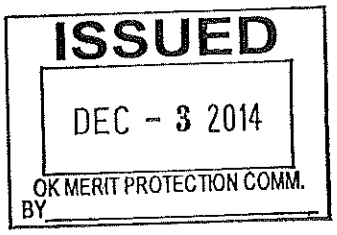
OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA



STAR YOUNG,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. MPC-14-211
	)	
OKLAHOMA DEPARTMENT OF HUMAN SERVICES,	)	
	)	
	)	
Appellee.	)	

FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 20th day of November, 2014 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Star Young ("Ms. Young" 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 effective at 5:00 p.m. on June 13, 2014, pursuant to 74 O.S. 840-6.5, OKDHS:2-1-11, and Merit Rule 455:10-11-17. DHS discharged Ms. Young for her alleged violation of OAC 340:2-1-140(1)(C), OAC 340: 2-1-43(c)(2), OAC 340:2-1-44(c), OKDHS:2-1-7(i)(2)(B), OKDHS:2-1-7(i)(2)(D).

The record was opened and the hearing began. Exhibits were introduced without objection and by agreement of the parties as Joint Exhibits 1-31, all of which are incorporated

herein and made a part hereof. Arguments were heard, and the sworn testimony of seven witnesses for Appellee and two 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. Young was employed by DHS as a Direct Care Specialist III at the Pauline E. Mayer Shelter (the "Shelter"). Ms. Young worked the night shift from 11:00 p.m., to 7:30 a.m. At the beginning of her shift on April 22, 2014, DHS delivered to Ms. Young a written notice to submit for random drug testing by 5:00 p.m. on April 23, 2014 (Ex. 10).

Instead of driving immediately to the testing facility at the end of her shift, Ms. Young went home to go to sleep. When Ms. Young woke up at 4:00 in the afternoon, she decided that one hour was insufficient time to drive to the testing facility, participate in the testing, and pick up her child from school. Ms. Young reported her failure to test to her supervisor near the beginning of her shift on April 23, 2014. Ms. Young voluntarily submitted for hair follicle testing several weeks after her notice to test, but did so without approval of the Department and outside the Department's testing procedure.

On April 24, 2014, DHS notified Ms. Young 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. Young'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. Young (Ex. 1). 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. Young made the alleged policy violations (Ex. 17).

On June 10, 2014, DHS issued its Notice of Final Formal Disciplinary Action – Discharge (the "Final Notice") (Ex. 4). The basis for Ms. Young'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. Young violate the above noted policies? Second, if Ms. Young violated the above noted policies, was her discharge just and appropriate under the circumstances.

SUMMARY OF TESTIMONY

Rebecca Price

Rebecca Price ("Ms. Price") is employed by DHS as an Institutional/Community Program Administrator, and is the Director of the Shelter. Ms. Price testified, in part, as follows:

- Ms. Young and another Shelter employee selected for random testing along with Ms. Young were the first Shelter employees to fail to show up for random testing;
- Ms. Young received the Department's alcohol and drug testing policies as identified on Page 4 of 16 of Exhibit 3;

- Selection of specific employees for random testing at the facility occurs by the testing vendor requesting a list of current direct care employees, the facility providing the list, and the vendor randomly selecting employees to test from the list;
- When the testing vendor provides a list of employees to be tested, Patricia Rowe assigns dates for testing based on each employee's next scheduled work shift, and Lynn McCloud fills out the notices to test;
- No facility employee has ever told Ms. Price that the notice to test is confusing about where or when to submit for testing;
- The facility has historically (and in this case) provided night shift employees until 5:00 p.m. on the day their shift ends to submit for testing as a matter of convenience for employees;
- The facility's notice to submit for random testing is changing to require night-shift employees to submit for testing immediately following their shifts because Ms. Price determined that current procedure does not follow the Department's policy that employees test during or immediately after their shifts;
- The facility, with the help of Eddie Collins in risk management and Brad Petty from the testing vendor, along with other shelters, has changed the notice to submit for testing to "look totally different";
- Testing procedure has also changed so that the testing vendor contacts the facility through the Department's Risk Management Division;
- Testing procedure is changing to provide that testing will occur at the facility;

- Someone from the facility could have offered to drive Appellant from work to the testing site if Appellant had notified the facility that she was too tired to drive there at the end of her shift.

The undersigned found Ms. Price 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 "Vendor"). Mr. Petty testified by telephone without objection of Appellant. Mr. Petty testified, in part, as follows:

- The list of direct care employees the Vendor receives from the facility is entered into a computer program that randomly selects names of employees to test;
- No one at the facility or the Department can influence what employees are selected for testing;
- A short window of time between an employee receiving a notice to test and submitting for testing is critical to the validity of test results;
- The testing conducted for facility employees is a standard ten panel test made on a urine sample;
- Hair follicle testing provides a larger snapshot in time of drug usage and goes back further than urine testing, and can "go back" 180 days depending on the test subject's ability to metabolize.

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

Patricia Rowe

Patricia Rowe ("Ms. Rowe") is employed by DHS as a Direct Care Specialist V at the Shelter. Ms. Rowe is a supervisor at the facility and works directly under Rebecca Price. Ms. Rowe testified, in part, as follows:

- The Department began drug testing around 2002;
- The facility has, in practice, allowed night shift employees to submit for random testing between the end of their shifts at 7:30 a.m. and the close of the testing site at 5:00 p.m. as a matter of convenience;
- The testing facility opens at 8:00 a.m. and accepts walk-ins until 5:00 p.m.;
- Night shift employees normally go to the testing site directly after the end of their shifts;
- The form the facility used to inform Appellant to submit for testing (Exhibit 10) is used for all employees and has been used at the direction of the Human Resources Department;
- The facility has never had an employee state that they did not understand the notice form (Exhibit 10) or that they believed the notice did not apply to them;
- Random testing was originally conducted in a bus at the facility, but the practice was discontinued because of employee complaints;
- The facility then changed to an off-site vendor that closed at 4:00 p.m., which provided insufficient time for employees working the shift ending at 3:00 p.m. to get there safely;
- The facility ultimately changed to the facility currently used to help the 3:00 shift because the current facility stays open until 5:00 p.m.;

- Ms. Rowe would have made arrangements for Appellant to be driven to the testing site at the end of her shift if she had known Appellant was too tired to drive herself.

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

Edwina Polk

Edwina Polk ("Ms. Polk") is employed by DHS as a Direct Care Specialist IV at the Shelter, and was Ms. Young's supervisor. Ms. Polk testified, in part, as follows:

- Ms. Polk gave Appellant her notice to submit to random testing at the beginning of Ms. Young's shift on April 22, 2014;
- Ms. Young did not talk to Ms. Polk about the notice during her shift;
- On April 23, 2014, Ms. Young told Ms. Polk that she did not submit for testing because she was tired after work, went home to sleep, and woke up too late to both pick up her daughter and submit for testing;
- Ms. Young was a satisfactory employee who followed the rules and was outspoken;
- Ms. Young did not tell Ms. Polk at any time that she did not understand the notice to test or that she thought the notice did not apply to her.

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

Eddie Collins

Eddie Collins ("Mr. Collins") has been head of Risk and Safety Management for DHS for five years. Drug testing falls under Mr. Collins' division. Mr. Collins testified, in part, as follows:

- An employee's refusal to submit for random testing is "treated as positive and you are terminated";

- Mr. Collins believes the policy that states a refusal to test is treated as a positive test is OAC 340:2-1-44(c);
- With regard to the requirement that random testing occur "immediately" after an employee's shift, as stated in OAC 340:2-1-43, Mr. Collins believes "immediately" means whatever time is specified in the notice to test;
- Ms. Young's submission to hair follicle testing a month after her deadline to submit for random testing did not cure her failure to test;
- Changes to the facility's random drug testing procedure are being made not because the Department considers current policy confusing, but because Mr. Collins would like to see the testing done "right then and there" and because, based on Ms. Young's and another employee's failure to test, he wanted to make the procedure uniform.

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

Marci Gracey

Marci Gracey ("Ms. Gracey") is a Human Resource Specialist II and works under the Department's Discipline and Grievance Manager, Leanne Saunders. Ms. Gracey testified, in part, as follows:

- Before the incident in which Ms. Young and a co-worker failed to submit for random testing, the Department has not had an employee refuse to submit to random testing;
- Ms. Gracey could not identify a Department policy that says an employee's failure to submit for testing is equivalent to the employee's "refusal" to test;
- With regard to the requirement that testing occur "immediately" after the end of an employee's shift, as stated in OAC 340:2-1-43(e), Ms. Gracey believes "immediately" means "within the hour".

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

Kevin Sharp

Kevin Sharp ("Mr. Sharp") is a Programs Administrator in the Department's Human Resources division, and is in charge of numerous programs. Mr. Sharp testified, in part, as follows:

- Ms. Young reported to Mr. Sharp following her notice to test that she believed she had been subjected to disparate treatment on the basis of race because, while she and another African American employee had been given 24 hours to test, another employee, who was Caucasian, was given 48 hours to test;
- Mr. Sharp determined that, while the Caucasian employee had, in fact, been given 48 hours to test, the employee had submitted to testing immediately after her shift was over because she knew the 48 hour allowance was a mistake;
- Mr. Sharp concluded that Ms. Young had not been subjected to disparate treatment;
- Mr. Sharp determined, by consulting MapQuest, that it would take Appellant 12 minutes to drive from her residence to the testing site and concluded, on this basis, that she had plenty of time to submit to testing after she woke up at 4:00 p.m., an hour before the testing deadline;
- Mr. Sharp initially stated that Ms. Young refused to test, but corrected his statement to say that "I shouldn't say 'refused' – she didn't get tested as she was supposed to and she knew the policy";
- Ms. Young was free to present for testing at any approved testing site shown on the Department's website – she could have presented to Tulsa or Ardmore or any site she chose;

- Mr. Sharp testified that normal drug testing procedure allows an employee 24 hours to submit for testing, and that this is stated on the first page of the Department's website, but stated that the 24 hour period may apply to pre-employment testing rather than random testing.

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

Renda K. Northington

Renda K. Northington ("Ms. Northington") worked at the Shelter from 1986 until her employment was terminated in 2011. Ms. Northington testified, in part, as follows:

- Drug testing began about 2 years before Ms. Northington left the Shelter;
- Testing originally occurred in a van behind the Shelter, and if an employee tested positive she was allowed to get treatment and keep her job;
- When testing first occurred offsite, the testing facility was located at Reno and Meridian in Oklahoma City;
- The form of the notice to test received by Ms. Young was not used during Ms. Northington's employment.

The undersigned found Ms. Northington to be a credible witness, but did not find her testimony relevant to this appeal.

Star Young

Appellant testified, in part, as follows:

- After her shift ended at 7:30 a.m. on April 22, 2014, Ms. Young participated in voluntary DHS training to become certified as a therapeutic foster parent – the training was not required by or part of her employment;

- Ms. Young slept little or not at all before the beginning of her shift at 11:00 p.m. on April 22, 2014;
- Ms. Young received the Notice to Test during her shift on April 22, 2014;
- Ms. Young informed her supervisor that she was too tired to go to the testing site at the end of her shift, but would go after she had time to sleep at home;
- Ms. Young went home after her shift ended on April 23, 2014, called her mother to ask for an early wake-up call so she could submit for testing, and went to bed;
- Ms. Young woke up when her mother called her at 4:00 p.m. to remind her to pick up her daughter from school;
- Ms. Young's mother normally picked up Ms. Young's daughter from school, but Ms. Young did not ask her to do so on April 23, 2014 so that she could, instead, submit for testing;
- When Ms. Young received the Notice to Test (Exhibit 10) she understood she was to go to the collection site for testing as stated in the notice.

FINDINGS OF FACT

1. The parties' stipulations are incorporated herein as findings of fact, as follows:

   (a) the Merit Protection Commission has jurisdiction over this appeal;

   (b) the Merit Rules apply;

   (c) the appeal was timely filed;

   (d) Appellant was a permanent, classified employee of Appellee; and

   (e) Appellant was terminated on June 13, 2014.

2. Ms. Young received notice requiring her to submit to random drug testing by 5:00 p.m. on April 23, 2014.

3. Ms. Young did not take a drug or alcohol test by 5:00 p.m. on April 23, 2014.

4. Although the Department argues that any failure to submit for random testing is a "refusal" to submit for testing that is an appropriate basis for termination, the Department's witnesses presented contrary testimony on the matter, including:

(a) Marci Gracey, who works directly under the Department's Discipline and Grievance Manager, could not identify a Department policy that says an employee's failure to submit for testing is equivalent to the employee's "refusal" to test;

(b) Kevin Sharp, who is a Programs Administrator in the Department's Human Resources division, testified that he shouldn't call Ms. Young's failure to test a "refusal" – she just didn't test when she knew policy required her to test.

5. Although OAC 340:2-1-43 requires the facility to make adequate arrangements for employees to test and requires testing to occur during or immediately after employees' work shifts, even the Department employees who run the drug testing program provided conflicting testimony regarding acceptable practice:

(a) Eddie Collins, who runs the Department's Risk and Safety Management Division, testified that "immediately" means whatever time is specified in the notice to test, which would, in this case, equate "immediately" with eight and a half hours;

(b) Marci Gracey, in contrast, testified that "immediately" after the end of an employee's shift means "within the hour";

(c) Kevin Sharp testified to a third possibility – that employees are given 24 hours to test but later stated that the period may apply only to new job applicants;

(d) Rebecca Price, the Facility director, testified that she determined, after Appellant's discharge, that the procedure allowing night shift employees to test within eight and

a half hours after the end of their shift was not "immediate" and that the procedure did not follow Department policy.

6. The Facility's notice to Ms. Young is unclear and confusing. The Notice to Test clearly indicates that Ms. Young 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. Young'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. Young 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.

7. Ms. Young was, however, not confused by the Notice to Test. When she received it, she knew she was to submit by the deadline.

8. The Department argues that because Ms. Young knew she was required to test, the confusing nature of the Notice to Test is irrelevant. The undersigned disagrees. The Department terminated Ms. Young because it determined her failure to test is, like all failures to test, a "refusal" to test. If the Department intends to hold Ms. Young to such a standard, it must first notify her and must make the notice plain and clear. The Notice to Test did not do so.

9. The Department did not follow its own policy regarding the manner in which it instructed Ms. Young to test. Although Department policy requires random testing to occur

during or immediately following a shift, the Department disregarded this policy by allowing night shit employees – including Ms. Young – an additional eight and a half hours to test. If the Department intends to hold Ms. Young to a standard that any failure to test is a refusal to test, it must at least follow its own policies regarding test delivery mechanisms. This is especially true when the policy that any failure to test is a "refusal" to test is either unwritten, or is not sufficiently explained to Appellant in the notices of discipline.

10. Ms. Young did not refuse to submit for drug testing. Although Ms. Young admitted she could have, but did not, ask her mother to pick up her child so that she could attempt to make it to the testing site, her failure to do so simply did not amount to her refusal to test under any written policy the Department cited as a basis for Ms. Young's termination.

11. The Facility's application of the Department's random drug testing policy in Ms. Young's case was clearly deficient. The Notice to Test was confusing and not in compliance with Department policy regarding the time for testing. In addition, the Notice to Test did not comply with the Department's policy, as established by the testimony of the Department's own witness, Kevin Sharp, that testing may occur at any location approved by the Department.

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. Young violated one of the following polices that it alleged she violated in the Notice of Final Formal Disciplinary Action – Discharge:

(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. Young, and DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Young 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. Young, and DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Young 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. Appellee has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Young violated this rule, because it has not proven that Ms. Young 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. Young 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. Young 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. Young. Even if the rule required Ms. Young to comply with directives, there has been no suggestion through evidence that Ms. Young "willfully" refused anything. DHS has failed to meet its burden to prove, by a preponderance of evidence, that Ms. Young 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.**

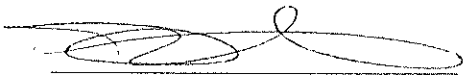
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the discipline imposed upon Appellant is rescinded.

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 pay and 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.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's prayer that the Department reimburse her for the expense of her voluntary drug test is denied.

Dated this 28th day of November, 2014.



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