

**BEFORE THE ALABAMA
STATE PERSONEL BOARD
IN THE MATTER OF**

Earl Foster,)	
)	
Appellant,)	
)	
v.)	CASE NO. 19-01-RCS
)	
Department of Mental Health,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

The issue before the State Personnel Board (“Board”) is whether Department of Mental Health (“DMH”) employee Earl Foster (“Foster”) is entitled to back pay. DMH dismissed Foster effective September 24, 2018, for allegedly physically abusing a patient. Foster timely appealed his dismissal to the Board, *pro se*. On November 20, 2018, DMH filed a Motion for Stay, pending criminal charges filed against Foster on the same allegation. On November 21, 2018, DMH’s Motion for Stay was granted. On December 4, 2018, Foster retained Counsel, who thereafter filed a Motion to Continue until the criminal charges were resolved. The undersigned ruled Foster’s Motion to Continue was moot since DMH’s Motion for Stay was previously granted. On May 12, 2020, the State filed a Motion to Dismiss the criminal charges against Foster for insufficient

evidence. On May 20, 2020, Foster's criminal charges were officially dismissed with prejudice. Foster's employee dismissal appeal was re-set for September 4, 2020. On August 31, 2020, DMH filed a Motion to Continue based upon good faith settlement negotiations. On November 17, 2020, DMH and Foster entered into a Settlement Agreement providing for the voluntary resignation of Foster.¹ DMH amended the personnel action form to reflect Foster left employment with DMH by resignation. Foster was also recommended for re-employment. The Settlement Agreement does not address back pay, but requested a hearing before the Board to determine whether back pay is appropriate. For reasons stated below, Foster is entitled to back pay and benefits offset by interim earnings he received while separated from State service.

I. PROCEDURAL HISTORY AND CHARGES

Foster began his employment with DMH as a Mental Health Worker I in September 2015, at Bryce Hospital in Tuscaloosa. He remained in that classification until his September 24, 2018 dismissal.

By letter dated September 21, 2018, Interim Facility Director Audrey L. McShan notified Foster of the charges supporting the termination of his employment and his right to appeal to the State Personnel Board. In the

¹ Exhibit A.

dismissal letter, DMH charges that Foster physically abused a patient which resulted in an injury to the patient.

On October 9, 2018, Foster timely appealed his dismissal to the State Personnel Board. On November 17, 2020, the parties' entered into a settlement agreement.

The undersigned conducted a hearing on December 9, 2020 at the State Personnel Department in Montgomery, Alabama on the issue of whether Foster should receive back pay. David Huddleston, Esq., appeared as counsel for DMH. Al Jones, Esq. appeared as counsel for Foster.

II. FINDINGS OF FACT

Having reviewed Foster's DMH personnel file and his State Personnel file and having heard the testimony and arguments presented at the hearing, the undersigned finds sufficient evidence supports the following findings of facts.²

A. Employee's Personnel File and Career History³

Foster was employed with DMH as a Mental Health Worker I in September 2015.

² All references to documents 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 Rules 670-X-18-.02(5) and 670-X-19-.01(1)(b) (employee's work record, including performance and disciplinary history and length of service considered in dismissing an employee).

Foster's annual performance appraisals ("APA") reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
1/1/2018	23	Meets Standards
1/1/2017	18	Meets Standards
3/15/2016	20	Meets Standards ⁴

Foster's prior disciplinary actions include:

- August 2, 2017 - Written Warning for Absenteeism.
- November 7, 2016 – Written Reprimand for Insubordination.

B. Issue of Back Pay

DMH did not offer exhibits or present witnesses regarding the allegation of abuse against Foster. DMH entered into a Settlement Agreement with Foster wherein Foster was allowed to resign his position in lieu of dismissal. DMH also marked Foster was eligible for rehire, although Foster agreed not to seek re-employment with DMH.

Foster proffered evidence he earned \$8,547.38 during 2018 that would mitigate any losses he suffered as a result of his dismissal that year. Foster also indicated he was not seeking any back-pay for 2020. Foster requested back pay for 2019, in the amount of \$20,297.64 which was his salary while employed with DMH (\$23,492.00) offset by interim earnings of \$3,194.36.⁵ DMH did not object to back-pay. Foster did not find work that year which

⁴ Final Probationary Evaluation.

⁵ Exhibit B.

would relieve his loss of income from DMH. Foster was awaiting a disposition of his pending criminal charges in hopes of being reinstated by DMH.

III. ISSUE

Does a sufficient basis exist for the award of back pay?

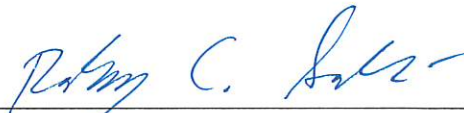
IV. CONCLUSIONS OF LAW

The State Personnel Board Rules provide that upon an employee's appeal of his dismissal, the Board shall, "if the charges are proved unwarranted, order the reinstatement of the employee under such conditions as the Board may determine. Upon a majority vote of the Board, the Board may impose a punishment other than termination including but not limited to a reinstatement with forfeiture of back wages" *Ala. Admin. Code 670-X-18-.02(2)*.

In the present case, DMH and Foster settled his appeal, and Foster was permitted to resign in lieu of dismissal. DMH did not present any evidence in support of the charges supporting the proposed dismissal. In other words, DMH did not offer proof of any misconduct that would support the Board's imposing any punishment, such as the forfeiture of back wages. Therefore, an award of back pay is proper.

Thus, considering Foster's work record, length of service, and the absence of proof of any misconduct by Foster, the undersigned recommends that Foster should be awarded back pay as well as any benefits he would have received while employed with DMH, offset by the \$3,194.36 he received as interim earnings while he was separated from State service during 2019.

Done, this the 6th day of January 2021.



RANDY C. SALLE'
Administrative Law Judge
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