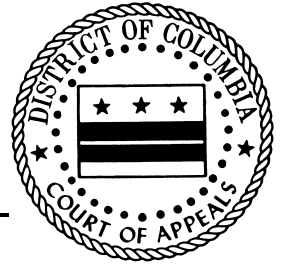


Appeal No. 22-CV-220



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**DISTRICT OF COLUMBIA
COURT OF APPEALS**

CRAIG ROYAL

Appellant,

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

Appellee.

On Appeal from the
Superior Court of the District of Columbia
Civil Division

BRIEF FOR APPELLANT CRAIG ROYAL

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JURISDICTIONAL STATEMENT

This court has jurisdiction under D.C. Code § 11-721(a)(1) as the appeal is taken from the final order of the Superior Court of the District of Columbia.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Office of Employee Appeals exceeded its jurisdiction by sustaining a disciplinary action based on charges that were different from those cited by the agency in its final decision.

2. Whether the Office of Employee Appeals erred in sustaining an inefficiency charge premised on three prior adverse actions, when one of those prior actions was reversed by OEA.

STATEMENT OF THE CASE

Lieutenant Craig Royal of the Metropolitan Police Department (“MPD”) appealed a 20-day suspension for an off-duty use of force incident in 2015. At the time, Lt. Royal was already facing a 15-day suspension for an unrelated incident. The earlier suspension was eventually overturned and is not directly at issue in this appeal, but it is necessary context for the 20-day suspension that Lt. Royal asks this Court to overturn.

On November 12, 2015, the Director of MPD’s Disciplinary Review Branch proposed the termination of Lt. Royal based on seven charges. Lt. Royal requested an Adverse Action Hearing Panel to contest the proposed termination. The Panel found Lt. Royal “not guilty” of five of the charges, but “guilty” of two, one for

escalating the conflict and one for “inefficiency,” a cumulative charge for having previous misconduct charges. On June 27, 2015, the Director of MPD’s Human Resource Management Division issued a final agency decision suspending Lt. Royal for 20 days based on the two charges. Lt. Royal appealed that decision to the Office of Employee Appeals (“OEA”).

At OEA, Lt. Royal moved to consolidate the appeal of his 20-day suspension with his already pending appeal of the 15-day suspension. The consolidation was necessary because the inefficiency charge was premised on the existence of three prior adverse actions, one of which was the 15-day suspension.

Senior Administrative Judge Joseph Lim reversed the 15-day suspension entirely. Judge Lim also reversed the escalation charge supporting the 20-day suspension. But not only did Judge Lim uphold the inefficiency charge, he found that the agency proved two other charges that had been proposed but were not included as a basis for MDP’s final decision. Based on these other charges (and the inefficiency charge), Judge Lim upheld the 20-day suspension.

Lt. Royal appealed Judge Lim’s decision to the D.C. Superior Court, arguing that OEA did not have jurisdiction to impose charges that were not brought by the agency. Lt. Royal also argued that Judge Lim erred in sustaining the inefficiency charge, which was based, in part, on the 15-day suspension that he reversed.

On March 7, 2022 the Superior Court denied Lt. Royal's Petition for Review. On March 29, 2022 Lt. Royal noted his appeal.

STATEMENT OF THE FACTS

Lt. Royal joined MPD on September 24, 1990, as a patrol officer. A87. In 2010, he purchased an apartment building at 3536 Center Street, N.W., Washington, D.C. A88. The building has 26 apartments and a small parking area for residents. *Id.* Lt. Royal has resided in the building with his family since 2012. *Id.* In early 2015, MPD initiated two disciplinary actions against Lt. Royal for incidents that occurred at his apartment building, one in February 2015 and one in April 2015.

February 7, 2015 – 15-Day Suspension

On February 7, 2015, Lt. Royal was off duty at his residence when he heard a woman's persistent screaming from one of the apartments. A90. Believing there might be an assault in progress, Lt. Royal responded to the apartment where he discovered his tenant with another man and a woman. *Id.* Once inside, Lt. Royal assessed that no one was hurt and that the screaming was due to an argument between one of the men and the woman. A50-51; A90. After evaluating the scene and helping to deescalate the argument, Lt. Royal escorted the woman out of the building at the request of his tenant. A91. The woman later called the police to report the incident. A92.

Following this incident, the Department served Lt. Royal with notice of a proposed 15-day suspension. A98. The Department accused Lt. Royal of failing to determine whether a crime had been committed, failing to obtain a translator for those involved, and taking police action without notifying on-duty members of the department. A98-99. Lt. Royal responded in writing and on August 27, 2015, MPD issued a final notice of adverse action suspending him for 15 days. A201. Lt. Royal appealed the suspension to the Chief of Police but was unsuccessful. *Id.* He then filed an appeal at OEA. A102.

April 16, 2015 – 20-Day Suspension

In April 2015, Lt. Royal was involved in another off-duty incident at his residence. At the time, Lt. Royal's neighborhood was undergoing extensive construction. Construction workers from job sites in the area had been parking illegally in the spaces designated for Lt. Royal's residents. A103.

On April 16, 2015, Lt. Royal saw a construction vehicle park in one of the apartment building's spots. A235. Lt. Royal directed the man, later identified as Theophilis Lewis, to move his vehicle. *Id.* Mr. Lewis blew him off, saying he would only be there for a second. *Id.* Lt. Royal replied that he could not park there for any period of time and demanded that he move his vehicle immediately. *Id.* Mr. Lewis ignored Lt. Royal and walked toward the construction site. *Id.*

After ten minutes, Lt. Royal decided to block the vehicle with his parent's minivan so that it could be ticketed and towed. A236. Lt. Royal then went back inside to call the police. A104; A236. While he watched from his apartment, Mr. Lewis returned with another man, Christian Johnson, and maneuvered the truck around Lt. Royal's van. A236-37. He saw the van move as if it had been struck, and the truck drove away. A237. Lt. Royal went downstairs to assess the damage to the van. *Id.* At the time, he was carrying his "less-than-lethals"—his Department issued baton and his oleoresin capsicum ("OC") spray. A104.

When he arrived downstairs, Lt. Royal saw Mr. Lewis's truck around the corner. A238. He noted the license plate number and called 911 to report the crash. A239. While on the phone with 911, Mr. Lewis emerged from his truck and confronted Lt. Royal. *Id.* He yelled and moved aggressively towards Lt. Royal. A239-40. The 911 recording confirms that Lt. Royal ordered the men to "step away" from him, repeating the order five times. A105. Mr. Lewis and Mr. Johnson can also be heard shouting on the 911 recording. A106.

While ordering the men to stop, Lt. Royal backed away from the men who continued to aggressively approach him. A241. In an attempt to diffuse the situation, Lt. Royal displayed his baton and OC spray. A240; A241. Mr. Lewis then threatened to "whip [Lt. Royal's] ass" and kept advancing. A241. Fearful and unable to deescalate the situation, Lt. Royal discharged his OC spray when Mr.

Lewis, still approaching, was three feet away. A243. The OC spray malfunctioned and Mr. Lewis appeared unharmed. *Id.*

Mr. Lewis then returned to his vehicle and rummaged through the back seat area. A246. Lt. Royal, fearing Mr. Lewis was searching for a weapon, retreated toward his apartment building and attempted to call 911, but it was busy. A107; A246. Lt. Royal then entered his apartment where he used his police radio to report his use of force and ask for assistance. *Id.* MPD officers reported to the scene and completed a procedurally deficient investigation into the incident. A223-24.

In November 2015, MPD's Disciplinary Review Branch proposed the termination of Lt. Royal. A304. The proposal was based on seven charges of misconduct for: making false statements (charge 1); failing to follow the use of force continuum (charge 2); using OC spray without legal cause to detain (charge 3); using OC spray in a manner that escalated the conflict (charge 4); failing to notify MPD of his off-duty police activity (charge 5); failing to determine whether medical attention was needed (charge 6); and "inefficiency" based on three prior sustained complaints (charge 7).¹ *Id.*

¹ On January 26, 2016, MPD issued an Amended Notice of Proposed Adverse Action. A313. MPD originally proposed the inefficiency charge and noted that three prior complaints constituted *prima facie* evidence because the infractions were incurred within 12 months. *Id.* The amended notice corrected this

Rather than responding in writing as he had before, Lt. Royal requested an internal hearing before an Adverse Action Panel to contest the proposed termination. A134. The hearing panel convened on April 19 and May 2, 2016. A319. After hearing witness testimony and reviewing all the evidence, the panel found cause to sustain only two of the charges: using OC spray in a manner that escalated conflict (charge 4) and “inefficiency” based on three prior disciplinary actions (charge 7), one of which was the 15-day suspension described above. *Id.* The panel recommended that the proposed termination be reduced to a 25-day suspension. A362.

On June 27, 2016, the Director of Human Resource Management issued a Final Notice of Adverse Action suspending Lt. Royal for 20 days based on the two charges recommended by the panel. A363. Lt. Royal appealed the adverse action to Acting Chief of Police Peter Newsham. On April 12, 2017, Chief Newsham denied the appeal, agreeing with the panel’s recommendation, and sustained the 20-day suspension based on the two charges. A370. Lt. Royal timely appealed the decision to OEA. A006.

to note that the three complaints occurred over a span of 16 months. *Id.* The amended charged noted that, “these complaints, while not prima facie evidence of inefficiency, point to a pattern of sustained misconduct which in and of itself is evidence of inefficiency.” *Id.*

OEA Decision

At the time that Lt. Royal appealed his 20-day suspension, his 15-day suspension was still pending before OEA. The parties successfully moved to consolidate the two matters. A85. At issue was whether there was sufficient evidence to support the charges and whether the penalties were appropriate. *Id.*

Judge Lim held an evidentiary hearing on January 24, 2019, and March 8, 2019. A434. The parties then submitted post-hearing briefs. A372; A400. Lt. Royal argued that the 15-day suspension should be reversed because he made a reasonable assessment of the scene and did not violate MPD policy. A393-98. He argued that the escalation charge supporting the 20-day suspension should be reversed because his use of OC spray was consistent with MPD's use of force policy and even if it was not, the OC spray malfunctioned and did not discharge. A386-89. He also argued, among other things, that the "inefficiency" charge constituted administrative double-jeopardy and that one of the prior disciplinary actions was based on an advisory training bulletin, not a compulsory general order. A389-93.

MPD's post-hearing brief argued that Lt. Royal improperly escalated the second incident by failing to identify himself as a police officer and that his use of OC spray was objectively unreasonable. A425-29. MPD also argued that Lt.

Royal’s three sustained disciplinary actions—including the 15-day suspension—were sufficient to sustain the inefficiency charge. A430-32.

Judge Lim issued an Initial Decision on April 29, 2019. A434. Judge Lim found Lt. Royal’s testimony to be credible, consistent, and forthright. A446. Judge Lim found that there was no evidence to support the charges underlying the 15-day suspension. A446-47. Judge Lim also concluded that Lt. Royal did not escalate the April 2015 conflict, but instead “found himself in reasonable fear of imminent attack when Johnson and one or two other men approached him in a threatening manner.” A449.

However, Judge Lim inexplicably addressed the five other proposed charges that were not included as a basis for the final agency decision. A447-50. Judge Lim proceeded to find that evidence supported two of these other proposed charges against Lt. Royal: charge 2, for failing to follow the use of force continuum, and charge 3, for using the OC spray without legal cause to detain the men. A448-49. Judge Lim also upheld the inefficiency charge based on three prior disciplinary actions, *including* the 15-day suspension he had just reversed. A450. Judge Lim upheld the 20-day suspension. A451.

Superior Court Decision

Lt. Royal filed a Petition for Review of OEA's decision to the Superior Court of the District of Columbia.² Royal Pet. for Review. Lt. Royal argued that Judge Lim's decision was erroneous because OEA lacked jurisdiction over the two charges that were not included as a basis for the final agency decision and that the inefficiency charge could not stand without the underlying 15-day suspension. Royal Br. at 11-18. MPD, as intervenor, filed a brief in opposition to Lt. Royals' petition. MPD Br. in Opp'n to Pet. Even though MPD had previously determined that there was no cause to discipline Lt. Royal for charges 2 and 3, it took a different position on appeal. MPD argued that because Judge Lim's review was *de novo*, he could sustain the suspension based on any cause, and that he was correct to find cause to support charges 2 and 3. *Id.* at 19. MPD further argued that the inefficiency charge was supported by substantial evidence because two well-founded complaints were sufficient to constitute inefficiency under MPD's General Order. *Id.* at 21.

The Honorable Fern Flanagan Saddler denied Lt. Royal's Petition for Review. A454. Recognizing the absence of authority directly on point, the court

² MPD filed a Petition for Review of OEA's decision reversing the 15-day suspension. That petition was dismissed as untimely. A002.

found that Judge Lim had authority under District of Columbia Municipal Regulation § 624.2 to “frame the issues as appropriate,” and that he framed the issue of cause as, “whether ‘Agency has cause for adverse action against employee.’” A463. This, together with OEA’s broad authority under District of Columbia Code § 1-606.03 to “uphold, reverse, or modify” decisions, gave Judge Lim authority to uphold the suspension based on any “cause.” *Id.*

The court also upheld Judge Lim’s decision to sustain the inefficiency charge. A464. The court reasoned that although Judge Lim reversed the 15-day suspension, he also found Lt. Royal “guilty” of two new use of force charges in the 20-day suspension case. A467. The court held that with these new charges, in addition to the other two prior complaints, there was “significant evidence to leave Judge Lim’s decision undisturbed.” *Id.*

SUMMARY OF THE ARGUMENT

The Superior Court erred in affirming OEA’s decision finding cause to uphold MPD’s 20-day suspension of Lt. Royal. OEA’s decision was based on three charges: charge 2, for failing to follow the use of force continuum; charge 3, for using OC spray without legal cause to detain the suspects; and charge 7, for inefficiency.

MPD determined on its own that Lt. Royal was “not guilty” of charges 2 and 3, and did not use those charges as a basis for the suspension. By looking to the

original disciplinary proposal, and finding cause to support charges that MPD had abandoned, OEA exceeded its jurisdiction which is limited to review of final agency decisions. Moreover, by upholding the suspension based on different charges, on which neither party presented any evidence or argument, OEA deprived Lt. Royal of his due process right to notice of the charges and an opportunity to respond to them.

The Superior Court also erred in upholding charge 7, for inefficiency. That charge was based on Lt. Royal having three sustained adverse actions, including the 15-day suspension related to the February 2015 domestic dispute. When OEA found no cause to sustain the 15-day suspension and reversed that disciplinary action, there was no longer any cause to uphold the inefficiency charge. It was arbitrary and capricious for OEA to uphold the charge by reasoning that Lt. Royal did not dispute that he had three prior offenses on his record. This was plainly wrong, as he had successfully appealed the 15-day suspension. Furthermore, the remaining prior adverse actions were not only insufficient to support the charge, they were time-barred by D.C. Code § 5-1031, which requires the agency to initiate disciplinary action within 90 business days.

The Superior Court then erred in finding that charges 2 and 3 could nevertheless take the place of the 15-day suspension as the third “prior.” The Superior Court and OEA were limited to considering the charge as articulated by

MPD in the final agency decision. In any event, the reformulated charge would also be barred by the 90-day rule under D.C. Code § 5-1031.

ARGUMENT

I. STANDARD OF REVIEW.

Although this case comes before the Court of Appeals from a Superior Court decision, the scope of review is “precisely the same” as if the case came directly from the agency. *District of Columbia v. King*, 766 A.2d 38, 44 (D.C. 2001).

Upon review of an Office of Employee Appeals decision, this Court applies the following standard:

Thus, in final analysis, confining ourselves strictly to the administrative record, we review the OEA’s decision, *not the Superior Court’s*, and we must affirm the OEA’s decision so long as it is supported by substantial evidence in the record *and otherwise in accordance with the law*.

Sims v. District of Columbia, 933 A.2d 305, 310 (2007) (quoting *Settlemire v. District of Columbia Office of Employee Apps.*, 898 A.2d 902, 905 (D.C. 2006) (emphasis added)). Therefore, this Court “examine[s] the agency record to determine whether there is substantial evidence to support OEA’s findings of fact, or whether OEA’s action was arbitrary, capricious, or an abuse of discretion.” *King*, 766 A.2d at 44 (quoting *Office of D.C. Controller v. Frost*, 638 A.2d 657, 660-61 (D.C.1994)).

The Court reviews questions of law *de novo*. *Placido v. District of Columbia Dep’t of Emp. Serv.*, 92 A.3d 323, 326 (D.C. 2014) (citing *Washington*

v. District of Columbia Dep't of Pub. Works, 954 A.2d 945, 948 (D.C. 2008)). An agency's interpretation of its own regulation is generally given deference, unless the interpretation is "plainly erroneous or inconsistent with the regulations." *Id.* (citing *District of Columbia Office of Tax & Revenue v. BAE Sys. Enter. Sys.*, 56 A.3d 477, 481 (D.C. 2012)). This court will only defer to an agency's interpretation of its governing statute, "so long as that interpretation is reasonable and consistent with the statutory language." *District of Columbia v. Davis*, 685 A.2d 389, 393 (D.C. 1996). However, this Court is "vested with the final authority on issues of statutory construction." *Id.*

II. OEA EXCEEDED ITS JURISDICTION BY CONSIDERING CHARGES OUTSIDE THE FINAL AGENCY DECISION.

The Superior Court was incorrect to hold that Judge Lim had authority to uphold a disciplinary action based on charges that were not part of the final agency action. By doing so, the Court permitted Judge Lim to stand in the shoes of the employer and discipline an employee for conduct that the employer did not find sanctionable.

As the Superior Court recognized, "administrative agencies typically have very limited jurisdiction, the confines of which are determined by a jurisdiction's respective legislature." A459. D.C. Code § 1-606.03(b) provides that "[i]n any appeal taken pursuant to this section, the Office shall review the record and uphold, reverse, or modify the decision of the agency." D.C. Code § 1-606.03(b). The

District of Columbia Municipal Regulations (“DCMR”), enacted by OEA through their rulemaking authority, give further guidance on OEA’s jurisdictional authority, stating that “any District of Columbia government employee may appeal a final agency decision affecting a suspension for ten days or more.” 6-B D.C.M.R. § 604.1. Simply put, OEA’s jurisdiction is limited to reviewing *final agency decisions*.

The DCMR defines a final agency decision as “a written document from a District agency which contains the cause of action taken by the District agency against an employee . . .” 6-B D.C.M.R. § 699.1. Here, the final agency decision was the June 27, 2016 memorandum from the Director of the Human Resource Management Division bearing the subject line, “Final Notice of Adverse Action.” A363. That memorandum advised Lt. Royal that his suspension would begin within 30 days unless he appealed the decision to the Chief of Police. A367. The cause of action taken by MPD against Lt. Royal, as set forth in that final agency decision, was a 20-day suspension based on two charges: using OC spray in a manner that escalated conflict (charge 4) and inefficiency (charge 7). Indeed, when Acting Chief Newsham denied Lt. Royal’s appeal, he wrote:

On June 27, 2016, Final Notice of Adverse Action was issued to Lieutenant Royal on these two charges. Suspension for 20 days is the proposed penalty on Charges 4 and 7.

* * *

Charges 4 and 7 will be sustained against Lieutenant Royal and he will be suspended for 20 days. This constitutes final agency action in this matter.

A370-71. MPD took no other action against Lt. Royal.

The charges contained in the proposal by the Disciplinary Review Branch are nothing more than an initial recommendation made prior to hearing the employee's defense. The Department itself concluded, after hearing Lt. Royal's defense, that charges 1 through 3 and charge 6 were not well-founded. As a result, those charges were not part of the final agency decision and were not part of the "cause of action taken by the District agency against an employee." MPD explicitly declined to base its suspension of Lt. Royal on those charges, noting that he was "not guilty" of the charges and that they resulted in "no penalty." A367. It makes no sense to permit OEA to suspend an employee for conduct that the agency itself did not find sanctionable.

The most analogous case that either party has found is *In re Employee v. Metropolitan Police Department*, OEA Matter No. 1601-0014-21, Initial Decision at 2, n.3 (August 22, 2022). There, an MPD employee received a 25-day suspension based on three charges. All three were included in the final decision, but the employee appealed to the Chief of Police, who dismissed one and reduced the penalty. *Id.* There, as here, the case arrived to OEA with only two of the several proposed charges remaining. In the Initial Decision, Administrative Judge

Ariel Cannon did not review every charge included in the proposal, but limited the review to those which the Chief upheld. In a footnote, AJ Cannon wrote that since the Chief “dismissed charge No. 2,” “it will not be addressed here.” Neither party has been able to find a single case where OEA did the opposite—upholding a disciplinary action based on different charges than those the agency relied upon.

Moreover, as Judge Lim himself has recognized, the Court of Appeals “has made clear that employees can be expected to defend only against charges which were actually leveled against them.” *Tonia Adams v. Department of Corrections*, OEA Matter No. 1601-0016-13, Initial Decision at 7 (Dec. 19, 2014) (citing *Frost*, 638 A.2d at 662); *Johnston v. Gov’t Printing Off.*, 5 M.S.P.R. 354, 357 (1981) (“Nor will the Board sustain the action on the basis of charges that could have been levied, but were not. To do otherwise would violate the basic procedural rights of employees.”) In *Frost*, an employee was proposed for termination after he changed the access code to the agency’s computer system and refused to share the new code with his supervisor. *Frost*, 638 A.2d at 659. The agency claimed this impeded its ability to produce financial forecasts. *Id.*

The agency charged the employee with “[m]isuse, mutilation or destruction of District property or funds, to wit, willful mutilation and alteration of official Government records.” *Id.* OEA found insufficient evidence to prove the employee mutilated or altered the records, in part because the employee was authorized to

change the code and caused no harm to the agency. *Id.* Nevertheless, applying a definition of “misuse” that included “concealment,” OEA upheld the charge. *Id.* at 660. In other words, “OEA held that the misuse charge was proven, based on a different ground.” *Id.* at 662. However, because it concluded “that the alternative basis relied upon by OEA cannot be supported,” the Court did not address whether this was permissible. *Id.*

These authorities, while not directly on point, are instructive. They show that an employee is entitled to know “the reasons, specifically and in detail, for the proposed action,” so the employee has “a fair opportunity to oppose the proposed” action. *Id.* Indeed, the Superior Court wrote that OEA’s authority is not without limits; “imposing sanctions for charges that were *never* brought before the agency could likely not be construed as ‘upholding, reversing, or modifying’ an agency’s decision, and would likely run afoul of D.C. Code § 1-606.03.” A463.

But permitting OEA to impose charges that were not included in the final agency decision is no different than permitting an agency to impose charges that were not included in the proposal. This is particularly true because Judge Lim did not simply rely on the record developed through the Adverse Panel Hearing but held a new evidentiary hearing at OEA and considered the charges *de novo*. Neither party had notice that Judge Lim was even considering the other charges. MPD, as the party with the burden of proof, presented no evidence or argument at

the hearing to support charges 2 or 3. 6-B D.C.M.R. § 631.2; A372; A400.

Neither party addressed those charges in their post-hearing briefs. *Id.* Judge Lim was limited to addressing the material issues before him, and those issues were whether there was cause to support charges 4 and 7. 6-B D.C.M.R. § 634.2(a).

The Superior Court rightly expressed “some concern” about the fact that charges 2 and 3 were not briefed at OEA. It said that “courts look unfavorably on any process, judicial or administrative, that constitutes prejudice or undue surprise against any party.” A463. But the court then reasoned that because Judge Lim framed the issue as whether “Agency has cause for adverse action against” him, Lt. Royal had “fair warning that the entirety of the [MPD’s] board decision was subject to review.” *Id.* But this gives too broad a meaning to the phrase “cause for adverse action.” It cannot mean that Judge Lim may find *any* cause that might justify a suspension; it must be limited to the cause asserted by MPD as the reason for the adverse action.

Moreover, the framing of the issue does not mitigate the court’s critical view of undue surprise. The court’s finding that the parties had “fair warning” is belied by the fact that neither briefed the issue and neither could identify a single case where OEA had done this in the past. Lt. Royal never had an opportunity to explain to Judge Lim why those charges should not be upheld. Judge Lim, having heard arguments and evidence and reviewed written briefs, never told the parties

he was considering other charges. Judge Lim cannot reframe the issue such that he exceeds his jurisdiction.

III. OEA ERRED IN SUSTAINING THE INEFFICIENCY CHARGE AFTER REVERSING THE 15-DAY SUSPENSION.

The Superior Court also erred in affirming Judge Lim’s decision to uphold the inefficiency charge after reversing the 15-day suspension.

MPD defines inefficiency as “repeated and well-founded complaints from superior officers, or others, concerning the performance of police duty, or the neglect of duty.” A80-81. The General Order clarifies what is required to establish complaints as “repeated and well-founded”: “Three sustained adverse actions within a 12-month period upon charges involving misconduct . . . shall be prima facie evidence of inefficiency.” *Id.* The charge was based on three adverse actions: (1) a 3-day suspension in July 2014; (2) a 2-day suspension in January 2015; and (3) the 15-day suspension related to the February 2015 domestic dispute. A313-14; A366.

Judge Lim erred by not reversing the inefficiency charge when he reversed the underlying 15-day suspension. Without the third action, there was no longer prima facie evidence of inefficiency. *See Urb. Dev. Sols., LLC v. D.C.*, 992 A.2d 1255, 1266 (D.C. 2010) (“[I]f it is clear that the plaintiff has not established a prima facie case, [we] must grant judgment as a matter of law for the defendant”) (quoting *Bd. of Trustees of Univ. of D.C. v. DiSalvo*, 974 A.2d 868, 870 (D.C.

2009)). The error appears to have been an oversight, as Judge Lim wrote that Lt. Royal had “three complaints lodged against him,” that he “does not deny having these priors in his work record,” and therefore, that he was “guilty of Inefficiency.” A450. Judge Lim never even addressed the fact that he had just dismissed one of the three complaints. *Id.*

The two remaining priors were insufficient to support the inefficiency charge both under the plain language of the General Order, which requires three sustained adverse actions, and because the charges were too stale. Pursuant to D.C. Code § 5-1031:

[N]o corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date the [MPD] had notice of the act or occurrence allegedly constituting cause.

D.C. Code § 5-1031(a-1)(1). OEA has held that this 90-day rule “is a mandatory, rather than directory provision,” and that “any violation of the statute by an agency would result in a reversal of the adverse action.” *Sholanda Miller v. D.C.*

Metropolitan Police Department, OEA Matter No. 1601-0325-10, *Opinion and Order on Petition for Review* (Apr. 14, 2015) (alteration in original); *Stanley Barker v. Metropolitan Police Department*, OEA Matter No. 1601-0143-10, Initial Decision (November 28, 2012).

It is undisputed that the first two priors were for incidents that occurred on October 24, 2013 and June 11, 2014. A360; A392. The inefficiency charge was not proposed until November 12, 2015, more than 350 business days after the June 2014 incident. A125. Therefore, even if an inefficiency charge could be premised upon two adverse actions, rather than three, the charge would fail as a matter of law under D.C. Code § 5-1031.³

Rather than remand the matter to OEA for Judge Lim to explain the discrepancy in reversing the 15-day suspension while also including it as part of the inefficiency charge, the Superior Court offered its own justification. Judge Saddler held that there was “significant evidence to leave Judge Lim’s decision undisturbed” because “Judge Lim still had his guilty finding from Counts 2 and 3, as well as the other well-founded complaints submitted by Petitioner’s supervisors to consider.” A467.

The *post hoc* substitution of charges 2 and 3 for the prior 15-day suspension fails for several reasons. First, nothing in the record suggests that this was Judge Lim’s rationale for sustaining the charge. “Generally, ‘an administrative order

³ Furthermore, the fact that MPD did not bring disciplinary charges for inefficiency based on the October 2013 and June 2014 complaints demonstrates that MPD did not believe those charges alone constituted inefficiency. Indeed, the agency’s own witness testified before Judge Lim that the charges were “not that serious.” A173-74.

cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” *Apartment & Off. Bldg. Ass’n of Metro. Washington v. Pub. Serv. Comm’n of D.C.*, 129 A.3d 925, 930 (D.C. 2016) (quoting *NBC v. District of Columbia Comm’n on Human Rights*, 463 A.2d 657, 663 (D.C.1983)). “[I]f a party asks this Court to affirm an agency order based upon a ground that was not considered by the agency, we ordinarily must remand for the agency to consider the new ground in the first instance.” *Id.* (citing *Jones v. District of Columbia Dept. of Emp’t Servs.*, 519 A.2d 704, 709 (D.C.1987)).

Second, as Judge Lim previously held, while an agency “could have brought a more appropriate charge against Employee which would cover the facts that occurred, the District of Columbia Court of Appeals has made clear that employees can be expected to defend only against charges which were actually leveled against them.” *Tonia Adams v. Department of Corrections*, OEA Matter No. 1601-0016-13, Initial Decision at p. 7 (Dec. 19, 2014) (citing *Frost*, 638 A.2d at 662; *Johnston*, 5 M.S.P.R. at 357 (“Nor will the Board sustain the action on the basis of charges that could have been levied, but were not. To do otherwise would violate the basic procedural rights of employees.”) Charges 2 and 3 were included in the very same disciplinary proposal as the inefficiency charge. If MPD wished to use those charges to support the inefficiency charge, it could have simply written

charge 7 to include them. But it chose not to do so and, as a result, Lt. Royal was never on notice that charges 2 and 3 could be used to find him guilty of inefficiency. *See Pope v. U.S.P.S.*, 114 F.3d 1144, 1148 (Fed. Cir. 1997) (due process requires that charges be sufficiently detailed to allow the employee to make an informed reply); *Sherman v. Alexander*, 684 F.2d 464, 471 (7th Cir. 1982) (“The purpose of the specificity requirement is ‘to allow the employee to make an informed reply,’ to the charges against him”). The Superior Court cannot, seven years and several levels of appeal later, change the factual underpinning of the charge.

Finally, assuming *arguendo* that the 20-day suspension could be used to support the inefficiency charge, it would still fail for two reasons. First, MPD brought the inefficiency charge against Lt. Royal on November 12, 2015, 192 business days after the February 7, 2015 incident. Therefore, the charge would fall outside the 90-day rule under D.C. Code § 5-1031. Second, the General Order states that prima facie evidence of inefficiency requires that the three sustained adverse actions occur within a 12-month period. A80-81. The October 2013 and April 2015 incidents were 18 months apart; therefore, the agency is unable to make out a prima facie case and the charge must be reversed. *See Urb. Dev. Sols., LLC*, 992 A.2d at 1266.

CONCLUSION

For all the reasons stated herein, Lt. Craig Royal respectfully requests that the Court reverse the Superior Court's order and remand this matter to OEA with instructions to vacate Lt. Royal's suspension.

Dated: February 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the Court's electronic filing, on February 1, 2023, to the following:

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District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

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22-CV-220

Case Number(s)

1/31/2023

Date

STATUTORY ADDENDUM TABLE OF CONTENTS

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D.C. Code § 1-606.03

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

(b) In any appeal taken pursuant to this section, the Office shall review the record and uphold, reverse, or modify the decision of the agency. The Office may order oral argument, on its own motion or on motion filed by any party within 15 days, and provide such other procedures or rules and regulations as it deems practicable or desirable in any appeal under this section.

D.C. Code § 5-1031(a)(a-1)

(a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

6-B D.C.M.R. § 1603.3

Except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01 et seq. (2016 Repl. & 2019 Supp.)) or § 604.3, any District of Columbia government employee may appeal a final agency decision affecting: (a) A performance rating which results in removal of the employee; (b) An adverse action for cause which results in removal; (c) A reduction in grade; (d) A suspension for ten (10) days or more; (e) A reduction-in-force; or (f) A placement on enforced leave for ten (10) days or more.

6-B D.C.M.R. § 631.2

For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

6-B D.C.M.R. § 634.2(a)

For appeals filed pursuant to § 604.1, each Initial Decision shall contain: (a)
Findings of fact and conclusions of law, as well as the reasons or bases therefore,
upon all the material issues of fact and law presented on the record.

6-B D.C.M.R. § 634.5

The Initial Decision shall uphold, reverse, or modify the determination of the agency or personnel authority.

6-B D.C.M.R. § 699.1

When used in this chapter, the words and phrases set forth in this section shall have the following meanings:

Final agency decision - a written document from a District agency which contains the cause of action taken by the District agency against an employee, the employee's right to appeal to OEA, OEA's rules, an OEA appeal form, notice of rights to appeal under a negotiated review procedure (if applicable), and notice of the right to representation by a lawyer or other representative authorized by these rules.