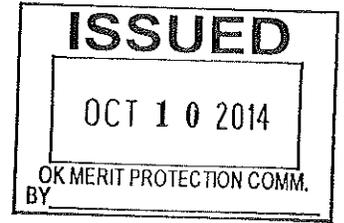


**OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**



TARRA DILLARD,)
)
 Appellant,)
)
 v.)
)
 OKLAHOMA DEPARTMENT OF)
 HUMAN SERVICES,)
)
 Appellee.)

Case No. MPC-14-209

FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 6th day of October, 2014 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Tarra Dillard (“Ms. Dillard” or “Appellant”), was present in person. The Appellee, Department of Human Services (“DHS” or “Appellee”) appeared by and through counsel, John E. Douglas, and table representative, Rebecca Price.

Appellant, a permanent classified employee working for Appellee, was discharged pursuant to Merit Rule 455:10-11-17, OKDHS:2-1-11, and 74 O.S. 840-6.5. DHS discharged Ms. Dillard for her alleged violation of OKDHS:2-1-7(i)(2)(B), OKDHS:2-1-7(i)(2)(D), OAC 340:2-1-140(1)(C), OAC 340: 2-1-43(c)(2), and OAC 340:2-1-44(c).

The record was opened and the hearing began. Exhibits were introduced without objection as Joint Exhibits 1-12, all of which are incorporated herein and made a part hereof. Arguments were heard, and the sworn testimony of seven witnesses for Appellee and one witness for Appellant was presented. After careful consideration of the record, including all

relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following case background, summary of testimony, findings of fact, conclusions of law, and order.

CASE BACKGROUND

Ms. Dillard was employed by DHS as a Direct Care Specialist II at the Pauline E. Mayer Shelter (the "Shelter"). The Shelter provides housing and care for up to forty-eight children ages birth to eighteen. Ms. Dillard worked the night shift from 11:00 p.m. until 7:30 a.m.

At the beginning of her shift on April 22, 2014, DHS delivered to Ms. Dillard a written notice to submit for random drug testing by 5:00 p.m. on April 23, 2014 (Ex. 4). Ms. Dillard failed to report to the testing facility by the deadline, and stated to her supervisor that she failed to report because she overslept. Ms. Dillard reported her failure to her supervisor prior to the beginning of her shift on April 23, 2014, and requested to take the test at a subsequent time.

On April 24, 2014, DHS notified Ms. Dillard that it was placing her on suspension with pay for up to twenty working days, beginning on April 25, 2014 (Ex. 2). On April 30, 2014, DHS modified the notice of suspension to also provide that Ms. Dillard's working hours were being changed to 8:00 a.m. to 5:00 p.m. during the suspension with pay (Ex. 3). On May 13, 2014, DHS sent Notice of Proposed Disciplinary Action – Discharge to Ms. Dillard (Ex. 1). Sometime after receiving the notice of proposed discipline, Ms. Dillard responded in writing (Ex. 5). On June 4, 2014, DHS conducted the required Pre-Termination Hearing at which the hearing officer determined that DHS failed to meet its burden to prove that Ms. Dillard made the alleged policy violations (Ex. 7, Pages 5-7).

On June 10, 2014, DHS issued its Notice of Final Formal Disciplinary Action – Discharge (the “Final Notice”) (Ex. 6). The basis for Ms. Dillard’s termination, as stated in the Final Notice, was her alleged violation of the following policies:

1. OAC 340:2-1-40(1)(C);
2. OAC 340:2-1-43(c)(2);
3. OAC 340:2-1-44(c);
4. OKDHS:2-1-7(i)(2)(B); and
5. OKDHS:2-1-7(i)(2)(D).

This appeal presents two issues. First, did Ms. Dillard violate the above noted policies? Second, if Ms. Dillard violated the above noted policies, was her discharge just and appropriate under the circumstances.

SUMMARY OF TESTIMONY

The testimony of seven witnesses for Appellee and one witness for Appellant, properly sworn and under oath, was taken and was made part of the record. The testimony was as follows:

Edwina Polk

Edwina Polk (“Ms. Polk”) is employed by DHS as a Direct Care Specialist IV at the Shelter. In that role, Ms. Polk supervises other employees, including Ms. Dillard. As part of her regular duties, Ms. Polk hand delivered Ms. Dillard’s notice to submit for drug and alcohol testing (the “Notice to Test”) at the beginning of Ms. Dillard’s shift – which began at 11:00 p.m. -- on April 22, 2014. Ms. Dillard called Ms. Polk prior to the beginning of Ms. Dillard’s shift on April 23, 2014, to report that she forgot to take the drug test. Ms. Polk did not recall Ms. Dillard telling her she failed to take the test because she overslept.

Ms. Polk advised Ms. Dillard that she would have to call her supervisor, Pat Rowe, to determine the appropriate course of action. When Ms. Polk called Ms. Rowe the next morning, Ms. Rowe indicated that she would have to check with her supervisor to determine the appropriate action. Later on the morning of April 24, 2014, Ms. Rowe called Ms. Polk to let her know she was still waiting on a response to her inquiry regarding the matter.

Ms. Dillard began and completed her 11:00 p.m. to 7:30 a.m. shift on April 23-24, 2014. Ms. Polk stated that she was not sure why Ms. Dillard was allowed to work the shift after missing the test.

The undersigned found Ms. Polk to be a credible witness.

Patricia Rowe

Patricia Rowe is employed by DHS as a Direct Care Specialist V at the Shelter, and was Ms. Polk's supervisor at the time Ms. Dillard failed to take the drug test. Ms. Rowe testified that Ms. Polk called her to request instruction after Ms. Dillard missed the drug test. She recalls that Ms. Dillard said she missed the test because she overslept and that Ms. Dillard requested that she be allowed to take the test the next day. Ms. Rowe informed Ms. Polk that she was afraid the result of Ms. Dillard's failure to test would be termination, but that she would read the policy and get back to her.

Ms. Rowe read the policy and determined that it had not changed. She instructed Ms. Polk to get Ms. Dillard's Notice to Test back from Ms. Dillard, and said she would call risk management for direction. Ms. Rowe called James Kyle in risk management at 8:00 a.m. on April 24, 2014 regarding the matter. After some email exchange, risk management advised Ms. Rowe that Ms. Dillard's failure to test amounted to a refusal to test and directed Ms. Rowe to

begin the process of terminating Ms. Dillard's employment. Ms. Rowe began that process with Rebecca Price.

Ms. Rowe testified that when DHS began random drug testing for direct care workers in 2002, it added a designation to the bottom of the form that had always been used for pre-employment testing. The purpose of the addition was to mark whether the testing was for pre-employment, random, accident, or for cause, whether the test was for drugs only or for drugs and alcohol, and whether the test was related to the Department of Transportation. The result is the form of the Notice to Test Ms. Dillard received (Ex. 4). Ms. Rowe testified that, following Ms. Dillard's discharge, DHS changed the form so that there's no misunderstanding as to when an employee has to be tested.

The undersigned found Ms. Rowe to be a credible witness.

Lynn McCloud

Lynn McCloud ("Ms. McCloud") is a Human Resource Manager at the Shelter. In that role, Ms. McCloud periodically receives emails from the Department's private drug testing vendor stating that it is time to conduct random testing, and requesting a list of active direct care employees at the Shelter. Ms. McCloud provides the list and, a few weeks later, receives an email from the vendor with a list of employees to test. Ms. McCloud delivers the list to Ms. Rowe, who assigns the testing dates based on each employee's next scheduled shift. After Ms. Rowe assigns testing dates, Ms. McCloud prepares the Notice to Test for each employee. Ms. McCloud prepared the Notice to Test provided to Ms. Dillard.

The undersigned found Ms. McCloud to be a credible witness.

Brad Petty

Brad Petty (“Mr. Petty”) is President of National Occupational Health Services, which is the private vendor hired by DHS to manage its drug testing programs (the “Private Vendor”). Mr. Petty testified that no one at DHS can influence which employees are chosen for random testing because each selection is made by software operated by the Private Vendor. The Private Vendor partners with several collection sites to collect employee urine samples and forward them to laboratories for testing.

Mr. Petty testified that each employee’s urine sample is divided into two vials. One vial is tested initially and the other is frozen for 366 days. If initial testing shows a positive result, tests are administered on the second vial for confirmation. Mr. Petty testified that, while second testing is required to confirm a positive result, DHS policy does not allow a second opportunity for an employee to appear for random testing. He considers failure of an employee to appear for random testing to be the same as the employee’s refusal to submit for testing.

Mr. Petty testified that random testing is more accurate when the window of time an employee has to present for testing is smaller because time allows employees to take certain action to alter the outcome of testing. Mr. Petty stated that the amount of time given to Ms. Dillard to present for testing is a “big window” and that presentation times can normally be as short as “immediately” or within one hour of notice. Mr. Petty testified that allowing an employee to change the date of her random test would not be a good idea.

The undersigned found Mr. Petty to be a credible witness.

Eddie Collins

Eddie Collins (“Mr. Collins”) is a Human Resource Manager II and works in the DHS drug and alcohol testing program. Mr. Collins testified that an employee’s refusal to submit for

testing is broader than the employee literally saying she refuses to submit. For example, a refusal to submit could be that the employee failed to produce enough urine during the test and left the testing site before doing so.

In addition, Mr. Collins stated that an employee is deemed to refuse to submit if the employee fails to show up for testing. Mr. Collins testified that this broader definition is established by DHS policy, but that the policy is implied. Mr. Collins testified that the policy that failure to appear for testing amounts to a refusal to submit for testing has been policy since inception of the random testing program, but that such policy is not written. Mr. Collins testified that he has never seen an employee “not show up for random testing”. Mr. Collins stated that no DHS policy excuses testing because an employee forgets to submit and said “it’s either you do it or you don’t”. Mr. Collins testified that this “implied rule” is explained to employees when they are hired.

The undersigned found Mr. Collins to be a credible witness.

Leanne Saunders

Leanne Saunders (“Ms. Saunders”) is the Employee Relations Manager for DHS. Her duties include acting as Corrective Discipline Manger for the Department. Ms. Saunders is familiar with DHS drug and alcohol testing policies and procedures.

Ms. Saunders testified that, prior to this round of testing, DHS had never had an employee fail to show up for a random test. On one prior instance an employee failed to show up for reasonable suspicion testing and the employee was discharged. Failure to show up for testing also happens occasionally with initial hires. Ms. Saunders stated that an employee’s failure to submit for testing equals a positive test result.

The undersigned found Ms. Saunders to be a credible witness.

Rebecca Price

Rebecca Price is employed by DHS as an Institutional/Community Program Administrator II. She is the top official at the Shelter, and has worked in that capacity for over four years.

Ms. Price testified that the Shelter employs 85 people, and that 60 to 65 employees are direct care staff. Ms. Price testified that Ms. Dillard and another Shelter employee selected for random testing along with Ms. Dillard, S.Y., were the first Shelter employees to fail to show up for random testing.

Ms. Price prepared the notice of discharge with the assistance of Ms. Saunders. She mailed the final discipline packet to Ms. Dillard in the time required by the rules. Ms. Price sent the final discharge packet twice. The first time she sent it, she inadvertently inserted documents related to another Shelter employee, S.Y., who was being discharged under the same circumstances as Ms. Dillard. When Ms. Dillard notified her of the mistake the next day, she sent the original Notice of Final Disciplinary Action – Discharge to Ms. Dillard with the documents applicable to Ms. Dillard.

Ms. Price testified that Ms. Dillard signed a statement showing she received the DHS policies on drug testing (Ex. 9). In addition, Ms. Price testified that Ms. Dillard received ongoing Drug Free Workplace training and Alcohol and Drug Testing Program training as indicated by Ms. Dillard's Staff Training Record (Ex. 10). Both were received about the time Ms. Dillard began working at the Shelter.

The undersigned found Ms. Price to be a credible witness.

Tarra Dillard

Ms. Dillard testified that she received the Notice to Test. She stated that she went home after her night shift and overslept, which prevented her from submitting for testing in time. She stated that she informed her supervisor, Ms. Polk of her failure to submit for the test by telephone prior to her shift that was to begin the same night. Ms. Polk advised her to come to work.

Ms. Dillard admitted on cross-examination that she signed the Receipt of Policy (Ex. 9) indicating she received the DHS drug testing policy 340:2-1-40 through 340:2-1-46 on or about the date she began working for the Shelter, and stated that she did in fact receive a copy of the DHS drug testing policy. She testified that she had been selected for random testing one time before, and had timely submitted for the test “because that’s what (she) was supposed to do”.

The undersigned found Ms. Dillard to be a credible witness.

FINDINGS OF FACT

The parties stipulated to the following matters:

1. MPC has jurisdiction over this appeal;
2. The Merit Rules apply;
3. The appeal was timely filed;
4. Ms. Dillard was a permanent, classified employee of DHS;
5. Ms. Dillard was terminated on June 13, 2014;
6. Ms. Dillard received notice requiring her to submit to random drug testing by 5:00 p.m. on April 23, 2014; and
7. Ms. Dillard did not take a drug or alcohol test by 5:00 p.m. on April 23, 2014.

The stipulations of the parties are incorporated herein as findings of fact.

The Notice to Test (Ex. 4) is unclear and confusing. The Notice to Test clearly indicates that Ms. Dillard was to submit for drug testing by 5:00 p.m. on April 23, 2014. However, the Notice to Test also indicates that the requirement is based on Ms. Dillard's application to be employed by DHS and that her failure to test will result in her conditional offer of employment being withdrawn. Although DHS attempted to broaden the Notice to Test to apply to existing employees selected for random testing by adding certain selections to the bottom of the form, including the word "random", the form is unclear in at least two respects. First, because the form indicates that the testing is necessary because of a conditional job offer, Ms. Dillard might have assumed the form was given to her – an existing employee – by mistake. The designation of "random" below does not change this fact. In addition, the consequences of failing to appear are not stated on the form. At no place does the form indicate an existing employee may be terminated for failure to test as instructed.

Ms. Dillard did not refuse to submit for drug testing, and the Department provided no testimony or documentary evidence to the contrary. In fact, the only evidence on the matter is that Ms. Dillard failed to appear because she overslept – not because she refused to be tested. In addition, Ms. Dillard clearly offered to submit for testing at another time. Whether Ms. Dillard's failure to submit for testing at the designated place by the designated time amounts to a refusal to submit, then, is a question of law.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.
2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. Merit Rule 455:10-11-17 states that a permanent classified employee may be discharged for any of the reasons set forth in 455:10-11-14.

4. The Personnel Act and Merit Rules provide that an employee must receive notice of the proposed action, *which shall include the statute, rule, policy, etc., which was violated*, the specific acts or omissions which are the cause of the suspension, an explanation of the evidence justifying the suspension, and the employee must be given an opportunity to respond to the proposed suspension either in writing or orally. 74 O.S. § 840-6.4; OAC 455:10-11-15.

5. Merit Rule 455-10-9-2 states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just. This is an adverse action appeal.

6. To meet its burden to prove that just cause exists for the discharge, DHS must prove, by a preponderance of the evidence, that Ms. Dillard violated one of the following policies that it alleged she violated in the Notice of Final Formal Disciplinary Action – Discharge (Ex. 1):

- (a) OAC 340:2-1-40(1)(C);
- (b) OAC 340:2-1-43(c)(2);
- (c) OAC 340:2-1-44(c);
- (d) OKDHS:2-1-7(i)(2)(B);
- (e) OKDHS:2-1-7(i)(2)(D).

7. OAC 340:2-1-40(1)(C) simply provides that DHS has a program for random alcohol and drug testing of direct care specialists. Nothing in this rule requires any action from Ms. Dillard, and DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Dillard violated this rule.

- 8. OAC 340:2-1-43(c)(2) simply provides the general method under which DHS will

conduct random testing. Nothing in this rule requires any action from Ms. Dillard, and DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Dillard violated this rule.

9. OAC 340:2-1-44(c) states that discharge proceedings are initiated for any employee who refuses to submit to an alcohol or drug test. Nothing in this rule, however, provides even a suggestion that an employee “refuses” to submit if she fails to show up for testing at the time and place directed by DHS. Appellant has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Dillard violated this rule, because it has not proven that Ms. Dillard refused to submit to testing.

10. OKDHS:2-1-7(i)(2)(B) defines “willful failure” to include “failure to follow established OKDHS policy, failure to attend training, and failure to complete required forms and reports”. Nothing in this provision – which is merely definitional – requires Ms. Dillard to submit for drug testing or provides that she may be terminated for failing to do so (even if that failure is willful). DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Dillard violated this definitional rule.

11. OKDHS 2-1-7(i)(2)(D) defines “willful disobedience” as the “intentional disregard of supervisory directives or willful refusal to comply with such directives. This provision is definitional only, and requires no action of Ms. Dillard. Even if the rule required Ms. Dillard to comply with directives, there has been no suggestion through evidence that Ms. Dillard “willfully” refused anything. DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Dillard violated this rule.

12. Because Appellee has failed to meet its burden of proof that just cause exists to impose any discipline on Appellant, no conclusion of law is necessary with regard to the justice

of the discipline imposed under the circumstances.

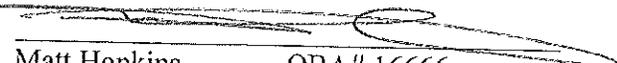
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal be **SUSTAINED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the discipline imposed upon Appellant is rescinded.

IT IS FURTHER ORDERED, ADUDGED AND DECREED that Appellee shall immediately reinstate Appellant at the same employment level she had attained at the time of her discharge and pay any and all benefits lost to Appellant by imposition of the discharge.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's personnel records are to be expunged of all references to this disciplinary action.

Dated this 9th day of October, 2014.


Matt Hopkins, OBA# 16666
Administrative Law Judge
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