

**BEFORE THE STATE PERSONNEL BOARD
IN THE MATTER OF**

| | | |
|---|---|---------------------------|
| MASEQUA JOHNSON, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case No: 18-23-RCS |
| |) | |
| ALABAMA DEPARTMENT OF CORRECTIONS, |) | |
| |) | |
| Appellee. |) | |

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This Recommended Order arises from an employment termination action by the Alabama Department of Corrections (hereinafter “DOC”). DOC terminated the employment of Masequa Johnson (hereinafter “Johnson” or “Employee”) after she attempted to give contraband to an inmate and was found in possession of a personal cell phone in a DOC facility. The evidence presented by DOC during the hearing showed that more probably than not, Johnson violated DOC rules and policies and its decision to dismiss Johnson was within its authority.

A hearing was held on June 21, 2018, at the State Personnel Department in Montgomery, Alabama. Gary Willford, Esq., appeared as counsel on behalf of DOC. Johnson proceeded *pro se*.

DOC introduced into evidence eleven exhibits, consecutively marked DOC Exhibits 1-11.

DOC called as witnesses:

- (1) Clarence Griffin, Correctional Officer;
- (2) Nygeon Thomas, Correctional Officer;
- (3) Kahdra Davis, Correctional Lieutenant;
- (4) Valerie Pittman, Correctional Lieutenant;
- (5) Brenda King, Correctional Captain; and
- (6) Jimmy Thomas, Correctional Warden II.

Johnson testified on her own behalf.

I. PROCEDURAL HISTORY AND CHARGES

Johnson began State employment in April 2012 when she was hired by DOC as a Correctional Officer Trainee. Johnson completed her training and was promoted to Correctional Officer in December 2012. Johnson resigned from DOC on April 2, 2015. On April 26, 2016, Johnson was rehired by DOC as a Correctional Officer. Johnson remained in that classification until her dismissal.

By letter dated April 3, 2018, DOC Commissioner Jefferson S. Dunn notified Johnson she was dismissed from State service by stating as follows:

...

On March 28, 2018, you appeared at a Pre-Dismissal Conference held by Warden Jimmy L. Thomas to allow you an opportunity to answer charges that you violated the following standards under Administrative Regulation 208, Employees Standards of Conduct and Discipline:

1. Employees shall render full, efficient, and industrious service. (Section V, Paragraph A2)[;]
2. Employees shall respond promptly to directions and instructions of supervisor. (Section V, Paragraph A3)[;]
3. Employees shall observe all laws, rules and regulations. (Section V, Paragraph A7)[;]
4. Employees shall not trade, barter, or accept a gift from or give a gift to an inmate, an inmate's family, or any other person on behalf of that inmate, or those on parole. (Section V, Paragraph C6)[;]
5. Employees shall not show partiality toward or become emotionally involved with an Alabama State inmate or parolee. (Section V, Paragraph C8)[; and]
6. Employees shall not introduce into any institution or bring upon an ADOC state property any article or property that is not authorized by written directive nor has the approval of the Warden/Division Director. (Section V, Paragraph C10)[.]

In determining the appropriate corrective action for violating the standards of conduct, [I have] considered the following infraction[s] under Administrative Regulation 208:

1. Conduct that is disgraceful, on or off the job that does adversely affect an employee's effectiveness on the job. (Administrative Regulation 208, Annex H, Number 33).
2. Borrowing/receiving money, or other items from, giving money/items to inmate(s) or inmate family members, corresponds with an inmate, or an inmate's family, in any capacity that is not officially required and in the line of duty. (Administrative Regulation 208, Annex H, Number 34).
3. The possession of any communication device, or accessories, such as, but not limited to, cell phones, cell phone chargers,

SIM cards, MP3 players, land-line phones, link phones, batteries, and walkie-talkies, that are not specifically authorized by regulation or the Warden/Division Director. (Administrative Regulation 208, Annex H, Number 36).

On February 21, 2018, at approximately 1:40 a.m., you were assigned as Tower 2A Officer at Draper Correctional Facility. You asked the Officer who was conducting a fence check to give an inmate a pack of Black and Mild cigars and a pack of Newport cigarettes. The officer advised the Lieutenant of this incident. The Lieutenant questioned you why you brought contraband items in an attempt to distribute them to an inmate. You stated that you did not know that it was wrong to give inmates these items. At approximately 2:15 a.m., the Lieutenant searched Tower 2A, where you were assigned and searched your personal property. The Lieutenant confiscated a black and gold cellular telephone from your person. During questioning you admitted that the cellular telephone was your personal phone. You later wrote a statement that you were in love with the inmate you brought in the items to.

The text messages on your phone also show that you were texting another inmate who is assigned to Holman's Death Row Unit. You did not have prior authorization to communicate by text with an inmate.

...

Having reviewed the Warden's Notice of Intent to Recommend Dismissal, including associated documents, and your overall work record, I do hereby order your dismissal for the good of the service to be effective the close of business April 4, 2018.

I regret this action is necessary, but Alabama Department of Corrections' employees are expected to maintain reasonable standards of conduct. Your failure to meet these standards cannot be condoned.

...

Johnson timely appealed her employment termination to the Alabama State Personnel Board. A pre-hearing conference was held on April 20, 2018. The case was initially set for hearing on June 5, 2018, but was thereafter continued until June 21, 2018 to accommodate Johnson's attempt to hire an attorney.¹ 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.²

A. Employee's Personnel File³

Johnson's annual performance appraisals while at DOC reflect:

| <u>Date Ending</u> | <u>Total Score</u> | <u>Category</u> |
|--------------------|--------------------|------------------------------|
| 02/18 | 7.0 | Partially Meets Standards |
| 07/16 | 25.0 | Meets Standards ⁴ |

¹ Johnson was unable to retain counsel. Johnson asked for another continuance the morning of the hearing, but that request was denied. Johnson's second request for continuance was denied in large part due to the difficulty the undersigned had staying in contact with Johnson. She had no mailing address, her phone number was not valid, and she purported she was periodically locked out of her e-mail address.

² 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.

³ See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history considered in dismissing employee).

⁴ Probationary period evaluation for Johnson as Correctional Officer, after she was rehired.

| | | |
|-------|------|------------------------------|
| 04/15 | 25.0 | Meets Standards |
| 04/14 | 22.0 | Meets Standards |
| 05/13 | 22.0 | Meets Standards ⁵ |
| 10/12 | 20.0 | Meets Standards ⁶ |

Johnson's prior discipline with DOC included:

- A pending Suspension for sleeping on duty on February 2, 2018.
- A Suspension served on January 12, 2018 for sleeping on duty on August 21, 2017.
- A Written Reprimand served on August 3, 2017 for failing to follow a supervisor's instructions and non-compliance with policies and procedures;
- A Suspension served on January 13, 2017 for borrowing/receiving money, or other items from giving money/items to inmate(s) or inmate family members, corresponds with an inmate, or an inmate's family, in any capacity that is not officially required and in the line of duty, a violation committed on or about September 10, 2016.
- A Warning served on December 5, 2016 for non-compliance with policies, procedures and regulations, committed on November 18, 2016.
- A Written Reprimand served on November 20, 2016 for taking into any ADOC facility an article, item, or property, which is not authorized by regulation, or without the approval of the Warden/Division Director, committed on September 16, 2016.
- A Suspension served on February 5, 2015 for sleeping on duty December 2, 2014.
- A Warning on August 7, 2014 for non-compliance with policies, procedures and regulations that same date.

⁵ Probationary period evaluation for Johnson as Correctional Officer.

⁶ Probationary Period Evaluation for Johnson as Correctional Officer Trainee.

B. DOC Policies/Procedures Forming the Basis of the Charges

DOC Administrative Regulation 208, Employee Standards of Conduct and

Discipline provides, in part:

...

V. PROCEDURES

A. All ADOC employees shall adhere to the following standards:

...

2. Render full, efficient, and industrious service.

3. Respond promptly to directions and instructions of supervisor.

...

7. Observe all laws, rules and regulations.

...

C. Employees shall **not**:

...

6. Trade, barter, or accept a gift from or give a gift to an inmate, an inmate's family, or any other person on behalf of that inmate, or those on parole.

...

8. Show partiality toward or become emotionally involved with an Alabama State inmate or parolee.

...

10. Introduce into any institution or bring upon an ADOC state property any article or property that is not authorized by written directive nor has the approval of the Warden/Division Director.

...

ANNEX H

...

33. Conduct that is disgraceful, on or off the job, that does adversely affect an employee's effectiveness on the job. First Offense – 3 days suspension; Second Offense – Dismissal.
34. Borrowing/receiving money, or other items from, giving money/items to inmate(s) or inmate family members, corresponds with an inmate, or an inmate's family, in any capacity that is not officially required and in the line of duty. First Offense – 3 days suspension; Second Offense - Dismissal.

...

36. The possession of any communication device, or accessories, such as, but not limited to, cell phones, cell phone chargers, SIM cards, MP3 players, land-line phones, link phones, batteries and walkie-talkies, that are not specifically authorized by regulation or the Warden/Division Director. First Offense – Dismissal.

...

C. Facts Forming the Basis of Dismissal

On February 17, 2018, Johnson began her shift at Draper Correctional Facility (“Draper”). Johnson worked the third shift from 10:00 p.m. until 6:00 a.m. A short time after 1:00 a.m. on February 18, 2018, Correctional Officer Clarence Griffin (“Griffin”) conducted a fence check along the inside of the facility. As Griffin passed by Tower 2A, Johnson called down from the tower and asked Griffin to deliver some items to Inmate Brantley, an inmate runner.⁷ Johnson tossed Griffin a pack of Newport Cigarettes and a pack of Black & Mild Cigars. Griffin told Johnson he would deliver the items to Inmate Brantley.

Griffin was a relatively new correctional officer, having worked for DOC in a facility for approximately two and a half months prior to this incident. Griffin testified as soon as he saw the Newport Cigarettes and Black & Mild Cigars, he “realized what [I] got myself into.”⁸ Griffin testified he walked into Draper’s backdoor and immediately called Correctional Officer Nygeon Thomas (“Thomas”) to meet him so he could ask him how to proceed. Thomas met Griffin in one of Draper’s hallways and told him they should immediately go see Correctional Lieutenant Valerie Pittman (“Pittman”) in the Shift Commander’s Office.

⁷ Inmate runners are inmates who have earned the privilege of running errands for correctional staff members at various DOC facilities.

⁸ Testimony of Griffin.

Griffin and Thomas took the pack of cigarettes and pack of cigars to Pittman in the Shift Commander's Office. When Griffin and Thomas arrived at the office they met with Pittman and Correctional Lieutenant Kahdra Davis ("Davis"). Griffin and Thomas told Pittman that Johnson asked Griffin to deliver the cigarettes and cigars to Inmate Brantley. Pittman ordered the two officers to immediately conduct a shakedown of Inmate Brantley in his dorm.

Griffin, Thomas, and some other correctional officers entered Inmate Brantley's dorm and conducted a shakedown. Inmate Brantley refused multiple direct orders and was resistant to a search of his person. Thomas and another Correctional Officer had to perform a 2:1 takedown of Inmate Brantley and place him in restraints. During the shakedown, Griffin and Thomas confiscated a cell phone from Inmate Brantley. Griffin and Thomas escorted Inmate Brantley to the Shift Commander's Office and gave the confiscated cell phone to Pittman. Pittman then ordered Davis and Griffin to follow her to Tower 2A to conduct a search of Johnson.

When Griffin, Pittman and Davis arrived at Tower 2A, Pittman ordered Griffin to search the grounds around the tower and watch for anything that may be dropped from the tower. Then, Pittman and Davis entered Tower 2A to search Johnson. Pittman testified that when she and Davis entered Tower 2A, she first asked Johnson if she had anything she was not supposed to have. Pittman testified

that Johnson responded, "No." Pittman conducted a "pat" search of Johnson while Davis observed. Pittman observed Johnson standing with her legs held tightly together and ordered her to spread her legs wider. After a few similar instructions, Pittman was able to search more thoroughly and detected something that felt like a cell phone in Johnson's pants. Pittman asked Johnson to produce the cell phone several times. Johnson finally complied and produced a gold and black cell phone. Pittman left Davis in Tower 2A to man the post while she escorted Johnson out. Once Pittman and Johnson exited Tower 2A, she ordered Griffin to relieve Davis and then Pittman and Davis escorted Johnson to the Shift Commander's Office.

Pittman ordered Johnson to sit in the Warden II Secretary's Office and write a statement regarding what had transpired. Pittman testified she then examined the cell phone and saw where a few calls came into the phone around midnight and text messages were sent during shift hours. Johnson was not compliant with Pittman, so Pittman called Correctional Captain Brenda King ("King"). King spoke with Johnson briefly over the phone. King testified she has a rapport with Johnson and has met with her on multiple occasions to discuss many different things. King testified Johnson sounded a bit hysterical on the phone and King asked Johnson to be compliant with Pittman's instructions. King then decided it would be best if she went to Draper herself.

King arrived at Draper and met with Johnson. King testified Johnson was upset about Inmate Brantley. King attempted to redirect Johnson by instructing her to concentrate on herself. King asked Johnson if she was involved with Inmate Brantley and, according to King, Johnson said, "Yes." King testified that Johnson told her she was possibly in love with Inmate Brantley. King instructed Johnson to write a statement based upon what she told her. Johnson produced an initial statement declaring, essentially, that she was not prepared to write a statement. King ordered Johnson to write a statement based upon their conversation. Following that order, Johnson submitted a written statement.⁹ In her statement, Johnson admitted she gave some items to Griffin to deliver to Inmate Brantley, stating, "I didn't think it would be a problem." Johnson also wrote, "I advised Captain King that I have feeling[s] for the inmate and I may even love him, but had no sexual relations with this Inmate Brantley." Johnson closed her statement by declaring, "I am willing to cooperate to prohibit any felony charges. I was not forced."

Mary Cooks, Correctional Warden II, drafted a pre-dismissal letter and set a pre-dismissal conference date for March 28, 2018. Prior to the pre-dismissal conference, Draper closed, and the staff and inmates were moved to various other DOC facilities. Johnson was reassigned to Kilby Correctional Facility and her disciplinary action was reassigned to Jimmy Thomas ("Warden Thomas"),

⁹ DOC Exhibit 6.

Correctional Warden II. Warden Thomas conducted the pre-dismissal conference. Warden Thomas testified that during the pre-dismissal conference, Johnson admitted she had a cell phone, but argued she had it only to keep up with the time. Johnson also admitted she did not have authority from Draper's Warden to have a cell phone at her post. Warden Thomas testified Johnson did not say much about the tobacco products, but argued she had seen other officers bring items to inmates. Warden Thomas recommended Johnson's dismissal largely based upon her possession of a cell phone on DOC premises without permission from a Warden. Warden Thomas pointed out this was Johnson's second offense for this charge and pursuant to Administrative Regulation 208, Annex H, dismissal is appropriate on the first offense.

Johnson testified on her own behalf. Johnson did not deny she gave Newport Cigarettes and Black & Mild Cigars to Griffin to deliver to Inmate Brantley. Johnson testified the items were not intended for the inmate, but rather another correctional officer. Johnson testified that Inmate Brantley knew to place the items in a drawer for the other correctional officer. Johnson also admitted she had a cell phone in Tower 2A. Johnson testified she had recently lost her adult son and the cell phone offered her comfort as she manned her post. Johnson testified the phone previously belonged to someone else and they recently gave her the phone and it was not

activated. According to Johnson, she had to wait 30 days before she could activate the phone. Johnson reiterated she only had the phone to tell time and as comfort.

Johnson also testified she was ordered by King on what to write in her second statement. Johnson testified she did not like having to just write a statement, she wanted to know what the accusations were before she wrote the statement. Johnson also testified that the story of her loving Inmate Brantley actually came from King, not Johnson. Johnson maintained her due process rights were violated because she was not given anything in writing before she was placed on mandatory leave. However, Johnson acknowledged she ultimately received the paperwork. Johnson acknowledged several things on cross-examination. First Johnson agreed that communication with her during the pendency of her appeal had been difficult because she was “locked out” of her e-mail account. Johnson also acknowledged she was present at the pre-dismissal conference and was given an opportunity there and again in this hearing to tell her side of the story. Johnson admitted she did not have approval from Draper’s Warden to have a cell phone in Tower 2A on the morning of February 18, 2018.

Griffin testified that while he was in Tower 2A, Johnson called him from the office she was in and threatened him. Griffin testified Johnson called and first asked him why he did not just throw the items back to her if he had a problem delivering them to Inmate Brantley. Johnson then indicated to Griffin that Inmate Brantley was

going to report him for moving contraband within the facility. Griffin testified he perceived Johnson's comments as a threat. Johnson acknowledged she called Griffin, but testified that she just asked him why he did not immediately get on the radio if he thought her request to deliver items to Inmate Brantley was so wrong.

Finally, Warden Thomas was called as a rebuttal witness. Warden Thomas testified that no one was permitted to bring Black & Mild's (ostensibly, any cigars) into a DOC facility. Thomas testified that directive came from the DOC Commissioner himself a while ago, well before this incident.

III. ISSUE

Did DOC produce sufficient evidence to warrant dismissal of Johnson?

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. 1953, 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, DOC presented substantial evidence supporting the charges against Johnson. On the morning of February 18, 2018, Johnson attempted to have contraband delivered to Inmate Brantley (*i.e.*, a pack of Newport Cigarettes and a pack of Black & Mild Cigars). Johnson’s action is sufficient to prove, she more probably than not, violated DOC AR 208, Annex H, #34 – Borrowing/receiving money, or other items from, giving money/items to inmate(s) or inmate family members; corresponds with an inmate, or an inmate’s family, in any capacity that is not officially required and in the line of duty. Furthermore, Johnson had a cell phone with her at her post. That action is prohibited by DOC AR 208, Annex H, #36 – The possession of any communication device, or accessories, such as, but not limited to, cell phones, cell phone chargers, SIM cards, MP3 Players, land-line phones, batteries, and walkie-talkies, that are not specifically authorized by regulation or the Warden/Division Director.

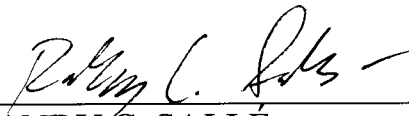
Finally, after the contraband and cell phone were confiscated and Johnson was removed from her shift and placed in an office until the situation was fully addressed, she called Griffin in Tower 2A. Griffin's account that Johnson not only questioned his actions, but also threatened him, was credible. Johnson's actions of introducing contraband into Draper, taking a cell phone to her post, and calling Griffin from the office after she was removed from her post violate DOC AR 208, Annex H, #33 – Conduct that is disgraceful, on or off the job that does adversely affect an employee's effectiveness on the job.

The undersigned has carefully considered mitigation in this case. The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal.¹² Accordingly, the undersigned finds the totality of the evidence warrants termination in this cause. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.¹³

¹² Johnson testified, almost in passing, that she wanted a cell phone with her when she manned a tower because it offered her comfort following the passing of her son. This was the only time she mentioned his loss in the record. She did not include this information in her explanation to Pittman and King, and she did not include it during her pre-dismissal conference with Warden Thomas. While his loss may certainly have been a catalyst for grief and depression, his passing had occurred approximately one year prior to the events of February 18, 2018 and is not acceptable as an excuse for such clear violations of DOC policies and procedures. DOC cannot condone employees in any emotional state compromising its clear policies regarding contraband and cell phones. Johnson was previously disciplined for having a cell phone with her on a post. She was graciously given another opportunity even though DOC policy clearly states dismissal is appropriate on the first offense. This was Johnson's second offense. She took a cell phone into Draper without first seeking approval from the Warden. That action alone is sufficient to uphold her dismissal. The other rule violations simply solidify DOC's position that Johnson cannot or will not comply with rules and policies.

¹³ Having found sufficient evidence to uphold the dismissal, any/all remaining issues are moot

Done, this the 30th day of July 2018.



RANDY C. SALLÉ
Administrative Law Judge
State Personnel Department
64 North Union Street
Montgomery, Alabama 36130
Telephone: (334) 242-8353
Facsimile: (334) 353-9901

VIA E-MAIL:¹⁴

Masequa Johnson, *Pro se*

Telephone: [REDACTED]

E-Mail: [REDACTED]

VIA E-MAIL AND U.S. FIRST CLASS MAIL:

Gary Willford, Esq.
Department of Corrections
301 South Ripley Street
Montgomery, Alabama 36130-1501
Telephone: (334) 353-5495
Facsimile: (334) 353-3891
E-Mail: gary.willford@doc.alabama.gov

¹⁴ Johnson testified she does not have a current mailing address. Johnson waived delivery of this Recommendation by U.S. First Class Mail and stated she would receive it via e-mail.