

At the beginning of the hearing, DHR introduced into evidence exhibits consecutively marked DHR Exhibits 1 – 12. During the hearing, Lancaster introduced two exhibits into evidence consecutively marked Employee Exhibits 1 – 2. The undersigned informed the parties that Lancaster’s personnel file at the Alabama State Personnel Department was included as evidence in this cause.

DHR called as witnesses:

- (1) Kelly Lever, DHR Personnel Director;
- (2) Brandon Hardin, DHR Director of Food Assistance Program;
- (3) Andrus Love, DHR Food Assistance Worker;
- (4) Cara Fields, DHR Food Assistance Worker;
- (5) Vanessa Wilson, DHR Food Assistance Worker; and
- (6) Kerita Howard Williams, DHR Food Assistance Worker.

Lancaster testified on his own behalf. Lancaster also called Linda Bibb (“Bibb”), Director of Macon County DHR, to testify on his behalf.

I. PROCEDURAL HISTORY AND CHARGES

Lancaster began State employment in 2006 as a Financial Support Worker with DHR. Lancaster was promoted to Financial Support Supervisor in August 2013. Lancaster remained in that classification until his dismissal. *See* January 25, 2016 dismissal letter signed by Bibb.

In the dismissal letter, Bibb stated:

This is to inform you that effective 4:30 p.m.[,] January 25, 2016[,] your employment with the Macon County Department of Human Resources will be terminated. This action has been made necessary because of your actions while employed as a Financial Support Supervisor in the Food Assistance program of the Macon County Department of Human Resources.

An Administrative Hearing was held on January 4, 2016, at the offices of the Macon County Department of Human Resources in Tuskegee, AL. You were charged with violating the Rules of the State Personnel Board, 670-X-19-.01 General Work Rules, (1)(a)3 inattention to job – Doing anything distracting while on the job, (1)(a)4 Failure to perform job properly, (1)(a)7 Participation in unauthorized activity on work premises, (1)(b)(10) Serious violation of any other department rule (Religious Quotes and Government Employees dated June 21, 2010 and Religious Expression and Government Employees dated August 31, 2010), (1)(b)(12) Disruptive conduct of any sort, and (1)(b)(13) Conduct unbecoming a state employee. The Hearing Officer who heard the facts in this personnel matter has found that the evidence and testimony support all charges. A copy of the recommendation to the appointing authority is attached.

For the reasons cited above and for the good of the service, I have decided to terminate your employment as a Financial Support Supervisor. ...

...

Lancaster timely appealed his dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). On April 11, 2016, the undersigned conducted a *de novo* hearing (“the 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

Lancaster's annual performance appraisals while at DHR reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
12/15	33.0	Exceeds Standards
12/14	31.8	Exceeds Standards
02/14	22.7	Meets Standards ³
01/13	32.2	Exceeds Standards
01/12	30.0	Exceeds Standards
01/11	28.0	Exceeds Standards
01/10	27.3	Exceeds Standards
01/09	22.0	Meets Standards
01/08	27.0	Exceeds Standards
03/07	24.0	Meets Standards ⁴

Lancaster's prior disciplinary actions while employed with DHR included:

- Warning on October 2, 2015 for disruptive conduct.

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 Lancaster's final probationary period evaluation score as Financial Support Supervisor.

⁴ Lancaster's final probationary period evaluation score as Financial Support Worker.

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

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

...

3. Inattention to job – Doing anything distracting while on the job.

4. Failure to perform job properly.

...

6. Unauthorized and/or unlicensed operation of vehicles, machinery, or equipment.

7. Participation in unauthorized activity or solicitations on work premises.

...

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

...

10. Serious violation of any other department rule.

...

12. Disruptive conduct of any sort.

13. Conduct unbecoming a state employee.

...

DHR's rule concerning Religious Expression and Government Employees states, in pertinent part:

...

These guidelines apply equally to religious expression and non-religious expression involving employees, clients and others. These guidelines are not intended to be comprehensive.

The following are guidelines for **PERMISSIBLE** forms of expression:

...

- Engaging in prayer, reading Bible verses and other religious expression may be included in DHR meetings **if staff are advised that they do not have to participate or be present for that portion of the event; (and that the event is non-mandatory).**

...

C. Facts Forming the Basis of Dismissal

Lancaster was promoted to Financial Support Supervisor with the Macon County DHR in August 2013. Following his promotion, Lancaster engaged in several actions that ultimately led to his recommended dismissal by DHR. DHR maintained Lancaster: (1) improperly used religion in the workplace; (2) failed to properly supervise his employees to ensure they completed the minimum work required by Federal and State standards; and (3) failed to properly supervise employees' outside employment and use of DHR resources for personal matters.

Improper Use of Religion in Workplace

On June 21, 2010, DHR General Counsel Sharon Ficquette (“Ficquette”), sent a memorandum *via* E-mail to all DHR employees, outlining DHR’s position on use of religious quotes in the workplace.⁵ On August 31, 2010, Ficquette sent another E-mail to all DHR employees clarifying some questions regarding her June 21, 2010 memorandum.⁶ In her August 31, 2010 E-mail, Ficquette summarized the Alabama Religious Freedom Amendment and federal law on religious freedom, then set out guidelines to be followed if religion was discussed in the workplace. Among the permissible forms of expression, Ficquette acknowledged that prayer, reading Bible verses, and other religious expression may be included in DHR meetings ***IF*** staff are advised that they do not have to participate or be present for that portion of the meeting (*i.e.*, participation and/or attendance for that portion is non-mandatory).⁷

Following his promotion, Lancaster used religious quotes, Bible verses, and prayer to encourage and motivate his employees in Macon County. Lancaster was employed by DHR during 2010, but claimed he was unaware of the 2010 memoranda concerning religion. Lancaster acknowledged supervisors are responsible for enforcing DHR rules and policies. Lancaster testified he

⁵ See DHR Exhibit 2(a).

⁶ See DHR Exhibit 2(b).

⁷ *Id.* at p. 3.

participated with Macon County DHR employees in two joint prayer meetings in the Macon County Office hallway. One of the prayer meetings was initiated by Lancaster, and the other was initiated by some of the employees.⁸ Lancaster testified he stopped having prayer meetings in June 2015.

Aside from the prayer meetings, Lancaster also used Biblical references in his monthly unit meetings. Lancaster's subordinates, Cara Fields ("Fields") and Andrus Love ("Love"), both testified Lancaster used religious material in his unit meetings and did not inform the employees they were permitted to leave during that portion of the meeting. Employees are expected to participate in monthly unit meetings.

Lancaster described the Macon County DHR Office as a free environment and claimed his subordinates "understood" they were free to participate in religious activities or leave. During his pre-dismissal conference, Lancaster testified he left it up to individual employees to come to him if they were uncomfortable.⁹ However, during his appeal hearing, Lancaster testified he did inform his employees they were free to leave meetings during religious portions. He asserted, "They understood."¹⁰ Lancaster did not describe how the employees had this

⁸ Testimony of Lancaster.

⁹ See DHR Exhibit 12, pp. 19-20.

¹⁰ Testimony of Lancaster.

understanding. Furthermore, Lancaster did not describe how he informed the employees that the prayer meetings and unit meetings were non-mandatory. When asked about the contradiction, Lancaster testified he was confused at his pre-dismissal conference. Lancaster alleged he had time afterwards to think back about each scenario.

Multiple employees testified during the hearing and all of them testified Lancaster did not advise them before the prayer meetings or unit meetings that they did not have to participate.¹¹ One employee, Vanessa Wilson (“Wilson”), testified she specifically asked Lancaster if she had to participate in one of the prayer meetings because she had work to do. Wilson testified Lancaster told her it was a directive to attend the meeting. Fields testified she did not have a problem with the prayer meetings, but she did say she would feel “judged” by her co-workers if she chose not to attend. Love testified he wrote an E-mail to Lancaster and stated, “Please refrain from praying to me, preaching to me concerning my particular walk with Christ, or quoting any Bible scriptures in reference to my work performance.”¹²

¹¹ Testimony of Love, Fields, and Wilson.

¹² See DHR Exhibit 3. It should be noted, Love sent this E-mail to Lancaster shortly after Lancaster placed him on a corrective action plan for job performance issues.

Failure to Supervise: Macon County DHR Operated Below Standards

Lancaster supervised the Macon County DHR Food Assistance Program. Pursuant to State standards, the counties had to maintain a delinquency error rate of 5% or less each month. The delinquency error rate measures the number of applicants that were not given benefits in a timely manner. Alabama has approximately 880,000 residents who receive benefits from DHR's Food Assistance Program. The State relies on Federal funding to help them with the cost of the service. The Federal standard is also a delinquency error rate of 5% or less. If the State fails to maintain the appropriate delinquency error rate, it is placed on a corrective action plan. Currently, the State is under a Federal corrective action plan. Brandon Hardin ("Hardin") is the Food Assistance Director for the State of Alabama. Hardin testified at the hearing.

Hardin testified that Macon County was placed on a corrective action plan for failing to maintain a delinquency error rate of 5% or lower. A county placed on a corrective action plan remains on the plan until they maintain the appropriate delinquency error rate for twelve consecutive months. Hardin explained that if the counties failed to maintain the appropriate error rate, the State would stop receiving the administrative funding from the Federal government and the program would be shut down. Based upon Hardin's information, Macon County had an insufficient delinquency error rate in October 2014 (6.11%); August 2015 (6.18%); September

2015(6.90%); October 2015 (10.71%); and November 2015 (9.70%).¹³ The error rate results in qualified individuals not receiving food assistance in a timely manner. This jeopardizes the safety and welfare of the citizens of Alabama.

During this timeframe, the Macon County DHR Food Assistance Unit had six to eight workers. Their individual error rates were presented during the hearing.¹⁴ Hardin testified Macon was considered a smaller county so one worker failing to meet standards could bring the entire county's number down. Lancaster had two employees who routinely posted high delinquency error rates – Roberts and Wilson. In September 2015, Lancaster had three employees with high delinquency rates and in October 2015, Lancaster had four employees post double-digit delinquency rates.

Macon County was on a corrective action plan and was unable to get off the plan because the workers could not lower the county's delinquency error rate. Lancaster, as supervisor of Macon County, was ultimately responsible for the failure. Furthermore, based upon the numbers, Macon County's performance was declining, not improving under Lancaster's leadership.

In his defense, Lancaster testified Wilson was the most egregious worker in his group and he gave her a warning and also placed her on a corrective action plan in an effort to boost her work output. Further, Lancaster attempted to introduce

¹³ See DHR Exhibit 5 and testimony of Hardin.

¹⁴ See DHR Exhibit 6.

evidence that showed Macon County had an appropriate delinquency error rate during 2014 – 2015. Hardin was shown a document he sent to the counties.¹⁵ Hardin testified the document was not complete, that there were other pages that were not included. The document he was shown was a memorandum to all counties explaining the statewide corrective action plan and showing counties' various numbers. Lancaster claimed the document showed Macon County operating below the appropriate delinquency error rate. While the document does show Macon County's delinquency error rates below 5%, the numbers are averages from October 2014 through the month posted. Even though the average may be lower than 5% for Macon County, the individual months were still above the 5% requirement. Hardin believed the missing pages would show the monthly numbers. The monthly numbers were contained in DHR Exhibit 5.

In spite of Lancaster's explanation of remedial measures, he had multiple employees failing to meet the appropriate delinquency error rate in various months, and Macon County's numbers were not improving. There was a six to eight month span where Macon County's numbers were within appropriate levels, but the county had to maintain that level for **twelve consecutive months** and the data suggested a significant decline after June 2015. In fact, things became so bad in November

¹⁵ See Employee Exhibit 1.

2015 that the Macon County DHR Office began receiving complaints about service from Lancaster's unit.¹⁶

Failure to Supervise: Outside Employment and Improper DHR Computer Use

One of Lancaster's employees, Love, operated an entity known as "Wise Words Consulting." Love wrote books, poems, and inspirational materials and had a Facebook page. Love was interviewed on the radio about his business. Furthermore, Love took pictures with DHR employees in the Macon County DHR Office which he used to promote the sale of his books.¹⁷ On Thursday, September 17, 2015, Love recorded a video while in the Macon County DHR Office and posted the video to his Facebook page at approximately 10:11 a.m. The video was an "I Love You Challenge" where individuals participated by tagging someone in the post and telling them, "I love you." Love would then select a winner who would receive a gift basket worth \$50.00.¹⁸ Lancaster participated in the challenge that afternoon at 2:43 p.m.¹⁹ Love testified Lancaster never told him he needed approval for employment outside his job with the State. Love also testified Lancaster never told him he could not market his materials on State property during work hours. Love

¹⁶ See DHR Exhibit 8.

¹⁷ See DHR Exhibit 9(a).

¹⁸ See DHR Exhibit 9(c)(1).

¹⁹ See DHR Exhibit 9(c)(2).

testified he was suspended by DHR for his actions and currently faces an investigation by the State Ethics Commission. Love also testified he brought his personal laptop to the Macon County DHR Office to perform work for Wise Words Consulting. Love recalled a time when Lancaster saw him working on his personal computer and then told Love he could use the DHR computer, as long as his work was caught up.

Another Macon County DHR employee, Kerita Howard Williams (“Williams”), testified she was suspended by DHR after Lancaster’s dismissal for having personal materials on her DHR computer. During her probationary period, Lancaster sent Williams an E-mail that contained the work product of his doctoral thesis. Lancaster wanted Williams to help him scan and organize the portfolio. Williams had other personal information on her DHR computer and testified Lancaster did not tell her it violated any rules.

Lancaster’s dismissal was not initiated by Bibb. Following an investigation by DHR’s Central Office, the DHR Personnel Department sent a termination letter to Bibb to serve on Lancaster.²⁰ Bibb acknowledged Macon County’s delinquency error rate had not improved under Lancaster. Bibb testified she attempted to help Lancaster by counseling Wilson to help her get her numbers to an acceptable level.

²⁰ Testimony of Bibb.

Bibb concluded that once Wilson was placed on a corrective action plan, no further discipline could be given to her.

III. ISSUE

Did DHR produce sufficient evidence to warrant Lancaster's dismissal?

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).²¹

In determining whether an employee's dismissal is warranted, the departmental agency bears the burden of proving the charges warrant termination by

²¹ 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).

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).²²

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).

²² 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.

In the present case, DHR presented sufficient evidence warranting Lancaster's dismissal. Based on the evidence, Lancaster violated State Personnel Board General Work Rules 670-X-19-.01(1)(a)(4) "Failure to perform job properly;" 670-X-19-.01(1)(b)(10) "Serious violation of any other department rule" (specifically, Memorandum on Religious Expression and Government Employees dated August 31, 2010); and 670-X-19-.01(1)(b)(12) "Disruptive conduct of any sort" by conducting prayer meetings and using Biblical references in unit meetings without giving the employees an affirmative opportunity to leave or not participate. All of the employees who testified stated Lancaster did not advise them that their participation was optional and they were free to leave. As a matter of fact, one employee who shared Lancaster's religious beliefs testified she felt she would be judged if she did not participate. This exemplifies the very reason why employees should be given an opportunity to opt-out of any portion of a meeting during which religious matters are being discussed. Lancaster testified he was not aware of DHR's policies, which were sent to every DHR employee *via* E-mail and posted on DHR's Human Resources website. This position is untenable. Lancaster utilized religion in his managerial style. He affirmatively incorporated the use of prayer and the Bible in his leadership. As a supervisor, Lancaster's responsibility, if he chooses to use religion in the workplace as motivation, is to make sure he complies with Federal and State laws. *Ignorantia juris non excusat* means ignorance of the

law excuses no one. When a supervisor intends to use religion in the workplace, he must perform due diligence to determine what is legal and what is not, because he will be held accountable. Lancaster violated DHR policy and therefore should be held accountable.

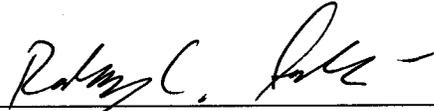
Furthermore, Lancaster violated State Personnel Board General Work Rules 670-X-19-.01(1)(a)(3) "Inattention to job;" 670-X-19-.01(1)(a)(4) "Failure to perform job properly;" 670-X-19-.01(1)(a)(6) "Unauthorized and/or unlicensed operation of vehicles, machinery, or equipment;" 670-X-19-.01(1)(a)(7) "Participation in unauthorized activity or solicitations on work premises;" 670-X-19-.01(1)(b)(12) "Disruptive conduct of any sort;" and 670-X-19-.01(1)(b)(13) "Conduct unbecoming a state employee" by permitting his employees to engage in outside employment without permission, use State computers for personal use, permit employees to solicit merchandise at the Macon County DHR Office, and have a probationary employee help him organize his doctoral thesis on a DHR computer. Lancaster's unit was in decline in late 2015 and after DHR investigated the environment following Lancaster's dismissal, the reasons were apparent. The evidence showed that employees supervised by Lancaster misused considerable time and resources. Lancaster failed to correct the actions of his employees and at times endorsed their misdeeds.

Lancaster asked for mitigation in this matter because he was not progressively disciplined. Progressive discipline is not an exact science. Progressive discipline is designed to help rehabilitate employees who have flaws. Progressive discipline is not intended to be a safety net to rescue serious rule offenders after a number of violations are discovered during an investigation. Lancaster's specific violations of serious violation of other department rules, conduct unbecoming a State employee, and disruptive conduct of any sort are all charges that may result in suspension or discharge on the first offense.²³ Lancaster has violated all three rules. Based upon the number of charges and the pervasiveness of misdeeds under Lancaster's supervision, mitigation is not appropriate.

The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal. 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 UPHELD.

Done this the 18th day of May, 2016.

²³ Furthermore, Lancaster's failure to perform his job properly was a serious violation because the result of his failure to properly supervise his employees placed the welfare of the public at risk. Food is a basic necessity and failing to timely handle cases may result in significant consequences.



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

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

A. Wesley Pitters, Esq.
P. O. Box 1973
Montgomery, Alabama 36102-1973
Telephone: (334) 265-3333
Facsimile: (334) 265-3411
E-mail: awpitters@pitterslawfirm.com

Kimberly J. Dobbs, Esq.
Department of Human Resources
Gordon Persons Building, 2nd Floor
50 North Ripley Street
Montgomery, Alabama 36130-4000
Telephone: (334) 242-9340
Facsimile: (334) 242-0689
Email: kimberly.dobbs@dhr.alabama.gov