THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Kimberly Leyland	) OEA Matter No. 1601-0234-09
Employee	)
	) Date of Issuance: November 18, 2011
v.	)
	) Joseph E. Lim, Esq.
D.C. Fire & Emergency Medical Services Department	) Senior Administrative Judge
Agency	)
	)

Thelma Chichester, Esq., Agency Representative
Steven Chasin, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 27, 2009, Employee filed a petition for appeal with this Office regarding an 11-day suspension by Agency for "Conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities."

I held a prehearing conference on November 29, 2010, determined that there were no relevant disputed facts, and subsequently ordered the parties to submit legal briefs on the issue of whether Agency's penalty suspending Employee should be upheld. I closed the record after the parties made their submissions.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. § 1-606.3(a) (1999 *repl.*).

ISSUE

Whether Agency's decision suspending Employee was in accordance with law or applicable regulations.

STATEMENT OF FACTS

The following facts are undisputed:

1. Employee is a Grade 7, DS-699, Emergency Medical Technician at the Agency.

2. On January 1, 2009, Employee was arrested and charged with driving or attempting to drive a vehicle while under the influence of alcohol and failure to control speed to avoid collision in Talbot County, Maryland.

3. Following departmental regulations, Employee reported her arrest to her superior.

4. On May 14, 2009, Employee's possible penalty was reduced by 40 duty hours after she completed the Early Intervention Program of the Calvert Substance Abuse Services.

5. On May 19, 2009, Employee's driving license was restricted by an Administrative Law Judge at the Maryland Department of Motor Vehicle.

6. On May 29, 2009, Employee pled guilty to one of the charges. Thus, the District Court of Maryland in Talbot County *Nolle Prosequi* the failure to control speed charge and gave Employee probation before judgment on the attempting to drive a vehicle while under the influence charge. Employee subsequently successfully completed her conditions of probation.

7. The Maryland statute, *Md. CRIMINAL PROCEDURE Code Ann. § 6-220(b)(1)* (2010) states:

   > When a defendant pleads guilty or nolo contendere or is found guilty of a crime, a court may stay the entering of judgment, defer further proceedings, and place the defendant on probation subject to reasonable conditions if:
   >
   > (i) the court finds that the best interests of the defendant and the public welfare would be served; and
   >
   > (ii) the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea.

   Md. CRIMINAL PROCEDURE Code Ann. § 6-220(g)(2010) states:

   > Effect of fulfillment of conditions of probation. --
   >
   > (1) On fulfillment of the conditions of probation, the court shall discharge the defendant from probation.
   >
   > (2) The discharge is a final disposition of the matter.
   >
   > (3) Discharge of a defendant under this section shall be without judgment of conviction and is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime.

8. On June 25, 2009, Agency served Employee with an advance notice of adverse action, which proposed a 15-day suspension from her position based on her conviction on criminal charges stemming from the January 1, 2009, incident.

Agency charged Employee with violating the D.C. Fire and Emergency Medical Services (EMS) Order Book. Specifically, she was charged with violating Article VII, Section 2 (4): "Any conviction of any crime (including a plea of no contest), regardless of punishment, at any time following submission of a member's job application when the crime is relevant to

the member's position, job duties or job activities" and Article VI, Section 6: "Any member convicted of the motor vehicle moving violation Driving Under the Influence or Driving While Intoxicated while off-duty will be charged with Conduct Unbecoming an Employee and will be charged a 120-duty hour suspension for a first offense..."

Agency went on to define Employee's conduct as cause under "Conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities," in 6 D.C.M.R. § 1603.3 (b), 54 DCR 12043 (December 14, 2007).

9. On July 29, 2009, Agency served Employee with a final notice of adverse action suspending her for 80 duty hours or eleven calendar days from her position with the Department. The effective date of the suspension was August 12, 2009. Employee was advised of her right to appeal to this Office, which Employee did on August 27, 2009.

ANALYSIS AND CONCLUSION

In her brief, Employee does not deny that she pled guilty to "attempting to drive a vehicle while under the influence," one of the criminal acts with which she was charged. Instead, Employee attacked Agency's imposed penalty by asserting that Employee suffered harmful error when Agency used her alleged criminal conviction as cause for adverse action when in fact, there was no criminal conviction at all. The Employee's criminal record at the District Court of Maryland in Talbot County showed that the verdict was a probation before judgment (PBJ), not a conviction. She argues that according to Maryland law (the jurisdiction where her criminal trial had its venue), a PBJ is not a criminal conviction.

"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). "[W]e look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 870, 896 (1984).

The statutory language in this case is clear. Maryland law authorizes the trial court to place a person accused of a crime on probation before rendering judgment. After successful completion of probation, discharge under this statute is without any civil disability or disqualification, as could occur with a criminal conviction. Indeed, the statute's wording in § 6-220(g)(3) states clearly that "Discharge of a defendant under this section shall be *without judgment of conviction*…" (Emphasis added.) The Maryland courts have interpreted this provision to mean that a finding of guilt, entered pursuant to a probation before judgment statute, should not be used as evidence of guilt in a subsequent administrative proceeding. *See Tate v. Board of Educ.*, 485 A.2d 688, *cert. denied*, 496 A.2d 312, 316 (Md. 1985); *Jones v. Baltimore City Police Dept., et al.*, 326 Md. 480; 606 A.2d 214 (Md. 1991).

In *Green v. Metropolitan Police Department*, OEA Matter No. 1601-0115-86R89, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ ( ), the OEA Board deferred to the Maryland courts for their interpretation of Maryland law and found that an administrative judge is not obligated to use the court's determination of guilt as evidence of an employee's misconduct in a proceeding before the OEA.

Based on my review of the undisputed facts, it is clear that Agency's cause against Employee centers on its charge that Employee incurred a criminal conviction involving the driving of a motor vehicle while under the influence of alcohol. The problem with Agency's cause is that there was no criminal conviction, and thus, Agency had no cause for adverse action.

Although it is true that 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 the charges which were actually leveled against them. *See Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994). Accord, *Goldstein v. Chestnut Ridge Vol. Fire Co*., 218 F. 3d 337, 357 (4th Cir. 2000) ("Inasmuch as explanations legitimizing otherwise prohibited conduct can easily be conjured post hoc, we have reviewed these explanations with a jaundiced eye.").

In addition, the Board in *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981) held that it will not sustain an agency action on the basis of a charge that could have been brought, but was not. Rather, it is required to adjudicate an appeal solely on the grounds invoked by the agency, and may not substitute what it considers to be a more appropriate charge. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

I therefore find that Agency had no basis for suspending Employee and thus find that its penalty must be overturned.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of suspending Employee is REVERSED; and

2. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of her suspension; and

3. 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:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge