

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

| | | |
|--------------------------|---|----------------------------------|
| In the Matter of: |) | |
| |) | |
| BRIAN K. JORDAN, |) | OEA Matter No. 1601-0123-09 |
| Employee |) | |
| |) | Date of Issuance: April 23, 2012 |
| |) | |
| D.C. METROPOLITAN POLICE |) | |
| DEPARTMENT, |) | |
| Agency |) | |
| |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Brian K. Jordan (“Employee”) joined the D.C. Metropolitan Police Department (“Agency” or “MPD”) in 1983 as a police officer. Throughout Employee’s tenure as a Career Service employee, his rank steadily progressed, allowing him to hold Investigator, Sergeant, Lieutenant, Captain, Inspector, Commander and Assistant Chief positions. On May 6, 2009 while working as a Commander, the Chief of Police verbally notified Employee that he was being demoted to the rank of Captain.¹ This demotion included a reduction in salary.²

Employee challenged the demotion by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 26, 2009. In the petition he argued that that his property

¹ *Petition for Appeal*, p. 3 (May 26, 2009).

² This was Employee’s second demotion. In October of 2007, Employee was demoted from Assistant Chief of Police for Regional Operations Command Central to Commander of the Office of Special Projects. The demotion was pursuant to a reorganization instituted by the Chief of Police. The Chief defined the demotion as a reclassification process under DPM § 1142.2(a). As a result of the reclassification, Employee’s rate of pay for the Assistant Chief position was retained for two years while he served as Commander.

rights as a Career Service Employee were violated because Agency did not provide him written notice of the demotion; it lacked cause for the demotion; and it failed to hold an adverse action hearing. In addition, Employee posited that the Chief of Police's discretionary authority under D.C. Official Code § 1-608.01(d-1) did not apply to Career Service Commanders. He requested to be reinstated to the Commander position and pay schedule.³

Agency filed a Motion for Summary Disposition of the matter on July 6, 2009. In its memorandum, Agency contended that OEA did not have jurisdiction over the appeal because the Chief of Police could demote certain employees without cause pursuant to D.C. Official Code §§ 1-608.01(d-1), 1-632.03(c), 5-105.01(a), and the District Personnel Manual § 872.5. Agency provided the legislative history of D.C. Official Code §§ 1-608.01(d-1) and 5-105.01.⁴ It further asserted that Employee's property rights were not applicable given the "notwithstanding" clause found in D.C. Official Code § 1-608.01(d-1) which counteracted his property rights and allowed the Chief the discretion to demote.⁵ Although D.C. Official Code § 1-608.01(d-1) does not specifically mention the Commander position, Agency argued that the rank of Deputy Chief is the same as the rank of Commander.⁶ Agency also relied on the decision of the OEA Board in

³ *Id.*, 5-6.

⁴ Agency noted that in 1919, Congress passed "An Act Relating to the Metropolitan Police Department of the District of Columbia," Chapter 1, § 1, 41 Stat. 363 (1919), which granted Commissioners of the District of Columbia authority to demote high ranking officials at their discretion. D.C. Official Code § 4-104 (1981 ed.) also granted the Mayor this authority. It opined that the United States Congress and Council for the District of Columbia's intent was to allow the Chief of Police to have the power to create a command staff with little procurement impediments. *Metropolitan Police Department's Motion for Summary Disposition*, p. 6 (July 6, 2009).

⁵ D.C. Official Code § 1-608.01 (d-1) states "[f]or 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."

⁶ It explained that through reorganization and promotion, in 1997, the Chief of Police renamed the Deputy Chief position to Commander. Agency noted that the reorganization and promotion also afforded the Commander the same salary schedule as a Deputy Chief. Therefore, Agency believed that the positions are historically and functionally equivalent. *Metropolitan Police Department's Motion for Summary Disposition*, p. 5-6 (July 6, 2009).

Robin Hoey v. Metropolitan Police Department, OEA Matter No. 1601-074-07, *Opinion and Order on Petition for Review* (June 25, 2008) which provided that the Chief of Police can return Commanders to the rank of Captain.⁷

On September 11, 2009, Employee filed an opposition to Agency's motion for summary disposition. He argued, *inter alia*, that (1) at all times during his employment with the MPD, he remained a Career Service Employee who was protected under provisions of the CMPA, D.C. Official Code § 1-616.51; (2) the Deputy Chief and Commander positions were not the same; (3) Agency should not have relied on the OEA's decision in *Hoey* because the Board failed to identify and apply a legal standard; (4) there was no statutory law that existed to assert that the Commander position was an at-will position; (5) the legislative history of D.C. Official Code § 5-105.01 proved that the Chief of Police did not have the authority to demote all positions above the rank of Captain; and (6) there was no valid regulation that existed which would deprive Employee of his property interests as a Career Service employee.⁸

The AJ issued her Initial Decision for the matter on March 22, 2010. After reviewing Agency's motion for summary disposition, she concluded that the Agency acted lawfully in demoting Employee. In her reasoning she agreed with Agency's belief that pursuant to D.C. Official Code §§ 1-608.01(d-1), it did not need a cause of action to demote Employee.⁹ She also found *Robin Hoey v. Metropolitan Police Department*, OEA Matter No. 1601-074-07, *Opinion and Order on Petition for Review* (June 25, 2008) to be the applicable law and stated that the

⁷ The Board in *Hoey* held that pursuant to D.C. Official Code §§ 1-608.01(d-1) and 5-105(a), the Chief of Police was delegated personnel authority which permitted her to return a Commander to the rank of Captain at her discretion.

⁸ *Employee Jordan's Opposition to the Agency's Motion for Summary Disposition* (September 11, 2009).

⁹ The AJ also cited the Mayor's Order 97-98 (5/9/97) when stating that the Mayor delegated to the Chief of Police the authority to appoint, assign, and promote all officers and members of the MPD. *Initial Decision*, p. 3 (March 22, 2010).

Chief of Police had discretionary authority to demote an Inspector to the rank of Captain.¹⁰ The AJ found that OEA did not have jurisdiction over this matter, and the appeal was dismissed for lack of jurisdiction.¹¹

On October 19, 2010, Employee filed a motion with the Board requesting that his case be reopened and reconsidered. Although the AJ's Initial Decision was final, Employee asserted that his motion to reopen and reconsider the decision should be granted for good cause.¹² He reasoned that nearly a month after the decision was final, the Board reversed itself with the issuance of its decision in *Keegan v. Metropolitan Police Department*, OEA Matter No. 1601-0044-08, *Opinion and Order on Petition for Review* (May 24, 2010).¹³ Based on OEA's decision in *Keegan*, Employee reasoned that the law governing his dismissal changed and that OEA has jurisdiction over his case. Therefore, he requested that the Board waive its rules regarding the finality of an Initial Decision, reopen and reconsider the matter, and remand it to an AJ for a hearing on the merits.

This Board will address the issues Employee raised on Petition for Review and those

¹⁰ This Board believes the Administrative Judge made an unintentional error in identifying Employee's position as Inspector. Employee was a Commander, not Inspector at the time of his demotion.

¹¹ *Initial Decision*, p. 3 (March 22, 2010).

¹² 6 DCMR 632.1 states that "[t]he initial decision [of an OEA Administrative Judge] shall become final thirty five (35) calendar days after issuance." Statutory law mirrors this language and states that "[t]he initial decision of the [OEA] Hearing Examiner shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." D.C. Code § 1-606.03(c). While Employee recognized OEA's rules and the statutory law regarding the finality of an Initial Decision, he believed that neither promulgated rules to answer the question of whether the OEA has authority to reopen and reconsider decisions after they have become final. However, he argues that since statutory law does not prohibit the OEA from reopening a case after a final decision, the OEA has authority to reopen his matter.

¹³ The OEA Board in *Keegan* agreed with the District Court's ruling in *Hoey v. District of Columbia, et al.*, 540 F. Supp. 2d. 218 (D.C. 2008) and held that pursuant to D.C. Code § 1-615.52(b), demotions and reductions in pay are adverse actions appealable to the OEA. Therefore, the OEA had jurisdiction over the matter. In addressing the issue of whether Employee remained in the Career Service when he was promoted to Inspector and subsequently demoted to Captain, the Board in *Keegan* also held that since Agency proffered no evidence that Employee was converted to an Excepted Service Employee, his status as a Career Service employee remained in effect. Hence, Employee's property rights as a Career Service Employee were retained. As a result, the Board ruled that Agency needed cause to demote Employee, and Employee maintained a right to notice of the demotion.

raised in his Opposition to Agency's Motion for Summary Disposition. Employee correctly provides that the OEA Board issued a decision in *Keegan* that was contrary to its previous decision issued in *Hoey*. However, the D.C. Court of Appeals addressed all relevant and pertinent issues raised and provided that the Board's decision in *Hoey* should be upheld.

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)¹⁴ with explicit discretionary authority to return any officer above the rank of Captain to the rank of Captain"¹⁵

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 reasoned, 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 is only applicable to those positions above Captain. Additionally, MPD employees cannot be

¹⁴ 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)).

¹⁵ *Id.* at 792.

terminated or demoted to a rank below Captain.¹⁶

Moreover, the Court found that Commanders were of the rank of Deputy Chiefs. It held that when the Council adopted D.C. Official Code § 1-608.01(d-1), the titles of Deputy Chief were already phased out. Therefore, since there were no Deputy Chiefs at the time the Code section was adopted, the term Deputy Chiefs must have referred to Commanders. It reasoned that this interpretation was consistent with Council Committee Reports which provided that the statutory provision would apply to “persons in positions of Inspector or above.”¹⁷

As to Employee’s argument regarding the constitutionality of the demotion and his property interest as a Career Service employee, the Court held that in order to invoke procedural due process protections, an employee must show that a protected property interest is implicated. It further reasoned that a property interest is defined by existing rules or understandings from an independent source such as state law. Therefore, 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

¹⁶ *Id.*, 795 and 796.

¹⁷ *Id.* at 797.

which he could be removed at the Chief's discretion.¹⁸

This Board must follow the Court's ruling in *Hoey*. Therefore, Employee's Petition for Review is denied.

¹⁸ *Id.* at 798.

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

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.