UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 347

Docket No. DE-0731-04-0354-I-1

Denise L. Doerr,

Appellant,

v.

Office of Personnel Management,

Agency.

December 5, 2006

Daniel Minahan, Esquire, Lakewood, Colorado, for the appellant.

Robin M. Richardson, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Chairman McPhie issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that sustained in part, and reversed in part, the Office of Personnel Management's (OPM's) negative suitability determination. OPM files a cross petition for review. We find that the appellant's petition does not meet the criteria for review set forth in 5 C.F.R. 1201.115, and we therefore DENY it. We GRANT OPM's cross petition and REMAND this case to OPM for further proceedings in accordance with this Opinion and Order.

BACKGROUND

¶2 On September 12, 2000, the appellant called sheriff's deputies to her home because her ex-boyfriend had returned there, although he had been ordered to stay away. Initial Appeal File (IAF), Tab 3, Subtab 2d. The appellant allowed the deputies to search her home, where they found marijuana plants, scales, plastic bags and pipes. *Id.* The appellant was charged with possession with intent to distribute a controlled substance, a second degree felony; possession with intent to manufacture or produce a controlled substance, a second degree felony; and use or possession of drug paraphernalia, a misdemeanor. *Id.* The appellant entered an abeyance agreement, under which she agreed that she would commit no violations of law and that, upon completion of the agreement, all conditions of the plea could be withdrawn and the case dismissed. *Id.* Prior to the completion of the abeyance agreement, the appellant tested positive for THC (tetrahydrocannabinol, or marijuana). *Id.* The abeyance agreement was continued with an additional 35 hours of community service and evaluation of the appellant. *Id.* The appellant completed the abeyance agreement on October 24, 2002, and the charges were dismissed. *Id.*

¶3 On June 1, 2003, the appellant was appointed to a Physical Scientist position with the Department of Labor, Occupational Health and Safety Administration (OSHA). IAF, Tab 3, Subtabs 2b, 2c. During its background investigation of the appellant, OPM discovered the criminal charges set forth above. *Id.*, Subtab 2c. OPM therefore charged the appellant with criminal or dishonest conduct based on the drug charges. *Id.* OPM also charged her with material, intentional false statement or deception or fraud in examination or appointment because, in response to a question on Optional Form 306, she indicated that she had not been convicted of a crime, imprisoned, or on probation or parole. *Id.* OPM gave the appellant the opportunity to respond, considered her response, and then issued a final letter that found the appellant unsuitable for federal employment, directed her removal from her position, and barred her from

appointment to any position within the federal government for three years. *Id.*, Subtab 2a.

¶4 After a hearing, the administrative judge (AJ) found that OPM failed to show that the appellant had intentionally falsified her employment application and therefore the charge could not be sustained. Initial Decision (ID) at 5-8. Specifically, the AJ found that the evidence established that the appellant had sought advice from her criminal lawyer prior to completing the application and that she reasonably relied on his advice to answer "no" to questions on application forms regarding convictions for crimes or serving probation. *Id.* at 7. Thus, the AJ found that the appellant honestly believed that she was answering the questions on the employment application truthfully. *Id.* With regard to the second charge, the AJ found that the appellant had engaged in criminal or dishonest conduct because she possessed marijuana plants and tested positive for THC. *Id.* at 8-9. The AJ therefore sustained the charge. *Id.* at 9. Noting that the appellant did not serve in law enforcement and that there was no evidence that her use of marijuana had any impact on her ability to perform her duties, the AJ found that OPM did not show a nexus between the appellant's conduct and the duties of her position and thus did not show that the appellant is unsuitable for federal service. *Id.* at 9-10. The AJ remanded the appeal to OPM to determine whether the removal and debarment actions were appropriate based on the sole sustained charge of criminal or dishonest conduct. *Id.* at 10-11.

¶5 The appellant filed a petition for review (PFR) in which she argues, inter alia, that the AJ erred in sustaining the charge of criminal or dishonest conduct and that the Board should reinstate her. PFR File (PFRF), Tab 3. OPM filed a cross PFR, in which it argues, inter alia, that the AJ failed to apply the correct nexus analysis because she did not determine whether the appellant's removal would promote the integrity of the service and that she erred in failing to affirm its negative suitability determination after sustaining the charge of criminal or dishonest conduct. *Id.*, Tab 9.

ANALYSIS

Charges

¶6 For the reasons set forth in the ID, we affirm the AJ's finding that OPM's falsification charge against the appellant cannot be sustained. With regard to the question of whether the appellant knowingly furnished inaccurate information with the intent to deceive, we agree with the administrative judge's finding the appellant reasonably relied on her attorney's advice that under Utah law, she was never convicted of a crime, she was not on probation with the Department of Corrections, and that she should complete any application forms by answering "no" to questions regarding convictions for crimes or being on probation. As the administrative judge noted, the appellant's attorney has been practicing criminal law in Utah for over 25 years and there was no reason for the appellant to disregard his advice or believe that he was not correct. IAF, Tab 17 at 7-8. Furthermore, the legal advice provided by appellant's attorney appears to be consistent with Utah law. The generally accepted definition of "probation" refers to conditions imposed after conviction for an offense. (See Black's Law Dictionary). Many states have pretrial diversion programs that are quite different from probation. The record in this case references an "abeyance agreement" whereby the criminal case against the appellant would be dismissed. Interestingly, the Utah Pre-Employment Inquiry Guide states it is an improper pre-employment inquiry to ask about arrest records not leading to a felony conviction. An inquiry into a felony conviction is allowed if job-related. UT Administrative Code, Rule 606-2, U-V. In Utah, a person whose arrest has been expunged may respond to any inquiry as though the arrest did not occur, unless otherwise provided by law. UT Code § 77-18-10. We refer to Utah state law solely because it supports the administrative judge's finding that the appellant reasonably relied on the advice of her attorney.

¶7 We also affirm the AJ's finding that OPM's charge against the appellant of criminal or dishonest conduct is sustained.

Nexus

¶8 In Folio v. Department of Homeland Security, 402 F.3d 1350, 1356 (Fed. Cir. 2005), the court held that, under 5 C.F.R. § 731.501, the Board has jurisdiction to review all aspects of an unsuitability determination, including whether, based on the factors set forth in 5 C.F.R. § 731.202, the charged conduct renders an individual unsuitable for the position in question. The court found further that, although section 731.501 "provides that an 'action' based on the determination shall be final without any further appeal to the Board," that preclusion "does not prevent the Board from considering the additional considerations that constitute the 'nexus' between the specific factors of paragraph (b) and the additional considerations of paragraph (c)." Id. at 1354 (footnote omitted). Thus, the court concluded that the Board must consider the individual's ability to perform in the position in order to determine whether the individual is in fact unsuitable for that job and, in making such a nexus determination, all aspects under section 731.202 may be considered. Id. at 1356.

¶9 Here, the AJ determined that OPM did not show a nexus between the appellant's conduct and her duties. In making this determination, the AJ noted that the appellant was not in law enforcement, there was no evidence that her use of marijuana had any impact on her ability to work as a Physical Scientist, and there was evidence that she was a valuable employee. ID at 9-10. OPM argues that the AJ erred in her nexus analysis because she considered only whether the appellant was able to perform the duties of her Physical Scientist position and not whether the appellant's removal would protect the integrity of the service. PFRF, Tab 9. We agree.

¶10 First, we note that under 5 C.F.R. § 731.201, which sets forth the standard for suitability determinations, "an applicant, appointee, or employee may be denied Federal employment or removed from a position only when the action will protect the integrity or promote the efficiency of the service." OPM included the

word “integrity” to clarify that integrity and honest conduct have always been an important part of the efficiency of the service standard, explaining as follows:

> The current efficiency of the service language might inadvertently lead some to believe that efficiency and effectiveness are limited to their dictionary definitions, namely, the capacity to produce desired results with a minimum expenditure of energy, time or money, or the ability to produce results. In fact, the efficiency of the service standard as used by OPM in a suitability context always has been a broader concept that involves, among other things, the integrity of the competitive examination system.

65 Fed. Reg. 82,239, 82,241 (Dec. 28, 2000). Thus, the AJ should have considered whether the appellant’s removal would protect the integrity of the service. *See also Ferguson v. Office of Personnel Management,* 100 M.S.P.R. 347, ¶ 9 (2005) (a suitability inquiry is directed toward whether the character or conduct of a candidate is such that employing him may have an impact on the integrity or efficiency of the service).

¶11 Second, in making its suitability determination, OPM, or an agency with delegated authority, must consider the specific factors in paragraph (b) of section 731.202, which include the sustained charge in the instant appeal, with appropriate consideration given to the additional considerations outlined in paragraph (c) of that section. 5 C.F.R. § 731.202(a)-(b). Those additional considerations, "to the extent they [are] deem[ed] pertinent to the individual case," are as follows:

> (1) The nature of the position for which the person is applying or in which the person is employed;
> (2) The nature and seriousness of the conduct;
> (3) The circumstances surrounding the conduct;
> (4) The recency of the conduct;
> (5) The age of the person involved at the time of the conduct;
> (6) Contributing societal conditions; and
> (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

5 C.F.R. § 731.202(c).

¶12 As mentioned above, the AJ properly sustained the criminal or dishonest conduct charge against the appellant. We note that her conduct was serious; two of the three charges against her were felonies – possession with intent to distribute a controlled substance and possession with intent to manufacture or produce a controlled substance. As a Physical Scientist for OSHA, the appellant's duties included ensuring a safe work environment for employees. Hearing Transcript (HT) at 4. Her duties also included performing independent professional analysis of toxic materials in samples from the workplace, providing expert advice on sampling and analytical methods, and providing expert testimony during litigation. IAF, Tab 3, Subtab 2k at 2. The appellant's credibility is therefore critical to her position. OPM points out that OSHA is a law enforcement agency responsible for public safety and that the public perception of the trustworthiness of its employees is integral to accomplishing OSHA's purpose. PFRF, Tab 9 at 15. The Board has held that, in reviewing an applicant's suitability for employment, it is permissible for the agency to consider the public trust in the agency in expressing its own level of trust and confidence in the appellant. *Richardson v. Resolution Trust Corp.*, 66 M.S.P.R. 302, 311 (1995).

¶13 Accordingly, because the appellant engaged in criminal or dishonest conduct of a serious nature, and because her position requires credibility generally and is tied to the agency's interest in maintaining the public trust, we find that OPM established a nexus between the drug-related charges against the appellant and her position.

Suitability Determination

¶*14* Under 5 C.F.R. § 731.501(a), the Board must affirm an unsuitability determination when it finds that one or more of the suitability charges is sustained. Because the criminal or dishonest conduct charge is sustained here, we affirm OPM's determination that the appellant is unsuitable for federal service. Section 731.501(a) further requires that, if the Board sustains fewer than all the

charges, the Board shall remand the case to OPM, or the agency with delegated authority, to determine whether the action taken is still appropriate based on the sustained charges. Accordingly, because only the criminal or dishonest conduct charge is sustained, this appeal is remanded in accordance with 5 C.F.R. § 731.501(a), so that OPM may determine whether its action of directing the appellant's removal from her position and barring her from appointment to any position within the federal government for three years is still appropriate.

ORDER

¶15 This case is REMANDED to OPM for further proceedings in accordance with this Opinion and Order.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Denise L. Doerr v. Office of Personnel Management

MSPB Docket No. DE-0731-04-0354-I-1

¶1 For the reasons given below, I disagree with my colleagues' decision not to sustain the falsification charge and to remand this matter to the Office of Personnel Management (OPM).

BACKGROUND

¶2 In 2000, police searched the appellant's home, with her consent, and discovered several 3-foot tall marijuana plants in a room outfitted with lights, reflectors, and an irrigation system, additional marijuana that had been harvested, and paraphernalia for processing and smoking marijuana. She was charged with two felonies and one misdemeanor under Utah law. The appellant entered a "plea in abeyance," under which she agreed to serve probation, submit to drug testing, and pay a fine, upon satisfactory completion of which the charges would be dismissed. Initial Appeal File (IAF), Tab 3, Subtab 2D.

¶3 The appellant applied for federal employment in 2003, prior to dismissal of the criminal charges under the abeyance agreement. She was appointed to a Physical Scientist position at the Occupational Safety & Health Administration. OPM directed the revocation of her appointment after less than one year when it learned of her 2000 encounter with the law. Specifically, OPM found that the appellant committed "Criminal or Dishonest Conduct" with regard to her cultivation of marijuana and possession of drug paraphernalia, and that she made a "Material, Intentional False Statement or [engaged in] Deception or Fraud in Examination or Appointment," when she answered "no" on two questionnaires when asked if she had been on probation in the last 10 years. IAF, Tab 3, Subtabs 2A, 2C.

¶4 On appeal, the administrative judge sustained the first charge upon finding that the appellant grew marijuana and tested positive for THC (a marijuana metabolite) during the period of the abeyance agreement. The administrative judge did not sustain the second charge. The administrative judge remanded the matter to OPM for reconsideration of the unsuitability action in light of the sole sustained charge. IAF, Tab 17.

¶5 The appellant has filed a petition for review in which she argues that the administrative judge erred in sustaining the criminal or dishonest conduct charge. OPM has filed a cross petition for review in which it argues that the administrative judge erred in not sustaining the falsification charge.

ANALYSIS

¶6 I agree with the majority that OPM proved the criminal or dishonest conduct charge. However, unlike the majority, I would reverse the administrative judge's determination that OPM failed to prove the falsification charge.

¶7 On two questionnaires, one dated May 21, 2003 and the second dated June 2, 2003, the appellant answered "no" when asked whether in the past 10 years she had "been on probation." IAF, Tab 3, Subtabs 2H, 2J. The criminal charges were not dismissed pursuant to the plea in abeyance agreement until July 22, 2003. IAF, Tab 3, Subtab 2D at 10 (court records); *see also* IAF, Tab 17 at 3 (administrative judge finds that the criminal charges were dismissed on July 22, 2003). The attorney who represented the appellant in the criminal proceeding testified that under his interpretation of Utah law, an individual who is convicted of a crime may be placed on "formal" probation, but an individual who enters into an abeyance agreement is placed on "informal" probation. The attorney further testified that in his view, an individual who is on "informal" probation is not really on probation, and accordingly, he told the appellant that she did not have to disclose in a job application that she was on probation. Hearing Transcript (Tr.) 18-19, 27.

¶8 A falsification charge requires proof that the appellant knowingly furnished inaccurate information with the intent to deceive. *Harmon v. General Services Administration*, 61 M.S.P.R. 327, 330 (1994), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table). The administrative judge did not make a clear finding on whether the answers the appellant gave on the questionnaires were inaccurate. The administrative judge found, in any event, that the appellant "truthfully and honestly believed that she was answering the questions on the employment application correctly. She sought advice from her attorney and reasonably relied upon that advice." On this basis, the administrative judge did not sustain the falsification charge. IAF, Tab 17 at 7-8.

¶9 I would find that the appellant knowingly furnished inaccurate information on the two questionnaires when she said she had not "been on probation" in the last 10 years. One of the provisions of the plea in abeyance agreement was that the appellant serve "probation." *See generally* IAF, Tab 3, Subtab 2D at 1-13. During the period of the agreement, the appellant's "Probation Case Manager" petitioned a judge to "revoke" her probation when she tested positive for THC. The petition states that the appellant's jail sentence had previously been "stayed," that she had been "placed on probation," and that it was the petitioner's belief that she had violated a "condition of probation." *Id*. at 14. As a result of that petition, the appellant signed a "Probation Agreement" requiring her to "sign in" once a month, to perform 35 hours of community service, to abstain from drugs, and to attend "meetings" and "appointments" scheduled for her by "Probation Services." *Id*. at 25. Despite the advice that the administrative judge found the appellant received from her attorney, the appellant could not have reasonably believed when she filled out the questionnaires that she had never been on probation in the previous 10 years. The two questionnaires the appellant filled out simply asked whether the appellant had "been on probation"; the questionnaires were not limited to "formal" probation and did not make any distinctions among types of probation. IAF, Tab 3, Subtabs 2H, 2J.

¶10 I would further find that the appellant provided the inaccurate information on the questionnaires with the intent to deceive. In the absence of some explanation, the evidence described above is sufficient to raise an inference that the appellant intended to deceive anyone who reviewed the questionnaires about the fact that she had been on probation. *See Harmon*, 61 M.S.P.R. at 330 (intent to deceive can be proven by circumstantial evidence or inferred from surrounding circumstances). Although the appellant's criminal defense attorney testified that he told the appellant that she did not have to report "informal" probation on a job application, he did not testify, nor was he competent to testify, about the appellant's state of mind when she filled out her questionnaires. The appellant, for her part, did *not* testify that she answered "no" to the question about probation because her attorney told her that she only had to report "formal" probation. Indeed, the appellant testified at length, but she did not give any explanation for answering the questions about probation the way she did. *See* Tr. 4-12, 29-54. The appellant did testify that she thought she did not have to report having been convicted of a crime in a job application if she completed the plea in abeyance agreement successfully. Tr. 33-34. This explanation does not directly address the probation issue, and in any event, as noted above, the appellant filled out the questionnaires before the criminal charges were dismissed. In other words, the appellant gave inaccurate answers on the questionnaires before the Utah court found that she had satisfactorily completed the plea in abeyance agreement. The appellant could not have reasonably believed that she could deny having been on probation for a criminal charge to which she had pleaded guilty and that had not been dismissed or expunged.

¶11 The administrative judge rejected, as "not acceptable," OPM's argument that the distinction between "formal" and "informal" probation is immaterial to the falsification charge. IAF, Tab 17 at 8. I believe, however, that it is for OPM, not the Board, to determine what information the federal government should obtain from individuals who seek federal employment. In this connection, I do

not agree with the plain implication of the majority's analysis, which is that applicants for federal employment may interpret pre-employment questionnaires with technical definitions under the laws of the 50 states in mind rather than the ordinary meaning of the words on the questionnaires.

¶12 I also disagree with the majority's suggestion that Utah law places limits on the information that OPM may obtain from applicants who reside in Utah. The President has a statutory responsibility to assess the "fitness of applicants [for the federal civil service] as to . . . character." 5 U.S.C. § 3301(2). OPM performs this statutory function for the President under a delegation of authority to investigate the "suitability" of applicants. Exec. Order No. 10,577, Part I, § 5.2(a). "It is long established that any state or local law which attempts to impede or control the federal government or its instrumentalities is deemed presumptively invalid under the Supremacy Clause." *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1339 (Fed. Cir. 2005).[*] The parties have not briefed the meaning and effect of the provisions from the Utah Code and the Utah Administrative Code that the majority raises sua sponte. I would not reach the significant Supremacy Clause issue that is implicated by the majority's analysis because the appellant could not have reasonably believed that she could deny having been on probation for a criminal charge to which she had pleaded guilty and that had not been dismissed or expunged when she filled out the two questionnaires. However, if I did find it necessary to reach the Supremacy Clause issue, I would not resolve it without first allowing OPM the opportunity to brief the effect of Utah law on an OPM suitability investigation.

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[*] The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Art. VI, § 2.

¶13 In sum, I would grant OPM's cross petition for review, sustain the falsification charge, and sustain the negative suitability determination.

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Neil A. G. McPhie
Chairman