

informed the parties that Kimbrough's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DYS called as witnesses:

- (1) Yolanda Byrdsong, DYS Campus Administrator, Vacca Campus;
- (2) Lomax O'Conner, DYS Chief of Security, Vacca Campus; and
- (3) Tom VanderWal, Special Investigator for DYS.

Kimbrough testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

Kimbrough began State employment with DYS in May 2009 as a Youth Services Security Officer when he was hired by DYS at Vacca. Kimbrough remained in that classification until his dismissal.

Following the pre-dismissal conference conducted on March 11, 2016, DYS terminated Kimbrough's employment, effective close of business April 12, 2016. *See* DYS Exhibit 3 (dismissal letter dated April 7, 2016, signed by Steven Lafreniere, Executive Director of DYS). DYS determined:

...

Based on the testimony and/or documents presented during the hearing there was evidence to support that there were violations of the State Personnel Board Rule 670-X-19-.01(1)(a)(2) – (Tardiness) {originally cited as Absenteeism}; and/or violation of State Personnel Board Rule 670-X-19-.01(1)(a)(3) – (Inattention to job) {originally cited as Tardiness}; and/or violation of State Personnel Board Rule 670-X-19-.01(1)(a)(4) – (Failure to perform job properly) {originally cited as Inattention to job}; and/or violation of State Personnel Board Rule 670-

X-19-.01(1)(b)(11) – (Leaving job station without permission)
{originally cited as (1)(a)(6)}.

...

Id.

Kimbrough timely appealed his employment dismissal to the State Personnel Board and requested a hearing, pursuant to ALA. CODE § 36-26-27(a) (1975).

In its Statement of the Facts, DYS reiterated its charges against Kimbrough and cited the same State Personnel Board policies listed in the charge and dismissal letters.

On June 21, 2016, the undersigned conducted a *de novo* hearing, at which *ore tenus* and documentary evidence was received.

II. FACTUAL BACKGROUND

Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses' demeanor and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of fact.¹

¹ All references to exhibits and testimony are intended to assist the State Personnel Board in considering this Recommended Order and are not necessarily the exclusive sources for such factual findings.

A. Employee's Personnel File²

Kimbrough's annual performance appraisals while at DYS reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
12/15	13.0	Partially Meets Standards
12/14	13.0	Partially Meets Standards
12/13	15.5	Partially Meets Standards
12/12 ³	----	----
12/11	8.0	Partially Meets Standards
12/10	20.0	Meets Standards
02/10 ⁴	17.5	Meets Standards
11/09 ⁵	16.25	Partially Meets Standards

Kimbrough's prior disciplinary actions include, in reverse chronological order:

- Written Reprimand on January 30, 2015 for failing to call his supervisor before taking leave.
- Written Reprimand on January 3, 2014 for failing to attend a mandatory training class on December 18, 2013.
- Written Reprimand on March 29, 2013 for leaving his assigned post without being properly relieved.
- Written Warning on August 9, 2011 for failure to follow proper call-in procedures.
- Written Warning on July 29, 2011 for contacting a student's mother.

² See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

³ Kimbrough's personnel file did not include an employee performance appraisal for the period ending 12/2012.

⁴ Final Probationary Evaluation.

⁵ Kimbrough's probationary period was extended for 90 days because he had to improve attendance and punctuality.

- Verbal Counseling on June 10, 2011 for reporting late for work.
- Written Reprimand on March 4, 2011 for failure to follow proper call-in procedures.
- Written Reprimand on January 3, 2011 for failure to follow proper call-in procedures.
- Written Counseling on March 9, 2010 for reporting late for work.

B. State Personnel Board Rules Forming the Basis of the Charges

Chapter 670-X-19-.01 General Work Rules provides, in pertinent part:

(1) In addition to any special rules issued by the various appointing authorities for the guidance of their employees, the following standard general work rules shall apply to all classified employees:

(a) Violations that normally result in disciplinary actions of increasing severity:

1. Absenteeism – Unexcused absence, unreported absence, a pattern of absences, or excessive absences.
2. Tardiness – Not on the job ready to work at the beginning of the shift.
3. Inattention to job – Doing anything distracting while on the job.
4. Failure to perform job properly.

...

(b) More serious violations that may result in suspension or discharge on the first offense.

...

2. Insubordination – Failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words...

...

6. Falsification of records – Application for Employment, time card, doctor’s excuse, etc.

...

9. Leaving before the end of the normal scheduled work hours/walking off the job.

10. Serious violation of any other department rule.

11. Leaving job station without permission.

...

C. Facts Forming the Basis of Dismissal

On or about November 6, 2015, Vacca Campus Administrator Yolanda Byrdsong (“Byrdsong”) attended a meeting with Vacca’s security officers. During the meeting, Byrdsong discussed issues brought to her attention, such as: officers’ tardiness and poor attendance; officers not properly signing in and out of the e-Start timekeeping system; and officers leaving campus without proper permission. Byrdsong instructed the officers to obtain prior approval from an administrator on duty if they intended to leave campus any time during their shift. She also instructed the officers to sign in and sign out of the timekeeping system when leaving campus. Kimbrough attended the meeting and asked a question about whether officers could take a lunch break. Byrdsong testified Vacca security officers worked an 8-hour straight shift, without a specified lunch break. Byrdsong explained officers were

permitted to eat during their normal two 15-minute breaks during their shift. Byrdsong clarified officers were not permitted to combine their two 15-minute breaks into one longer 30-minute break.

Kimbrough's direct supervisor, Lomax O'Conner ("O'Conner"), testified he routinely "posted time" for his employees. O'Conner explained that officers were required to clock in when they arrived on duty and clock out when they left Vacca premises. O'Conner further explained how he handled time sheets for employees arriving late to work. When O'Conner's officers reported late to work, in lieu of deducting money from their paycheck, he would deduct time from the employee's accumulated annual leave. O'Conner recalled Kimbrough reported late to work on many occasions. Kimbrough's shift began at 3:00 p.m. and ended at 11:00 p.m. Kimbrough was supposed to clock in when he arrived at Vacca and clock out at the end of his shift. Kimbrough was also supposed to clock out for his 15-minute breaks if he left campus and then clock back in when he returned to campus.

O'Conner testified that officers, including Kimbrough, were not clocking out or obtaining permission prior to leaving Vacca on breaks. This issue was discussed at length with the officers during the November 6, 2015 staff meeting. O'Conner testified he heard about the rule violations from Vacca's second shift administrator on duty. O'Conner also testified that following a review of the allegation, all the

officers were disciplined in one manner or another.⁶ Kimbrough received a reprimand while the other officers received warnings.⁷

Kimbrough reported to work tardy on many occasions. Pursuant to his time sheets for 2015, Kimbrough reported late to work on more than 100 occasions during the year. Following the November 2015 meeting, Kimbrough's arrival time improved slightly for a short time, but soon reverted back to significant tardiness.

Tom VanderWal ("VanderWal"), DYS Special Investigator, was assigned the task of investigating the claims that some security officers were leaving campus without permission or without properly signing out of the timekeeping system. VanderWal reviewed video footage after the November 6, 2015 meeting (*i.e.*, the meeting in which the officers were given explicit instructions on what to do if they left campus). VanderWal reviewed video footage that corresponded to Kimbrough's time sheets. After he reviewed the video, VanderWal determined Kimbrough walked to the gatehouse from off-campus, clocked out, and then left campus again. After varying times off campus, some 25 minutes and other times more than an hour, Kimbrough would return from the off-campus parking area, clock back in and then return to campus. VanderWal walked the parties through the video surveillance

⁶ DYS Exhibit 4, p. 43.

⁷ It is unclear why the disciplines were different. Kimbrough had significant prior discipline. The identities of the other officers and their prior discipline, if any, were not included in the record.

during Kimbrough's pre-dismissal conference.⁸ VanderWal showed that Kimbrough routinely left campus for more than 30 minutes.

Kimbrough testified that any time he left campus he would first get permission. According to Kimbrough, the administrator on duty would leave Vacca at approximately 9:00 p.m. Kimbrough testified he would ask for permission to leave the campus to get food prior to 9:00 p.m.; however, Kimbrough also testified there would not be a log of his request because he never saw the administrator write anything in the log book after he requested permission to leave. Kimbrough acknowledged he did not request leave using the e-Start program when he planned to leave to pick up food.

Kimbrough also explained he would leave his post to take smoke breaks in the parking lot. Smoking is not allowed on Vacca premises, so Kimbrough maintained he would walk off campus into the parking lot, smoke, and then re-enter the campus to clock out for his break.⁹

Kimbrough concluded his testimony by alleging his dismissal was the result of retaliation. Kimbrough complained to Byrdsong about another employee, Denise Taylor ("Taylor"). Kimbrough and Taylor had an altercation and Kimbrough wrote Taylor up. Kimbrough submitted the write-up to Byrdsong. Kimbrough contended

⁸ DYS Exhibit 4.

⁹ DYS Exhibit 4, p. 96.

that Taylor told him, “I know how to get you.” Kimbrough believed he was recommended for dismissal because Taylor and Byrdsong were close friends.

Byrdsong acknowledged she knew Taylor, however, there was insufficient evidence to prove they were close friends. Taylor was not called as a witness in the matter. Byrdsong recalled that she recommended Kimbrough’s dismissal for violation of work rules before he submitted a complaint against Taylor. Kimbrough testified the incident occurred before his recommended dismissal. Kimbrough did not produce a copy of the complaint and the exact date is not clear in the record.

III. ISSUE

Did DYS produce sufficient evidence to warrant dismissal of Kimbrough?

IV. DISCUSSION

Standard of Review

The purpose of the administrative appeal is to determine if the termination of the employee’s employment is warranted and supported by the evidence. *Kucera v. Ballard*, 485 So. 2d 345 (Ala. Civ. App. 1986); *Thompson v. Alabama Dept. of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985); *Roberson v. Personnel Bd. of the State of Alabama*, 390 So. 2d 658 (Ala. Civ. App. 1980). In *Earl v. State Personnel Board*, 948 So. 2d 549 (Ala. Civ. App. 2006), the Alabama Court of Civil Appeals reiterated:

“[D]ismissal by an appointing authority ... is reviewable by the personnel board only to determine if the reasons stated for the dismissal

are sustained by the evidence presented at the hearing.”

Id. at 559, quoting *Johnston v. State Personnel Bd.*, 447 So. 2d 752, 755 (Ala. Civ. App. 1983).¹⁰

In determining whether an employee’s dismissal is warranted, the departmental agency bears the burden of proving the charges warrant termination by a “preponderance of the evidence.” The law is well settled that a “preponderance of the evidence” standard requires a showing of a *probability* that the employee is guilty of the acts as charged. **Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue.** The evidence must establish that *more probably than not*, the employee performed, or failed to properly perform, as charged. See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S. Ct. 1997, 138 L.Ed. 2d 327 (1997), holding that a “significant possibility” falls far short of the Administrative Procedure Act’s preponderance of the evidence standard. See also *Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).¹¹

¹⁰ The Alabama Court of Civil Appeals went further to hold: “both this court and the circuit court must take the administrative agency’s order as ‘prima facie just and reasonable’ and neither this court nor the circuit court may ‘substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.’” *Id.* at 559, citing ALA. CODE § 41-22-20(k) (1975); *State Dept. of Human Res. v. Gilbert*, 681 So. 2d 560, 562 (Ala. Civ. App. 1995).

¹¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla and must do more than create a suspicion of the existence of a fact to be established.’” *Alabama Alcoholic Beverage Control Bd. v. Tyson*, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

In the present case, DYS provided substantial evidence that Kimbrough violated State Personnel Board General Work Rules and his violation should result in dismissal from service. On November 6, 2015, Byrdsong and O’Conner met with Vacca’s security officers to remind them of several problem areas: specifically, tardiness and attendance; officers leaving campus without permission; and officers not properly using the e-Start timekeeping system. After this warning, Kimbrough continued to arrive to work tardy. Kimbrough’s shift began at 3:00 p.m. Kimbrough violated State Personnel Board Rule 670-X-19-.01(1)(a)(2) – tardiness, by not being on the job and ready to work when his shift began at 3:00 p.m. each day. The evidence is clear that Kimbrough had struggled with this rule since his hire date in 2009. As a matter of fact, Kimbrough’s probationary period was extended because he failed to report to work timely. Kimbrough was repeatedly disciplined for tardiness during his career, up to and including written reprimands.

Furthermore, Kimbrough violated State Personnel Board Rule 670-X-19-.01(1)(b)(11) – leaving job station without permission. During the November 6, 2015 staff meeting, Kimbrough was told he had to get prior approval before he left campus. Following the meeting, Kimbrough continued to leave campus without permission from the administrator on duty. O’Conner testified he knew about the issue because he was told by an administrator on duty that officers were leaving the premises without permission. The administrator would not bring this to O’Conner’s attention if the officers were following the November 6, 2015 directive. Kimbrough contended he had permission to leave campus when he did; however, he conveniently added it would not be in the administrators’ log because he did not see them write anything down. This assertion was disingenuous.

Kimbrough also violated State Personnel Board Rule 670-X-19-.01(1)(b)(6) – falsification of records, specifically time sheets. Video evidence showed Kimbrough walking onto campus from an off-campus location and then signing out. Kimbrough was responsible for being on his post, on campus, while clocked in at work. The video evidence clearly showed Kimbrough off-campus when he was supposed to be on the clock. Kimbrough alleged he was on a smoke break or in his car warming up on cold nights; however, these assertions, even if true, do not excuse the fact that he was on the clock, but not at his post. Kimbrough falsely represented he was on the clock working when he was on a break. After these “smoke breaks,”

he sometimes clocked out to take another break. This conduct is a clear abuse of time and attendance.

Kimbrough's actions also violated State Personnel Board Rule 670-X-19-.01(1)(b)(2), insubordination – failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words. Kimbrough disobeyed directives given to him on November 6, 2015; specifically, attendance issues and to get permission before leaving campus. Insubordination is a serious rule violation that gives DYS authority to discharge Kimbrough on the first offense.

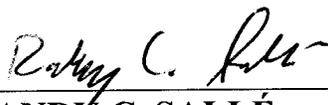
Kimbrough was given multiple opportunities to change his poor work performance. Kimbrough failed to help himself. His continual disregard for DYS and State Personnel Board work rules cannot be condoned. Based upon Kimbrough's prior discipline, DYS's attempt to help him correct his behavior by giving him directives on November 6, 2015, and his violation of those directives soon after they were given to him, dismissal is appropriate.

Kimbrough maintained his dismissal was the result of retaliation because he complained about Taylor, whom he believes is one of Byrdsong's friends. This assertion is untenable based upon the evidence in the record. Byrdsong testified she knew Taylor, however, the extent of their relationship is not clear. Furthermore, Byrdsong recalled she began implementing discipline that led to Kimbrough's dismissal before he complained about Taylor. Kimbrough recalled he was

recommended for dismissal after he complained about Taylor. In either event, there is no evidence to support Kimbrough's blanket assertion. Without more evidence, his claim fails to meet the legal standard.

Accordingly, the undersigned finds the totality of the evidence warrants dismissal in this cause. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.

Done this the 12th day of August, 2016.



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