THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAULA EDMISTON	)	OEA Matter No. 1601-0057-07
Employee	)	
	)	Date of Issuance: April 30, 2008
v.	)	
	)	Administrative Judge
METROPOLITAN POLICE DEPARTMENT	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Ted Williams, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On March 7, 2007, Employee, a former Captain in the Police force, filed a petition for appeal from Agency's final decision removing her from her position. After a postponement requested by the parties, I conducted a Prehearing Conference on June 27, 2007, and referred the matter for mediation at the request of the parties. After mediation failed, Employee filed a motion for summary judgment. Agency submitted its response. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency's adverse action was timely.

2. Whether the Chief of Police properly and legally increased Employee's proposed penalty.

FINDINGS OF FACT

Based on the submissions of both parties, I make the following findings of facts:

1. Employee was a Captain with the Metropolitan Police Department (MPD), Second District. At an Agency-sponsored event, Employee told fellow officers that she had made disrespectful remarks to a female cashier at the grocery store and then to a fellow patron at another

grocery. Both events occurred on April 1, 2006. When subsequently confronted by her superiors, Employee denied the charges and implicated a fellow officer.

2. Effective April 13, 2006, Agency issued General Order (G.O) 120.21 regarding disciplinary procedures and processes. With regard to adverse action appeals, that G.O. provided, *inter alia*, that the Chief of Police (COP) or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the Assistant Chief of Human Services. (G.O 120.21, p. 17*)*.

3. G.O 120.21 replaced G.O. 1202.1, which was essentially similar to the new order, but had no provision allowing the COP to impose a penalty higher than the one initially recommended.

4. On June 2, 2006, pursuant to G.O 120.21, Assistant Chief of Human Services (ACHS) Shannon Cockett served Employee with a proposed Notice of Adverse Action (Notice) to demote Employee to the rank of lieutenant based on three charges of misconduct: 1) Conduct unbecoming an officer; 2) Failure to obey orders or directives; and 3) Willfully and knowingly making untruthful statements. [Notice of Proposed Adverse Action] Each charge contained specifications to support it.

5. This Notice was issued forty-four business days from April 1, 2006, the day Agency learned of Employee's conduct. Agency does not allege that it undertook a criminal investigation of the incident.

6. On July 25, 2006, following a review of the documents submitted by Employee through counsel, Assistant Chief Cockett served Capt. Edmiston with a Final Notice of Adverse Action ("Final Notice"), demoting Employee to the rank of lieutenant, based upon a preponderance of evidence that Employee was guilty of the charged misconduct. The six-page document listed 26 Findings and contained a Conclusion that Capt. Edmiston was guilty of the charges and specifications listed in the Notice. The Final Notice stated: For the cited violations, you will be demoted to the rank of "Lieutenant."

7. The July 25, 2006, Final Notice advised Employee that she could appeal to the Chief of Police (COP), and she had the right to appeal her adverse action to the Office of Employee Appeals (OEA) within 30 days of the final agency action.

8. On August 8, 2006, Employee chose to appeal the demotion to the COP asking that the demotion be reversed or the penalty mitigated.

9. On August 29, 2006, COP Charles H. Ramsey denied Employee's appeal, and further recommended that Employee be discharged. [Letter from Charles H. Ramsey, Chief of Police to John V. Berry, Esq. dated August 29, 2006]. Additionally, the COP remanded the adverse action for a hearing before a police trial board (Hearing Tribunal or Adverse Action Panel (Panel)), "if Employee so elected." (*Tab J).* The first paragraph acknowledged receipt of the appeal. The second paragraph said:

> After a thorough review of the record developed in this matter and your letter of August 8, 2006, I am denying your appeal. I have carefully reviewed the facts and circumstances surrounding the very serious charges and specifications in this case and have determined that there were no mitigating factors. Additionally, I have reviewed your work performance, disciplinary history and commendations. Based upon this review, I am recommending that you be discharged.

The third paragraph stated that the matter was to be scheduled for a hearing before the Trial Board "if you so elect," and the final paragraph stated that the letter constituted final Agency action in the matter.

10. Assistant Chief Cockett arranged for service of the Chief of Police's August 29, 2006, letter on Capt. Edmiston via a memo, also dated August 29, 2006, [Memorandum dated August 29, 2006 to Inspector Second District from Assistant Chief Office of Human Services], which characterized the decision of the Chief of Police as deciding that "the penalty should be amended from demotion to Removal."

11. On August 31, 2006, Employee, through counsel, elected to have a hearing before a Trial Board Panel. On October 27, November 3, and November 27, 2006, Employee received a full evidentiary hearing before the Panel, which found Employee guilty of all three charges, and the underlying specifications, and unanimously recommended that Employee be terminated. (*Tab E).*

12. On January 10, 2007, based on the Panel's recommendation, the ACHS issued a second Final Notice of Adverse Action notifying Employee that her removal from MPD would be effective March 2, 2007. Assistant Chief Cockett issued a removal notice on January 10, 2007.

13. Employee appealed to Acting Chief of Police Cathy Lanier, who denied the appeal on February 23, 2007. Employee appealed this action to the COP by letter dated February 1, 2007. (*Tab C*) On February 23, 2007, the COP denied Employee's appeal. (*Tab B*).

14. Employee was charged with "Conduct unbecoming an officer," "Failure to obey orders or directives issued by the Chief of Police," and "Willfully and knowingly making an untruthful statement." She was removed from her position effective March 2, 2007.

15. On March 7, 2007, Employee appealed the removal to the Office of Employee Appeals.

ANALYSIS AND CONCLUSION

Whether Agency's adverse action was timely.

In her motion for summary judgment, Employee first argues that Agency's removal action is untimely because the August 29, 2006, letter from the COP to Employee exceeded the ninety business days notice required.

The Police and Firefighters Disciplinary Action Procedures Act, Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031 (2005 Supp.), states:

> Commencement of corrective or adverse action.
>
> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Attorney General, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

Thus, D.C. Code § 5-1031 (effective September 30, 2004), prohibits any adverse action being commenced against the Employee more than 90 days (not including Saturdays, Sundays or legal holidays) after the date the Agency knew "of the act or occurrence allegedly constituting cause." See also, 6 DCMR § 1601.9. The statute contains an exception for acts subject to criminal investigations, but it is undisputed that the exception does not apply here.

Employee alleges that the Agency knew of the alleged acts for which it charged the Employee not later than April 1, 2006, and that August 29, 2006 is more than 90 business days after April 1, 2006. It was too late for the Chief of Police to issue a new proposed penalty to start the process anew in order to discharge the Employee.

Employee further asserts that the August 29, 2006 letter does not comply with the requirements for a notice of proposed adverse action calling for an increased penalty. The General Order in effect on August 29, 2006, spells out in detail the elements a notice of proposed adverse action must contain. See GO-PER-120-21 VI.H. [Employee Exhibit D, pp. 12-13] Chief Ramsey's one-page four-paragraph letter "recommending" discharge fails to comply with the required elements notwithstanding the letter gives the Employee the option of electing a hearing before the Trial Board. [Employee Exhibit G]

Agency's response, as set forth in its brief, basically argues that the August 29, 2006, letter relates back to the June 2, 2006, Adverse Action Notice to demote Employee to the rank of lieutenant based on three charges of misconduct. This Notice was issued forty-four business days from April

1, 2006, the day Agency learned of Employee's conduct. Thus, it was well within the ninety day deadline set by D.C. Code § 5-1031.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _D.C. Reg. __( ). The language within D.C. Official Code § 5-1031 is clear and unambiguous and its time limits are mandatory in nature. The ninety day deadline is clear and mandatory. However, it applies to the initial notice of adverse action.

Based on my examination of the August 29, 2006, letter, I am not persuaded that the COP meant his August 29, 2006, letter as a new advance notice of adverse action. Looking at the captions of these documents, I note that Agency itself has labeled its June 2, 2006, notice as its proposed Notice of Adverse Action, and the July 25, 2006, notice as its Final Notice of Adverse Action. Unlike the other notices, the August 29, 2006, letter does not identify itself as proposed Notice of Adverse Action. Nor does it contain the charges and specifications required of such a notice. Instead, the COP in the body of this letter self-identifies itself as simply his response to Employee's final appeal to him of an adverse action. Agency's GO 120.21 gives Employee this right to appeal to the COP, and the COP is obligated to give his response to Employee's appeal.

I thus find that the August 29, 2006, letter cannot serve as a new notice of adverse action nor can it relate back to the June 2, 2006, Notice. Indeed, if Agency did establish that the COP's August 29, 2006, letter is a new, or second proposed Notice of Adverse Action, then § 5-1031 mandates a reversal of Agency's action.

I find that the initial June 2, 2006, Notice is the initial notice of adverse action, and that the August 29, 2006, letter is not. Since the June 2, 2006, Notice is well within the 90-day deadline, I find that the notice is timely.

Whether the Chief of Police properly and legally increased Employee's proposed penalty.

We now go to Employee's next argument in his motion, that the COP had no authority to increase the proposed penalty. The critical issue then is whether the COP may increase the original proposed penalty of a demotion to a termination.

Employee argues that the applicable regulation concerning a deciding official's authority to determine a penalty is governed by Chapter 16, Part I, § 1613.2, p. 16-1-8, 47 D.C. Register 7094 (2000), which states:

> The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss

> the action with or without prejudice, but in no event shall he or she increase the penalty.

Conversely, Agency insists that the above regulation had been superseded and that the COP now had this authority under GO 120.21, which was in effect at the time the adverse action was proposed. In short, Agency is arguing that the applicable law should be the one that was in effect at the time the adverse action was proposed, not the law that was in effect at the time of Employee's offense. To state it in a different way, does the new General Order apply retroactively to an act that occurred before its effective date?

A regulation is retroactive when "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483 (1994), 128 L.Ed.2d 229 (1994) (applying this retroactivity definition to a statute). *See also Peterson v. District of Columbia Lottery and Charitable Games Control Bd.*, 673 A.2d 664, 669 (D.C. 1996) (the case in which the District of Columbia Court of Appeals expressly applied the *Landgraf* principles to District of Columbia agency regulations; *Chadmoore Commc'nc, Inc. v. FCC*, 324 U.S. App. D.C. 282, 287, 113 F.3d 235, 240 (1997) (stating that a rule is retroactive when it impairs rights a party possessed when it acted, increases a party's liability for past conduct, or imposes new duties for completed transactions).

The prohibition against retroactive regulation comes into effect when "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *Washington Gas Energy Services, Inc. v. District of Columbia Public Service Com'n.*, 893 A.2d 981, 990 (D.C. 2006) (a case refusing to enforce actions by an agency because they were "impermissibly retroactive"), quoting *Landgraf*, 114 S.Ct. at 1482.

It is well settled that, "[a]statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *See, generally, Giant Food v. District of Columbia D.O.E.S., 2007* D.C. App. Lexis 645 (D.C. 2007) quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, at 269 -70 (1994) (worker's compensation related statute applied as of time of employee's retirement, not as of time of her injury).

Here, contrary to Agency's assertion, G.O. 120.21 did attach new legal consequences to Employee's misconduct,because under the old G.O. 1202.1, the maximum penalty she would have been subject to was the proposed demotion, not removal. This would have been the result despite the fact that the applicable table of offenses and penalties has a range of penalties that included termination. However, here the final recommended discipline was a demotion, not a termination.

The traditional presumption against retroactivity has "consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483. The D.C. Court of Appeals has recognized the "fundamental unfairness" when

new regulations are applied retroactively. *Reichley v. District of Columbia Dep't of Employment Servs.*, 531 A.2d 244, 248 (D.C. 1987) (internal citation omitted).

In the instant matter, there is no question that Employee's right not to have her proposed penalty increased was impaired by Agency's retroactive use of General Order GO-PER-120-21 to remove Employee. When the underlying events occurred on April 1, 2006, GO-PER-120-21 was not in place, and the Chief of Police was not authorized to increase punishment. The enactment of the new General Order — if held to apply to the punishment imposed on the Employee — would increase the Employee's liability for past conduct because she would be subject to a removal rather than a mere demotion. Under *Landgraf* and the District of Columbia administrative agency cases following it, the Employee's punishment cannot be increased by means of the General Order applied retroactively to conduct occurring before its enactment.

Next, Agency cites 6 DCMR 1601.5, which states in pertinent part as follows:

> (a) Any procedures for handling corrective or adverse actions involving uniformed members of the Metropolitan Police Department, or of the Fire and Emergency Medical Services Department (FEMSD) at the rank of Captain or below provided for 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 that there is a difference. (Emphasis added.)

Agency's argument is applicable only if the new regulation itself states that it is meant to be applied retroactively. However, there is nothing in the language of GO-PER-120-21 that indicates that the regulation was meant to apply retroactively. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by [the legislature] in express terms." *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed. 2d 493 (1988). See also *Peterson*, 673 A.2d at 669 (adopting the *Bowen* reasoning). Thus, the COP impermissibly increased Employee's penalty from a demotion to a termination.

The proper penalty for Employee.

The next issue to be dealt with is the proper remedy for Agency's poor choice of penalty. Employee argues that she should be reinstated to her original position of Captain because Agency impermissibly increased Employee's penalty from a demotion to a termination and failed to issue her a new Notice of Proposed Removal. In effect, Employee is arguing that because Agency erred in choosing the penalty, she should be given a free pass for her offenses.

Employee's contention that she was innocent of the charges had been refuted by her fellow officers in a police trial board hearing. Employee had been given her due process rights as she was

able to confront and cross-examine her accusers. Apart from her own self-serving claims of innocence, she did not present any witnesses or other evidence to corroborate her position. The Trial Board unanimously found her guilty of all charges, and recommended termination.[1]

This Office's review of an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's workforce is a matter entrusted to the agency, not to this Office. When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1010 (D.C. 1985). Indeed, this Office's scope of review is limited to a determination of whether the penalty is within the range allowed by the table of penalties, whether the penalty is based on relevant *Douglas* factors, and whether there is a clear error of judgment *Taggert v. Metropolitan Police Department*, OEA Matter No. 2405-0113-92R94 (Jan. 9, 1998).

Here, Employee was given due process in a hearing and was afforded several opportunities to appeal her penalty. Where Agency erred only in the choice of its penalty, but not in its decision to penalize Employee, the proper remedy is to apply the proper penalty. Under the old G.O. 1202.1 and statutes applicable to the instant matter, Agency was limited to its original proposed penalty of a demotion. Considering that demotion was within the range allowed by the table of penalties, that Employee was found guilty of all specifications and charges, and that there is no clear error of judgment, I find that the proper remedy is to reinstate the proposed penalty of demotion.

ORDER

It is hereby ORDERED that:

1) Employee's Motion for Summary Judgment is granted;

2) Agency's penalty removing Employee from her position is MODIFIED to the original proposed penalty of Demotion to Lieutenant; and

3) Agency reimburse Employee all pay and benefits lost as a result of the removal; and

4) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which

[1] It was not clear from the record whether Employee was a member of a bargaining unit covered by a collective bargaining agreement which limits appeals solely to the record established in the Departmental hearing. But if she was such a member, I note that had the factual findings of the Police Trial Board been an issue, then this Office's review of the Trial Board's findings would have been "limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations." Thus, Employee would not have been entitled to a "de novo" hearing. *District of Columbia Metropolitan Police Dep't v. Pinkard*, 801 A.2d 86 (D.C. 2002).

this decision becomes final.

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JOSEPH E. LIM, ESQ.
Senior Administrative Judge