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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
KEVIN KEEGAN,	)	OEA Matter No. 1601-0044-08-R10
Employee	)	
	)	Date of Issuance: September 18, 2012
	)	
	)	
D.C. METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
_____	)	

OPINION AND ORDER ON REMAND

This case has been before the Office of Employee (“OEA”) Board previously. Kevin Keegan (“Employee”) worked as a police officer with the D.C. Metropolitan Police Department (“Agency”) since 1981. In 1991, Employee was promoted to Captain. He was subsequently promoted to the position of Inspector in 2004. However, on August 5, 2007, Employee was demoted from Inspector back to Captain by the Chief of Police.<sup>1</sup>

On February 8, 2008, Employee filed a Petition for Appeal with OEA arguing that the

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<sup>1</sup> Employee claimed that in July of 2007, he went on sick leave because of the stress that resulted from the extraordinary demands and pressure imposed by his supervisor. Two days prior to his demotion, Employee attended a meeting with the Chief of Police who informed him that his decision to take sick leave to deal with stress did not set a good example to members of the command staff. Accordingly, she demoted him to Captain. *Petition for Appeal*, p.7 (February 8, 2008).

demotion was unlawful because he was a Career Service employee, and it violated his employment protections provided by his status.<sup>2</sup>

Agency responded by claiming that the Chief of Police had the authority to demote members of the command staff without cause and at her discretion. Agency further argued that in accordance with D.C. Official Code §§ 1-608.01, 1-632.03(c), and 5-105.01 and 6 District Personnel Manual (“DPM”) § 872.5, Employee occupied a discretionary command position and could be demoted without cause. Specifically, Agency provided that DPM § 872.5 stated that Inspectors selected pursuant to D.C. Official Code §§ 1-608.01 and 5-105.01 were Career Service employees who serve in such positions at the pleasure of the Chief of Police and may be returned to their previous rank or position at the Chief’s discretion. Thus, OEA lacked jurisdiction to consider this appeal.<sup>3</sup>

According to OEA’s Administrative Judge (“AJ”), the parties revealed during a July 22, 2008 Status Conference that Employee voluntarily retired before a decision was issued on the merits of his case. Consequently, the AJ issued his Initial Decision on September 17, 2008. He determined that because Employee voluntarily retired, OEA’s jurisdiction was moot. The AJ relied on OEA’s general position that jurisdiction is moot in cases of voluntary retirement. He found that there was no evidence of Agency misrepresentation or deception involved in Employee’s choice to retire. Therefore, he held that OEA lacked jurisdiction to consider the matter and the case was dismissed.<sup>4</sup>

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 2, 2008. On May 24, 2010, the Board issued its Opinion and Order on

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<sup>2</sup> *Id.*, 8-9.

<sup>3</sup> *Metropolitan Police Department’s Memorandum in Support of Motion for Summary Disposition*, p. 1-3, (April 14, 2008).

<sup>4</sup> *Initial Decision*, p. 2-4 (September 17, 2008).

the Petition for Review. It found that there were two jurisdictional issues before it: whether OEA's jurisdiction was moot because Employee voluntarily retired after his demotion, and whether Employee was in a Career or Excepted Service status when he was demoted. With regard to the former issue, the Board relied on the decisions of the District of Columbia Court of Appeals in *Settlemyre v. D.C. Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006) and *Grant v. District of Columbia*, 908 A.2d 1173 (D.C. 2006). It held that OEA lacks jurisdiction in removal actions where employees voluntarily retire in lieu of a removal action and subsequently request reinstatement on appeal to OEA. The Board reasoned that a request of reinstatement was relief that “. . . [could not] be granted to an employee who no longer holds his position as a direct result of his decision to retire.”<sup>5</sup> However, the Board did find that relief could be awarded in a demotion matter where an Employee suffered loss of pay and benefits that violated his property interests.<sup>6</sup> Therefore, it ruled that if Employee was still in Career Service status when he was demoted, OEA would have jurisdiction over his case because the monetary difference in the loss salary and benefits as a result of the demotion could be awarded to him.<sup>7</sup>

With regard to whether Employee was in a Career or Excepted Service status when he was promoted to Inspector and then demoted to Captain, the Board relied on the decisions of the United States District Court for the District of Columbia in *Hoey v. District of Columbia, et al.*, 540 F.Supp.2d 218 (D.C. 2008) and *Fonville v. District of Columbia*, 448 F.Supp.2d 21 (D.C. 2006). The Board held that Employee may have been in the Career Service when he was demoted. Further, since Employee argued that he was a Career Service employee and Agency offered no proof that he was in an Excepted Service status, the Board held that similar to those

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<sup>5</sup> *Opinion and Order on Petition for Review*, p.7 (March 24, 2010).

<sup>6</sup> As an Inspector, Employee was a grade 8, step 4 with an annual salary of \$116,710. When he was demoted to a Captain, he was a grade 7, step 4 with an annual salary of \$104,885. *Pre-hearing Statement of Employee*, Exhibit #5 (April 2, 2008).

<sup>7</sup> *Opinion and Order on Petition for Review* (March 24, 2010).

demoted employees in *Hoey* and *Fonville*, Employee retained his rights as a Career Service employee.<sup>8</sup> As a result, it ruled that Agency could not have demoted him from Inspector to Captain without cause or prior notice. Because Employee may have been a Career Service employee and because OEA could award him the monetary difference in the loss salary and benefits as a result of the demotion, the Board granted the Petition for Review and remanded the matter back to the AJ to consider the case on its merits and determine if Agency had cause to demote Employee.<sup>9</sup>

After the AJ convened a status conference on October 7, 2010, Agency filed a motion for a stay of the proceedings pending the outcome of the District of Columbia Court of Appeals decisions in *Robin Hoey v. District of Columbia*, Civil Action No. 08-5322, Appeal No. 10-CV-0963 and *Hilton Burton v. District of Columbia*, Civil Action No. 08-6371, Appeal No. 09-CV-1493. It reasoned that these cases presented identical issues as Employee's case.<sup>10</sup> Employee opposed the motion, arguing that if a stay was granted, he would suffer great financial losses, and it would be detrimental to his legal rights.<sup>11</sup>

After convening another status conference and ordering the parties to submit final legal briefs on whether Agency had cause to demote Employee, and if so, whether the penalty was appropriate given the circumstances, the AJ issued his Initial Decision on Remand. He found that throughout Employee's tenure with Agency, he remained in the Career Service and none of the promotions he received ". . . effectuated a legitimate change in status from Career Service to Excepted Service."<sup>12</sup> As a result of this finding, the AJ held that D.C. Official Code § 1-632.03(c) and D.C. Official Code § 5-105.1 were inapplicable and could not be used against a

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Agency's Motion for a Stay of Proceedings* (October 27, 2010).

<sup>11</sup> *Brief of Employee Regarding Stay*, p. 7-8 (November 5, 2010).

<sup>12</sup> *Initial Decision on Remand*, p. 5 (June 13, 2011).

Career Service employee because the aforementioned statutes pertain to employees promoted through Excepted Service appointments. He further found that employees in the Career Service are afforded protections pursuant to D.C. Official Code § 1-606.03 *et al.* Therefore, the AJ held that Agency needed cause to demote Employee. He ruled that Agency lacked cause, and Employee was not subject to a RIF. Accordingly, the AJ reversed Agency's demotion action and ordered it to reimburse Employee all back-pay and benefits lost as a result of the demotion from the date of the action through the date he retired.<sup>13</sup>

On July 18, 2011, Agency filed a Petition for Review of the Initial Decision on Remand. It asserted that the AJ misapplied the law and erred in holding that it needed cause to demote Employee from the rank of Inspector to Captain. Agency reasoned that D.C. Official Code §§ 1-608.01(d-1), 1-632.03(c), and 5-105.01 allowed the Chief of Police to demote Inspectors at her discretion.<sup>14</sup> Further, although Employee was in the Career Service, Agency believed that Employee had no protected right to remain at a rank above Captain; he only retained his Career Service protections up to and including the rank of Captain.

Agency contended that Employee's due process rights under the Comprehensive Merit Personnel Act ("CMPA") and the DPM were not applicable given the "notwithstanding" clause found in D.C. Official Code § 1-608.01(d-1).<sup>15</sup> To bolster this argument, Agency discussed the legislative history of D.C. Code §§ 1-608.01(d-1) and 5-105.01. Lastly, it believed that the OEA Board's reliance on the United States District Court for the District of Columbia decisions in

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<sup>13</sup> *Id.*, 6-7.

<sup>14</sup> Agency also contended that the language of DPM § 872.5 allowed the Chief of Police to demote Inspectors appointed under D.C. Official Code §§ 1-608.01 and § 5-105.01. *Metropolitan Police Department's Petition for Review* (July 18, 2011).

<sup>15</sup> Agency believed that the notwithstanding language counteracted Employee's property rights and provided the Chief of Police the ability to exercise broad authority, including demoting a Career Service. D.C. 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." *Id.*

*Hoey v. District of Columbia, et al.*, 540 F.Supp.2d 218 (D.C. 2008) and *Fonville v. District of Columbia*, 448 F.Supp.2d 21 (D.C. 2006) was misplaced.<sup>16</sup>

On August 18, 2011, Employee filed an opposition to the Petition for Review of the Initial Decision on Remand. He argued that the Chief of Police did not have discretion to demote him; she did not exercise her authority when she demoted him; and the notwithstanding language found in D.C. Official Code § 1-608.01(d-1) did not apply to his demotion.<sup>17</sup> He further opined that his demotion was an adverse action. Employee reasoned that his demotion was based on perceived unsatisfactory personal conduct by the Chief of Police, and there was no reduction in force or reorganization related to the demotion action. Lastly, Employee asserted that the Board's decision should not be stayed and requested that Agency's Petition for Review be denied.<sup>18</sup>

On November 3, 2011, Agency submitted additional support for its Petition for Review. It directed the Board's attention to the District of Columbia Court of Appeals' decision in *Hilton Burton and Robin Hoey v. Office of Employee Appeals, et al.*, 30 A.3d 789 (D.C. 2011). The Court held that the Chief of Police had discretionary authority to demote Career Service employees back to the rank of Captain without cause. Therefore, Agency requests that the Board grant its Petition for Review based on this decision.<sup>19</sup>

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<sup>16</sup> *Id.*, 9-12.

<sup>17</sup> Employee reasoned that D.C. Code §5-105.01(a), which preceded § 1-608.01(d-1), only applied to police officers hired before January 1, 1980, and he was appointed to the MPD after this date. Employee believed that D.C. Code §5-105.01(a) was a "pre-CMPA" provision and the CMPA repealed many provisions of previous law. Employee noted that a "principle purpose of the CMPA was to adopt a comprehensive merit system of personnel management for the District of Columbia before January 2, 1980 . . ." He provided that only D.C. Official Code § 1-608.01(a) applies, as it is a CMPA provision which distinguishes Career Service from other categories of employees. Thus, it is Employee's position that Agency's management practices were unlawful because they did not comply with the CMPA. However, even if the Board finds that the Chief of Police had discretionary authority under statutory law, Employee argues that she failed to exercise it and therefore the demotion is invalid. *Employee's Opposition to Agency's Petition for Review* (August 18, 2011).

<sup>18</sup> *Id.*

<sup>19</sup> *Additional Authority in Support of Metropolitan Police Department's Petition for Review* (November 3, 2011).

Employee filed a response to Agency's submission which provided that although the decision resolved one of the issues, Employee's demotion was not an exercise of the Chief of Police's discretionary authority under D.C. Official Code § 1-608.01(d-1). He argued that his demotion was pursuant to a "change to lower grade" under DPM § 836 and was due to an "... emergency requirement, reduction in force, and reclassification."<sup>20</sup> Therefore, Employee believed that the decisions in *Hoey* and *Burton* are inapplicable.

In *Hilton Burton and Robin Hoey v. Office of Employee Appeals, et al.*, 30 A.3d 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)<sup>21</sup> with explicit discretionary authority to return any officer above the rank of Captain to the rank of Captain . . . ."<sup>22</sup>

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, this section of the Code supersedes any conflicting regulations in place regarding Career Service protections.<sup>23</sup> The

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<sup>20</sup> *Employee's Response to Agency's Submission of Additional Authority*, p. 2 (November 17, 2011).

<sup>21</sup> 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.3d 789 (D.C. 2011)).

<sup>22</sup> *Id.* at 792.

<sup>23</sup> It should be noted that the Court addressed DPM §836, which Employee believes distinguishes his cases from *Hoey* and *Burton*. Even after considering DPM §836, the Court still ruled that Chief Lanier had the authority to demote employees. See *Hilton Burton and Robin Hoey v. Office of Employee Appeals, et al.*, 30 A.3d 789, 795 (D.C. 2011).

Court noted that although § 1-608.01(d-1) did eliminate the right not to be reduced in rank without cause, it only applies to those positions above Captain. Agency employees cannot be terminated or demoted to a rank below Captain.<sup>24</sup>

The Court ruled 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.3d 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 when an employee loses an increased salary, the incremental advantages are not protected because they were tied to a position from which they could be removed at the Chief’s discretion.<sup>25</sup> In accordance with the Court’s reasoning, Employee is not entitled to back pay as a result of his demotion. This Board must follow the Court’s ruling and grant Agency’s Petition for Review. The Initial Decision on Remand is, therefore, reversed.

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<sup>24</sup> *Id.*, 795 and 796.

<sup>25</sup> *Id.* at 798.

**ORDER**

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**, and the Initial Decision on Remand is **REVERSED**.

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.