THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAULA EDMISTON,	)	
Employee	)	
	)	OEA Matter No.: 1601-0057-07R16
v.	)	
	)	Date of Issuance: November 7, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Paula Edmiston ("Employee") was a captain with the Metropolitan Police Department ("Agency"). On June 2, 2006, the Assistant Chief of Human Services ("ACHS"), Shannon Cockett, served Employee with a Proposed Notice of Adverse Action and recommended that she be demoted to the rank of lieutenant. Employee was charged with conduct unbecoming of an officer, failure to obey orders, and willfully and knowingly making an untruthful statement. The charges stemmed from two events in 2006, wherein Employee made disrespectful comments to a cashier at a grocery store regarding the cashier's race and national origin. Employee subsequently made disparaging remarks to a male patron at another grocery store pertaining to his sexual orientation. Agency conducted an

administrative review and issued its Final Notice of Adverse Action on July 25, 2006. The notice stated that that Employee was guilty of all three charges based on the preponderance of the evidence. As a result, Employee was demoted to the rank of lieutenant.

Thereafter, Employee appealed her demotion to former Chief of Police, Charles Ramsey. On August 29, 2006, Chief Ramsey denied Employee's appeal and recommended that her punishment be increased from demotion to removal. Employee elected to have the adverse action reviewed by a panel of police officers ("Trial Panel"). The Trial Panel found Employee guilty of all three charges and recommended that she be terminated. Employee appealed the Trial Panel's decision to Acting Chief of Police, Cathy Lanier. However, Employee's appeal was denied on February 23, 2007 and her termination became effective on March 2, 2007.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 7, 2007. Two issues were presented to the Administrative Judge ("AJ") for adjudication: whether Agency commenced its adverse action in a timely manner and whether Agency had the authority to increase the proposed penalty from demotion to removal. The AJ issued his Initial Decision on April 30, 2008. With respect to the timeliness issue, the AJ held that Agency did not violate D.C. Official Code § 5-1031, commonly referred to as the 90-day rule. The rule prohibits adverse actions from commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause.[2] According to the AJ, Chief Ramsey's August 29, 2006 letter to Employee did not trigger the 90-day time period because the notice did not identify itself as a proposed notice of adverse action and did

[1] *Petition for Appeal* (March 7, 2007).
[2] The AJ noted that the statute contains an exception for acts subject to criminal investigations; however there was no pending criminal investigation pending against Employee.

not contain the charges and specifications required of such a notice. Hence, the AJ determined that Agency's June 2, 2006 proposed notice to Employee was well within the 90-day deadline.

With respect to the Chief's authority to increase Employee's proposed penalty, the AJ stated that Employee's "right not to have her proposed penalty increased was impaired by Agency's retroactive use of [the General Order].[3] He further provided the following:

> 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.

Based on the foregoing, the AJ held that Chief Ramsey improperly increased Employee's penalty from demotion to removal. Therefore, he reversed Agency's adverse action and held that the correct remedy was to reinstate Employee's demotion.[4]

Thereafter, Employee filed a Petition for Review with OEA's Board.[5] Her sole argument in the petition was that the AJ "lacked the power to *sua sponte* demote [Employee] without permitting her the opportunity to petition OEA for a de novo evidentiary hearing."[6] In its Opinion and Order on Petition for Review, the Board highlighted OEA Rule 625.1, which

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[3] Effective April 13, 2006, Agency issued General Order ("GO") 120.21, which addresses disciplinary procedures and processes. With regard to adverse action appeals, the GO provided that the Chief of Police 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.

[4] *Initial Decision* (April 30, 2008).

[5] While Employee's Petition for Review was pending before OEA's Board, Agency filed a Petition for Review in D.C. Superior Court. Agency also filed an Opposition to Employee's June 2, 2008 Petition for Review with OEA on July 17, 2008. However, D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the Board's decision. On July 9, 2009, Agency filed a Motion for Extension of Time to File Petition for Review of Agency Decision. The parties subsequently requested to stay the matter pending before OEA, and subsequently requested that the stay be lifted on August 26, 2009. The request was granted.

[6] *Petition for Review*, p. 8 (June 2, 2008)

provides that a party may request the opportunity for an evidentiary hearing; however, it is within the AJ's discretion to grant such a request. The Board agreed with the AJ's assessment that an evidentiary hearing was not warranted based on the issues presented by the parties. Furthermore, the Board held that the AJ did not abuse his discretion by deciding this matter based solely on the documents of record. As a result, Employee's Petition for Review was denied and the AJ's Initial Decision was upheld.[7]

Agency subsequently filed an appeal with D.C. Superior Court. On October 9, 2013, the Honorable Judge Judith Macaluso issued an Order Reversing Agency Decision, in part. In her analysis, Judge Macaluso, stated that "Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for the Petitioner." Therefore, the matter was remanded to the AJ for reconsideration consistent with the Order.[8]

On August 8, 2014, the AJ issued his Initial Decision on Remand. He reiterated his previous finding that Agency did not violate the 90-day rule. However, the AJ reversed his original decision with respect to Agency's ability to increase a proposed penalty and concluded that it did not abuse its discretion by terminating Employee.[9] Consequently, Agency's termination action was upheld.

Employee appealed the Initial Decision on Remand to D.C. Superior Court on September 9, 2015, wherein she asserted that the AJ's decision should be reversed because the GO that the Chief of Police relied upon in imposing a higher penalty was superseded by D.C. Municipal Regulation ("DCMR") § 1613.2. In its June 8, 2016 Order, the Court discussed three issues:

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[7] *Opinion and Order on Petition for Review* (January 25, 2010). The Board also denied Agency's Motion for Extension of Time to File Petition for Review of Agency Decision because it failed to file its petition within the thirty-five day deadline as required by D.C. Official Code § 1-606.03(c).
[8] *District of Columbia Metropolitan Police Department v. Office of Employee Appeals*, 2008 CA 004804 P(MPA) (D.C. Super. Ct. 2013).
[9] *Initial Decision on Remand* (August 8, 2014).

whether the argument raised by Employee in her petition regarding DCMR § 1613.2 was being raised for the first time; whether the law of the case doctrine prohibited the Court from making a determination with respect to the aforementioned issue; and whether DCMR § 1613.2 prohibited the Chief of Police from increasing Employee's penalty. In its analysis, the Court provided that Employee's argument was properly preserved for appeal. It further stated that the law of the case doctrine was inapplicable in this matter. Regarding the last issue, the Court agreed with Employee's contention that the AJ did not properly analyze whether Agency's GO could supersede a municipal regulation. Therefore, the matter was remanded to the AJ "in order for OEA to make a determination as to whether MPD General Order 120.21 supersedes [the] applicable version of 6-B DCMR § 1613.2…."[10]

Thereafter, the parties were ordered to address the issue identified in the Court's June 8, 2016 Order.[11] In its Remand Brief, Agency argued that its action of reducing Employee's rank to lieutenant was done so in accordance with GO 120.21 and that it did not violate DCMR § 1613.2. It further stated that the Chief of Police "in denying Employee's appeal, did not increase the penalty. Instead the [Chief] 'remand[ed] the case for an alternative process,' a trial board and recommendation of termination." Agency further questioned the applicability of DCMR § 1613.2 to the instant matter because it believed that Chief Ramsey was the appeals official, not the deciding official. In addition, it posited that the language contained in § 1613.2 and GO 120.21 was "congruent and harmonious in allowing a matter to be remanded for further consideration." As a result, Agency reiterated its position that Employee's termination was appropriate.[12]

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[10] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) (D.C. Super. Ct. 2014).
[11] *Post-Conference Briefing Order* (November 9, 2016).
[12] *Agency's Brief Following Remand from the District of Columbia Superior Court* (November 10, 2016). *Also See Agency's Reply to Employee's Brief on Remand in Response to the Superior Court Decision* (December 2, 2016).

In response, Employee contended that the Chief of Police lacked the authority to amend the Assistant Chief of Police's findings and increase the penalty. According to Employee, Agency's General Orders are merely internal guidelines that do not supersede District regulations. She further stated that the Chief of Police was limited to promulgating orders which are consistent with District law. Consequently, Employee requested that Agency's termination action be reversed.[13]

The AJ issued his Second Initial Decision on Remand on December 12, 2016. He disagreed with Agency's argument that DCMR § 1613.2 and GO 120.21 were congruent because Chief Ramsey was not the deciding official as envisioned by the regulations. According to the AJ, while Chief Ramsey remanded the matter for a hearing before the Trial Panel, it was Chief Lanier who ultimately acted as a deciding official in this case. He further stated that it was evident that § 1613.2 and GO 120.21 contained conflicting language and that an agency's internal orders cannot override municipal regulations. Thus, in response to Superior Court's Order, the AJ concluded that Chief Lanier, acting as the ultimate decision maker, was legally prohibited from increasing the proposed penalty levied against Employee from demotion to termination. As a result, the AJ determined that the imposed penalty of termination was an abuse of discretion and that there was substantial evidence in the record to support the penalty of demotion. Consequently, Agency's termination action was reversed and Employee was ordered to be reinstated and demoted to the rank of lieutenant.[14]

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[13] *Employee's Brief on Remand in Response to the Superior Court's Decision* (November 14, 2016). Employee subsequently filed a Reply Brief to Agency's November 10, 2016 submission, wherein she argued that Agency's brief was non-responsive to the question presented by D.C. Superior Court in its Remand Order. In addition, Employee restated her position that MPD's General Order was inconsistent with DCMR § 1613.2. *Employee's Reply Brief* (December 1, 2016).

[14] *Second Initial Decision on Remand* (December 12, 2016).

Agency filed a Petition for Review with OEA's Board on January 17, 2017. It insists that the Second Initial Decision on Remand was based on an erroneous interpretation of DCMR § 1613.2 because the evidence shows that neither Chief Ramsey nor Chief Lanier increased the penalty of termination. According to Agency, the penalty of termination was recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett. Agency does not dispute that statutes and regulations override internal general orders. However, it argues that regulations and statutes supersede internal general orders only to the extent that the specific provision is in conflict with the regulation. Thus, Agency believes that Chief Ramsey acted in accordance with GO 120.21(VI)(L)(4) when he remanded Employee's case for an alternative process and that the subsection he relied upon does not conflict with § 1613.2. Consequently, it opines that Employee's termination was proper and requests that the Petition for Review be granted.[15]

In response, Employee submits that Agency's Remand Brief and Petition for Review are not responsive to the question presented by D.C. Superior Court. Employee states that Agency's arguments go beyond the purview of the specific order to be addressed on remand. She further argues that Agency's attempts to make semantical distinctions regarding Chief Ramsey's actions are "meaningless" because Judge Okun has already concluded that Ramsey increased Employee's penalty. Moreover, Employee reiterates her argument that the Chief of Police is the deciding official for every Agency disciplinary action. As a result, she contends that the language contained in GO 120.21 directly conflicts with DCMR § 1613.2 and that the maximum penalty Agency could impose was a demotion. Therefore, Employee asks this Board to deny Agency's Petition for Review.

[15] *Agency's Petition for Review* (January 17, 2017).

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
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> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

D.C. Superior Court's Instructions on Remand

In his June 8, 2016, Order, the Honorable Judge Robert Okun remanded this matter to the AJ to specifically address the following question: "[d]id District of Columbia Regulation § 1613.2 prohibit *Chief Ramsey* from increasing Petitioner's penalty?" (emphasis added). According to Judge Okun, the AJ failed to address the issue of whether Agency's GO was superseded by the relevant DCMR regulation. He went on to state that "[t]he court finds nothing in the administrative record or the IDR to suggest that OEA concluded that General Order 120.21 granted Chief Ramsey the authority to act in a way prohibited by the municipal regulations of the District of Columbia."[16] As such, Agency's argument that the penalty of termination was actually recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett, is non responsive to the question presented on remand because it exceeds the purview of Judge Okun's instructions. Accordingly, D.C. Superior Court has already determined that the

[16] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) at 11.

Chief of Police acted as the final decision maker in this case. Therefore, we must determine if the AJ's findings regarding the conflict between GO 120.21 and DCMR § 1613.2 are supported by substantial evidence and if they were based on an erroneous interpretation of statute or regulation.[17]

General Order 120.21 and D.C. Municipal Regulation § 1613.2

At the time Employee committed the misconduct, Agency's GO 1201.1 was the current internal order in place. GO 1201.1 authorized the Chief of Police to sustain a proposed penalty, reduce it, or remand the matter for further consideration. Under 1201.1, the penalty imposed could not be increased from the penalty originally proposed. On April 13, 2006, less than two weeks after the alleged acts occurred, but before Agency issued its final notice to Employee, GO 120.21 was enacted to replace its predecessor.[18] GO 120.21(VI) states the following in part:

> H. Notice of Proposed Adverse Action.
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> > (1) The Assistant Chief…shall issue a Notice of Proposed Adverse Action. The member shall be given an opportunity to respond to the notice, in writing, within fifteen (15) business days, and the Assistant Chief, OHS, shall consider the member's response before rendering a written decision.
> >
> > (2) The Notice of Proposed Adverse Action issued by the Assistant Chief…shall include:
> > a. Charges

[17] It important to distinguish between a proposing official and a deciding official. In *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998), the D.C. Court of Appeals sought to clearly define the term "penalty proposed" within the parameters of § 1614.4, a previous, but similar, version of § 1613.2. The Court deferred to OEA's interpretation of the term, holding that the penalty proposed refers to the initial penalty suggested by the proposing official, not the recommendation of the assigned disinterested designee. In Agency's June 2, 2006 Notice of Proposed Adverse Action, Assistant Chief of Police, Shannon Cockett, recommended that Employee be demoted to the rank of lieutenant. Thus, the proposing official in this case was Assistant Chief Cockett, not the Trial Panel, as Agency suggests. In contrast, DCMR § 1699 defines the term deciding official as the individual who issues a final decision on a disciplinary action in accordance with § 1623. Moreover, Agency's own GO 120.21 IV(A) states that "[t]he Chief of Police is the designated final authority with respect to discipline." Part B further provides that the "Chief of Police shall *review and decide* all appeals of disciplinary actions. The decision of the Chief of Police, or his/her designee, any appeals of Corrective Actions shall be the final administrative review of these actions."

[18] In D.C. Superior Court's first Order Reversing Agency Decision, Judge Macaluso determined that the Chief of Police correctly applied GO 120.21 to Employee's case because that was the internal regulation that was in place at the time she filed her appeal.

b. Specifications(s)
c. The proposed action; and
d. A copy of the investigative report

L. Adverse Action Appeals

(4) When an appeal is made, the appropriate papers shall be forwarded to the Chief of Police, who may affirm or modify the findings and/or the penalty imposed, remand the case to a previous step in the process, or remand the case for an alternative process, as he/she deems appropriate.

(5) The Chief of Police *may impose a higher penalty than recommended* by the Hearing Tribunal, *or the Assistant Chief, OHS*. (emphasis added)

In contrast, Chapter 16 of the District of Columbia Regulations (formally 47 D.C. Reg. 7094 (September 1, 2000)) limits a deciding official to the following:

Duties and Responsibilities of the Proposing Official: General Discipline

1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

1613.2 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*. (emphasis added).

Accordingly, under GO 120.21, the Chief of Police is permitted to impose a higher penalty than was recommended by the proposing official. Conversely, under DCMR § 1613.2, the deciding official is prohibited from increasing the penalty recommended by the proposing official. 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 (D.C. 2013), the

D.C. Court of Appeals held that an MPD General Order "essentially serves the purpose of an internal operating manual," and "do[es] not have the force or effect of a statute or an administrative regulation.…"[19] Moreover, in *Flores v. Metropolitan Police Department*, OEA Matter No. 1601-0131-11, *Opinion and Order on Petition for Review* (March 29, 2016), this Board held that Agency's General Order 120.21 is an internal guideline that is superseded by a conflicting municipal regulation.

Based on the foregoing, this Board finds that the AJ correctly determined that DCMR § 1613.2 supersedes Agency's internal operating procedure, GO 120.21. After Employee appealed the proposing official's recommendation of demotion, the Chief of Police was permitted to sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice. Instead, former Chief Ramsey issued a letter on August 29, 2006 in response to Employee's proposed demotion in which he both denied her appeal and increased the penalty to termination. Chief Ramsey further designated the letter as the "final Agency action in this matter." As such, Chief Ramsey impermissibly increased the proposed penalty in violation of § 1613.2. There is no language in GO 120.21 which grants the Chief of Police the authority to act in a way that is prohibited by the municipal regulations of the District of Columbia. Therefore, the AJ correctly held that Agency erred in imposing the penalty of termination. Accordingly, the Initial Decision is based on substantial evidence and was not an erroneous interpretation of statute or regulation. Consequently, Agency's Petition for Review must be denied.

[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).

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.