

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

EUGENE LAVINE)

Appellant,)

v.)

CASE NO. 16-03-JJW

**ALABAMA DEPARTMENT OF
CORRECTIONS,**)

Appellee.)

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

The employment termination appeal of Eugene Lavine (hereinafter “Lavine”) from his dismissal by the Alabama Department of Corrections (hereinafter “DOC”) occasions this Recommended Order. DOC charges that Lavine violated DOC Administrative Regulation 208, Employee Standards of Conduct and Discipline, Sections V.A.2, 6, 7, 8; V.B.; V.C.9, 18, 20 and certain State Personnel Board Rules. Lavine, a member of the Donaldson Facility Critical Emergency Response Team (CERT), took the CERT van without permission and without an authorized purpose. Lavine admitted he had taken the CERT van for personal use. Lavine initially did not tell the truth about how he obtained the keys to the CERT van. Lavine’s taking of the van without the knowledge of DOC authorities interrupted the routine operations of the Donaldson facility, caused a lock-down to be ordered and necessitated a bed check at the facility. Two Correctional Officers had to be

removed from their critical posts to go to Birmingham to retrieve the CERT van. Lavine later admitted taking the CERT van and asked for another chance.

Lavine had worked for DOC for approximately six and one half (6½) years. Lavine believes termination of his employment is too harsh punishment for his offense.

DOC had a proper basis for its decision, followed its procedures, policies and the law. The undersigned recommends DOC's decision to terminate Lavine's employment be upheld by the State Personnel Board.

On January 26, 2016, the undersigned conducted a *de novo* hearing ("the hearing") at the offices of the Alabama State Personnel Department in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. Albert S. Butler, Esq., appeared as counsel on behalf of DOC. Lavine did not attend the hearing and did not contact the ALJ Division. Lavine had proper notice and participated in prehearing conferences including the setting of his appeal hearing on January 26, 2016, beginning at 9:00 a.m. ALA. CODE § 41-22-12(d) provides, "If a party fails to appear in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, proceed with the hearing and make a decision in the absence of the party."

At the beginning of the hearing, DOC introduced Exhibits 1 – 6. The undersigned stated, without objection, that Lavine's personnel file at the Alabama

State Personnel Department would be included in the record as evidence in this matter.

DOC called one witness, Warden Angela Miree.

I. PROCEDURAL HISTORY AND CHARGES

DOC hired Lavine in 2009 as a Correctional Officer. Lavine was in that classification when DOC dismissed him on November 26, 2015. The dismissal letter signed by the appointing authority, DOC Commissioner Jefferson S. Dunn, is dated November 2, 2015.¹

Lavine timely appealed his dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). At the prehearing conference held on November 19, 2015, the parties selected January 19, 2016, for the hearing. The hearing was continued by agreement of the parties to January 26, 2016.

In its short plain statement of facts, DOC alleged, in pertinent part:

The general basis of the Commissioner's termination of this former employee is centered around the former employee's unauthorized taking and use of the Donaldson Correctional Facility CERT (Critical Emergency Response Team) team vehicle. (Administrative Regulation 208, Annex H, Number[s] 33, 37 and 46). On July 10, 2015, the Donaldson Correctional Facility was notified by the Birmingham Police Department that the Department's van was located in an unusual area of Birmingham. The former employee was contacted by the CERT commander who was trying to locate the van. The former employee admitted to taking the CERT van without permission and driving the van to the area where he was confronted by the Birmingham Police Department.

¹ See DOC Exhibit 3.

II. FACTUAL BACKGROUND

Having reviewed the documentary evidence, 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

Lavine's performance appraisals while at DOC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
05/01/2015	26	Meets Standards
05/01/2014	16	Meets Standards ⁴
05/01/2013	25	Meets Standards
05/01/2012	29	Exceeds Standards
05/01/2011	28	Exceeds Standards
07/15/2010	27	Exceeds Standards
06/16/2009	20	Meets Standards

Lavine's prior disciplinary history at DOC includes the following disciplinary actions:

1. December 29, 2014 Warning Late for work.
2. October 2, 2014 Written Reprimand Leaving assigned post and/or work station before the end of shift without permission from proper authority or

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 Rules 670-X-18-.02 (5) and 670-X-19-.01(1)(b) (employee's work record, including performance and disciplinary history, and length of service considered in dismissing employee).

⁴ The "Meets Standards (16.7 – 26.6)" box was checked on the Employee Performance Appraisal form even though the total performance appraisal score was 16 which falls within the Partially Meets Standards range (*i.e.*, 6.7 – 16.6).

proper relief and no serious consequences occur.

- | | | |
|----------------------|-------------------|---|
| 3. July 25, 2014 | Warning | Non-compliance with policies. |
| 4. May 6, 2014 | Written Reprimand | Violation of safety/security regulations /procedures when no consequences occur. |
| 5. August 12, 2013 | Suspension | Sleeping on duty. |
| 6. May 23, 2012 | Written Reprimand | Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations. |
| 7. September 6, 2010 | Warning | Non-compliance with policies. |

B. State Personnel Board Rules and DOC Policies/Procedures Forming the Basis of the Charges

State Personnel Board Rules 670-X-19-.01(1)(a)(6), (8), and (1)(b)(3), (10)

provide, 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:
 - ...
 6. Unauthorized and/or unlicensed operation of vehicles, machinery, or equipment.
 - ...
 8. Violation of specific department rules.
 - (b) More serious violations that may result in suspension or discharge on the first offense.

...

3. Theft or unauthorized possession of company property.

...

10. Serious violation of any other department rule.

...

DOC Administrative Regulation 208 provides, in pertinent part:

...

V. PROCEDURES

- A. All DOC employees shall adhere to the following standards:

...

2. Render full, efficient and industrious service.

...

6. Protect and conserve funds, property, equipment and materials.

7. Observe all laws, rules and regulations.

8. Uphold, with integrity, the public's trust involved in their position.

...

- B. Each employee's conduct shall, at all times, be consistent with the maintenance of proper security and welfare of the institution and of the inmates under his/her supervision.

- C. Employees shall **not**:

...

9. Take any article or property whatsoever from any institution or from state property not specifically authorized by regulation.

...

18. Use ADOC owned property or any state-owned property for his/her personal use without the approval of the Commissioner.

...

20. Provide false information, alter an investigation or incident report, and/or intentionally omit facts pertinent to the inquiry.

DOC Administrative Regulation 208, Annex H, provides, in pertinent part:

...

33. Conduct that is disgraceful, on or off the job that does adversely affect an employee's effectiveness on the job.

...

37. Theft or unauthorized possession of ADOC or another individual's property.

...

46. Giving false information or verbal/written statement in connection with employment, investigation, or injury.

...

C. Facts Forming the Basis of Dismissal

On July 10, 2015, at approximately 2:30 p.m., Correctional Warden Angela Miree ("Warden Miree") received information that Donaldson Facility CERT Van S0787A was located in Birmingham. Warden Miree determined that no one had authorized the use of the CERT van and that it should be in the Donaldson Facility parking lot. Once she determined the CERT van was not on state property, Warden Miree immediately interrupted the routine operations of the facility, ordered the camp to be locked down and initiated a bed roster. All on duty personnel were

questioned about the whereabouts of the CERT van. No one had any knowledge of the missing van. The Birmingham Police Department had located the van parked in front of 3900 28th Street in Birmingham. Warden Miree had two Correctional Officers go to Birmingham to retrieve the CERT van. When contacted by Correctional Captain Jeffery E. Baldwin, Lavine admitted he had taken the CERT van from state property without authorization for personal use. Lavine was not truthful when asked how he obtained the keys to the van. Lavine was not truthful in his responses to Warden Miree's questions about his taking of the CERT van. The CERT van was parked in front of a location the Birmingham Police Department had under surveillance. The taking of the CERT van by Lavine was embarrassing to DOC. The location where he parked it was embarrassing to DOC and exhibited disgraceful conduct on the part of Lavine.

Warden Miree considered Lavine's conduct and the provisions of AR Regulation 208, Annex H, Infraction 33 (Conduct that is disgraceful, on or off the job that does adversely affect the employee's effectiveness on the job); Infraction 37 (Theft or unauthorized possession of DOC or another individual's property) and Infraction 46 (Giving false information or verbal/written statement in connection with employment, an investigation, or injury).

Warden Miree testified at the hearing that she believed Lavine's dismissal from his employment with DOC was the appropriate discipline for his unauthorized

taking of the CERT van owing to the disruption of work at Donaldson and the potential consequences should there have been an emergency requiring the availability of the CERT van for Critical Emergency Response Team activities. Warden Miree was empathetic to Lavine's personal problems and his personal situation; however, considering Lavine's initial untruthfulness in this matter and his disciplinary history at DOC, Miree considered termination of Lavine's employment was the appropriate disciplinary action.

Lavine ultimately took full responsibility for taking the CERT van, without permission, and asked for a second chance assuring DOC it would not happen again.⁵

III. ISSUES

Did DOC produce sufficient evidence to sustain Lavine's dismissal from employment with DOC based on violations of State Personnel Board Rules and DOC regulations, procedures and policies?

IV. DISCUSSION

The purpose of the administrative appeal is to determine if the termination of the Employee 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); *Robertson v. Personnel Bd. of the State of Alabama*, 390 So. 2d 658 (Ala. Civ. App. 1980). In *Earl v. State Personnel Board*,

⁵ See DOC Exhibit 6.

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).⁶

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. 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).⁷

⁶ 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).

⁷ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding

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 this case, the preponderance of the available evidence supports the decision by DOC to terminate the employment of Lavine. The undersigned has reviewed carefully the documentary and testimonial evidence. The undersigned finds the reasons stated for the dismissal of Lavine are sustained by the evidence presented at the hearing. The undersigned finds no basis for mitigation.

The undersigned recommends the dismissal of Lavine by DOC be upheld.

Done this the 3rd day of February, 2016.



JAMES JERRY WOOD
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precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

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