

October 26, the lab notified Moore that she had tested positive for marijuana and advised her of her right to an independent test and the procedure to do so. Her husband was also present and received the same information about re-testing. Moore immediately notified the Center Director.

On October 30, 2007, ODVA provided Moore with notice of the proposed disciplinary action, advising her that she was being considered for termination of her employment as a result of the positive drug test. (Appellee's Exhibit 5A). A pre-termination hearing was held on November 8, 2007. Moore was given an opportunity to respond to the charges and to present evidence. Based upon all of the information including Moore's testimony at the hearing, ODVA found that there were reasonable grounds to support the proposed discipline of termination. On November 13, 2007, ODVA provided Moore with notice of action, terminating her from her position effective November 13, 2007. (Appellee's Exhibit 5B). In the notice, ODVA finds that Moore's positive drug screening test constitutes misconduct and conduct unbecoming a public employee, in violation of ODVA policy, the merit rules and the statutes of the State of Oklahoma. ODVA found that the severity of the offense justified the discipline imposed. The notice contained no references to prior disciplinary actions.

At the pre-hearing conference, Moore was advised that if she wished to pursue her defense that the drug screening was conducted in violation of ODVA policy and state statutes, she should file a Motion for Summary Judgment and the time frame was established. Moore chose not to pursue that remedy. ODVA objected to any testimony or arguments regarding the policy and statute violations. The objection was overruled; however, the violations were not to be permitted to act as a bar to this disciplinary action since Moore failed to file any authority in support of her position.

The Testimony

ODVA offered the testimony of three (3) witnesses in support of its disciplinary action. Charlotte Jenkins was the first witness. Jenkins is an employee in the toxicology lab at St. Anthony's Hospital in Oklahoma City. The lab primarily conducts employee drug screening and is the lab currently under contract with the ODVA to perform its random testing. (Appellee's Exhibit 8). Jenkins stated that the lab uses a computer program, which randomly selects the employees for testing from a pool of ODVA employees. The names of the employees for the pool are supplied by ODVA. Jenkins testified that Moore was selected by the computer for random testing on October 23, 2007. The collection was supervised and a chain of custody and

control form was completed. (Appellee's Exhibit 4). Moore's sample returned a positive result for marijuana metabolites. Jenkins contacted Moore by telephone on October 26, 2007 to advise her of the test results and to discuss the possibility of other medications which could affect the results. She also advised Moore and Moore's husband of her right to have the specimen tested at another facility. Jenkins gave Moore information on contacting the lab including the name, address and telephone number. Jenkins testified that Moore did not request that the sample be re-tested.

Mike Walters is an ODVA Programs administrator who is responsible for the drug screening program. He testified that because of the large federal grants and federal funding received by ODVA, he is responsible to maintain a drug-free workplace. He stated that he is required to certify at least once a year that the facility is in compliance. (Appellee's Exhibit 9). As a result, ODVA established its own Drug-Free Workplace Policy which contains a "no tolerance" position. (Appellee's Exhibit 1A). ODVA also established a procedure for implementing the policy and for employee drug testing. (Appellee's Exhibit 1B). Walters stated that all employees of the Claremore Center are subject to the drug testing policy as all employees have contact with the residents at one time or another and all are responsible for the safety and well-being of the residents. He stated that all of the residents were long-term care patients who were honorably discharged war-time veterans. The residents have both physical and mental disabilities. Walters testified that every employee at the Center who has had a positive drug test has been discharged from employment. He also stated that when the drug test is positive, it may be impossible to tell when the drug usage occurred and whether it occurred while on duty. Walters noted paragraph 1D of the policy to support disciplinary action for all positive drug tests, because the influence of the illegal substance can affect the employee after it is consumed. He stated that the safety of the residents was the top concern and that employees under the influence could put the residents at risk. He also stated that use of the state Employee's Assistance Program (hereinafter "EAP") is not an option to mitigate the positive drug test. He stated that Moore could still utilize the services but it does not stop the termination.

Cynthia Adams has worked at ODVA for 32 years and is the Administrator of the Claremore Center since 2000. She testified that she has also been subjected to random drug testing and that the policy applies to everyone at the Center. She stated that the policy had been provided to every employee at the Center and that Moore had received it on November 29, 2005,

on December 30, 2005 and again on October 11, 2006. (Appellee's Exhibit 6). Adams went over Moore's job description as set forth on her PMP, which includes daily direct contact with residents and family members and occasional transport of residents to appointments or errands as necessary. (Appellee's Exhibit 7). She stated that Moore called her at home to notify her of the telephone call from St. Anthony's lab and her positive drug test. She said that, at the pre-termination hearing, Moore made a request for referral to the EAP. Adams testified that Moore's termination had nothing to do with a performance problem and that it was a difficult decision for her. She stated that Moore had previously been selected the Center's Employee of the Year, however, she had to be consistent in imposing discipline. She stated that every employee who tested positive at a random drug screening had been terminated. She also stated that any employee who refuses the test is also terminated. Adams testified that the central office of ODVA provides the employees names for the pool to determine random testing. It is her understanding that all center employees are included in the pool. Adams states that she is advised of the date of the testing about a week ahead of time, but that the lab does not tell her the selected employee's names until they arrive on the testing date. She testified that Moore was not suspended and was permitted to work up to her date of termination.

Adams stated that the name of the testing facility was posted on the employee bulletin board and on the ODVA web site. She admitted that the contracted lab had been changed and that the St. Anthony's lab information had not been posted at the time of this testing. Adams testified that the decision to terminate Moore was because of the agency-wide no tolerance policy. She stated that the progressive discipline policy provided that a single incident could justify skipping steps and that termination was appropriate because of the seriousness of the offense and the risk to the safety and welfare of the residents. Adams also testified about the federal certification process for Drug-Free Workplaces.

The Appellant offered the testimony of only one (1) witness, herself. Lisa Moore testified that she has been employed at the Claremore Center since January of 1997. She stated that her last position was a Social Worker. She testified that her last evaluation rating was "exceeds standards" and that she was chosen as Employee of the Year in 2005. She stated that she had no prior discipline, but admitted on cross examination that she had received written reprimands in the past. She stated that she generally has 1-3 hours of contact with the residents or their families per day. Moore stated that she had not transported a resident in over four years

and that transportation safety should not, therefore, be an issue. She stated that she was not under the influence of any illegal substance while on duty at the Center. Moore admitted that the St. Anthony's lab provided her with all of the information about the lab and the re-testing procedure. She stated that she contact the EAP coordinator on the following Monday to ask about treatment and/or assessment. She testified that she did not pursue treatment or assessment after she was terminated because of the loss of insurance. She admitted however, that her husband was also an employee at the Center and she had or could have had insurance coverage through him. Moore testified that she believed that the punishment was too severe and she should have been allowed to rehabilitate herself. She also admitted that many residents at the center were "feeble" and relied on her for care. She also stated that other employees with positive drug tests were not terminated, but could not provide any evidence on this statement. She stated that she was offered the opportunity to voluntarily resign, but she declined.

ISSUES

1. Was drug testing applicable to Appellant Moore's position?
2. Was the discipline imposed upon the Appellant just and appropriate under the circumstances, including consistency with other similar situations?
3. Was the drug testing performed in accordance with state law?

DISCUSSION

There is substantial, uncontroverted evidence that the Appellant had a positive drug result following a random test performed on October 23, 2007. Lisa Moore tested positive for an illegal controlled dangerous substance and was unable to provide any evidence to mitigate this result. Moore argues that state law only permits random testing on certain employees and her position is not one which is applicable. The statute permits testing on employees who are "engaged in activities which directly affect the safety of others". See Title 40 O.S. §40-554(4)(d.). All of the evidence indicates that Moore was involved directly with the residents at the Center on a daily basis and that she assisted them with a variety of tasks. Because of the nature of the Center as a long-term care facility, it is clear that Moore was responsible for the

safety of the residents and this argument has no merit. Moore is an employee who can be subject to random drug testing under Oklahoma law.

Moore's actions as alleged in the Notice of Final Action did occur as alleged and did warrant disciplinary action. Having so found, the next issue is whether the discipline imposed upon the Appellant just and appropriate under the circumstances? It is clear from the testimony and evidence that illegal drug use by ODVA employees could have had serious consequences for the residents of the Claremore Center. It is also clear that illegal drug use is a very serious offense. There is uncontroverted evidence that all other employees of ODVA who have tested positive were subject to the same disciplinary action. Because of the federal certification requirements and, consistent with the Governor's Executive Order 2004-38, ODVA has adopted a "no tolerance" drug policy. ODVA has also specifically provided that its definition of "under the influence" includes any time that an employee has "metabolites" present in his or her body. (Appellee's Exhibit 1B, page 2, paragraph 2.B.). These metabolites were present in Moore's body as evidenced by the positive drug test, and therefore, Moore was under the influence of an illegal substance while on duty. ODVA has proven, by a preponderance of the evidence, that its actions relating to this employee were consistent and proper under the circumstances. ODVA determined that, given the severity of the offense, no lesser discipline was appropriate. This Judge will not substitute her judgment on this issue.

In general, the Appellant did not deny the allegations. Rather, Moore chooses to complain that the name of the drug lab was not posted as required by ODVA policy. ODVA admits that the lab changed and that the bulletin board posting listed the old lab information. However, Moore admits that she was given all information about the contracted lab at the time of the testing and is unable to show how this out-of-date lab information posting adversely affects her. State law requires that the random testing policy be provided to each employee and Moore did not dispute that she received the policy. The policy itself did not change. ODVA is in compliance with state law. ODVA was not in compliance with its own policy as to posting the name of the lab, however, since Moore admits to having the required information, the lack of current posting is deemed to be harmless error.

Moore also alleges that she should have been referred to the EAP and given an opportunity to rehabilitate herself. Although use of the EAP is an option, it does not bar this

disciplinary action. Further, Moore admitted that she had the option to utilize the EAP and did not pursue it.

The undersigned has considered the facts and circumstances of this case, the testimony of the witnesses, state law as well as ODVA's policies and prior actions. Based upon the entire record, it is clear that ODVA has met its burden of proof that the discipline imposed was just and appropriate. Moore's argument that ODVA violated state law regarding random drug testing is not supported by the evidence and is without merit.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Title 74 O.S. §840-6.5 and Merit Rule 455:10-9-2 states that the Appellee ODVA has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.
4. 74 O.S. §840-6.5 and Merit Rule 455:10-11-17 state that a permanent classified employee may be discharged for the reasons of misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee, conviction of a crime involving moral turpitude or any other just cause.
5. The preponderance of the evidence shows that Moore's actions constituted Misconduct and Conduct Unbecoming a Public Employee.
6. Appellee, ODVA, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Moore for her actions as set forth in the Notice of Final Action.
7. Appellee, ODVA, has met its burden to prove, by a preponderance of the evidence, that the discipline of discharge imposed was just under the totality of the circumstances.
8. Appellant, Moore, has not proven or shown that ODVA's random drug testing policy and practice violated Oklahoma state law as alleged by the Appellant.

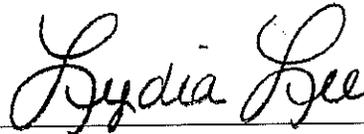
9. ODVA's admitted violation of its policy on Employee Drug Testing, #249, regarding the posting of the name, address and telephone number of the testing lab is not sufficient to bar the disciplinary action and is considered harmless error for the reasons set forth herein.

10. Great deference is given to ODVA's interpretation of its drug testing policy pursuant to *Estes v. Conoco Phillips Company*, 2008 OK 21.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Lisa R. Moore, MPC 08-078 be **DENIED.**

This Order entered this 18th day of April, 2008.



Lydia Lee
Administrative Law Judge