THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Pavin Brown	)	OEA Matter No. 1601-0088-11
Employee	)	
	)	Date of Issuance: February 13, 2014
vs.	)	
	)	Joseph Edward Lim, Esq.
D.C. Department of Human Resources[1]	)	Senior Administrative Judge
Agency	)	
	)	

Andrea Comentale, Esq., Agency Representative
Gony F. Goldberg, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On March 21, 2011, Pavin Brown ("Employee") filed a petition for appeal with this Office from D.C. Department of Human Resources ("DCHR" or "Agency")'s final decision removing her for committing an on-duty employment related act or omission that she knew or should have known was a violation of law.

This Matter was assigned to me on July 30, 2012. I scheduled a prehearing conference for October 26, 2012, but Agency was a no show. I issued an Order for Good Cause Statement to Agency and Agency complied. Employee submitted a motion for summary judgment. Agency filed its response. No hearing was held as there were no relevant factual disputes. I closed the record after their submission.

JURISDICTION

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

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1 Employee initially designated the DC Fire & Emergency Medical Services Department ("FEMSD") as the disciplining agency. However, it was clarified that Agency's proper name was the D.C. Department of Human Resources since it exercised its personnel authority under the Child Youth Safety Health Act to terminate Employee. Determining an individual's suitability for employment is exclusively within the province of DHR's authority and independent personnel authorities. See DPM § 4071(b).

ISSUES

1. Whether Employee's actions constituted cause for adverse action.
   a. Was Agency's adverse action untimely?
   b. Did Agency impose an adverse action more than once for the same misconduct?
   c. Did Agency prove Cause 1 in its Notice of Proposed Adverse Action-Amended?
   d. Did Agency prove Cause 2 in its Notice of Proposed Adverse Action-Amended?

2. If so, whether the penalty of removal was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following facts are undisputed:

1. Employee was employed as an Emergency Medical Technician ("EMT") with the DC Fire & Emergency Medical Services Department ("FEMSD").

2. On or about January 12, 2007, Employee was arrested by the D.C. Metropolitan Police Department and charged with several counts of criminal behavior: 1) Carrying a Pistol Without a License, 1st Offense; 2) Possession of Unregistered Ammunition; and 3) Possession of Unregistered Firearm.

3. On February 13, 2007, Acting Assistant Fire Chief Lawrence S. Shultz, Operations Bureau, FEMSD, issued a Final Decision/Enforced Leave, placing Employee on enforced leave effective Saturday, February 10, 2007.

4. Employee was arrested in 2007 due to the presence of drugs on her property. Although it is not reflected in the court records, Employee asserts that the drugs belonged to her nephew.

5. On January 14, 2008, Employee was found guilty of Possession of a Controlled Substance, and consented to probation. Pursuant to D.C. Code 2001, § 48-904(e)(1), D.C. Superior Court Judge John R. Johnson entered an Order Imposing Probation Without Adjudication of Guilt. (*See* Agency Exhibit 5 of Agency's answer and Employee Attachment 1 to Employee's Motion for Summary Judgment.) Thus, the Court placed Employee on probation for six months under the supervision of the Director of the Social Services of the Court.

6. On March 3, 2008, FEMSD issued to Employee its first proposed termination based on the 2007 arrest and 2008 order imposing probation. (*See* Employee Attachment 3 to Employee's Motion for Summary Judgment.) However, FEMSD then rescinded said action based on the hearing officer's recommendation.

7. On May 2, 2008, D.C. Superior Court Judge Johnson signed an "Order of Discharge

from Probation and Dismissal of Proceedings" in the matter against Employee. The Court found that Employee had successfully completed the terms and conditions of probation in pursuant to D.C. Code 2001 § 48-904(e)(1). It ordered that there "be maintained a nonpublic record of this case solely for the purpose of use by the courts in determining whether, in subsequent proceedings, the defendant qualifies for probation under D.C. Code 2001 § 48-904(e)(1)." Thus the Court discharged petitioner from probation, dismissed the criminal proceeding, and entered an order expunging her criminal record. The remaining charges were also dismissed.

8. On July 28, 2008, FEMSD issued its second proposed termination again based on the 2007 arrest and 2008 order imposing probation. Although the hearing officer recommended rescission of said removal, FEMSD sustained the removal. The removal was tried before Robert Simmeljaer, an arbitrator.

9. On February 15, 2010, Robert T. Simmelkjaer, issued an Opinion and Award in the arbitration matter between American Federation of Government Employees, Local 3721, and the FEMSD, in the matter of Employee's Discharge, Case No. 090202-53494-A. Mr. Simmelkjaer made the following findings:

    1) FEMSD did not timely commence an adverse action against Employee, pursuant to Section 1601.9(a) of the District of Columbia Personnel Manual ("DPM");
    2) FEMSD did not have cause to discharge Employee pursuant to Chapter 16 of the DPM; and
    3) Employee was to be immediately reinstated as an EMT with FEMSD, retroactive to the date of her enforced leave of absence on February 2, 2007.

    (*See* Agency Exhibit 6 of Agency's answer and Employee Attachment 4 to Employee's Motion for Summary Judgment.)

10. The Arbitrator ordered FEMSD to reinstate Employee. FEMSD began processing Employee's reinstatement as an EMT retroactive to the date of her enforced leave of absence.

11. Employee had been informed that she occupied a covered position under Title 1 of the Child and Youth, Safety and Health Omnibus Amendment Act ("CYSHA") 2004 (D.C. Official Code §§ 1-620.31 through 1-620.37.). Employee signed her acknowledgement. (See Agency Exhibit 8 and 9 of Agency's answer.)

12. The Mayor of the District of Columbia granted DCHR exclusive authority to conduct criminal background checks pursuant to CYHSA. The Mayor also delegated DCHR the exclusive authority to conduct suitability determinations pursuant to CYHSA. Suitability actions are initiated against employees under CYSHA and DPM § 407.1(c) that render

employees unfit for work because of the employee's misconduct and/or behavior.

13. Employee was informed in writing that FEMSD was a subordinate agency subject to the CYHSA, and DCHR was authorized to conduct a criminal background check on its employees and may terminate employment based on the outcome of the criminal background check. (*See* Agency Exhibit 10 of Agency's answer.)

14. DCHR is charged with conducting criminal background checks on all applicants for employment, employees and volunteers, who serve in child safety sensitive positions pursuant to Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), D.C. Code § 4-1501.01, *et. seq.* CYSHA also mandates petitioner undergo a criminal background check as a precondition to reinstatement. Possession of a controlled substance is one of several enumerated offenses that CYSHA indicates undermines the integrity and honesty of District employees occupying safety-sensitive positions.

15. On June 16, 2010, Employee signed a Criminal History Request and Criminal Background Check Affirmation Form, and appeared at the D.C. Metropolitan Police Department ("MPD") for a criminal background check pursuant to CYSHA.

16. Employee executed several documents which permitted DCHR to conduct a criminal background check. These documents consisted of the following:

    a) Metropolitan Police Department Criminal History Request, Pavin Brown, signed June 16, 2010;

    b) DCSF 4-02, *Criminal Background Check Affirmation Form,* Pavin Brown, signed June 16, 2010;

    c) DCSF 4-03, *Authorization Form,* Pavin Brown, signed June 16, 2010;

    d) DCSF 4-01, *Individual Notification of Criminal Background Check and Traffic Record Check Requirement Form,* Pavin Brown, signed June 16, 2010;

    e) *Criminal Background Check Referral Form for Employees, New Hires, and Volunteers in Safety Sensitive Positions,* Pavin Brown, signed June 16, 2010; and

    f) *Criminal Background Check Process: Check List and Information,* Pavin Brown.

    As part of its investigation, DCHR received several documents pertaining to petitioner's criminal background. These documents consisted of the following:

    a) FBI Identification Record, Pavin Brown, dated June 16, 2010;

    b) Order Imposing Probation Without Adjudication of Guilt, *United States of America v.*

Pavin Brown, D.C. Superior Court, Criminal Division, Case Number 2007 CMD 1128, dated January 14, 2008, hereinafter "2008 Order"; and

c) PRISM Criminal History Report, Pavin Brown.

17. Despite the Order of Expungement, the background check discovered the 2007 arrest, the 2008 Order Imposing Probation, and the 2008 expungement, all of which should have been removed from public records pursuant to D.C. Code sec. 48-904.01. The Agency determined that due to the nature of the offense and Employee's potential for interaction with vulnerable members of society such as the elderly, she was unsuitable to hold the position of EMT. *See* Employee Attachment 6 to Employee's Motion for Summary Judgment.

18. Employee's Federal Bureau of Investigation ("FBI") record indicates that she was arrested on two other occasions. The first arrest occurred on or about October 16, 1992. Petitioner was charged with one count of UCSA Distribution of Cocaine in the District of Columbia. The FBI record reflects that this charge was dismissed on or about October 28, 1992. The second arrest occurred on or about November 7, 1995, in the state of Maryland. Employee was charged with two drug-related offenses, to wit: (1) Possession of Cocaine; and (2) Possession of Drug Paraphernalia. The FBI record does not contain a final disposition for these offenses.

19. The Metropolitan Police Department obtained an FBI report which identified three separate arrests for Employee. They are as follows: 1) Arrested in Washington, DC on October 16, 1992, and charged with Unlawful Distribution of Cocaine. This charge was dismissed on October 28, 1992; 2) Arrested in Montgomery County, Maryland (Rockville), on November 7, 1995, and charged with Possession of Cocaine and Possession of Drug Paraphernalia. The dispositions of these charges were not listed in the FBI report. 3) Arrested in Washington, DC, on January 12, 2007, and charged with three offenses, to wit: Carrying Pistol without a License, 1st Offense; Unregistered Ammunition; and Unregistered Firearm.

20. On August 18, 2010, DCHR completed its suitability investigation of Employee, and found her unsuitable for continued employment with FEMSD. The investigator spoke with Employee by telephone, and Employee confirmed that she had been arrested on the three separate occasions listed in the FBI report. Employee stated that the charges associated with her October 16, 1992, and November 7, 1995, arrests were dismissed. Employee was asked to present documentation to confirm dismissal of the November 7, 1995 arrest, but failed to do so.

21. The investigator found that Employee admitted illegally possessing a firearm without a license and illegally possessing ammunition as a result of her January 13, 2007, arrest. Therefore, the investigator determined that Employee engaged in criminal misconduct which undermined the honesty and integrity of the office in which she was to occupy. The investigator also determined that Employee 's conduct discredited the District

of Columbia Government, undermined its efficiency in service, and violated the public trust. This was based on the fact that Employee admitted to "participating in felonious criminal activity" on the record in D.C. Superior Court.

22. On August 18, 2010, the DCHR issued a Notice of Proposed Adverse Action in the matter of Employee. The Compliance Manager cited two causes for the proposed action: (1) conviction of a felony and (2) the agency obtaining derogatory information on the employee which impacted the employee's suitability to continue performing the duties of her position.

23. On September 13, 2010, the Agency issued another Notice of Proposed Adverse Action – Amended (Notice). *See* Employee Attachment 7 to Employee's Motion for Summary Judgment. It contained two Causes, the first that Employee was convicted of a misdemeanor and the second that she is unsuitable.

24. On November 16, 2010, Matthew W. Caspari, Esquire, a DCHR designated Hearing Officer, conducted an administrative review of the adverse personnel action in the matter of Ms. Brown. In his Report and Recommendation regarding the Notice of Adverse Action, Mr. Caspari concluded that DCHR had not proven its case against Ms. Brown by a preponderance of the evidence. *See* Employee Attachment 8 to Employee's Motion for Summary Judgment. He recommended that the Notice of Proposed Adverse Action — Amended be dismissed, and Employee returned to work. Mr. Caspari relied in part on *Hairston v. Department of Corrections*, OEA No. 1601-0047-08 (2008), which he attached to his recommendation.

25. On January 26, 2011, DCHR issued a Final Decision of Removal in the Adverse Action Case involving Employee. The notice stated that this action is based on the following cause as outlined in 6-B DCMR §1603.3: "Cause for disciplinary action for all employees covered under this chapter is defined as follows: (b) Conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities." In addition, DCHR also bases this action upon 6B DCMR § 407.1 for this employee's misconduct. The regulation states: "The D.C. Department of Human Resources (DCHR) shall initiate, or initiate and take, suitability action against District government employees pursuant to this section and chapter when: (c) Derogatory information about an employee, of a nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by a credible source or independent discovered;" and as outlined in 6B DCMR § 419.8: "When the Department of Human Resources (DCHR)...resolve[s] criminal background check information issues, the DCHR...shall make the final suitability determination whether: (d) a current employee shall be retained or employment shall be terminated."

26. Employee was terminated effective February 18, 2011. This appeal ensued.

ANALYSIS AND CONCLUSIONS

CONTENTIONS OF THE PARTIES

The agency contends that Employee was guilty of committing an on-duty employment related act or omission that she knew or should have known was a violation of law. Agency alleges that Employee's criminal actions render her unsuitable for employment in her position under CYSHA.

Employee presents the following arguments: The adverse action was untimely pursuant to D.C. Code sec. 5-1031. The Agency cannot impose an adverse action or try to remove Employee more than once for the same misconduct. The Agency cannot remove an Employee based on an arrest alone. The Agency action is in violation of D.C. Code sec. 48-904.01(e)(1).

Whether Employee's actions constituted cause for adverse action.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes, *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id*, provides that the sections covering general discipline "apply to each employee of the District government in the Career Service who has completed a probationary period." It is uncontroverted that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken. In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 628.1, 59 D.C. Reg. 2129 (2012).

These rules were again amended at 47 D.C. Reg. 7094 and were published as final on September 1, 2000. Pursuant thereto, cause has been redefined at 47 D.C. at 7096, §1603.3 as:

> For the purpose of this chapter, "cause" means a conviction (including a plea of *Nolo Contendere*) of a felony at anytime following submission of an employee's job application; a conviction (including a plea of *Nolo Contendere*) of another crime (regardless of punishment) at anytime following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent misrepresentation on an employment application or other document given to a government agency; **any on duty or employment related act or omission that the employee knew or**

> **should have known is a violation of law**; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government. [*emphasis added.*]

Thus, any on duty or employment related act or omission that the employee knew or should have known is a violation of law is a valid cause for adverse action in the current rules.

It is well established that summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

a. Was Agency's adverse action untimely?

Employee argues that the adverse action was untimely pursuant to D.C. Code sec. 5-1031. She states that the Agency's removal based on the alleged misconduct set forth in both Causes occurred more than the statutory imposed 90 day deadline for the Agency to impose an adverse action and therefore must be reversed. D.C. Code sec. 5-1031 definitively states that "no corrective or adverse action against any sworn member or civilian employee of the FEMSD shall be commenced more than 90 days after the date that FEMSD knew or should have known of the act or occurrence allegedly constituting cause for the corrective of adverse action." The D.C. Council passed this rule to address an important failure of the Agency, namely that the Agency has in the past taken "exorbitant amount[s] of time" for adverse actions, "such that FEMS and MPD employees had to wait 'months or even years' to see the conclusion of an investigation against them." Un. 14 (Report on Bill), pp. 13, 14. The District passed the 90 day rule for FEMS… to provide a "deadline intended to bring 'certainty' to employees over whose heads a potential adverse action might otherwise linger indefinitely. *See also D.C. Fire and Medical Services Department v. D.C. Office of Employee Appeals (Selena Walker),* 986 A. 2d 419 (D.C. Ct. App. Jan. 7, 2010) (Court of Appeals upheld D.C. OEA's determination that violation of the 90 – day limitation on commencing adverse actions requires the reversal of the adverse action); *Selena Walker v. D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601 – 0133 -06 (June 26, 2007).

Employee argues that there is no doubt that the FEMSD knew of the 2007 arrest and January 2008 Order by March 3, 2008 when it issued its first attempt to remove Ms. Brown. Definitely by July 28, 2008, when the FEMSD issued its second attempt to remove Ms. Brown, FEMSD knew of the 2007 arrest and January 2008 Order. As discussed by the Arbitrator:

> The Agency's reliance on the January 14, 2008 plea of guilty and Order

> Imposing Without Adjudication of Guilt is reasonable as the date the Agency knew or should have known of the act or occurrence…Accordingly, the Agency had 90-days or until May 21, 2008 to commence the initial adverse action.

Attachment 4 to Employee's Motion for Summary Judgment at 12 (reference to FEMSD knowledge of the 2007 arrest) and 24 (quote above). Therefore, Employee states, FEMSD cannot now argue years later, that it is in compliance with Sec. 5-1031. Employee argues that as a result, the removal should be reversed as untimely.

Analysis and Conclusion

Employee's argument is unavailing in this matter as she is confusing FEMSD and DCHR as one and the same agency. Instead, these are two separate entities. It is only under CYSHA that Agency (DCHR) has the authority to remove an employee based on its suitability provisions. FEMSD's prior knowledge of Employee's criminal record cannot be imputed to DCHR. DCHR learned of Employee's criminal record on August 18, 2010, when it completed its suitability investigation. DCHR then issued a Notice of Proposed Adverse Action against Employee on September 13, 2010, well within the 90-day rule of D.C. Code sec. 5-1031. Thus, I conclude that Agency's action is timely.

b. Did Agency impose an adverse action more than once for the same misconduct?

Next, Employee argues that Agency cannot impose an adverse action more than once for the same misconduct as it constitutes improper multiple punishment. The Merit Systems Protection Board has held that an agency cannot impose disciplinary or adverse action more than once for the same misconduct. *See Gartner v. Department of the Army*, 104 M.S.P.R. 463 (2007). Agency has twice before attempted to remove Employee for the same underlying misconduct. Although case law does provide an exception to the double punishment rule, i.e. that it is not unlawful to refile the same charge against an employee included in a previous, *rescinded* adverse action, this exception is inapplicable here. In the instant case, the July 28, 2008, adverse action was not rescinded by the Agency and removal was effectuated. A neutral arbitrator, Robert Simmeljaer, found that the Agency had violated law when it removed Employee and ordered restoration.

Notwithstanding said finding and order, Employee finds herself removed from her position. Employee asserts that this removal should not be sustained because doing so would not only be improper double punishment but also an unfair labor practice (failing to follow an arbitrator's decision).

In summary, Employee opposes the Agency's third attempt to remove her from her position as an Emergency Medical Technician (EMT) for the same misconduct, specifically, her expunged arrest in 2007 and expunged adjudication without finding of guilt for possession of a controlled substance in 2008.

Analysis and Conclusion

Again Employee is confusing FEMSD and DCHR as one and the same agency. Instead, these are two separate entities. As noted above, it was FEMSD that had attempted twice to remove Employee, not DCHR. This was DCHR's first and only action to remove Employee. In addition, Employee cannot cite any law that prohibits DCHR from removing her based on the provisions of CYSHA. Thus, I conclude that Employee's argument on this issue fails.

c. Did Agency prove Cause 1 in its Notice of Proposed Adverse Action-Amended?

On June 16, 2010, after being reinstated, Employee appeared for a criminal background check. The background check discovered Employee's previous arrests from 1992, 1995, and 2007. The 1992 arrest was determined to have been dismissed. The disposition of the 1995 arrest was determined to be unknown. For the 2007 arrest, Employee was placed on probation and the court agreed not to adjudication her guilty charge upon satisfying her probation.

On September 13, 2010, Agency issued a Notice of Proposed Adverse Action-Amended after DC Human Resources conducted an Adverse Suitability Investigation. The Adverse Action was based on two causes. The first charge against Employee was conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities. The charge was based on Employee's January 12, 2007 arrest and subsequent probation order.

Agency is now arguing that an expunged criminal background record does not preclude DCHR from moving forward with its duty to conduct criminal background and suitability checks. Further, it argues that it was appropriate for DCHR to deny petitioner's reinstatement based on her underlying criminal misconduct. Employee argues that Agency's first charge cannot stand because there was no conviction.

Rule and Analysis

We have previously held in *Kimberley Leyland v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0234-09, *Opinion and Order on Petition for Review* (March 19, 2010) that under *Tate v. Board of Education of Kent County*, 485 A.2d 688 (1985), "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."[2] The Court in *Tate* stated:

> Discharge and dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by the law upon conviction of a crime. Any expunged arrest and/or conviction shall not thereafter be regarded as an arrest or conviction for purposes of employment, civil rights, or any statute or regulation or license or questionnaire or any other public or private purpose, provided that any such conviction shall continue to constitute an offense for

2 In the OEA case, the AJ held that since Agency's charge was based on Employee's alleged criminal conviction, and there was no conviction, Agency did not have cause for the adverse action.

> purposes of this subheading or any other criminal statute under which the existence of a prior conviction is relevant.[3]

The D.C. Official Code §48-904.01(e)(1) is similar to the reasoning of *Tate,* in that it provides:

> If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. **Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under § 48-904.08 for second or subsequent convictions) or for any other purpose.**

D.C. Official Code §48-904.01(e)(2) provides:

> (2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order. **The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.**

OEA also held in *Settles v. Department of Parks and Recreation,* OEA Matter No. 1601-0252-09 (February 14, 2012) that in matters involving probation before judgment, a guilty plea is not synonymous with a conviction. The AJ in *Settles* relied on *Godfrey v. United States*, 454 A.2d 293, 305 (D.C. 1982) where the D.C. Court of Appeals held that a guilty ". . . plea lacks the trustworthiness and finality of a conviction."

Based on the Courts and OEA, and the laws of the D.C. Official Code, Agency clearly did not have cause for the first adverse action because Employee was not convicted of a misdemeanor. On January 14, 2008, the D.C. Superior Court issued an Order Imposing

3 *Id.* at 689.

Probation without Adjudication of Guilt. Upon completion of the probation, the Court entered an order dismissing the charges pursuant to D.C. Official Code § 48-904(e). Employee was later discharged from probation, the proceeding was dismissed, and the Court issued an Order of Expungement on May 2, 2008.

In addition, Agency cannot remove an Employee based on an arrest alone as it does not provide a reliable basis to establish underlying facts. Agency's removal of Employee based on Cause #1 Specification #1, specifically her record of arrest in 2007, violates case law. Case law is clear that an arrest in and of itself is insufficient basis for removal. *See Dunnington v. Department of Justice,* 956 F.2d 1151 (Fed.Cir.1992)("We are not prepared to conclude, however, that the issuance of an arrest warrant, presumably based on a finding of probable cause found by a magistrate, is the equivalent to more formal proceedings. The process by which arrest warrants are issued is typically *ex parte.* They are often based on information from confidential informers, or other sources not subject to testing for credibility. Given the reality of the manner in which arrest warrants are often issued, it is incumbent upon the agency when an arrest warrant is a major part of the case to assure itself that the surrounding facts are sufficient to justify summary action by the agency."); *Beamer v. Department of Justice*, 25 M.S.P.R. 483 (1984) (adverse action could not be sustained based solely on the employee's arrest and without proof of underlying misconduct).

Conclusion for Issue C.

Agency did not have cause for the first adverse action because Employee was not convicted of a misdemeanor.

d. Did Agency prove Cause 2 in its Notice of Proposed Adverse Action-Amended?

Cause 2 is based on a suitability assessment completed by DCHR, where it determined that Employee was not suitable and that his continued employment presented a clear danger to children and youth and undermines the efficiency of service. According to Agency, in the 2007 arrest, Employee admitted to a D.C. Superior Court Judge that he illegally possessed a controlled substance. It reasons that Employee not only admitted to the misconduct, but also signed an order admitting the misconduct.

In its Opposition to Employee's Motion for Summary Judgment, Agency argues that an expunged criminal background record does not preclude DCHR from moving forward with its duty to conduct criminal background and suitability checks. Agency argues that it was appropriate for DCHR to deny petitioner's reinstatement based on her underlying criminal misconduct. To make this determination, it cited, *inter alia,* 6 DCMR §§ 407.1(c), 407.1(d), 407.2(a) and (c) in its Amended/Supplemental Suitability Investigation, and §407.1(c) §419.8(d) in its Notice of Proposed Adverse Action Amended. Further, in DCHR's Suitability Investigation, DCHR cites *Forbez v. Department of Justice,* 36 M.S.P.R. 185, 190 (1988)[4] and

4 Cited as *People v. Reich*, AT07318710201, 1988 WL 10002 (M.S.P.B. Feb. 2, 1988).

states that a negative determination may be based on criminal conduct even where no conviction results.

Employee argues that there is no documentary evidence included in Agency's case file that supports its statement. Further, Employee states that she did not sign an order admitting misconduct; she signed verification that she understood the conditions of her probation and the potential ramifications of violating the probation.

Rule and Analysis

DCHR cited *Forbez v. Department of Justice,* 36 M.S.P.R. 185, 190 (1988) to state that a negative determination may be based on criminal conduct even where no conviction results. In *Forbez,* Agency conducted a suitability determination and determined that appellant was disqualified for appointment. Agency's decision was based on appellant's delinquency or misconduct in prior employment and engaging in criminal, dishonest, infamous, or notoriously disgraceful conduct. The Board found that Agency "established, by preponderance of the evidence, that its negative suitability determination and disqualification of applicant promoted efficiency of the service."[5]

Agency is correct in relying on *Forbez* and stating that a negative determination may be based on criminal conduct even where no conviction results. The Board in *Forbez* cited the Federal Personnel Manual Supplement 731-1, S3-2a(1)(c) which provides that "the circumstances leading to arrests may have a genuine bearing on a person's fitness for federal employment, even though there was no criminal conviction." However, the Board also stated that in situations involving criminal conduct, "**the agency must consider the recency and circumstances surrounding the criminal conduct, as well as the absence or presence of rehabilitation, in determining an applicant's suitability.**" Furthermore, the Board stated that "**in order to sustain a negative-suitability determination . . . the agency must show by preponderant evidence a pattern of conduct which would be incompatible with or would interfere with or prevent effective performance by the employing agency of its duties or responsibilities.**"

In *Forbez,* appellant's disqualification was based on a clear pattern of misconduct, including the circumstances surrounding the criminal conduct. In this case, however, DCHR's disqualification was based on an arrest that occurred in 2007 and the circumstances surrounding it. It did not discuss in its Suitability Investigation how the 2007 arrest presented a pattern of misconduct. While it does report findings of arrests in 1992 and 1995, it did not focus on those arrests. Instead, it primarily focused on Employee admitting to a D.C. Superior Court Judge in the 2007 matter that she illegally possessed a controlled substance. Therefore, it is clear from DCHR's Suitability Investigation that it only considered Employee's 2007 arrest.

Secondly, based on the OEA record, DCHR may have not considered the absence or

5 *Id.* at 186.

presence of rehabilitation, as the Board in *Forbez* required. It did not consider that Employee met her probation requirement for the 2007 arrest. One could view Employee's probation as an attempt at rehabilitation. After probation, the court dismissed the matter. DCHR did not report any additional misconduct or criminal conduct subsequent to the 2007 incident.

Finally, even if Agency considered all of the factors MSPB lists, this law is merely persuasive. We have previously discussed the plain meaning and intent of D.C. Official Code § 48-904(e)(2) with regard to an expungement order in *Richard Hairston v. Department of Corrections,* OEA Matter No. 1601-0047-08 (December 15, 2008).[6] We held that the law ". . . clearly places Employee to the status he or she occupied before such arrest or indictment or information."[7] Therefore, since Employee's record was expunged, she is brought back to the status she occupied before Agency obtained information that led to her being charged. Accordingly, DCHR could no longer use the following facts as its basis for an adverse action: obtaining derogatory information on the employee which impacted the employee's suitability to continue performing the duties of her position.

Discussion of 6 DCMR §407.1 *et seq.*

Agency argues that it was appropriate for DCHR to deny petitioner's reinstatement based on her underlying criminal misconduct. It cited 6 DCMR §§ 407.1(c), 407.1(d), 407.2(a) and (c) in its Amended/Supplemental Suitability Investigation, and §407.1(c) §419.8(d) in its Notice of Proposed Adverse Action Amended.
6 DCMR §407.1(c) provides:

> The DCHR and independent personnel authorities covered by this chapter shall initiate, or initiate and take, suitability action against District government employees pursuant to this section and chapter when derogatory information about an employee, of a nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by a credible source or independently discovered by the personnel authority or employing agency.

6 DCMR §407.1(d) provides:

> A determination is made to terminate the employment of an employee subject to the provisions on criminal background checks for the protection of children and youth contained in sections 412 through 427 of this chapter because:

6 DCMR §407.2(a) and (c) provide:

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6 See also *Leyland v FEMSD*, OEA Matter No. 1601-0234-09, *Opinion and Order on Petition for Review* (Mar. 19, 2013).

7 *Id.* at 6.

> In the circumstances described in section 407.1 (a) through (c) of this section, the DCHR or independent personnel authority shall:
>
> (a) Require that the employing agency remove the employee from District government service;
>
> (c) In addition to the actions in accordance with subsection 407.2 (a) and (b) of this section, deny the employee examination for and appointment to a position in the particular agency for a period of not more than three (3) years from the date of the determination of unsuitability.

Finally, 6 DCMR §419.8(d) provides that:

> When the DCHR or independent personnel authority resolve criminal background check information issues, the DCHR or independent personnel authority shall make the final suitability determination whether a current employee shall be retained or employment shall be terminated.

It is clear that under 6 DCMR §407.1(c), DCHR initiated or took suitability action against Employee upon disclosure of derogatory information. However, it is not clear from the record why its Amended/Supplemental Suitability Investigation cited 6 DCMR §407.1(d). This section has enumerated reasoning for an agency to determine it will terminate employment of an employee subject to the provisions on criminal background checks for the protection of children and youth. Agency did not cite one of the two enumerated reasons.[8] Nevertheless, it moved forward with 6 DCMR §407.2(a) and (c) and required that Agency remove Employee and deny her examination for and appointment to a position.[9]

Assuming that DCHR chose to use 6 DCMR §407.1(d)(1), it did not state that Employee failed a criminal background check. It stated that its assessment to determine suitability to continue to serve her employ determined that she was not suitable and that her continued

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8 6 DCMR §407.1(d)(1) and (2) state:

> The DCHR and independent personnel authorities covered by this chapter shall initiate, or initiate and take, suitability action against District government employees pursuant to this section and chapter when:
> A determination is made to terminate the employment of an employee subject to the provisions on criminal background checks for the protection of children and youth contained in sections 412 through 427 of this chapter because:
> (1) The employee has failed a criminal background check; or
> (2) As specified in D.C. Official Code § 4-1501.05a and subsections 419.7 and 426.7 of this chapter, the employee has been convicted of, has pleaded nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity for a sexual offense involving a minor.

9 It made this determination in its Notice of Proposed Adverse Action Amended.

employment presented a clear danger to children and youth. Assuming that DCHR intended to use 6 DCMR §407.1(d)(2), Employee was not convicted of, plead nolo contendere, is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity **for a sexual offense involving a minor**.[10] Employee received probation before judgment for a possession charge. This is not a sexual offense involving a minor. Further, she served out her probation prior to reinstatement; the court discharged her from probation; the matter was dismissed; and the record was expunged. Therefore, even if DCHR received derogatory information in its suitability assessment, under *Hairston v. Department of Corrections, supra,* such information could not be used as the basis for its adverse action because without the 2007 possession charge, DCHR would not have been able to question Employee about it.

Conclusion for Issue D.

Agency's derogatory information obtained during its Suitability Investigation regarding the 2007 arrest could not be used because pursuant to *Hairston* and D.C. Official Code § 48-904(e)(2), after this record was expunged, she was brought back to the status she occupied prior to her arrest.

In adverse actions, Agency has the burden of proof and must meet its burden by a preponderance of evidence. For the reasons discussed herein, Agency has not met its burden of proof by a preponderance of evidence in this matter, thus its decision must be reversed.

Whether the penalty of removal was appropriate under the circumstances

Because I have concluded that Agency has failed to establish cause for its adverse action, I find that Agency's penalty of removal should be overturned.

ORDER

It is hereby ORDERED:

1. Agency's decision is to remove Employee is reversed.

2. Agency is directed to reinstate Employee to her position of record to the date of her removal, to restore any benefits lost as a result of her removal from the date of her removal and to pay her all back pay to which she is entitled. Agency is directed to comply with these directives by no later than 45 calendar days from the date of issuance of this decision.

3. Agency is directed to document its compliance with this ORDER no later than 50

10 Employee's charges involved carrying a pistol without a license; unregistered firearm; unregistered ammunition; possession with intent to distribute cocaine while armed; and possession of paraphernalia. While the weapons charges were apparently dismissed on January 14, 2008. *See Employee's Motion for Summary Judgment,* Attachment 8, p. 2, footnote 1 (October 19, 2012).

calendar days from the date of issuance of this decision.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge