

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

<b>Michal Ruth Mitchell,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 18-22-JJW</b>
	)	
<b>Alabama Department of Labor,</b>	)	
	)	
<b>Appellee.</b>	)	

**RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD**

The employment termination of Michal Ruth Mitchell (hereinafter “Mitchell”) by the Alabama Department of Labor (hereinafter “DOL”) is the subject of this Recommended Order.

Mitchell had been employed by DOL since 1994. Mitchell had prior State service with the Alabama Department of Conservation and Natural Resources, the Alabama Department of Corrections, and the Alabama State Department of Education. Mitchell has worked in accounting functions and last worked as a Workers’ Comp Ombudsman in the Workers’ Compensation Division of DOL. Her primary job function was to conduct mediations and Benefit Review Conferences (BRC’s) for workers’ compensation claims. Ombudsmen provide their services to those requesting them through DOL’s Workers’ Compensation Ombudsman Program. DOL does not control the assignment of Ombudsmen to all

mediation and BRC cases.<sup>1</sup> Circuit Judges sometimes assign mediators to cases where mandatory mediation is ordered. Attorneys, self-insurers, insurance companies and others using mediation have great discretion and flexibility in whether they will use a particular mediator or Ombudsman. Mitchell did not have good rapport with those who would normally be her clientele. DOL provides Ombudsmen as a resource to the workers' compensation community, but does not have the ability to compel the use of a particular Ombudsman over the objections of the parties.

## **I. PROCEDURAL HISTORY AND CHARGES**

Since 1992, Ombudsmen have been made available at no cost to those attorneys and workers' compensation carriers and funds utilizing their services. Over time, preferences for certain Ombudsmen by certain utilizing entities have developed. In Mitchell's case, her handling of Ombudsmen duties has not helped her develop a clientele. In fact, many attorneys and others have declined to use Mitchell's services claiming that she does not understand her role as a mediator and that she has acted more like an advocate for claimants than as a neutral in mediations and BRC's.<sup>2</sup> As a consequence, DOL has not had success in its efforts to have

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<sup>1</sup> Employee Exhibit 1, p. 2., Rule 3 reads, "DOL will select a mediator from its Ombudsmen." However, the selection of mediators is largely up to the parties. There is no requirement that all mediations or BRC's are done by Ombudsmen. *See* ALA. CODE § 25-5-290.

<sup>2</sup> DOL Exhibit 10, pp. 848-850; p.976; pp. 981-988; pp. 1010-1012.

clients use Mitchell despite its efforts to encourage her use by them.<sup>3</sup> Mitchell was appointed as an Ombudsman in 2002. She was assigned to Mobile. She was not able to develop a viable workload as an Ombudsman there. Mitchell was brought back to Montgomery<sup>4</sup> where she functioned more as “Medical Dispute Ombudsman” (an examiner) answering questions by telephone, but maintaining her Ombudsman classification.

In 2016, Secretary of Labor Fitzgerald Washington ordered a review of job functions and updated Form 40 descriptions of Ombudsman duties. As an Ombudsman, Mitchell had to return to her described job duties. In order to assist Mitchell, John Lewis (“Lewis”), her direct supervisor, undertook efforts to involve her in mediations and BRC’s, mentoring her, providing guidance, and training to renew and enhance her mediation skills.<sup>5</sup> A notification was sent to all the entities in the State of Alabama who customarily might use the services of an Ombudsman about Mitchell’s availability to serve.

In 2016, Mitchell only conducted or participated in 24 mediations/BRC’s. As a result, on her November 20, 2017 Annual Performance Appraisal, her score was “01.40” which fell within the “Does Not Meet Standards” category. During

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<sup>3</sup> DOL Exhibit 10, pp. 979-980.

<sup>4</sup> DOL Exhibit 1, p. 113.

<sup>5</sup> DOL Exhibit 8, p. 712.

her Performance Appraisal conducted by Lewis, with Charles Delamar (“Delamar”) present, Mitchell was insubordinate when she told Delamar to “stop talking now” after he said that both he and Lewis had tried to get more mediations for Mitchell. Mitchell admits she said that to Delamar. This action by Mitchell was overtly insubordinate.

At this same meeting, Lewis provided a Performance Improvement Plan (“PIP”) to Mitchell designed to help her improve mediation numbers and her overall performance. Mitchell completely disregarded the PIP, refused to follow it, and did no mediations or BRC’s in December 2017, January 2018 and February 2018. When Lewis met with Mitchell at the conclusion of the first three months of the PIP, Mitchell explicitly declined to follow the PIP stating she disagreed with it. This action, and lack of action, by Mitchell was insubordinate.

On March 13, 2018, Mitchell was recommended for termination of her employment.<sup>6</sup> On April 5, 2018, the appointing authority for DOL issued a letter terminating Mitchell’s employment effective Friday, April 6, 2018.<sup>7</sup> The basis for Mitchell’s employment termination was the violation of the following State Personnel Board General Work Rules:

- 670-X-19-.01(1)(a)(4) Failure to perform job properly;

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<sup>6</sup> DOL Exhibit 2, pp. 303-305.

<sup>7</sup> DOL Exhibit 3, pp. 306-307.

- 670-X-19-.01(1)(b)(2) Insubordination – Failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words ...; and
- 670-X-19-.01(1)(b)(13) Conduct unbecoming a State employee.

DOL, in its Short Statement of Facts, stated in pertinent part:

...

Mitchell was employed as an Ombudsman in the Workers' Compensation Division of ADOL... Her primary job function was to conduct mediations and Benefit Review Conferences ("BRC's") relative to workers' compensation claims. She was required to complete 3 to 3.5 mediations/BRC's per week. She consistently failed to do this. During the relevant time frame for her Performance Appraisal, Ms. Mitchell conducted 24 mediations/BRC's, whereas her fellow Ombudsmen conducted between 127 and 412. As a result, on November 20, 2017, she received a Performance Appraisal Score of 01.40. This score fell within the "Does Not Meet Standards" category.

During her Performance Appraisal on November 20, 2017, Mitchell was insubordinate when she told the Workers' Compensation Division Director to "stop talking now" after his remark that he and her supervisor had tried to get more mediations for Mitchell.

As a result of her unacceptable job performance, her Supervisor provided a Performance Improvement Plan to Mitchell on November 20, 2017, in an effort to improve mediation numbers and her overall performance. Ms. Mitchell was again insubordinate by completely disregarding the plan, and refusing and/or failing to implement the listed items, which was reflected in her failure to improve her performance in the following three months:

DECEMBER 2017: **ZERO MEDIATIONS OR BENEFIT REVIEW CONFERENCES**  
 JANUARY 2018: **ZERO MEDIATIONS OR BENEFIT REVIEW CONFERENCES**

FEBRUARY 2018: **ZERO MEDIATIONS OR BENEFIT REVIEW CONFERENCES**

Moreover, when Mitchell's supervisor met with her at the conclusion of the first three months of her Performance Improvement Plan, she explicitly told him that she declined to follow her performance improvement [plan] because she disagreed with those instructions.

Mitchell was recommended for termination on March 13, 2018, due to failure to perform job properly, insubordination, falsification of records, and conduct unbecoming a state employee. The falsification charge stemmed from a finding by ADOL's EEO Manager that Mitchell made a false allegation in a grievance she made against the Workers' Compensation Division Director.

Ms. Mitchell exercised her right for a Pre-Termination Conference. On April 3, 2018, a panel of three ADOL employees conducted the Pre-Termination Conference and received testimony and evidence. The ADOL employee panel recommended that Mitchell be terminated due to failure to perform her job, insubordination, and conduct unbecoming a state employee.

Ms. Mitchell's job history includes a previous 10-day suspension which was given in part due to insubordination, previous counseling sessions for failing to conduct the requisite number of mediations, and a number of other issues.

...

On April 9, 2018, Mitchell, through counsel, denied the charges and asked for an appeal hearing before the State Personnel Board. On April 17, 2018, the undersigned held a prehearing conference at which the parties selected June 7, 2018 at 9:00 a.m. for the hearing. On that day, the undersigned conducted a scheduled *de novo* hearing on Mitchell's requested appeal of her dismissal by DOL at the offices of the State Personnel Department in Montgomery, Alabama. Donald M.

Harrison, Esq. and Alysonne O. Hatfield, Esq., represented DOL. Jason Lee Manasco, Esq., represented Mitchell. DOL offered 14 exhibits marked as DOL Exhibits 1-14, which were admitted without objection. Mitchell offered two exhibits marked as Employee Exhibits 1-2, which were admitted without objection. The undersigned advised the parties that he would consider Mitchell's State Personnel Department personnel file as evidence.

DOL presented the testimony of the following witnesses:

- (1) Renee Minor, DOL Human Resources Director,
- (2) John Lewis, DOL Ombudsmen Section Supervisor,
- (3) John Bradwell, Attorney,
- (4) Jonathon Berryhill, Attorney,
- (5) Reylon Ritchie, Retired DOL ASA III,
- (6) Tracy Stallings, Ala-Comp Senior Claims Adjustor; and
- (7) Charles Delamar, Retired DOL Director of Workers' Compensation.

Mitchell called no separate witnesses.

## **II. FACTUAL BACKGROUND**

Having reviewed all the available evidence, the undersigned finds the greater weight of evidence supports the following findings of facts.<sup>8</sup>

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<sup>8</sup> 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.

**A. Employee's Personnel File<sup>9</sup>**

Mitchell's annual performance appraisals reflect:

**Alabama Department of Labor**

<u>Date Ending</u>	<u>Total</u>	<u>Score Category</u>
11/01/2017	1.4	Does Not Meet Standards
11/01/2016	30.0	Exceeds Standards
11/01/2015	30.0	Exceeds Standards
11/01/2014	35.0	Exceeds Standards
11/01/2013	35.0	Exceeds Standards
11/01/2012	35.0	Exceeds Standards
11/01/2011	35.0	Exceeds Standards
11/01/2010	35.0	Exceeds Standards
11/01/2009	35.0	Exceeds Standards
11/01/2008	35.0	Exceeds Standards
11/01/2007	18.0	Meets Standards
11/01/2006	31.7	Exceeds Standards
11/01/2005	25.0	Meets Standards
11/01/2004	30.0	Exceeds Standards
11/01/2003	30.0	Exceeds Standards
12/28/2002	33.3	Exceeds Standards
07/01/2001	28.0	Exceeds Standards
07/01/2000	22.5	Meets Standards
07/01/1999	21.3	Meets Standards
07/01/1998	30.0	Exceeds Standards
07/01/1997	30.0	Exceeds Standards
09/01/1996	25.0	Meets Standards
06/01/1996	23.3	Meets Standards

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<sup>9</sup> See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).



01/01/1996	38.3	Consistently Exceeds Standards
02/19/1995	40.0	Consistently Exceeds Standards
11/19/1994	30.0	Exceeds Standards

**Alabama Department of Conservation and Natural Resources**

03/01/1994	23.6	Meets Standards
03/01/1993	17.9	Meets Standards

**Alabama Department of Corrections**

03/01/1992	33.6	Exceeds Standards
03/01/1991	33.6	Exceeds Standards
04/22/1990	31.8	Exceeds Standards

**Alabama State Department of Education**

03/1989	72.0	Exceeds Standards
03/1988	84.0	Exceeds Standards
03/1987	82.0	Exceeds Standards
03/1986	74.0	Exceeds Standards

Mitchell’s disciplinary history reflects the following:

05/03/2007	Insubordination, failure to follow chain of command	10-day Suspension <sup>10</sup>
06/29/1999	Tardiness	Written Reprimand <sup>11</sup>
10/15/1998	Insubordination, Non-compliance with rules; Disruption of the work place; Failure to follow proper procedures	Written Reprimand <sup>12</sup>

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<sup>10</sup> DOL Exhibit 1, p. 97

<sup>11</sup> DOL Exhibit 1, p. 185.

<sup>12</sup> DOL Exhibit 1, p. 188.

**B. State Personnel Board General Work Rules Forming the Basis of the Charges**

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

...

4. Failure to perform job properly.

...

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

...

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

...

13. Conduct unbecoming a State employee.

...

**C. Facts Forming the Basis of Dismissal**

Mitchell started at the DOL Workers' Compensation Division in 1994 as an Accounting Technician I and subsequently became a Workers' Comp Ombudsman

in 2002. Mitchell was assigned to the Mobile area in 2002. Mitchell did not develop good rapport with those persons and entities who utilize Ombudsman services. Her personnel file reflects some attorneys thought Mitchell unsuited for her role.

In November 2017, Mitchell continued her lack of respect for authority and told her Director of Workers' Compensation to "stop talking now." Not only that, Mitchell decided she did not have to participate in a PIP because she did not agree with it and did nothing in furtherance of the PIP. She deliberately determined that she did not have to follow instructions or take any action to perform her duties at DOL. She showed no respect for authority. DOL gave her every opportunity to succeed. The preponderance of the evidence shows Mitchell was guilty of failing to perform her job properly, she was insubordinate and she was guilty of conduct unbecoming a State employee. A panel of her peers recommended to the appointing authority of DOL that her employment be terminated.

### **III. ISSUE**

Did DOL, as the appointing authority, have sufficient evidence to sustain Mitchell's dismissal based upon violations of the State Personnel Board Rules?

### **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).<sup>13</sup>

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*,

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<sup>13</sup> 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).

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 (5<sup>th</sup> Cir. 1976).

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, DOL, over a period of years, patiently and carefully tried to develop, maximize and utilize the services of Mitchell to DOL. They did virtually everything possible to accommodate her. Mitchell, by her insubordination and demonstrated lack of respect for authority, left DOL no option but the termination of her employment. Mitchell was insubordinate in her comments to Delamar. Mitchell was insubordinate in refusing to engage in the PIP designed to help her succeed. Mitchell did not do her job properly. Many potential clients refused to use Mitchell as an Ombudsman.<sup>14</sup> Peter Scales III, an attorney in Mobile,

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<sup>14</sup> DOL Exhibit 8, p. 699; Testimony of John Bradwell; Testimony of Jonathon Berryhill; DOL Exhibit 10,

suggested to DOL's Director of Workers' Compensation in 2006, that he find another position for Mitchell, because she was "not competent to do mediations" and "does not understand the mediation process and does not possess the people skills necessary to act as a mediator."<sup>15</sup> DOL Exhibit 10 includes numerous other references to complaints from attorneys, adjusters, and co-workers. Scottie Spates, the late DOL Director of Workers' Compensation Division, observed in 2007, "I believe that Ms. Mitchell is completely unmanageable by anyone in my office. She has been under the supervision of a number of people in my office and on each occasion, there has been conflict. Ms Mitchell has a problem with accepting authority and doesn't understand the boundaries of her position."<sup>16</sup> DOL gave Mitchell ample opportunity to improve and succeed. Unfortunately, Mitchell continued to be difficult to manage. DOL had no other course of action but termination of Mitchell's employment. A panel of her peers agreed and so recommended to the appointing authority.

The undersigned has carefully considered all the evidence in this case and finds no basis for a lesser disciplinary action than dismissal. There is no evidentiary basis for mitigation. Accordingly, the undersigned finds the

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p. 976; pp. 981-982.

<sup>15</sup> DOL Exhibit 10, p. 983.

<sup>16</sup> DOL Exhibit 10, p. 847.

preponderance of the evidence warrants dismissal in this case. Therefore, the undersigned recommends to the State Personnel Board that the dismissal of Mitchell be UPHELD.

Done, this the 27<sup>th</sup> day of June 2018.



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JAMES JERRY WOOD  
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