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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: March 19, 2013
)	
DISTRICT OF COLUMBIA)	
FIRE AND EMERGENCY MEDICAL)	
SERVICES DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kimberly Leyland (“Employee”) worked as an Emergency Medical Technician with the D.C. Fire and Emergency Medical Services Department (“Agency”). On June 25, 2009, Employee was served with an Advanced Notice of Proposed Adverse Action to suspend her for eleven days without pay.¹ Agency charged Employee with “conviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities.” According to Agency, Employee plead guilty to driving, attempting to drive a vehicle while under the influence and was sentenced to probation for one year.²

¹ On January 1, 2009, while off duty, Employee was arrested for failure to control speed to avoid a collision; driving while under the influence; and driving while impaired by alcohol. Employee entered a guilty plea in the District Court of Maryland for Talbot County for attempting to drive a vehicle while under the influence, and she received a probation before judgment verdict. The verdict for the other charges was *Nolle Prosequi*, meaning the prosecutor declined to pursue the charges.

² A Final Decision was issued on July 29, 2009, upholding Employee’s suspension. *Agency’s Answer to Employee’s*

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 27, 2009. She argued that Agency failed to meet its burden of proving that she was convicted of a crime.³ Therefore, she requested that the adverse action be reversed and that all lost pay and benefits be restored.⁴

In response to Employee’s Petition for Appeal, Agency asserted that Employee’s interpretation of Maryland Criminal Procedure Code § 6-220(g) was inconsistent with Maryland law.⁵ It further provided that it met its burden of proving that Employee was found guilty and convicted of driving, attempting to drive a vehicle while under the influence. Lastly, Agency argued that the relevant sections of the Maryland Code did not bar it from imposing disciplinary action against Employee.⁶ Thus, it believed that it established cause and its adverse action should be upheld.

The AJ issued his Initial Decision on November 18, 2011. He found that while Employee entered a guilty plea to the offense, she did successfully complete probation which resulted in a court verdict of probation before judgment, not a conviction. The AJ held that Maryland Criminal Procedure Code § 6-220(g) provided that “discharge of a defendant under this section shall be without the judgment of conviction” Moreover, he reasoned that

Petition for Appeal, Tab #5 (September 28, 2009).

³ In a subsequent brief on this issue, Employee explained that Agency had the burden of proving by preponderance of the evidence that the action taken against her was for cause. Hence, it had to prove that she was convicted of a crime in order to have the action sustained. However, she contended that she received probation before judgment in accordance with Maryland Criminal Procedure Code § 6-220(b)(1) and § 6-220(g). According to Employee, upon the fulfillment of the conditions of probation, no conviction was actually entered in her case. Therefore, it was Employee’s position that because no conviction was entered, Agency failed to meet its burden of proof, and the adverse action could not stand. *Employee’s Brief to the Office of Employee Appeals* (January 7, 2011).

⁴ *Employee’s Petition for Appeal*, p. 2 (August 27, 2009).

⁵ In its brief on this issue, Agency argued that the Court in *Curry v. Department of Public Safety & Correctional Services*, 651 A.2d 390 (1994) held that a disciplinary action against an employee is not a disqualification or disability as defined in Maryland Criminal Procedure Code § 6-220(g)(3). Therefore, a government employer is not prohibited from taking disciplinary action against its employee based upon a finding of guilt for which the employee received probation before judgment. Agency further provided that Maryland courts have held that the term ‘conviction’ includes circumstances where an employee has pled guilty but received probation before judgment. *Agency’s Brief in Response to Petition for Appeal*, p. 3-6 (January 28, 2011).

⁶ *Agency’s Answer to Employee’s Petition for Appeal*, p. 2 (September 28, 2009).

pursuant to *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.⁷ Since Agency's charge was based on Employee's alleged criminal conviction, and the AJ found that there was no conviction, he held that Agency did not have cause for the adverse action. Accordingly, he overturned Agency's decision to suspend Employee and ordered Agency to reimburse Employee with all back pay and benefits lost as a result of her suspension.⁸

Agency subsequently filed a Petition for Review of the Initial Decision with the OEA Board on December 28, 2011. It asserts that the AJ failed to consider the court's decision in *Curry* and its interpretation of the relevant statutory provision. Therefore, it believes that the AJ's interpretation of law is erroneous and that the Initial Decision should be reversed.⁹

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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁰ After reviewing the record, this Board agrees with the AJ's assessment and believes his decision was based on substantial evidence.

In accordance with District Personnel Manual ("DPM") § 1603.3(b), Employee was removed on the basis of "conviction of a misdemeanor based on conduct relevant to an

⁷ Further, based on an OEA Board decision in *Green v. Metropolitan Police Department*, OEA Matter No. 1601-0115- 86R89, *Opinion and Order on Petition for Review* (January 22, 1993), an administrative judge is not obligated to use the Maryland court's determination of guilt as evidence of an employee's misconduct in a proceeding before OEA.

⁸ *Initial Decision*, p. 3-4 (November 18, 2011).

⁹ *Petition for Review* (December 28, 2011).

¹⁰ *Black's Law Dictionary*, Eighth Edition; *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).

employee's position, job duties, or job activities."¹¹ DPM § 1603.2 provides that “. . . disciplinary actions may only be taken for cause.” As explained below, Agency failed to prove Employee's conviction. Accordingly, this Board cannot uphold its suspension action against Employee.

Maryland Criminal Procedure Code § 6-220(b)(1) provides the following:

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.

Maryland Criminal Procedure Code § 6-220(g) goes on to provide that:

- (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.

After reviewing the clear language of the Maryland Code, this Board agrees with the AJ's assessment that because there was no criminal conviction, Agency lacked cause to suspend Employee. The Court in *Tate v. Board of Education of Kent County*, 485 A.2d 688, 689 (1985) provided that upon fulfillment of the terms and conditions of probation before judgment, the court shall discharge the defendant and dismiss the proceedings against him. Moreover, it held that

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,

¹¹ *Agency's Answer to Employee's Petition for Appeal*, Tab #5 (September 28, 2009).

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

The *Tate* Court reasoned that the obvious goal of the Maryland General Assembly was to afford a degree of protection to first offenders in certain controlled substance cases. To accomplish that end, through Maryland Criminal Procedure §6-220,¹² the legislature directed that those “persons who are placed by the court on probation, and who satisfactorily complete that probation, shall not have a criminal record. Furthermore, but of equal importance . . . the arrest cannot be taken into account insofar as employment, civil rights, or licensing are concerned.”¹³

Similarly, OEA recently 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). In that case the D.C. Court of Appeals held that “[a] plea lacks the finality of a conviction because, before sentencing, it may be withdrawn for any reason that is fair and just.”¹⁴

Contrary to Agency’s assertions in its Petition for Review, *Curry v. Department of Public Safety and Corrections*, 651 A.2d 390 (1994) is distinguishable from the current case. In *Curry*, the employee was suspended from work without pay for five days on the basis of his agency’s Division of Correction Directive (DCD) 50–2. Directive 50–2 contained the agency’s internal disciplinary rules and procedures and allowed the agency to discipline employees who are convicted of alcohol-related offenses. The directive defines “conviction” to include situations

¹² During the time of the *Tate* decision, the relevant Code section was Maryland Code Article 27 Section 292.

¹³ *Tate v. Board of Education of Kent County*, 485 A.2d 688, 690 (1985).

¹⁴ *Settles v. Department of Parks and Recreation*, OEA Matter No. 1601-0252-09, p. 6 (February 14, 2012). Also see *Taylor v. United States, D.C. App.*, 366 A.2d 444, 447 (1976).

where the employee is granted probation before judgment.¹⁵

In the current matter, disciplinary action was taken against Employee because she violated D.C. Fire and EMS Order Book, Article VII, Section 2(4).¹⁶ Article VII, Section 2(4) defines cause as:

any conviction of a 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.

Because the regulation in *Curry* defines a conviction to include probation before judgment, the agency only had to prove that he received probation before judgment to prove that a conviction occurred.¹⁷ No such language appears in Article VII, Section 2(4), the regulation used as the basis of Employee's suspension. Article VII, Section 2(4) provides that cause is only present when there is a conviction of a crime. There is no reference at all to probation before judgment. In accordance with Maryland Criminal Procedure § 6-220(g)(3), there is no conviction if the party satisfactorily completes the requirements under probation before judgment. Employee successfully completed an early intervention drug program on May 19, 2009.¹⁸ Subsequently, she received a probation before judgment verdict. Because Agency failed to prove that Employee was convicted of driving under the influence, it lacked the requisite cause to take disciplinary action against her. Accordingly, its suspension action against Employee must be reversed.

¹⁵ *Curry v. Department of Public Safety and Corrections*, 651 A.2d 390, 391 (1994).

¹⁶ Employee was also charged with violating Article VI, Section 6, which provides the following:
any member convicted of the motor vehicle 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 the first offense.
This penalty may be reduced 40-hours pending the member's completion of an alcohol rehabilitation program approved by the Assistant Fire Chief.

¹⁷ *Id.*

¹⁸ *Agency's Pre-hearing Statement*, p. 2 (November 23, 2010).

ORDER

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

FOR THE BOARD:

William Persina, Chair

Vera M. Abbott

Sheree L. Price

Necola Shaw

Alvin Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.