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

_____ )	
In the Matter of: )	
)	
KEVIN KEEGAN, )	
Employee )	OEA Matter No. 1601-0044-08-R-10
)	
v. )	Date of Issuance: June 13, 2011
)	
D.C. METROPOLITAN POLICE )	
DEPARTMENT, )	
Agency )	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____ )	

Robert Deso, Esq., Employee Representative  
Ronald Harris, Esq., Deputy General Counsel

**INITIAL DECISION ON REMAND**

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 8, 2008, Kevin Keegan (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Metropolitan Police Department (“MPD” or “the Agency”) action of demoting him from Inspector to Captain. At this juncture, the Employee was still employed as a full time employee of the MPD albeit as a Captain. I was assigned this matter on or around, March 21, 2008. On this same date, I issued an Order Convening a Prehearing Conference requiring the parties to appear at the Office on April 22, 2008.

The conference was held as scheduled. During it, the Agency argued, *inter alia*, that review of the instant matter should be stayed until the OEA Board had an opportunity to issue an opinion and order in *Robin Hoey v. MPD*, OEA Matter No. 1601-0074-07. According to the Agency, the facts in both matters were similar enough that it would be prudent to wait for the decision in *Hoey* before proceeding further in the instant matter. While considering the merits of Agency’s argument to stay further proceedings in the instant matter, the Board of the OEA issued an opinion and order on petition for review in *Hoey* on June 25, 2008. Accordingly, a status conference was convened on July 22, 2008, to address the salient issues in the instant matter in light of the recently issued opinion and order in *Hoey*. During this status conference, it was first disclosed to the undersigned that the Employee had voluntarily retired from Service

with the Agency. I then required the parties to submit written briefs on whether the OEA may exercise jurisdiction in the instant matter given that the Employee had retired as well as on the issue of the timeliness of the Employee's filing of his petition for appeal.

I then issued an Initial Decision wherein I determined, *inter alia*, that the OEA did not have jurisdiction to preside over Employee's petition for appeal due to his retirement. Furthermore, I disagreed with Employee's contention that with respect to OEA's ability to exercise jurisdiction over matters where an employee has retired that a substantive distinction should be made when an employee is demoted and is only seeking back-pay versus an employee who is seeking reinstatement. Employee disagreed with my Initial Decision and on October 2, 2008, he filed a Petition for Review with the Board of the OEA. The Board of the OEA agreed with Employee's arguments and in an Opinion and Order on Petition for Review dated May 24, 2010, remanded the instant matter back to the undersigned. In effectuating the remand, the Board of the OEA stated the following:

Employee contended throughout his appeal that he was a Career Service employee. Agency offered no proof that he was converted to an Excepted Service status. As a result, this Board is inclined to believe that Employee retained his rights as a Career Service employee as those demoted employees in *Hoey* and *Fonville*. Consequently, Agency could not have demoted him from Inspector to Captain without cause or notice.

Thus, we remand this matter to the Administrative Judge to consider the case on its merits and determine if Agency had cause to remove Employee. If it is determined that Agency lacked the requisite cause, then the AJ must determine the effective date of Employee's retirement. This date was not reflected in the record. The AJ must also award a remedy through Employee's effective date of retirement. Therefore, Employee's Petition for Review is granted and the matter is remanded to the Administrative Judge for further consideration. *Footnote Omitted. Citations Omitted. Kevin Keegan v. Metropolitan Police Department, Office of Employee Appeals Opinion and Order on Petition for Review dated May 24, 2010, at 10.*

After this matter was remanded to the Undersigned, I then ordered two subsequent status conferences. After considering the parties positions I then ordered the parties to submit final legal briefs regarding whether MPD had cause to demote Employee. Both parties have submitted their respective briefs in this matter. The record is now closed.

#### BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.2, id. states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.

### JURISDICTION

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

### ISSUES

1. Whether the Agency had cause to demote Employee.
2. If so, whether the penalty was appropriate under the circumstances.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSION

#### Agency's Position

The Agency in its Brief on Whether It Had Cause to Demote Employee (“Agency’s Brief”) dated May 23, 2011, admitted it “has not asserted at any point during the pendency of this matter that Employee was demoted for cause. As mentioned in previous filings in this matter, Agency did not have to have cause in order to demote Employee... In short, District of Columbia career Service employees cannot be suspended, demoted or terminated without cause. D.C. Official Code §§ 1-606.03(a); 1-616.51-.52. (Employee was in the career Service at the time of his promotion to Inspector on July 27, 2004, and retained this classification during his appointment).” Agency’s Brief at 1. It was surprising to the Undersigned that the Agency made the preceding admission. However, MPD went on to elaborate that it did not need cause in order to demote Employee relying primarily on D.C. Official Code § 1-632.03(c), which states:

Notwithstanding the provisions of subsection (a)(1)(B) of this section, or of any other law or regulation, for members of the Metropolitan Police Department, 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 provided in § 5-105.01.

Furthermore, D.C. Official Code § 5-105.01, provides in pertinent part that:

(a) The Mayor of said District shall appoint to office, assign to such duty or duties as he may prescribe, and promote all officers and members of said Metropolitan Police force; provided, that all officers, members, and civilian employees of the force except the Chief of Police, the Assistant and Deputy Chiefs of Police, and the inspectors, shall be appointed and promoted in accordance with the provisions of [§§ 1101-1103](#), [1105](#), [1301-1303](#), [1307](#), [1308](#), [2102](#), [2951](#), [3302-3306](#), [3318](#), [3319](#), [3321](#), [3361](#), 7152, [7321](#), [7322](#), and [7352 of Title 5, United States Code](#), and the rules and regulations made in pursuance thereof, in the same manner as members of the classified civil Service of the United States; provided further, that 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...

### Employee's Position

Employee in his Brief on the Merits dated June 3, 2011, argued that at all relevant times throughout his tenure with MPD, Employee was in the Career Service and as such he should have been afforded the protections that come with said Service including protection from a demotion action where either cause was not established nor a properly implemented Reduction in Force ("RIF") was taken. Employee further contends that his promotion to Inspector did not move his Service with the MPD from Career to Excepted. Considering as much, the Agency's act of summarily and orally demoting him to Captain without either first giving him written notice and without establishing either cause or instituting a legitimate RIF did not comport with the protections afforded to Career Service employees pursuant to D.C. Official Code § 1-606.03 *et al* and prays that I now reverse the Agency's action. Employee also admits that he retired from Service with the MPD on April 27, 2008. Employee provided a copy of the MPD Retirement Action Form in order to substantiate his retirement date. This document indicates that Employee retired from Service on April 27, 2008.

### Analysis and Conclusion

After carefully reviewing the parties respective arguments with respect to the issues placed before the Undersigned pursuant to the aforementioned Opinion and Order on Petition for Review, it has become abundantly clear that the following facts are uncontroverted and are not subject to genuine dispute:

1. Employee joined the MPD in 1981.
2. At the time that he was appointed, Employee was a part of the Career Service.
3. Employee enjoyed several career promotions throughout his tenure with MPD. In 1991, Employee's was promoted from Lieutenant to

Captain in 1991. Next, Employee was promoted from Captain to Inspector in 2004.

4. Employee was demoted from Inspector to Captain on August 5, 2007.
5. Employee was summarily demoted from Inspector to Captain. He received no prior written notice that he was going to be demoted.
6. The basis for Employee's demotion was the apparent displeasure of Chief of Police Cathy Lanier regarding Employee's action of opting to utilize his sick leave for stress related reasons. Chief Lanier initially indicated that this would set a bad example for other members of the MPD force.
7. Throughout his tenure with MPD, Employee remained in the Career Service. None of the aforementioned promotions effectuated a legitimate change in status from Career Service to Excepted Service.
8. Employee retired from service on April 27, 2008.

The District Personnel Manual ("DPM") requires in relevant part that:

836.5 An involuntary demotion of a Career Service employee shall be made by either of the following:

- (a) By adverse action procedures in accordance with chapter 16 of these regulations; or
- (b) By reduction-in-force procedures in accordance with chapter 24 of these regulations.

836.7 An employee may voluntarily accept a position with lesser rights or benefits, provided that a waiver is executed in accordance with § 833.2.

Agency justified its demotion action by relying on D.C. Official Code § 1-632.03(c) and D.C. Official Code § 5-105.01 which provide the Mayor and his delegate in these matters – the Chief of Police with the ability to demote certain high ranking members within the MPD. This was seemingly enacted so that the Chief of Police can have trusted members of the force within the command hierarchy and can remove these same persons from the hierarchy if and when the Chief of Police deems it necessary. There is no specific clause in these statutes that indicate that affected employees promoted to positions within the MPD lose their Career Service protection merely by being

appointed to the rank of Inspector or higher. As such, it seems infinitely reasonable that these statutes refer to MPD members promoted through Excepted Service appointments, which do not carry the Career Service protections that are conferred through D.C. Official Code § 1-606.03 *et al.* Certain District government personnel encumber Excepted Service positions because they are generally afforded other benefits than Career Service rights, including but not limited to advanced grade, rank, authority and a higher pay scale.

I find that because Employee was in the Career Service at the time that this action occurred, that the two aforementioned statutes are inapplicable to this matter. I further find that D.C. Official Code § 1-632.03(c) and D.C. Official Code § 5-105.01 cannot be utilized against an employee that is serving in the Career Service. These employees enjoy Career Service rights pursuant to D.C. Official Code § 1-606.03 *et al.* For a District government employee to lose their Career Service rights without any written notice, forewarning, or choice in the matter is abominable. Further, under similar circumstances, some District employees may opt to forego a promotion in order to preserve their Career Service rights albeit with a lower grade, salary and responsibility than they would otherwise command if they accepted the offer of promotion.

The main problem with what has occurred in the instant matter is that throughout Employee's tenure with the Agency he was never properly transferred from the Career to Excepted Service. MPD could have easily accomplished this transfer when it constantly promoted Employee throughout his tenure. All other things being equal, if Employee was properly placed in the Excepted Service, with Agency adhering to DPM § 836.7 when it promoted Employee from Captain to Inspector, then D.C. Official Code § 1-632.03(c) and D.C. Official Code § 5-105.01 would have been applicable and Employee's demotion would otherwise stand. However, such is not the case in the instant matter. MPD cannot easily forego the protections afforded by Employee's Career Service rights when it suits their purposes. I find that DPM § 836.7 provides for an efficient procedure, that the District government must follow, in order for an employee to make a knowing waiver of their Career Service rights. To its detriment, MPD opted not to follow this simple procedure as it promoted Employee. It cannot now violate Employee's Career Service rights by demoting him without cause or implementation of a RIF. I find that the MPD did not have cause to demote Employee. I further find that Employee was not subjected to a properly implemented RIF. Accordingly, I further find that I must reverse Agency's demotion action.

Of peculiar note to the instant matter, the Employee retired from Service while this matter was initially pending before the Undersigned. According to a letter dated March 18, 2011, from the District of Columbia Retirement Board, the effective date of Employee's retirement from the MPD was April 27, 2008. I find that Employee retired from Service on April 27, 2008.

#### ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of demoting Employee from Inspector to Captain is **REVERSED**; and
2. The Agency shall reimburse Employee all back-pay and benefits lost as a result of his demotion from the date of his demotion through the date that he retired; and
3. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.  
Administrative Judge