

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

DONNIE WARREN,)	
)	
Appellant,)	
)	
v.)	Case No: 18-18-RCS
)	
ALABAMA DEPARTMENT OF MENTAL HEALTH,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This Recommended Order arises from an employment termination action by the Alabama Department of Mental Health (hereinafter “DMH”). DMH terminated the employment of Donnie Warren (hereinafter “Warren” or “the employee”) based upon his mistreatment of a patient. The evidence presented by DMH during the hearing demonstrated Warren acted aggressively toward a patient and shoved papers down the back of the patient’s jacket. Therefore, DMH’s decision to dismiss Warren was within its authority and should be upheld.

A hearing was held on July 20, 2018, at Taylor Hardin Secure Medical Facility (“Taylor Hardin”) in Tuscaloosa, Alabama. David Huddleston, Esq., appeared as counsel on behalf of DMH. Warren proceeded *pro se*, but failed to appear at the hearing.¹

¹ The hearing was continued on multiple occasions to accommodate Warren.

DMH introduced into evidence six exhibits consecutively numbered DMH Exhibits 1-6. Warren did not introduce any exhibits. Warren's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DMH called Annie Jackson ("Jackson"), Taylor Hardin Facility Director, as a witness.

I. PROCEDURAL HISTORY AND CHARGES

Warren began State employment in June 2016 as a Mental Health Worker I when he was hired by DMH at Taylor Hardin. Warren remained in that classification until his dismissal.

Following the pre-dismissal conference conducted on February 26, 2018, DMH terminated Warren's employment, effective close of business February 27, 2018. *See* DMH Exhibit 1 (dismissal letter dated February 26, 2018, signed by Jackson). DMH determined Warren violated DMH Policy 70-5, *Employee Conduct and Accountability*; II.1(a), - Client abuse, mistreatment, neglect or exploitation; 1(t) - Inattention to job duties; 1(bb) - Failure to perform job properly; and THSMF Supplement to ADMH Policy 430-5, "Seclusion and Restraint." *See* dismissal letter. DMH further determined:

...

A review of the video surveillance system shows that on February 21, 2018, at approximately 12:30 a.m. on the CARE Program that patient “TF” tore up some paper and threw the paper at another staff member. While in the patient’s room, you picked up the paper off the floor and shoved the paper down the patient’s jacket.

...

Warren timely appealed his employment dismissal to the State Personnel Board and requested a hearing, pursuant to ALA. CODE § 36-26-27(a) (1975).

In its Short Plain Statement of Facts, DMH reiterated its charges against Warren and cited the same DMH policies listed in the charge and dismissal letters.

On July 20, 2018, the undersigned conducted a *de novo* 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

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.

A. Employee's Personnel File³

Warren's annual performance appraisals while at DMH reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
12/17 ⁴	26.0	Meets Standards

Warren's prior disciplinary actions include:

- Written Warning on February 2, 2018 for dress code violation.
- Written Warning on December 19, 2017 for neglect, inattention to job duties, failure to perform job properly, and using cell phone in patient area.

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

DMH's Policy #70-5, Employee Conduct and Accountability provides, in pertinent part:

I. POLICY:

All Department employees will adhere to accepted standards of professional and personal conduct. Violation of these standards may result in disciplinary action.

II. STANDARDS:

1. The listing of violations below is not meant to be all inclusive and does not imply that discipline may not be imposed for other sufficient reasons. Unacceptable conduct is defined as, but not limited to, the following:
 - a. Client abuse, mistreatment, neglect or exploitation.

³ See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history).

⁴ First Probationary Performance Appraisal.

...

t. Inattention to job duties.

...

bb. Failure to perform job properly

...

DMH's Policy #19-10, Abuse, Neglect, Mistreatment, and Exploitation, provides, in pertinent part:

I. POLICY:

Any form of recipient abuse, neglect, exploitation or mistreatment will not be tolerated. The DMH will immediately investigate and provide for appropriate legal and administrative actions based upon such investigation in any state-operated facility. (Reference DMH Incident Management Plan)

...

II. PURPOSE

This policy establishes standards for addressing findings of recipient abuse, neglect, mistreatment, exploitation, and other similar incidents in all DMH facilities. While this policy also attempts to ensure consistent and equitable treatment of both employees and recipients, it is not intended to ignore extenuating circumstances and the individuality of situations that arise; but rather, to be the starting point and common ground from which decisions are to be made.

III. STANDARDS:

1. It is the responsibility of DMH employees to treat all recipients with dignity and respect, to ensure that all recipients receive appropriate care and treatment, and to provide all recipients with protection from abuse and neglect, mistreatment or exploitation. (Reference Department Policy Number 20-40, "Protection from Harm").

2. Employees found in violation of this policy shall be subject to disciplinary actions as follows. Facilities will utilize progressive discipline as appropriate and to the extent possible (see DMH Policy Number 60-40, "Progressive Discipline"); however, the DMH reserves the right to take more or less stringent disciplinary action as applicable to the offense(s) by the employee.

...

- f. **Mistreatment** as defined in the DMH Incident Management Plan shall result in a minimum of a written reprimand to termination.

...

DMH's Incident Management Plan provides, in pertinent part:

...

VIII. DEFINITIONS

...

- Q. Mistreatment:** Any act or threat of intimidation, harassment or similar act and includes but is not limited to active verbal aggression or intimidation; use of physical or non-verbal gestures as a means of intimidation; withholding of or the threat of withholding physical

necessities or personal possessions as a means of intimidation for the control of the recipient; making false statements as a means of confusing or frightening or badgering a recipient.

...

C. Facts Forming the Basis of Dismissal

Taylor Hardin is an Alabama mental health facility that provides care for court ordered criminal male patients. On or about February 21, 2018, at 12:30 a.m. Warren was assigned with another DMH worker to care for patient T.F. The assignment was 2:1. Jackson testified T.F. was the only patient at Taylor Hardin that was assigned 2:1 monitoring. T.F. is intellectually disabled and has been on 2:1 since some time last year. Jackson explained that since T.F. is intellectually disabled, he becomes agitated quickly and becomes aggressive if he believes he may be harmed. Jackson testified that she discussed T.F.'s unique disposition with her staff and nurses, and a psychologist also routinely discussed T.F. with the staff during shift change meetings.

Jackson testified that T.F. had received unusual, suspicious injuries. T.F.'s room was close to a camera. Jackson assigned one of Taylor Hardin's police captains to continually review video surveillance of T.F.'s room and treatment. On February 22, 2018, during a morning staff meeting, Jackson was told that an incident occurred with T.F., reported by the police captain reviewing T.F.'s video

surveillance. The incident report alleged that Warren mistreated T.F. on the morning of February 21, 2018. Jackson assigned her clinical investigator, Kimberly McAlpine (“McAlpine”), to conduct an investigation into the incident. McAlpine reviewed the video surveillance, spoke with Warren and the other worker in T.F.’s room and spoke with other workers from the shift. Ultimately, McAlpine determined the incident was “substantiated” and presented her findings to the Investigative Review Panel (“IRC”).

The IRC is responsible for conducting an independent review of the investigative findings. The IRC is comprised of several different workers from different clinical disciplines, including: Taylor Hardin’s Director of Nursing, the Human Resources Director, a staff psychologist, a staff nurse, an internal client advocacy representative and an Alabama Disability Advocacy Program Advocate. After reviewing McAlpine’s findings the IRC determined Warren’s actions with T.F. on February 21, 2018 were mistreatment of T.F.

Video evidence was used during the hearing. The video shows T.F. on his bed tearing pages out of a book/magazine. One worker is sitting in a chair by T.F.’s bed between T.F. and the bedroom door leading to the hallway. Warren was sitting with his back against the wall just inside T.F.’s room facing T.F. Both workers appeared to be on their cell phones. T.F. stood up and walked toward his bedroom door. The worker near T.F. raised his legs to prevent T.F. from leaving the room.

T.F. took the torn pages and threw them on the floor by the doorway and then moved toward the end of his bed. Warren stood up and got in T.F.'s face, turned and picked up the papers and shoved them between T.F.'s jacket and his shirt.

T.F. ripped off his jacket, flinging the papers back onto the floor. He then went and sat back at the head of his bed. Warren then picked the papers back up and threw them into the trash can.

Jackson testified that Warren did not respond as he was trained. Jackson testified as she viewed the video and pointed out that Warren got in T.F.'s face in an aggressive manner and then shoved papers inside T.F.'s jacket. Jackson described both actions as aggressive and escalating. Jackson testified workers are trained to de-escalate the patients. When she questioned Warren about his actions, he told her that he was just playing. Jackson testified she saw no playful act in the video sequence. Jackson testified the purpose of Taylor Hardin is to treat patients with dignity and respect; to treat them as they would their own family members. Jackson pointed to Warren's behavior and explained, "That is not who we are." Jackson testified that patient safety and security is her number one goal. She summed up her testimony by indicating that if she cannot trust staff, they cannot work at Taylor Hardin.

Warren failed to appear at the hearing and testify on his own behalf.

III. ISSUE

Did DMH produce sufficient evidence to warrant dismissal of Warren?

IV. DISCUSSION

Standard of Review

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

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).

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).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).

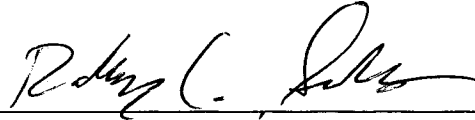
In the present case, DMH provided substantial evidence Warren violated DMH Policy 70-5, Employee Conduct and Accountability, II.1.a., Client abuse,

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.

mistreatment, neglect or exploitation; and DMH Policy 19-10 Abuse, Neglect, Mistreatment and Exploitation, “Mistreatment” as defined in the ADMH Incident Management Plan. The evidence clearly shows Warren mistreat T.F. in his room on January 21, 2018. Warren acted in an aggressive, intimidating manner when he got in T.F.’s face after T.F. threw papers on the floor. Warren also acted in an aggressive, intimidating manner when he shoved the torn paper into T.F.’s jacket. Warren’s actions were escalating in nature which is the exact opposite of how he was trained to respond when a patient acts out. Further, T.F. was on 2:1 observation for almost a year. T.F. was the only patient at Taylor Hardin on 2:1 observation. This sort of observation was intended to protect T.F. and the workers. The workers were trained on how to deal with T.F. and they were repeatedly reminded during staff change meetings of his unique condition and how to properly deal with his outbursts. Regardless, Warren mistreated T.F. and Jackson no longer trusts Warren to conduct himself appropriately at Taylor Hardin. DMH cannot condone such behavior from its employees, for the good of the service.

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 UPHOLD.

Done, this the 20th day of August 2018.



RANDY C. SALLÉ
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VIA E-MAIL, CERTIFIED AND FIRST CLASS U.S. MAIL

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