

Katherine Jessip, Esq., appeared as counsel on behalf of DOC. Anthony Michel, Esq., appeared as counsel on behalf of Howard.

At the beginning of the hearing, DOC introduced into evidence ten exhibits consecutively marked as DOC Exhibits 1 – 10. Howard introduced into evidence five exhibits consecutively marked as Employee Exhibits A – E. The undersigned informed the parties Howard’s personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOC called as witnesses:

- (1) Michael Calhoun, DOC Correctional Lieutenant;
- (2) Elijah Rouse, DOC Correctional Sergeant; and
- (3) Karla Jones, DOC Correctional Warden III.

Howard testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

DOC hired Howard in April 2006 as a “Correctional Officer Trainee” and assigned him to Ventress Correctional Facility (“Ventress”). On September 28, 2006, Howard’s probationary period was extended for ninety days to allow him an opportunity to complete the academy and become APOSTC Certified. In March 2007, Howard was promoted to Correctional Officer. Howard remained in that job classification until DOC dismissed him September 30, 2015. *See* September 23,

2015 dismissal letter (“dismissal letter”) signed by DOC Commissioner Jefferson S. Dunn.¹

In the dismissal letter, Dunn stated:

On September 8, 2015[,] you appeared at a Pre-dismissal Conference held by Warden Karla Jones to allow you an opportunity to answer charges that you violated the following standards under Administrative Regulation 208, Employee Standards of Conduct and Discipline:

...

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

1. Late for work (tardiness)/Failure to follow proper call-in procedure. (Administrative Regulation 208, Annex H, Number 7).
2. Failure to report to work (unexcused absence). (Administrative Regulation 208, Annex H, Number 27).

On July 16, 2015, you were scheduled to work 6 p.m. to 6 a.m., at Ventress Correctional Facility. You did not call in to advise of your absence. Your supervisor attempted to make contact with you, with no response. You failed to report to work. This was your fourth (4th) offense.

...

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 September 30, 2015.

¹ See DOC Exhibit 3.

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.

...

Howard timely appealed his dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975).

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

Howard's annual performance appraisals while at DOC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
08/15	24.0	Meets Standards
08/14	32.0	Exceeds Standards
08/13	32.0	Exceeds Standards
08/12	30.0	Exceeds Standards
08/11	26.0	Meets Standards
08/10	17.0	Meets Standards
08/09	26.0	Meets Standards
08/08	30.0	Exceeds Standards

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) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

09/07	24.0	Meets Standards ⁴
01/07	20.0	Meets Standards ⁵

Howard's prior disciplinary history at DOC includes the following disciplinary actions (in reverse chronological order):

- A pending suspension for an unexcused absence on June 22, 2015.
- A pending suspension for an unexcused absence on June 13, 2015.
- A pending suspension for an unexcused absence on May 16, 2015.
- A Written Reprimand on January 22, 2015 for disagreeable behavior.
- A Warning on June 21, 2014 for failure to follow proper call in procedures.
- A two-day Suspension served on August 25, 2010 and August 26, 2010 for sleeping or giving the appearance of sleeping.
- A Warning on March 30, 2010 for non-compliance with policies.
- A Written Reprimand on February 19, 2010 for taking unauthorized item into facility.

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

Administrative Regulation 208, Employee Standards of Conduct and Discipline, provides, in part:

...

V. PROCEDURES

- A. All ADOC employees shall adhere to the following standards:
1. Report for work on time and in a condition to perform their job properly.
 3. Render full, efficient, and industrious service.

⁴ Final Probationary Evaluation as a Correctional Officer.

⁵ Final Probationary Evaluation as a Correctional Officer Trainee.

...

7. Observe all laws, rules and regulations.

...

18. Obtain approval for any absence from work. Tardiness, failure to follow proper call-in procedures, and unexcused absences shall subject the employee to disciplinary action.

...

ANNEX H

...

7. Late for work (tardiness)/Failure to follow proper call-in procedure. (First Offense – Warning; Second Offense – Written Reprimand; Third Offense – 3 days suspension; 4th Offense – 3 days suspension...).

...

27. Failure to report to work (unexcused absence). (First Offense – 2 days suspension; Second Offense – 3 days suspension; Third Offense – 3 days suspension; 4th Offense – Dismissal).

...

C. Facts Forming the Basis of Dismissal

In March 2015, Karla Jones (“Jones”), DOC Warden III, was assigned to Ventress. As the Warden of Ventress, Jones noticed many mandatory posts were going unfilled during work shifts. In an effort to fully staff Ventress, Jones reviewed a Ventress Standard Operating Procedure (“SOP”) implementing mandatory overtime created in August 2014 by the facility’s former warden. The

SOP was created, but not implemented, prior to Jones's assignment. Jones decided to implement mandatory overtime for all Ventress employees for the safety and security of officers and inmates. The newly implemented mandatory overtime policy began on April 1, 2015. Pursuant to the policy, officers were required to work a minimum of three days of overtime per month.⁶ The officers were allowed to apply for certain dates during a month. The applications were reviewed by supervisors and the officers were scheduled to work certain dates based on their requests or the need of the institution.⁷ The application clearly indicated which dates the officer was approved to work and the officer then signed the form acknowledging the assignments.

Howard was scheduled to work mandatory overtime on Saturday, May 16, 2015; Saturday, June 13, 2015; and Monday June 22, 2015. Howard failed to report to work on those three days. Howard did not utilize Ventress's call-in procedure and did not respond when a Ventress Supervisor called him during the shifts. On Thursday, July 16, 2015, Howard was scheduled to work mandatory overtime. Howard failed to report to work on that date. Howard did not utilize Ventress's call-in procedure and did not respond when a Ventress Supervisor attempted to call

⁶ Officers were assigned to work the opposite assignment. For example, an officer who regularly worked the B Night shift was assigned to the A Night Shift for mandatory overtime.

⁷ See DOC Exhibit 7, an example of an application for employee overtime.

him during the shift. Howard did not deny failing to report to work on any of the four dates.

Jones testified she submitted paperwork to the Central Office recommending the following penalties for each of Howard's violations: (1) for his May 16, 2015 unexcused absence, Jones recommended a two-day suspension; (2) for his June 13, 2015 unexcused absence, Jones recommended a three-day suspension; (3) for his June 22, 2015 unexcused absence, Jones recommended a three-day suspension; and (4) for his July 16, 2015 unexcused absence, Jones recommended dismissal. Jones testified her recommended discipline was made pursuant to Administrative Regulation 208, Annex H, #27.

Jones testified she send her recommended disciplinary action to the Central Office for review and approval. Jones testified it routinely takes more than a month for the approved or modified recommendation to be delivered to her. Jones explained the recommendation is reviewed by at least three people before it is returned to her. Jones received approval for all three recommended suspensions on the same date, August 5, 2015.⁸ Jones served the suspensions on Howard on August 12, 2015.⁹ On August 24, 2015, Jones served Howard with a Notice of Pre-

⁸ See DOC Exhibits 6A, p. 8; 6B, p. 8; and 6C, p. 8.

⁹ See DOC Exhibits 6A, p. 5; 6B, p. 5; and 6C, p. 5.

Dismissal Conference.¹⁰ The pre-dismissal conference was held on September 8, 2015, and Howard was dismissed from service on September 30, 2015.

In his defense, Howard did not deny failing to report to work on the four mandatory overtime days. During his pre-dismissal conference, Howard told the Warden if she had met with him on May 16, 2015, after his first violation, and told him he needed to come to work that he would not have missed any more days. Howard testified he believed mandatory overtime days were treated differently than officers' regular shift days. Howard testified other officers missed mandatory overtime days and were not punished. Howard also testified he was not given a chance to change his poor behavior because all of his disciplinary actions were served on him at one time and he was not put on notice that his actions constituted a violation of DOC policy. Howard's contentions will be discussed individually:

Treatment of Days

Howard's argument that regular shift days are different than mandatory overtime days is untenable. The Application for Employee Overtime states, in part, "All officers **may be required to work** a minimum of 3 days of overtime a month" [emphasis added]. The plain language of the document denotes a requirement for officers to work mandatory overtime. The application does not contain ambiguous

¹⁰ See DOC Exhibit 3.

language and Howard acknowledged his overtime assignments by signing the bottom of the application.¹¹ As a matter of fact, the application even warns the officer of corrective action if he fails to work an assigned day. Howard acknowledged unexcused absences were a rule violation. Howard admitted he missed four days he was assigned to work. Howard also admitted his unexcused absences were violations of DOC policy. Howard testified he assumed it was acceptable not to show up because other officers did so.

Other Officers Not Disciplined

Howard contended other officers failed to report to Ventress during their mandatory overtime shifts. Howard's allegation was not substantiated by the evidence. Howard testified Elijah Rouse ("Rouse"), DOC Correctional Sergeant, told him supervisors removed the names of officers from the duty roster sheet after the shift started to prevent those officers from being disciplined. Rouse denied this allegation. Rouse testified an officer's name may be removed if he called in sick or called in to reschedule his shift.

In order to bolster his contention, Howard introduced multiple applications for overtime for various officers and compared them to the Duty Post Roster for the respective shifts. Howard showed that Officer Eaton applied and was approved to

¹¹ See DOC Exhibit 7.

work on August 7, 2015 and August 26, 2015. The Duty Post Roster showed on August 7, 2015, Officer Eaton called in and was marked off the Duty Post Roster. The August 26, 2015 Duty Post Roster showed that Officer Eaton was marked off the Duty Post Roster and beside his name was written, “rescheduled.” There was no testimony that Officer Eaton failed to report to work without prior approval. As a matter of fact, Officer Eaton called in on August 7, 2015 which was an appropriate course of action. Howard pointed out other officers, similar to Eaton. Without more testimony from the officers and the supervisors on those shifts, Howard’s blanket contention is unsustainable.

Howard Not Given an Opportunity to Correct his Behavior

Finally, Howard contended he was not given the opportunity to change his negative work habits, through progressive discipline, because his disciplinary actions were accumulated and then served on him on the same date. Howard accumulated four unexcused absences in the span of two months. An unexcused absence is a serious offense that leads to suspension on the first violation. Correctional officers’ attendance is necessary for the safety and security of other officers and inmates. Failing to report to work or failing to call-in pursuant to DOC policy causes significant staffing problems in a correctional institution.¹² Howard knew he was scheduled to work and failed to appear or call-in on four separate

¹² Testimony of Jones and Correctional Lieutenant Michael Calhoun.

occasions. Jones testified she does not submit a recommendation for discipline until she gets a statement from the officer. Jones testified she received statements from Howard; however, she did not produce those statements at the hearing. Rouse testified he got a statement from Howard on at least one occasion. Howard acknowledged he gave a statement to Rouse and then later in his testimony alluded to multiple statements he had given. Howard knew unexcused absences were a violation of DOC rules. Howard knew failure to report to work could result in discipline.

Howard was not naive to the disciplinary process. In fact, Howard was disciplined on five separate occasions prior to his unexcused absences, including a two-day suspension in 2010. Furthermore, discipline has not always worked for Howard. Howard was disciplined for disagreeable behavior on January 22, 2015. Following his discipline for disagreeable behavior, the mandatory overtime policy was implemented. Rouse testified that after the policy was released, Howard told him he would work his regular shift, but did not want to work an overtime shift. In spite of recent discipline for the same offense, Howard continued to demonstrate disagreeable behavior.¹³

III. ISSUE

Did DOC produce sufficient evidence to warrant Howard's dismissal?

¹³ Howard testified he worked some of his mandatory overtime days and did not work others.

IV. DISCUSSION

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).¹⁴

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.

¹⁴ 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).

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 APA’s preponderance of the evidence standard. See also *Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).¹⁵

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 sufficient evidence to prove that Howard more probably than not violated Administrative Regulation 208, Annex H, #27 – Failure to report to work. Howard admitted he failed to report to work for four separate mandatory overtime assignments. These violations occurred over a two month span. A violation of Administrative Regulation 208, Annex H, #27 is grounds for a suspension on the first three offenses and dismissal on the fourth

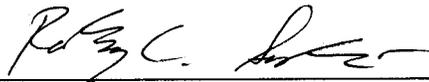
¹⁵ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

offense. Howard's July 16, 2015 infraction was his fourth violation of the rule, which is grounds for dismissal.

Based upon Howard's violations of Administrative Regulation 208, Annex H, #27, Howard's dismissal was appropriate discipline pursuant to DOC rules and regulations. The fact that three of Howard's disciplinary actions were served on him on August 12, 2015 and his pre-dismissal paperwork was served on him on August 26, 2015 does not warrant a lesser penalty. Howard referred to a former Court of Civil Appeals case, *State of Alabama Department of Conservation v. State Personnel Board*, 637 So. 2d 894 (1994). In that case, the State Personnel Board found mitigation in that the Conservation employee dismissed from state service was not offered progressive discipline and had no prior discipline within his 13-year career. In the present case, Howard had previously been disciplined; he did not have an exemplary employment record. Furthermore, Howard was provided supervision and instruction on Ventress's mandatory overtime policy. Howard committed multiple infractions in a short time frame and gave statements to Rouse following his unexcused absences, which put him on notice he was being disciplined. Discipline is not an exact science. Howard knew unexcused absences were violations of DOC policy. Howard determined if he failed to report to work on a mandatory overtime day, he would not be disciplined. Howard was mistaken. Howard's belief was based on false or incomplete information, none of which came

from his supervisors. Howard's failure to report to work placed the institution in an untenable staffing position; this conduct cannot be condoned. As a matter of fact, mitigating Howard's punishment would send a message to correctional officers that as long as they commit numerous infractions within a short time frame they could escape the consequences. Following a careful and thorough review of all the facts and circumstances in this particular case, including mitigation, the undersigned recommends to the State Personnel Board that Howard's dismissal from DOC be UPHELD.

Done this the 10th day of February, 2016.



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