

Abner had previously been employed by the Alabama Department of Youth Services (“DYS”).² Abner resigned and joined the military for approximately eight months in 2000. Abner was first employed by DOC in 2003. Abner resigned from DOC on August 1, 2005. Abner was re-employed by DOC on January 2, 2007. Abner, over his DOC career, has been subject to discipline on approximately 23 occasions.³

Abner was disciplined for disagreeable behavior by DOC on April 30, 2015; May 11, 2015; July 17, 2015; and November 5, 2015.⁴ These violations of AR 208, Annex H, No. 13, along with Abner’s total disciplinary history at DOC, were the considerations upon which the appointing authority ultimately determined the good of the service required the termination of Abner’s employment at DOC.

Abner argued that he was the victim of retaliatory actions by his supervisors, that he was a “whistleblower,” that he challenged the “Blue Wall of Silence” at DOC and that the allegations against him were false.

Based on observation of the witnesses, the testimony, and the documentary evidence, the undersigned recommends the termination of Abner’s employment with DOC be upheld.

² Abner’s State Personnel File

³ See DOC Exhibits 3 and 5.

⁴ See DOC Exhibit 6, pp. 4-6 for information regarding November 5, 2015 disciplinary action.

On April 21, 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. Mary-Coleman Butler, Esq., appeared as counsel on behalf of DOC. Abner was *pro se*.

At the beginning of the hearing, DOC introduced, without objection, DOC Exhibits 1 – 12. Abner offered no exhibits. The undersigned informed the parties, without objection, that Abner’s personnel file at the Alabama State Personnel Department would be included in the record as evidence in this matter.

DOC called as witnesses:

- (1) Michael Lanier, Correctional Officer, DOC;
- (2) Jonathan Richardson, Correctional Sergeant, DOC;
- (3) Charles McKee, Correctional Captain, DOC;
- (4) Leon Forniss, Correctional Warden III, Retired, DOC; and
- (5) Solomon Abner, Appellant.

Abner testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

DOC rehired Abner on January 2, 2007 as a Correctional Officer and he remained in that classification until DOC dismissed him effective February 29, 2016. The dismissal letter signed by the appointing authority, ADOC Commissioner

Jefferson S. Dunn, is dated February 29, 2016.⁵

Abner 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 March 21, 2016, the appeal hearing was scheduled for April 21, 2016.

In its Statement of the Facts, DOC alleged, in pertinent part:

Solomon Abner was a Correctional Officer at the Elmore Correctional Facility located in Elmore, Alabama. He was employed with the ADOC for twelve years and three months.

On or about September 23, 2015, ... Mr. Abner referred to Correctional Officer Michael Lanier as "Officer Laqueer," while utilizing his state-issued handheld radio. Thereafter, on September 25, 2015, Mr. Abner was questioned by Warden III Leon Forniss, Warden II Carl Clay, Captain Charles McKee, and Anthony Smiley concerning the unprofessional comment that Mr. Abner made in reference to Officer Lanier. Additionally, Captain McKee collected statements from five other correctional officers assigned to third shift in reference to the comment or comments Mr. Abner made toward Officer Lanier.

Mr. Abner was given notice of a pre-dismissal conference to be held on February 23, 2016, at 8:30 a.m. In a letter dated February 9, 2016, Mr. Abner was given notice of a pre-dismissal conference in which he could present his side of the story. The letter was received and signed for by Mr. Abner on February 9, 2016 at 10:20 a.m. A pre-dismissal conference was held on February 23, 2016. After affording Mr. Abner the opportunity to tell his side of the story, which he submitted in the form of a written statement, Warden Leon Forniss recommended that Mr. Abner be dismissed based upon his actions.

⁵ See DOC Exhibit 3.

Mr. Abner's actions violated ADOC's Administrative Regulation 208 – Employee Standards of Conduct and Discipline with respect to the following provisions:

Section V.A.1 – Employees shall report for work on time and in a condition to perform their job properly.

Section V.A.2 – Employees shall render full, efficient, and industrious service.

Section V.A.3 – Employees shall respond promptly to directions and instructions of supervisor.

Section V.A.4 – Employees shall exercise courtesy and tact.

Section V.A.7 – Employees shall observe all laws, rules, and regulations.

Section V.C.4 – Employees shall not use profane, abusive, or threatening language in communication with other employees, the public, or when supervising inmates.

Mr. Abner's prior disciplinary actions are as follows:

- | | | |
|--------------------|-------------------|---|
| 1. Pending | Suspension | Sleeping (7/25/15) |
| 2. Pending | Suspension | Sleeping; Disagreeable Behavior (7/17/15) |
| 3. June 16, 2015 | Warning | Late for Work (6/5/15) |
| 4. May 20, 2015 | Informal Warning | Late for Work (5/20/15) |
| 5. Dec. 4, 2015 | Suspension | Disagreeable Behavior (5/11/15) |
| 6. Nov. 6, 2015 | Suspension | Disagreeable Behavior (4/30/15) |
| 7. May 8, 2014 | Written Reprimand | Disagreeable Behavior (3/12/14) |
| 8. Dec. 2, 2013 | Written Reprimand | Misuse of State Equipment (10/21/13) |
| 9. Dec. 11, 2013 | Written Reprimand | Use of abusive, profane, etc. (7/22/13) |
| 10. Dec. 11, 2013 | Written Reprimand | Leaving Assigned Post (5/27/13) |
| 11. July 12, 2013 | Suspension | Failure to Report for Work (12/24/12) |
| 12. Sept. 17, 2012 | Written Reprimand | Disagreeable Behavior (5/28/12) |
| 13. March 1, 2010 | Warning | Non-Compliance with Policies (1/7/10) |
| 14. April 3, 2009 | Suspension | Taking into any ADOC facility any article, item, or property, etc. (12/30/08) |
| 15. Sept. 25, 2008 | Suspension | Failure to Follow Supervisor's Instruction (12/30/08) |

16. June 11, 2009	Suspension	Violations of Sexual Misconduct Statute (9/18/08)
17. Dec. 31, 2008	Suspension	Failure to Follow Supervisor's Instruction (6/2/08)
18. Dec. 20, 2008	Suspension	Failure to Report for Work (5/15-16/08)
19. May 20, 2008	Written Reprimand	Disagreeable Behavior (2/8/08)
20. June 13, 2008	Suspension	Inattention to the Job; Sleeping (1/26/08)
21. April 3, 2008	Written Reprimand	Failure to Follow Supervisor's Instruction (1/9/08)
22. Dec. 20, 2007	Written Reprimand	Late for Work (9/24/07)
23. May 4, 2007	Warning	Late for Work (4/23/07)

In determining the appropriate corrective action for violating the standards of conduct, the Commissioner considered the following infraction under Administrative Regulation 208:

Disagreeable behavior, including lack of cooperation and insubordination. (AR 208, Annex H, 13).

Based on the regulations set forth in Administrative Regulation 208, the recommendation of termination was made and approved by the requisite authorities due to the fact that this was Mr. Abner's fourth (4th) offense for disagreeable behavior in a twelve (12) month period. Warden Leon Forniss, Institutional Coordinator Cheryl Price, and Associate Commissioner Grantt Culliver recommended the dismissal of Mr. Abner. Commissioner Jefferson S. Dunn, by and through his designee, then approved the dismissal effective at the close of business on February 29, 2016. Mr. Abner's actions were in violation of ADOC Regulations, he was provided with due process ... The ADOC denies that any action was taken in retaliation or for any improper purpose.

Additionally, the ADOC submits that Mr. Abner's conduct also violates the General Work Rules of the Alabama State Personnel Department, Administrative Code § 670-X-19-.01:

For violations which would normally result in increasing severity of discipline as enumerated in section (a) - 7. Disruptive conduct of any sort.

For violations which would normally result in suspension or termination in the first offense as enumerated in section (b) - 5. Use of abusive or threatening language.

...

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.⁶

A. Employee's Personnel File⁷

Abner's performance appraisals while in State service at DOC reflect:

Date Ending	Total	Score Category
02/01/2016	13	Partially Meets Standards
02/01/2015	23	Meets Standards
02/01/2014	13	Partially Meets Standards
02/01/2013	22	Meets Standards
02/01/2012	28.9	Exceeds Standards
02/01/2011	34.4	Exceeds Standards
02/01/2010	18.6	Meets Standards
02/01/2009	4	Does Not Meet Standards
02/01/2008	14	Partially Meets Standards
04/01/2007 ⁸	20	Meets Standards
03/01/2005	4	Does Not Meet Standards
05/23/2004	20	Meets Standards

⁶ 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.

⁷ See *generally* State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

⁸ Abner resigned from employment with DOC on August 1, 2005 and was subsequently re-employed by DOC on January 2, 2007.

Abner's performance appraisal ratings while at DYS were as follows:

Date Ending	Total	Score Category
01/01/2002	23	Meets Standards
01/01/2001	27	Exceeds Standards
02/27/2000	20	Meets Standards

Abner's prior disciplinary history at DOC is detailed in DOC Exhibits 1 – 3 and 6, and on pp. 5 – 6 of this Recommended Order. It includes twelve suspensions, eight written reprimands, and four warnings over his twelve year and three month career at DOC. It includes four suspensions for disagreeable behavior in 2015: April 30, May 11, July 17, and November 5.

B. DOC Regulations, Policies and Procedures and State Personnel Board General Work Rules Forming the Basis of the Charges

AR 208, provides in pertinent part:

...

V. PROCEDURES

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

1. Report to work on time and in a condition to perform their job properly.
2. Render full, efficient, and industrious service.
3. Respond promptly to directions and instructions of supervisor.
4. Exercise courtesy and tact.

...

7. Observe all laws, rules and regulations.

...

...

C. Employees shall **not**:

...

4. Use profane, abusive, or threatening language in communication with other employees, the public, or when supervising inmates.

...

...

AR 208, Annex H: TABLE OF INFRACTIONS and LEVEL OF DISCIPLINE:

...

13. Disagreeable behavior, including lack of cooperation and insubordination. (**First Offense**: Written Reprimand; **Second Offense**: 2 days suspension; **Third Offense**: 3 days suspension; **Fourth Offense**: Dismissal)

...

State Personnel Board Rules applicable:

670-X-19-.01 General Work Rules.

(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:

...

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

...

5. Use of abuse or threatening language.

...

12. Disruptive conduct of any sort.

...

C. Facts Forming the Basis of Dismissal

Abner was assigned to the third shift at the Elmore Correctional Facility on September 23, 2015. Abner was assigned to a dorm. Correctional Officer Michael Lanier (“Lanier”) was on duty as the “Kitchen Rover.” Lanier called on the radio for kitchen workers to report. Abner responded on the radio, “10-4 Officer ‘Laqueer.’”⁹

Lanier said he called Abner to say he needed a kitchen worker from Abner’s dorm. Lanier said Abner responded, “10-4, Officer Laqueer.” Lanier asked Abner to repeat what he said by saying, “10-9?” Lanier said Abner repeated, “10-4, Officer Laqueer.”¹⁰

⁹ See DOC Exhibit 7.

¹⁰ See DOC Exhibit 8.

Other officers heard the transmission in which Abner referred to Officer Lanier as “Officer Laqueer.”¹¹

Lanier testified that he felt disrespected by Abner and believed Abner had called him a “queer.”

Correctional Sergeant Jonathan Richardson (“Richardson”) testified he heard Abner refer to Lanier as “Officer Laqueer.” On cross-examination, Richardson said he “unequivocally” recognized Abner’s voice referring to Lanier as “Officer Laqueer.”¹²

Abner says this is all made up and false. Abner suggested his radio transmission was “stepped on” by other radio traffic.

Correctional Captain Charles McKee (“McKee”) testified he conducted an investigation which he said confirms that Abner made the “Laqueer” statement. McKee said Abner admitted making the statement. Abner denies he made such an admission. On cross-examination, Abner suggested he was a “whistleblower” and was being retaliated against by other officers. McKee denied that there had been any retaliation against Abner.

Abner produced no witnesses or exhibits. In his closing argument, Abner recounted a series of incidents in which he alleged various DOC employees resented

¹¹ See DOC Exhibits 9-10.

¹² Testimony of Richardson.

and took exception to his actions, which Abner said were to do and have others do right and follow the law and the rules. Abner says “he reports stuff” and other officers resent that. Abner says he is a licensed and ordained minister and he considered DOC a place where he could serve. Abner is articulate and intelligent. He says he does not drink or socialize with co-workers. He says others have fabricated lies about him.

Retired Correctional Warden III Leon Forniss (“Forniss”) testified he gave Abner an opportunity to tell his side of the story at a pre-dismissal conference and Abner submitted a written statement.¹³ Forniss reviewed all the witness statements and Abner’s disciplinary record then determined it was appropriate to recommend Abner’s dismissal for the good of the service. The appointing authority accepted the recommendation after its review by appropriate members of DOC staff. Abner was dismissed from his employment with DOC effective February 29, 2016.¹⁴

III. ISSUE

Did DOC produce sufficient evidence to sustain Abner’s dismissal based upon violations of the State Personnel Board Rules and DOC rules, regulations, policies and procedures?

¹³ See DOC Exhibit 12.

¹⁴ See DOC Exhibit 3.

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).¹⁵

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

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 ‘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).

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

In the conditions extant in DOC, it is terribly important there be mutual respect and cooperation among all DOC personnel. The need to be professional and disciplined is enhanced by a system that faces challenges of an overcapacity population, inadequate facilities, lack of fiscal resources, and too few correctional

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.

officers. DOC needed Abner to be cooperative, efficient, and productive. Abner was rehired by DOC in 2007 as a Correctional Officer when his prior record was less than exemplary. At the time of his dismissal, Abner had pending disciplinary matters unresolved. Abner's four disagreeable behavior events in 2015, along with his overall disciplinary record, caused DOC to have no choice but to end his employment.

DOC presented sufficient evidence to warrant Abner's dismissal. DOC showed by a preponderance of the evidence Abner had been progressively disciplined. Abner's conduct constituted a violation of State Personnel Board General Work Rules 670-X-19-.01(2)(b)5 and (b)12.

Abner's conduct constituted violations of AR 208, Employee Standards of Conduct and Discipline, V.A.1, 2, 3, 4, 7 and V.C.4. AR 208, Annex H, No. 13, makes dismissal warranted for the fourth offense of disagreeable behavior in a twelve-month period. That, considering Abner's overall disciplinary history, compels his separation from employment at DOC.

The undersigned has carefully observed and carefully considered the witnesses' demeanor, testimony, and all the documentary evidence in this case and finds that the preponderance of the evidence establishes that DOC followed its rules and procedures, and had a proper basis and the authority to discharge Abner from his employment.

The undersigned finds no basis for a lesser disciplinary action than dismissal.
Therefore, the undersigned recommends to the State Personnel Board that the
dismissal be UPHELD.

Done, this the 3rd day of May, 2016.



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