

At the beginning of the hearing, ABC introduced into evidence exhibits consecutively marked as ABC Exhibits 1 – 6. The undersigned informed the parties that Muhammad’s personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

ABC called as witnesses:

- (1) Marsha Nicole Watson, ABC District 10 Supervisor; and
- (2) Demond Powell, ABC Manager I.

Muhammad testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

ABC hired Muhammad in August 2013 as an “ABC Sales Associate I.” Muhammad completed his probationary period in February 2014. Muhammad was promoted to “ABC Sales Associate II/Floater” in August 2015. Muhammad’s probationary period was extended on December 16, 2015 because he received a written reprimand on November 17, 2015. Muhammad remained in that classification until his dismissal on March 9, 2016. *See* March 8, 2016 Pre-Termination Letter (“Pre-Termination Letter”) signed by ABC Administrator H. M. Gipson.¹

In the Pre-Termination Letter, Gipson stated:

The policy violation(s) for this recommendation occurred on or about February 19, 2016. Specifically, you were scheduled to work from

¹ *See* ABC Exhibit 2.

11:30AM – 8:30PM. On Thursday, February 18, 2016, Ms. Nicki Watson (District 10 Operations Supervisor) called to notify you of a schedule change. Due to the truck arriving early, Ms. Watson advised you that you would need to report to work at 10AM for the truck delivery. On Friday, February 19, 2016 at 10:20AM, Ms. Watson was notified that you had not reported to work. The store attempted, but was unable to reach you by phone. Ms. Watson then attempted several times to reach you by phone, but was also unsuccessful. You called Ms. Watson at 10:53AM stating that you had just woke up and thought that you did not have to report to work until 11:30AM. During the conversation with Ms. Watson, you became argumentative and raised your voice. Ms. Watson advised you to lower your voice and not to argue with her. It is noted that until recently, you held a second job which required you to work overnight. Ms. Watson noticed that this was beginning to interfere with your job performance with the ABC Board. Ms. Watson has spoken with you several times about this, the most recent occurrence was on February 18, 2016 when she called to tell you of the schedule change.

Subsequently, on February 20, 2016, you were working at Store#38 with Mr. Demond Powell (Store Manager). You went to lunch at 3:06PM and returned at 4:19PM. When you returned from lunch you went to the warehouse, sat down, and proceeded to eat your lunch. After Mr. Powell finished with customers in the front of the store, he asked you what you were doing. You replied, "I'm eating nigga." This offended Mr. Powell and he told you that you had already taken an hour and fifteen (1:15) minutes for lunch and wasn't supposed to be back there eating. You told Mr. Powell that he was bothering you for no reason. Sometime during the exchange, you interrupted Mr. Powell asking, "if we just need to clock out to take this outside?" When Ms. Watson questioned you about the incident, you told her that you did tell Mr. Powell this, but you made attempts to downplay the situation. Ms. Watson asked you if she needed to come to the store and you told her "no, everything would be fine." Ms. Watson did not talk with Mr. Powell until he returned to work on Tuesday, February 23, 2016 and he indicated that he felt like he was being threatened by you and further, asked that you not be scheduled to work with him.

Lastly, on February 24, 2016, you were scheduled to work at Store #79 from 10:30AM – 7:30PM. At 10:42AM, Ms. Patty Ferri (Store

Manager) called Ms. Watson to advise her that you had not reported to work. Ms. Watson called you and you indicated to her that you thought you were supposed to report to Store #38 at 11:30AM. Ms. Watson had in fact made changes to the schedule due to Ms. Kaniqua Kelly's (previous employee) departure, but on February 16, 2016 you were notified by Ms. Watson of the schedule changes. Accordingly now, your actions for this notification constitute violations of ABC Personnel Policy as follows:

- ABC-4-10-.02 GENERAL WORK RULES
 - (1) Minor Violations – c) Tardiness – not on the job ready to work at the beginning of the shift. g) Disruptive conduct of any sort including a lack of cooperation and an unpleasant behavior toward fellow employees and/or supervisor.
 - (2) Serious Violations – b) Insubordination – Failure to submit to authority as shown by demeanor or words. e) Use of abusive or threatening language.
- ABC-4-10-.03 EMPLOYEE STANDARDS OF CONDUCT
 - (1) Professional Behavior and Conduct – An attitude of cooperation and respect is expected of every employee. Interaction with fellow employees must not cause dissension or discord. Malicious or excessive griping; loud, disruptive talking that affects the activities of other employees; vulgar, abusive, or threatening language; and emotional outbursts at another individual of the Agency are examples of inappropriate conduct from employees that will not be tolerated.

Employees are expected to perform their assigned duties conscientiously and to respond readily to the direction of supervisors. Failure to comply with a supervisor's instructions, arguing with a supervisor, and resisting authority are unacceptable and will subject the employee to disciplinary action.

...

- (4) Hours of Work – Employees are required to comply with work hours established by his/her supervisor. Violations such as tardiness and unexcused, unreported, and or excessive absenteeism could lead to disciplinary action as such behavior disrupts work schedules and places an added burden on co-workers and supervisors.

...

Muhammad timely appealed his dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). On May 12, 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.²

A. Employee’s Personnel File³

Muhammad’s annual performance appraisals while at ABC reflect:

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 Rule 670-X-18-.02(5) (employee’s work record, including performance and disciplinary history, considered in dismissing employee).

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
01/16	16.8	Meets Standards
12/14	25.7	Meets Standards
02/14	22.9	Meets Standards

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

- Written Reprimand on 11/16/15 for inattention to job, disruptive conduct, failure to perform job properly, and unacceptable employee conduct.
- Written Warning on 8/27/14, for failure to perform job properly and violating ABC's Professional Behavior and Conduct Policy.
- Written Warning on October 8, 2013 for inattention to job, failure to perform job properly, and disposition of merchandise due to loss or damage.
- Verbal Counseling on September 27, 2013 for tardiness and falsification of records.

B. ABC Policies/Procedures Forming the Basis of the Charges⁴

ABC Personnel Work Rules, Chapter ABC-4-10 provides, in part:

...

ABC-4-10-.02 GENERAL WORK RULES

In addition to any special rules implemented by the various Division Heads for the guidance of their employees, the following standard general work rules shall apply to all Agency employees. The lists are not all-inclusive and there is no implication that discipline may not be imposed for other sufficient reasons. These rules are consistent with

⁴ The ABC Policies and Procedures are identical to the State Personnel Board's General Work Rules.

those of the Rules of the State Personnel Board, as amended, Chapter 670-x-19.

(1) **Minor Violations** – violations that normally result in disciplinary actions of increasing severity:

...

c) Tardiness – not on the job ready to work at the beginning of the shift.

...

g) Disruptive conduct of any sort including a lack of cooperation and an unpleasant behavior toward fellow employees and/or supervisor.

(2) **Serious Violations** – More serious violations that may result in suspension or termination on the first offense, considering work record and length of service.

...

b) Insubordination – Failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words, with the one exception of not following an order the employee has good reason to believe is unsafe or illegal.

...

e) Use of abusive or threatening language.

...

ABC-4-10-.03 EMPLOYEE STANDARDS OF CONDUCT

(1) **Professional Behavior and Conduct** – ... An attitude of cooperation and respect is expected of every employee. Interaction with fellow employees must not cause dissention or

discord. Malicious or excessive griping; loud, disruptive talking that affects the activities of other employees; vulgar, abusive, or threatening language; and emotional outbursts at another individual of the Agency are examples of inappropriate conduct from employees that will not be tolerated. ...

Employees are expected to perform their assigned duties conscientiously and to respond readily to the direction of supervisors. Failure to comply with a supervisor's instructions, arguing with a supervisor, and resisting authority are unacceptable and will subject the employee to disciplinary action.

...

C. Facts Forming the Basis of Dismissal

Muhammad was originally scheduled to work from 11:30 a.m. until 8:30 p.m. on Friday, February 19, 2016. However, on February 18, 2016, Muhammad's direct supervisor, Nicole Watson ("Watson"), called Muhammad and instructed him to report to work the next day at 10:00 a.m. for a truck delivery. Muhammad's work schedule changed frequently since he worked for ABC as a floater. Muhammad's primary responsibility was to fill in for workers who would be out of their respective stores and it was typical for his assignments to change. On February 19, 2016, a truck was delivering approximately 250 cases of alcohol, weighing approximately 53 lbs. each. The truck drivers do not unload the boxes, they merely pull up to the store and set up the rollers for the store workers to use as they unload the boxes. Muhammad failed to appear at work by 10:00 a.m. which caused one employee to have to unload the truck by herself.

Watson was notified at approximately 10:20 a.m. that Muhammad failed to appear at work. Watson called Muhammad and Muhammad failed to answer his phone. At approximately 10:53 a.m., Muhammad returned Watson's phone call and told her he just woke up and did not realize he was supposed to be at work by 10:00 a.m. that morning. Watson described Muhammad as argumentative and testified he raised his voice while attempting to speak over her. Watson testified that Muhammad worked a second job and she believed the second job was interfering with his ABC job. Watson attempted to raise her concern to Muhammad on the phone and she indicated he cut her off saying he quit the job and his second job was none of her concern.

On or about Saturday, February 20, 2016, Muhammad was assigned to work at Store #38 with Store Manager Demond Powell ("Powell"). Muhammad went to lunch at approximately 3:06 p.m. and returned to the store at approximately 4:19 p.m. Upon his return, Muhammad went to the warehouse and began eating some food he brought back with him. Powell testified that after he realized Muhammad was gone for over an hour and then returned with food and an intention to eat on the clock, Powell questioned Muhammad. Powell testified Muhammad replied, "I'm eating n****." Powell then testified Muhammad stood up and accused him of bothering him for no reason. At that point, Muhammad invited Powell to clock out so they could handle the issue outside. Powell testified he felt threatened by

Muhammad. Powell told Muhammad he would call Watson and ask her not to schedule Muhammad at his store in the future. Later that evening, Muhammad called Watson to tell her his version of events. Watson asked Muhammad if she needed to come to the store and he replied, "No."

The following week, Watson spoke to Powell about the incident and he told her Muhammad threatened him. Powell explained to her what happened and how Muhammad reacted. Watson testified Powell's version of events was different than Muhammad's explanation from the previous week. Watson concluded her testimony by acknowledging Muhammad was a hard worker, when he worked; however, she received many complaints from others at ABC that he was difficult to work with.

On or about February 24, 2016, Muhammad was scheduled to work at ABC Store #79 from 10:30 a.m. until 7:30 p.m. Muhammad failed to appear by 10:30 a.m. Watson called Muhammad at approximately 10:42 a.m. and he told her he thought he did not have to report to the store until 11:30 a.m. Watson had changed Muhammad's work schedule on February 16, 2016 and he failed to record the changes in an appropriate manner.

Muhammad testified on his own behalf. Muhammad admitted that on the two tardiness charges he knew his schedule changed; however, he forgot about the time changes. Muhammad explained he wrote the changes on a post-it note and

lost the reminder. Muhammad testified his failure to report to work timely was not the result of a second job, but that he was simply confused about his shift. Muhammad also testified ABC had a back-up procedure in place such that if he was late for a shift, another worker would fill in and help unload a truck.

Finally, Muhammad addressed the alleged confrontation with Powell. Muhammad testified that lunch was not an important work-related issue and he was not aware of any other employees getting in trouble over the length of their lunch hour. Muhammad testified it was not uncommon for ABC workers to eat in the warehouse when the store was slow. Muhammad believed there was miscommunication between Watson and Powell. Muhammad testified he did use unprofessional language with Powell, but claimed that was common practice between the two men. Muhammad explained his wife was sick and he had to use his lunch hour to pick up his daughter and take her somewhere. Muhammad also explained he had a toothache and was given medication which made his stomach upset if he did not take the medication with food. Muhammad testified he did invite Powell to go outside, off the clock, but claimed it was not a threat; he just knew other employees had gotten in trouble for arguing while on the clock.

III. ISSUE

Did ABC produce sufficient evidence to warrant Muhammad'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).⁵

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.

⁵ 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 Administrative Procedure Act’s preponderance of the evidence standard. See also *Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).⁶

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, ABC presented sufficient evidence warranting Muhammad’s dismissal. Muhammad was tardy on two dates, specifically, February 19, 2016 and February 24, 2016. Muhammad’s tardiness is a violation of ABC Departmental Policy ABC-4-10-.02(1)(c) “Tardiness – not on the job and ready to work at beginning of shift.” Tardiness is a violation that results in

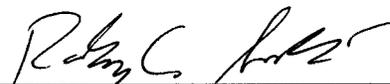
⁶ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

progressive discipline. Muhammad received two verbal counseling sessions, one warning, and one written reprimand for rule violations within the last three years. At a minimum, this violation would normally result in a suspension.

The evidence also showed that on February 19, 2016 and February 20, 2016, Muhammad engaged in insubordination with his direct supervisor, Wilson, and a store manager, Powell. On February 19, 2016, Muhammad argued with Wilson on the telephone over his tardiness and raised his voice in an attempt to talk over her. Furthermore, Muhammad told Wilson his second job was none of her concern. The evidence indicated Wilson was concerned about Muhammad's second job because she noticed it affected his job with ABC. Muhammad's demeanor and words were insubordinate towards Wilson. Also, on February 20, 2016, Muhammad argued with Powell about his lunch break and even asked Powell to clock out so they could "argue" outside. Muhammad's actions were insubordinate toward Powell and showed a clear disregard for Powell's authority. Pursuant to ABC-4-10-.02(2)(b), insubordination is a more serious violation that can warrant dismissal on the first offense. Muhammad's words toward Powell were also threatening which is explicitly prohibited by ABC-4-10-.02(2)(e). Based upon a totality of the evidence, Muhammad violated multiple ABC work rules and dismissal from State service is appropriate. Muhammad's continual failure to submit to authority is egregious and cannot be condoned.

The undersigned has carefully considered mitigation in this case. 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 8th day of July, 2016.



Randy E. 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, CERTIFIED AND FIRST CLASS U.S. MAIL

Aben Muhammad, *Pro se*



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

Robert L. Martin III, Esq.
Alcoholic Beverage Control Board
2715 Gunter Park Drive West
Montgomery, Alabama 36109
Telephone: (334) 260-5442
Facsimile: (334) 277-2150
E-mail: bob.martin@abc.alabama.gov