

file located at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOT called the following individuals as witnesses during the hearing:

- (1) Deborah Leo, DOT Southwest Region Manager, ATS Center; and
- (2) David Driskell, DOT Southwest Region TSMO Engineer.

Goff testified on her own behalf.

I. PROCEDURAL HISTORY AND CHARGES

Goff began State employment in March 1999 as a Mental Health Worker I (“MHW I”) when she was hired by the Alabama Department of Mental Health (“DMH”). Goff resigned from DMH as a MHW I effective October 18, 2005. Goff was hired by DOT on December 16, 2008 as a Service Patrol Officer. Goff completed her probationary period on June 15, 2009. On August 1, 2015, Goff accepted a new job with DOT as an Automatic Traffic System Operator (“ATS Operator”). Goff completed her probationary period on January 31, 2016 and remained in that position until her dismissal.

Following the pre-dismissal conference conducted on October 22, 2019, DOT terminated Goff’s employment, effective close of business October 22, 2019. *See* DOT Exhibit 3 (dismissal letter dated October 22, 2019, signed by Transportation Director John Cooper). DOT determined:

...

A pre-dismissal conference was scheduled for you on Tuesday, October 22, 2019. Present at the conference were Brian Aaron and you. During this time, you were provided an opportunity to present any relevant information regarding your proposed dismissal, and you thus provided an oral response to the reasons for your dismissal. After considering your response, I have concluded that your dismissal is warranted.

Consequently, for the reasons stated below, you are hereby notified of your dismissal from the Alabama Department of Transportation effective at the close of business Tuesday, October 22, 2019.

On the morning of October 10, 2019, you were witnessed sleeping while at your workstation during regular work hours. You were awakened by your manager and told to wake up. The next day you were witnessed again by your manager sleeping while sitting at your workstation and told to wake up. You have therefore been recommended for termination from the Alabama Department of Transportation.

...

Goff timely appealed her employment dismissal to the State Personnel Board and requested a hearing, pursuant to ALA. CODE § 36-26-27(a) (1975). In its Short Plain Statement of Facts, DOT reiterated its charges against Goff and cited the same State Personnel Board General Work Rules and DOT policies listed in the charge and dismissal letters.

A pre-hearing conference was held on November 13, 2019 and the parties mutually selected December 20, 2019 as the hearing date.

On December 20, 2019, 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

A. Employee's Personnel File²

Goff's annual performance appraisals while at DOT reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
12/18	28.9	Exceeds Standards
12/17	28.8	Exceeds Standards
12/16	28.8	Exceeds Standards
01/16 ³	28.8	Exceeds Standards
04/15	27.5	Exceeds Standards
04/14	27.5	Exceeds Standards
04/13	27.5	Exceeds Standards
04/12	27.5	Exceeds Standards
04/11	27.5	Exceeds Standards
04/10	23.3	Meets Standards
06/09 ⁴	21.7	Meets Standards

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.

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 ATS Operator Final Probationary Performance Appraisal.

⁴ Service Patrol Operator Final Probationary Performance Appraisal.

Goff's prior disciplinary actions include:

- 5-day Suspension recommended on September 20, 2019, approved on October 15, 2019, for absenteeism, inattention to job, failure to perform job properly, insubordination, falsification of records and leaving job station without permission.
- Warning/Corrective Action plan on May 8, 2014 for insubordination, falsification of records, violation of safety rules, and use of abusive or threatening language.
- Counseling on May 1, 2013 for tardiness.
- Counseling on December 21, 2011 for failure to perform job properly, and disruptive conduct.
- Counseling on January 8, 2010 for absenteeism.

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

State Personnel Board General Work Rules, 670-X-19-.01 provides, in

part:

...

(b) More serious violations that may result in suspension or discharge on the first offense, considering work record and length of service.

...

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

...

8. Sleeping on the job.

...

C. Facts Forming the Basis of Dismissal

On October 10, 2019, Deborah Leo (“Leo”), Southwest Region Manager, ATS Center, reported to work at the Traffic Management Center (“TMC”) around 5:10 a.m. Leo walked into the TMC and immediately noticed Goff was asleep at her workstation. Leo testified she walked up to Goff and told her, “Lee, I need you to wake up, please.” Leo testified Goff did not respond verbally to Leo’s instruction, but she did comply. Still pictures taken from a video camera confirmed Leo’s testimony.⁵

The next day, on October 11, 2019, Leo walked into the TMC before her shift started and sat down at her desk. At approximately 5:24 a.m., Leo looked down and saw Goff asleep at her workstation. Leo approached Goff, touched the back of Goff’s chair and asked her to wake up. Goff protested she was not asleep; but gave no further explanation. Leo testified she was certain Goff was asleep. Still pictures taken from a video camera confirmed Leo’s testimony.⁶

Leo testified she reported Goff’s sleeping to her immediate supervisor, Southwest Region TSMO Engineer Daniel Driskell (“Driskell”). Driskell was off on leave taken under the Family Medical Leave Act (“FMLA”); however, he

⁵ DOT Exhibit 32, pp. 244-249.

⁶ DOT Exhibit 33, pp. 250-254.

instructed Leo to pull the videotape of the incidents. Driskell and Leo discussed Goff's sleeping on the job with the Southwest Region Disciplinary Committee and they determined the appropriate course of action was to recommend Goff's dismissal from state service.

Both Driskell and Leo testified they followed DOT's progressive discipline policy. Goff participated in a pre-suspension hearing on October 9, 2019, just one day before she was caught sleeping on the job for two days in a row.⁷ Ultimately, while Driskell and Leo were collecting evidence of Goff's sleeping, on October 15, 2019, Goff was notified she was suspended for five days for absenteeism, inattention to job, failure to perform job properly, insubordination, falsification of records, and leaving job station without permission.⁸

Goff was previously warned about sleeping on the job. During June 2019, DOT installed cameras in the TMC to monitor employee activities.⁹ The cameras covered the employee workstations and part of the surrounding area. The employees were told the cameras were installed and that they would be monitored.¹⁰ Driskell testified that he reviewed a spot check of employee activity and found multiple employees sleeping at their workstations in June 2019. On June 26, 2019, at 6:30

⁷ DOT Exhibit 6, p. 172.

⁸ DOT Exhibit 6, p. 170.

⁹ Testimony of Leo and Driskell.

¹⁰ Testimony of Driskell.

a.m., Driskell and Brian Aaron (“Aaron”) met with Goff and showed her still pictures of her sleeping at her workstation obtained by the newly installed cameras. Goff admitted she was sleeping to the supervisors and Aaron told Goff that behavior was unacceptable. Goff acknowledged she understood and told the supervisors it would not happen again.¹¹

Goff’s shift was 9:30 p.m. until 6:00 a.m. Leo’s shift begins at 5:30 a.m. and ends at 2:00 p.m. Accordingly, the shifts have a 30-minute overlap. A third shift works from 1:30 p.m. until 10:00 p.m. Leo testified the TMS’s function is to monitor traffic flow and make sure if an incident occurs on a roadway or in the tunnel a service patrol driver assists as soon as possible. The purpose of the TMC is to help maintain as efficient a flow of traffic as possible. Employees staying awake and alert at their workstation is a priority. Driskell testified no other employees have been caught sleeping on the job since the video equipment was installed in June 2019.

Goff testified on her own behalf. Even though Goff admitted she was asleep on October 10, 2019, she denied sleeping on October 11, 2019. Goff testified that on that date she had a migraine headache and a co-worker was sitting next to her wearing strong perfume. Goff testified her co-worker did not always wear strong perfume, but that particular day she did and in an effort to combat the odor, Goff

¹¹ DOT Exhibit 9.

testified she closed her eyes for relief. Goff testified she knew Leo was in the building and was just trying to make it to the end of her shift battling with her migraine medication and her co-worker's perfume. Goff also testified that she takes a variety of medication for her migraine headaches and some make her sleepy while others do not. Goff did not provide the name of the medication she took on October 11, 2019 and did not report her use of medication to any of her supervisors. Pursuant to ALDOT's Alcohol and Drug Policy; Alcohol and Drug Directives:

D. Employees who have been prescribed medication that may affect performing his/her job duties safely must provide written documentation from the employee's physician to his/her supervisor. A determination will be made about whether the employee can safely perform his/her job duties, be temporarily reassigned until no longer taking the prescribed medication, or be required to take authorized leave (accumulated or leave without pay) until no longer taking the medication.¹²

Goff acknowledged she received a copy of DOT's policy yet indicated she did not remember everything about the policy. Goff testified she told her immediate supervisor, Shirley Lampley ("Lampley"), that she was having migraine headaches, but could not recall exactly what she told her about medication, if anything.

Goff also explained how difficult the 9:30 p.m. - 6:00 a.m. shift was to work. Goff talked about the toll the shift took on employees' bodies and how difficult it was to work long stretches at a time, sometimes six to seven days in a row. Goff

¹² DOT Exhibit 7.

previously asked about working other shifts, but ultimately turned down an opportunity to work 5:30 a.m. until 2:00 p.m. because of childcare issues. Lampley also gave the employees on Goff's shift an opportunity to create a work schedule they believed was better than what the supervisors put in place; however, Goff said any recommendations had to be unanimous and some of her co-workers, one man in particular, refused to help come up with a schedule because he claimed that was the supervisors' job.

Finally, Goff alleged she contacted Valerie Boynton ("Boynton") and asked for FMLA paperwork in early October. Goff testified that Boynton told her "they" would not even let her [Boynton] send her the paperwork. Goff identified "they" as the Southwest Region Administration. Boynton was not called as a witness and Goff testified that she did not follow-up or pursue FMLA after the phone conversation.¹³

DOT also presented numerous still photographs of Goff sleeping at her workstation on days leading up to October 10 and 11, 2019. After her meeting on June 26, 2019 when she was shown photos of herself sleeping at her workstation and counseled by her supervisors to stay awake, Goff was again recorded sleeping at her workstation on June 30, 2019; July 2, 2019; July 9, 2019; July 23, 2019; July 27, 2019; August 1, 2019; August 3, 2019; August 14, 2019; August 15, 2019; August

¹³ Goff testified she had been to the doctor, but other than a blanket statement did not provide any additional evidence to support her request for FMLA paperwork. She did not submit her request in writing and did not call Boynton as a witness to testify about her alleged request.

16, 2019; August 17, 2019; August 31, 2019; September 2, 2019; September 5, 2019; September 6, 2019; September 7, 2019; September 8, 2019; September 13, 2019; September 19, 2019; and September 20, 2019.¹⁴

III. ISSUE

Did DOT produce sufficient evidence to warrant dismissal of Goff?

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).¹⁵

¹⁴ See DOT Exhibits 9-29.

¹⁵ 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

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).¹⁶

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*

'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).

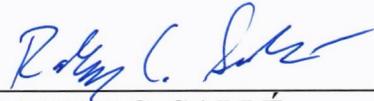
¹⁶ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

Alcoholic Beverage Control Bd. v. Tyson, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

In the present case, DOT provided substantial evidence that Goff violated DOT's State Personnel Board General Work Rules; specifically, 670-X-19-.01(1)(b)8 – Sleeping on the job; and 670-X-19-.01(1)(b)2 – Insubordination which is defined as failure to follow an order, disobedience, failure to submit to authority as shown by demeanor or words. Goff was warned on June 26, 2019 not to sleep on the job anymore. She acknowledged the directive and proceeded to sleep on the job anyway. Goff's admission to sleeping on the job on October 10, 2019 is sufficient evidence to show she violated State Personnel Board General Work Rules and her dismissal was warranted.

The undersigned carefully considered mitigation in this case. The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal. DOT followed progressive discipline, Goff was given many opportunities to correct her negative work habits and refused to do so. Further, Goff's excuses lacked credible evidence to support consideration for mitigation. 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 UPHOLD.

Done, this 20th day of February 2020.



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