on November 8, 2012.[17] In this case, the aggrieved employee ("Grievant") was terminated from his position as a Police Officer with the Metropolitan Police Department after being arrested for several crimes. Agency's arbitrator reduced the proposed termination to a thirty (30) day suspension. MPD subsequently filed an appeal of the arbitration award. In its decision, the PERB board stated the following:

> Even if § 1001.5 were adopted pursuant to a repealed statute, it is incorporated by reference by § 1601.5(a), which was adopted pursuant to

[13] *Initial Decision* at 18.
[14] 27 DCR 5127, 5143.
[15] *Employee Brief in Opposition to Agency's Petition for Review*, p.7 (October 27, 2014).
[16] *Initial Decision* at 18.
[17] PERB Case No. 12-A-05, Opinion No. 1344 (November 8, 2012).

> statute that has not been repealed. Moreover, under § 1601.5(a) the trial board regulations are not only still in effect, but also they take precedence over the new regulations to the extent there is a difference between the two.[18]

The PERB opinion further provided that "…neither § 1001.5 nor the new regulations adopted pursuant to the CMPA permit the assistant chief to increase the recommended penalty." We agree with this analysis and find that 6-A DCMR § 1001 still applies to police officers, including Employee, because it has yet to be repealed. Therefore, the AJ did not base her decision on an erroneous interpretation of statute.

In this case, there is conflicting language between 6-A DCMR § 1001.5 and MPD General Order 120.21, Part IV (K)(8). DCMR § 1001.5(a) states the following:

> Upon receipt of the trial board's finding and recommendations, and no appeal to the Mayor has been made, the Chief of Police may either confirm the finding and impose the penalty recommended, reduce the penalty, or may declare the board's proceedings void and refer the case to another regularly appointed trial board.

However, MPD General Order 120.21, Part IV (K)(8) provides that:

> After reviewing the Hearing Tribunal's proposed decision, the Assistant Chief, Office of Human Services ("OHS"), may remand the case to the same, or a different tribunal, or issue a decision (Final Notice of Adverse Action) affirming, reducing, or setting aside the action, as originally proposed in the Notice of Proposed Adverse Action."

As a general rule, statutes and regulations take precedence over an agency's internal procedures. In *Nunnally v. D.C. Metropolitan Police Department*, 80 A.3d 1004, 1012 (D.C. 2013), the D.C. Court of Appeals held that an MPD General Order "essentially serves the purpose of an internal operating

[18] *Id*.

manual," and "do[es] not have the force or effect of a statute or an administrative regulation…."[19] In essence, MPD's General Order authorizes the deciding official to increase the penalty from that which was proposed by the Trial Board Panel. Conversely, DCMR § 1001.5 only permits the Chief of Police to impose the Panel's recommended penalty, reduce the penalty, or declare the penalty void and refer the affected employee's case to another trial board.

In reviewing the record, this Board finds that, while Agency had cause to take adverse action against Employee for conviction of a criminal offense and conduct unbecoming of an officer, it committed harmful procedural error by increasing the Panel's recommended penalty of a sixty (60) day suspension. MPD's General Order 120.21 is an internal guideline that is superseded by a municipal regulation that was in effect at the time of Employee's termination. Under 6-A DCMR § 1001.5, Director Hanes had the option to either confirm the Panel's finding and impose the recommended penalty, reduce the penalty, or declare the board's proceedings void and refer the case to another trial board. She did not have the authority, however, to increase the penalty from a suspension to termination. Based on the foregoing, we find that the Initial Decision was based on substantial evidence; therefore, Agency's Petition for Review is denied.[20]

[19] *Id.* (Quoting *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C.1990)). *See also District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).

[20] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *See Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

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ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **DENIED**, and the Initial Decision is **UPHELD**. The Adverse Action Panel's penalty of sixty (60) day suspension is upheld, with recognition that Employee has served the suspension while appealing his termination before OEA. Accordingly, Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action, with an adjustment for the sixty (60) day suspension. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

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