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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
KIMBERLY McCAIN,)	OEA Matter No. 1601-0375-10
Employee)	
)	
v.)	Date of Issuance: June 9, 2015
)	
D.C. FIRE & EMERGENCY MEDICAL)	
SERVICES DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kimberly McCain (“Employee”) was an Emergency Medical Technician with the D.C. Fire and Emergency Medical Services Department (“Agency”). On July 19, 2010, Agency advised Employee that she would be removed from her position for any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law.¹ The effective date of removal was July 23, 2010.²

Employee contested the removal and filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 19, 2010. She argued that the Advanced Notice of Proposed Removal was untimely; her removal violated statute, regulation, personnel practices,

¹ Specifically, on July 12, 2009, Employee was arrested for driving under the influence of alcohol. Employee subsequently pled guilty to driving and attempting to drive while under the influence.

² *Petition for Appeal* (August 19, 2010).

and the *Douglas* Factors;³ and the removal was discriminatory. Employee contended that there was no conviction upon which her removal was based and that the conviction was defective. Therefore, she requested reinstatement with back-pay and benefits, removal from her personnel file all documents referencing the removal, and attorney fees.⁴

In Agency's Answer to the Petition for Appeal, it explained that its Advanced Notice of Proposed Removal was issued within ninety days of Employee's finding of guilt in the Superior Court for the District of Columbia.⁵ Moreover, it asserted that its action did not violate D.C. Official Code § 5-1031(b).⁶ As for Employee's contention that the removal was defective, Agency provided that she did not present evidence to support this allegation.⁷

The OEA Administrative Judge ("AJ") issued an Order Convening a Status Conference

³ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

⁴ *Petition for Appeal*, p. 3-6 (August 19, 2010).

⁵ It explained that during sentencing in the Superior Court for the District of Columbia, Employee entered a guilty plea for driving while intoxicated ("DWI").

⁶ D.C. Official Code § 5-1031(b) provides that:

if the act . . . constituting cause is the subject of a criminal investigation[,] . . . the 90 day period for commencing a . . . adverse action . . . shall be tolled until the conclusion of the investigation.

⁷ *Agency's Answer to Employee's Petition for Appeal* (October 4, 2010).

and subsequently ordered the parties to submit briefs.⁸ Employee filed a Motion for Summary Reversal on December 7, 2012. She asserted that her termination was based on two charges: any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law and conviction of a misdemeanor based on conduct relevant to her position, job duties, or job activities.⁹ Employee argued that the charge of any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law could not stand because Agency did not allege that she was on duty, per Article VI, Section 8 of the Fire & Emergency Medical Services' rules and regulations. She also opined the conviction of a misdemeanor could not be sustained because pursuant to Article VII, Section 2(4), the penalty for DWI should have been a suspension ranging between ninety and one hundred and twenty hours. Furthermore, Employee provided that her guilty plea was defective because based on information she received from the Office of Attorney General ("OAG"), the DWI conviction was based on a flawed blood alcohol analysis.¹⁰

In opposition to Employee's Motion, Agency argued that ". . . employees[] driving under the influence, even while off-duty, conflicts with [its] public safety mission."¹¹ Agency reasoned that Employee's removal was based on her conviction of a crime relevant to her position. Moreover, Agency contended that Article VI, Section 8 of the Fire & Emergency Medical Services rules did not apply to Employee because she was not under that particular labor agreement. It submitted that under the Table of Penalties, removal was the appropriate penalty.

⁸ *Order Convening a Status Conference* (July 25, 2012).

⁹ The conviction of a misdemeanor charge was provided in Agency's Advanced Notice of Proposed Removal, but it did not appear in Agency's Notice of Final Decision.

¹⁰ Employee explained that she received a letter from OAG which provided that she could consider her remedies in court because her conviction was based on a flawed Blood Alcohol Content analysis. Thus, Employee asserted that Agency conceded that the conviction was improper. *Employee Kimberly McCain's Motion for Summary Reversal*, p. 7-11 (December 7, 2012).

¹¹ *Fire and Emergency Medical Services' Motion for Summary Disposition and Opposition to Employee's Summary Reversal Motion*, p. 7 (January 7, 2013).

Accordingly, Agency requested that its action be affirmed.¹²

The Initial Decision was issued on January 27, 2014. First, the AJ found that Employee was not on duty when she was arrested. Accordingly, she determined that because the conduct occurred while Employee was off-duty, there needed to be a nexus between the misconduct and the efficiency of Employee's service. The AJ agreed with Agency's assertion that driving while under the influence, even while off-duty, conflicted with its mission. She reasoned that "FEMS employees, especially firefighters and EMTs, are in the public eye on a daily basis and are expected to follow the law."¹³ As a result, the AJ found that pursuant to Chapter 6, § 1603.3(e) of the D.C. Municipal Regulations ("DCMR"), Agency had cause to charge Employee.

With regard to the charge of conviction of a misdemeanor, the AJ found that OAG "... conceded that several of the intoxilizer devices used by the Metropolitan Police Department were miscalibrated between the years of 2008 and 2010." However, she concluded that because Employee did not file a motion with the Superior Court for the District of Columbia to withdraw her guilty plea, she was bound by the conviction.¹⁴ As a result, the AJ concluded that this charge was supported by substantial evidence and also in accordance with 6 DCMR § 1603.3(b).¹⁵

Lastly, with regard to the appropriateness of the penalty, the AJ found that DCMR § 1619.1(2) was the relevant regulation for any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. She found that Employee should have known that her actions violated the law. As for the conviction of a misdemeanor, the AJ found that under Agency's Collective Bargaining Agreement with Local 3721, the imposed discipline was based on the rules of the Comprehensive Merit Personnel Act

¹² *Id.*, 8-11.

¹³ *Initial Decision*, p. 7 (January 27, 2014).

¹⁴ The AJ reasoned that OEA did not have jurisdiction to reverse the court's conviction.

¹⁵ The AJ misquoted the proper subsection for this cause of action. It is 6 DCMR § 1603.3(b), not 1603.3(e).

("CMPA"). Accordingly, based on the District Personnel Manual ("DPM"), the AJ found that the penalty for a conviction of a misdemeanor based on conduct relevant to an employee's job position was removal.¹⁶ Thus, she ruled that Agency's action was taken for cause, and its penalty was not an abuse of discretion. Therefore, its action was upheld.¹⁷

Employee filed a Petition for Review with the OEA Board on February 28, 2014. She asserts that new and material evidence is available that was not available when the record closed. Employee provides that on December 6, 2013, she filed a Motion to Withdraw Guilty Plea and Vacate Conviction in the Superior Court for the District of Columbia. She explains that the Court subsequently issued an Order vacating her conviction.¹⁸

With regard to the charge of conviction of a misdemeanor, Employee argues that the AJ incorrectly determined that there was a nexus between her offense and her position. She notes that Agency did not cite the charge of conviction of a misdemeanor in its final decision, but the AJ cited this charge pursuant to 6 DCMR § 1603.3(b). Lastly, Employee submits that the AJ ". . . misperceived her role in reviewing penalties . . ." and failed to rule that the penalty was inappropriate.¹⁹ She argues that the AJ and Agency did not thoroughly review and apply the *Douglas* Factors. Therefore, Employee believes that the Initial Decision must also be reversed.²⁰

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's

¹⁶ The AJ noted that *assuming arguendo* that Agency's General Orders governed this case, there was still substantial evidence to uphold termination for the any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law.

¹⁷ *Initial Decision*, p. 9-11 (January 27, 2014).

¹⁸ Employee claims that although the Court's Order was issued on February 21, 2014, the delay was caused by Agency's failure to respond to her initial motion. Employee also contends that her motion was filed after she realized that Agency was disavowing the letter from the Attorney General.

¹⁹ Employee explains that although the AJ agreed with Agency in that its General Orders did not apply to Employee, the AJ did not reconcile how the conviction of a misdemeanor could be sustained when it was brought under Article VI, Section 6 of Agency's General Rules of Conduct. *Employee Kimberly McCain Petition for Review*, p. 10 (February 28, 2014).

²⁰ *Id.* at 17.

decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.²¹ The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

Conviction

Employee argues that in light of her vacated conviction, OEA cannot ignore the withdrawal of her guilty plea. As a result, she suggests that her vacated conviction is new and material evidence that was not available at the time the record closed. She reasons that the government failed to respond to her motion to vacate her conviction which resulted in the order being issued after the AJ issued her Initial Decision.

OEA Rule 629.2 provides that “once the record is closed, no additional evidence or argument shall be accepted into the record unless the Administrative Judge reopens the record pursuant to 630.1.” OEA Rule 630.1 states that “the Administrative Judge may reopen the record to receive further evidence or argument at any time prior to the issuance of the initial decision.” In this case, Employee filed her closing brief on April 5, 2013. She explains that the motion to vacate was filed in Superior Court on December 6, 2013. The Initial Decision was issued on January 27, 2014. Therefore, Employee had over one month, from the time she filed her motion in Superior Court, to request that the AJ hold the matter in abeyance to receive new evidence and arguments. Employee, through counsel, could have easily requested that the AJ hold her decision in abeyance until the Superior Court judge ruled on her motion to vacate. She failed to lodge such a request. Based on the record, the AJ had no way of knowing that a motion

²¹*Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

was even filed in Superior Court before issuing her decision. Accordingly, she cannot be held responsible for not considering said motion. At the time that the record was closed before OEA, Employee still had a conviction. Hence, the AJ made a decision based on the cause of action taken against her by Agency which involved her arrest.

Moreover, it must be noted that the Superior Court order granted Employee's motion to withdraw her guilty plea and vacated the judgment and commitment order. However, the order clearly states that the charge of driving under the influence and operating a vehicle was reinstated and a status hearing was scheduled on the reinstated charge. Therefore, the matter is not concluded as Employee would lead this Board to believe.

Employee also argues that she did not take action to vacate the motion until she realized that the government would disavow the letter from the Attorney General. This Board is puzzled by this argument because there is nothing in the record to support Employee's assertion. The letter was written by the Attorney General to Employee on July 21, 2010. It took over three years before Employee decided to file a motion to vacate her conviction in Superior Court. We are unable to understand why Employee waited so long to attempt to vacate the conviction, or why she contends that the AJ's decision is improper when it was issued four years after Employee was made aware of the miscalibration for the breathalyzer machine used in her criminal case. Additionally, Employee is under the mistaken belief that vacating her conviction automatically results in her reinstatement.²² Agency did have cause to remove her from her position.

²² In accordance with OEA Rule 633.4, Employee cannot now request that this Board consider evidence that she failed to present to the Administrative Judge. The rule states that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." This Board will only consider the evidence presented to the AJ before her Initial Decision was rendered. Accordingly, Employee's vacated conviction argument is deemed waived.

Cause

Employee does not dispute that she was a member of Local Union 36. In accordance with Agency's General Order, disciplinary action against Employee was governed by the collective bargaining agreement and Chapter 16 of the DPM.²³ Therefore, the AJ was correct in relying on the DPM and collective bargaining agreement when rendering her decision.

As previously noted, Employee was charged with any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. This cause of action is provided in DPM § 1603.3(e). Article VII, Section 2 of the General Order provides that “‘employment-related act or omission’ means an act or omission occurring during a time that the member was other than on duty, and which adversely and materially has affected, or is likely to affect, the efficiency of government operations or the member’s performance of his or her duties.” Because Article VII, Section 2 exists, this Board does not believe that the requirement for a nexus to Employee’s position is needed. This section specifically covers incidents that occurred while an employee is off duty that affects Agency’s operation or Employee’s performance of her duties.

As the AJ and Agency provided, Employee’s decision to drive while intoxicated conflicts with Agency’s mission to preserve life and promote safety. Moreover, as a result of her arrest for driving while intoxicated, Employee’s driver’s license was suspended.²⁴ The lack of a driver’s license as an EMT impacted both Agency’s operations, and Employee’s ability to perform her job.²⁵ Therefore, Agency proved that Employee engaged in any on duty or

²³ *Fire and Emergency Medical Services’ Motion for Summary Disposition and Opposition to Employee’s Summary Reversal Motion*, Attachment #12 (January 7, 2013). Article VII, Section 1 of the General Order provides that “disciplinary action against firefighters . . . shall be governed by the collective bargaining agreement between the Department and D.C. Fire Fighters’ Association Local 36 and Chapter 16 of the District Personnel Manual (DPM). . . .”

²⁴ *Agency’s Answer to Employee’s Petition for Appeal*, p. 5 (October 4, 2010).

²⁵ Agency provided that Employee was unable to perform an essential work duty of driving the ambulance because

employment related act or omission that Employee knew or should reasonably have known was a violation of the law.²⁶

Penalty

DCMR §1619.1(5) lists the range of penalties for the charge of any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. There are three sub-categories for the penalty for this cause of action that range from a five-day suspension to removal. Unfortunately, the record is void of which sub-category Agency used to determine Employee's penalty.²⁷ However, there is evidence in the record for this Board to make a determination of the penalty without remanding the matter to the AJ for further consideration.

Because Employee is a member of the Local 36, Agency could have also used the penalty structure outlined in Article VII, Section 8. This section provides the following:

Any appropriate remedy from reprimand to removal may be selected. Consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate. The following is a list of factors that may be considered:

of a suspended license. Additionally, she was unable to report to work due to a ten-day jail sentence and a twenty-eight day court ordered stay in a rehabilitation center. *Id.* at 29. *Assuming arguendo* that a nexus is required in this case, this Board believes that despite Employee's contention, there was substantial evidence to support the AJ's ruling on the issue of nexus. Employee's suspended license and inability to perform her job functions are a nexus between the charge and her position. Employee's behavior was egregious because she made a misguided judgment call to continue to drive her vehicle in an unsafe condition and provided incoherent statements to police officers. It is evident to this Board that such a serious charge, in relationship to Employee's duties, would cause management to question her ability to adequately perform her job. Finally, the AJ provided sufficient analysis on how driving while intoxicated conflicted with Agency's mission. Therefore, a nexus did exist between Employee's off-duty conduct and her performing her job efficiently.

²⁶ It should be noted that the AJ improperly considered the charges of "conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities" and "conduct unbecoming an employee." *Initial Decision*, p. 8-9 (January 27, 2014). Although these charges were provided in the advanced proposal to remove Employee, they were not considered in Agency's final notice of removal. *Agency's Answer to Employee's Petition for Appeal*, Exhibit #8 (October 4, 2010). Agency solely relied on the charge of "any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law." *Petition for Appeal*, p. 8-10 (August 19, 2010). Therefore, that is the only issue this Board will address.

²⁷ Moreover, the AJ offered the penalty for the charge of conviction of a misdemeanor in her analysis. As previously stated, this cause of action was not noted in Agency's final decision. Therefore, it should not have been considered.

- (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Thus, in accordance with Article VII, Section 8, Agency was within its authority to select any penalty from reprimand to removal as the appropriate penalty for the cause of action of any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. Therefore, removal was an appropriate penalty.²⁸

²⁸ As for Employee's argument that Agency failed to consider the Douglas Factors, in accordance with Article VII, Section 8, it was not a requirement. That section provides that Agency "may" consider those factors. Therefore, consideration of the factors was not mandatory.

Conclusion

This Board agrees with Employee's assessment that the AJ confused some of the issues in her analysis of this case. However, there is substantial evidence in the record to support her ruling that Agency properly removed Employee in this case. Accordingly, we must deny Employee's Petition for Review.

ORDER

It is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.