

DOF introduced into evidence 15 exhibits consecutively marked DOF Exhibits 1-15. Floyd did not introduce any additional exhibits. Floyd's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOF called the following witnesses to testify at the hearing:

(1) Jacob Brown, Plant Maintenance Supervisor II, DOF Services Division;

(2) Arthur Jennings, Plant Maintenance Supervisor I, DOF Services Division; and

(3) Elizabeth Allen, DOF Personnel Manager.

I. PROCEDURAL HISTORY AND CHARGES

Floyd began State employment in July 2001 as a Utility Laborer when he was hired by the Alabama Historical Commission. Floyd was promoted to Plant Maintenance Worker in September 2002. Floyd was again promoted in August 2004 to Plant Maintenance Supervisor I. On July 9, 2005, Floyd was transferred to DOF. Floyd was demoted to Plant Maintenance Worker on November 16, 2008 after he was found to have misused a State vehicle. Floyd remained in that classification until his dismissal.

Following the pre-dismissal conference conducted on July 31, 2018, DOF terminated Floyd's employment, effective close of business August 3, 2018. *See*

DOF Exhibit 6 (dismissal letter dated August 2, 2018, signed by Clinton Carter, former Finance Director). DOF determined Floyd violated State Personnel Board Work Rules 670-X-19-.01(1)(b)(2) – Insubordination; (1)(b)(5) – Use of abusive or threatening language; and (1)(b)(13) – Conduct unbecoming a State employee. DOF determined:

...

On Friday, July 13, 2018, Jacob Brown, Plant Maintenance Supervisor II, and your immediate supervisor, Arthur Jennings, Plant Maintenance Supervisor I, met with you to issue a written reprimand for failure to perform your job properly. During the disciplinary session, you became loud, argumentative, and told Jennings that he did not know the job, was petty, and childish. You also stated, “This won’t be the last of this, I can promise you that... I’m going to get this handled and you need to go home and play with your grandchildren because I’m not going to play with you.” When your supervisor asked you what you meant by that you stated, “You heard me, I didn’t stutter.”

...

Floyd 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 Statement of Facts, DOF reiterated its charges against Floyd and cited the same DOF policies listed in the charge and dismissal letters.

On September 19, 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.¹

A. Employee's Personnel File²

Floyd's annual performance appraisals while at DOF reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
12/17	22.5	Meets Standards
12/16	26.7	Exceeds Standards
12/15	30.0	Exceeds Standards
12/14	30.0	Exceeds Standards
12/13	30.0	Exceeds Standards
12/12	25.0	Meets Standards
12/11	31.4	Exceeds Standards
12/10	32.2	Exceeds Standards
12/09	30.0	Exceeds Standards
12/08	8.9	Partially Meets Standards
12/07	32.5	Exceeds Standards
12/06	20.0	Meets Standards
12/05	30.0	Exceeds Standards

Floyd's prior disciplinary actions include:

- Written Reprimand on July 13, 2018 for failure to perform job properly.

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).

- Written Warning on March 28, 2018 for failure to perform job properly and disrespectful attitude toward supervision.
- Verbal Counseling on January 9, 2018 for rude behavior.
- 10-day suspension (from October 21, 2008 through November 3, 2008) and demotion for misuse of a State vehicle, falsification of records, participation in unauthorized activity, and leaving job station without permission.
- Written Warning on November 9, 2006 for failing to appropriately supervise inmate workers in the Capitol Building.

B. State Personnel Board Rules Forming the Basis of the Charges

State Personnel Board General Work Rules, 670-X-19-.01, provide, in pertinent part:

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.

...

2. 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 which the employee has good reason to believe is unsafe or illegal.

...

5. Use of abusive or threatening language.

...

13. Conduct unbecoming a state employee.

...

C. Facts Forming the Basis of Dismissal

THE INCIDENT:

On July 13, 2018, Floyd was called into a meeting to receive a Written Reprimand for failing to perform his job properly. The meeting was called by Floyd's his immediate supervisor, Arthur Jennings ("Jennings"), Plant Maintenance Supervisor I. Also present at the meeting was Jacob Brown ("Brown"), Plant Maintenance Supervisor II. The meeting was recorded.³ During the meeting, Floyd was very argumentative and disrespectful. Floyd interrupted Jennings repeatedly during the disciplinary conference. Floyd referred to the disciplinary action as "petty" and "childish" on at least three occasions. Floyd called Jennings a "big baby" twice, once saying, "You a big baby is what you are." Floyd also told his supervisor, "I'm sorry if your little feelings are hurt, Art." Toward the end of the meeting, Floyd stated, "This won't be the last of this, I can promise you that." Jennings replied, "I hope so, I hope this works." Floyd then responded, "No, I mean I'm gonna get this handled." Floyd then told Jennings, "You can go home and play

³ DOF Exhibit 9.

with your grandkids, because I'm not one to play with." Jennings responded, "You're not one to play with?" Floyd responded, "That's what I just said, Art. I didn't stutter." Jennings then asked for clarification by inquiring, "What do you mean by that?" Floyd answered by saying, "What I just said!" A telephone call interrupted the exchange. Floyd ultimately signed the Written Reprimand, called the discipline "petty" again and the meeting concluded.

Both Brown and Jennings interpreted Floyd's statements toward the end of the meeting as threatening.⁴ Following the meeting, Brown discussed Floyd's actions with DOF's Personnel Department and ultimately recommended Floyd's dismissal from service based upon insubordination, use of abusive or threatening language, and conduct unbecoming a State employee.⁵

BACKGROUND:

Brown, Jennings and Floyd all work at the Gordon Persons Building. The building has three main tenants: the Department of Revenue, the Department of Education, and the Department of Human Resources. Brown testified that customer service is a big priority. Floyd worked as the HVAC "guy." Gordon Persons has pneumatic HVAC units and Floyd possessed a large wealth of knowledge on the systems and how they operate.

⁴ Testimony of Brown and Jennings.

⁵ DOF Exhibits 2 and 4.

Brown was hired by DOF during 2014. Floyd testified he applied for the same position when it was open. Brown was Floyd's direct supervisor until February 2018 when he hired Jennings to run the day-to-day operations. Brown testified that Floyd's work was good in 2014, but the quality had decreased over the last several years. Floyd's performance appraisals showed a drop in performance during 2016 and 2017 (*Supra.*).

In February 2018, Brown decided to hire Jennings to run daily operations. Among other directions, Brown told Jennings he wanted him to make sure the air filters were changed four times per year, specifically, in December, March, June and September. Brown also told Jennings that he met with David Morrow, DOF's Director of Facilities Management, and representatives from Honeywell and they concluded daily inspections of the HVAC units were necessary to make sure any problems were limited in severity.⁶

Jennings instructed Floyd to conduct daily inspections of the HVAC units throughout the building and make sure the air filters were changed quarterly, during the months specified by Brown. Jennings placed a sheet by the HVAC units in the building and when one was inspected, the inspector was supposed to initial the daily inspection log. Jennings routinely went behind Floyd, at the end of the day, to check whether the units were properly inspected daily. Floyd failed to comply with daily

⁶ Honeywell performs contract work for DOF on the HVAC units.

inspections and also failed to properly change all of the air filters during June 2018, which was the impetus for the July 13, 2018 Written Reprimand.

Jennings testified he and Floyd did not have a good working relationship. Jennings previously worked on electrical HVAC units and the pneumatic units at Gordon Persons were new to him. He went on service calls with Floyd during his first few months on the job to learn more about the pneumatic units. Jennings testified he worked with most of his subordinates during his first 30 days in order to observe their service.

The first tangible discord between Jennings and Floyd occurred in March 2018. On that occasion, a Honeywell worker asked Jennings if Floyd could help him install a motor into an HVAC unit since his coworker was still out of work following a surgery. Floyd had assisted in similar instances before. Jennings testified that Floyd argued with him about the task and complained about having to assist Honeywell. Floyd received a written warning for his dissension.⁷ In his written rebuttal to the discipline, Floyd pointed out that Jennings had only worked at DOF for 40 days and they had only spoken about four times. Floyd also stated, “I have never been disrespectful to anyone unless they were disrespect[ful] first...”⁸

⁷ DOF Exhibit 7b.

⁸ Floyd also indicated in his written rebuttal that Honeywell had employees sitting around the day before and he was not arguing, but rather asking Jennings why he had to assist since the contract stated Honeywell would handle such issues.

Jennings testified he met Floyd on his first day of work; however, their introduction was cut short because Floyd received a service call. Jennings testified that even though he had limited contact with Floyd during his first few months on the job, every time the men worked together, Floyd argued or complained about the tasks he was given to perform.

DEFENSE:

Floyd testified at the hearing and explained he was the victim of discrimination and harassment. Floyd testified he filed a complaint in 2015 with the Equal Employment Opportunity Commission after he was not chosen for Brown's job. Floyd believed his dismissal was a direct result of his prior complaint. Floyd complained about being written up weekly and being passed over for other job opportunities. Floyd stated that he did not argue with Jennings, he was just trying to explain a better way of doing things.⁹ Floyd testified he did not resent Jennings, but rather, Jennings resented him. In his closing, Floyd pointed out that Jennings told him what to do, he never asked Floyd what to do. Floyd testified he knew more about the job than Jennings or Brown, and he wanted the job to be performed correctly. Floyd contended that Brown and Jennings wanted the job done "their" way which was not the correct way. Floyd also contended that he knew other

⁹ On July 5, 2017, Floyd was removed from all employment registers by the State Personnel Department (until July 5, 2022) for providing false information on the number of employees he previously supervised. DOF Exhibit 1, pp. 33-34.

employees who committed far more egregious actions and were not dismissed from State service.

III. ISSUE

Did DOF produce sufficient evidence to warrant dismissal of Floyd?

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).¹⁰

¹⁰ 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).

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.** 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).¹¹

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).

¹¹ 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, DOF provided substantial evidence Floyd was: (1) insubordinate, (2) used abusive or threatening language; and (3) demonstrated conduct unbecoming a State employee during the July 13, 2018 disciplinary meeting. The evidence clearly showed Floyd had no regard for Jennings's position of authority. Insubordination is defined as "A failure to follow an order; disobedience; **failure to submit to authority as shown by demeanor or words...**" Floyd's demeanor and words during the July 13, 2018 disciplinary meeting clearly showed a failure to submit to authority. Floyd argued with Jennings and Brown and used language that clearly showed a lack of submission to the authority of the two supervisors. Floyd called Jennings a "big baby" and told him to go home and play with his grandkids. Floyd also used threatening language during the meeting. While the language was not specific, Floyd stated, "This won't be the last of this, I can promise you that." Initially, Jennings believed this was Floyd submitting to authority and recognizing his failure to perform the job properly; however, Floyd clarified, "I'm going to get this handled." At that point, it was clear he was not submitting to authority and in effect, kept the threat open to interpretation. Both Brown and Jennings interpreted this exchange as threatening.¹² Finally, Floyd committed conduct unbecoming a State employee by his words and demeanor toward his

¹² During the hearing, Floyd testified he meant he intended to file an EEOC complaint; however, he never clarified his intention during the July meeting. There is insufficient evidence to conclude from his demeanor, tone and words that his intent was docile during the July meeting.

supervisor. Supervision of employees is not an exact science. Relationships between supervisors and their employees vary to some degree; however, employees must ultimately defer to the judgment of their supervisor as long as it is not unlawful or unsafe. The instructions given to Floyd, specifically, changing the filters quarterly and conducting daily inspections of the HVAC units did not direct him to do anything that was unlawful or unsafe. Floyd failed to submit to Jennings's authority and DOF cannot condone such behavior from its employees, for the good of the service.


Floyd failed to supply evidence to support his defenses. Floyd claimed he was continually harassed and written up daily; however, during his testimony he explained how little contact he had with Jennings. Floyd also complained of racial discrimination. However, he called no witnesses to support his contention and failed to supply a valid comparator.¹³ Furthermore, Floyd contended his dismissal was retaliation because he applied for Brown's job and when he was not hired he filed an EEOC complaint. Jennings testified he did not know Floyd ever filed an EEOC complaint. Brown and DOF's Personnel Manager, Elizabeth Allen, both knew Floyd filed a complaint; however, that was three years before the facts of this case and there

¹³ Floyd claimed he emailed a witness list to the ALJ and counsel for DOF; however, upon closer inspection, Floyd misspelled the names in his email transmission. Floyd did not follow up after sending his list and did not bring any witnesses with him to the hearing. The undersigned allowed testimony from Floyd about other employees' misconduct, which generally is not permitted unless there is a direct correlation with the case. Floyd's examples were insufficient to show another employee was treated more favorably than he was when they were insubordinate toward a supervisor. Floyd's examples were largely employee misconduct with other employees. Brown testified about a time he lost his cool in a staff meeting and cursed at the employees. Brown self-reported and was not disciplined. However, even this example is not a valid legal comparison for the facts of this case.

was no causal connection established by Floyd. There was substantial evidence Floyd violated Alabama State Personnel Board General Work Rules and therefore, the discipline imposed was appropriate.

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 1st day of November 2018.



RANDY C. SALLÉ
Administrative Law Judge
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

Anthony Floyd, *Pro se*



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

John H. Montgomery, Esq.
Alabama Department of Finance
600 Dexter Avenue, Suite E-306
Montgomery, Alabama 36130-2600
Telephone: (334) 242-7165
Facsimile: (334) 242-2008
E-mail: john.montgomery@finance.alabama.gov