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State Personnel Board

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April 20, 2021

MEMORANDUM

TO: Kenneth Shinbaum, Esq.
Bart Harmon, Esq.

FROM: Jackie Graham 
State Personnel Director

RE: Dismissal Appeal of Darayle Atkins

Enclosed please find a copy of the Hearing Officer's Recommended Order to the State Personnel Board in connection with the above-referenced appeal. The parties to this appeal have five (5) working days after the date of receipt of this report to file written exceptions to this report. If written exceptions are desired, you must file the exceptions within the five (5) days, rather than request scheduling within five (5) days. A copy of any exceptions should be served upon the opposing party who shall have five (5) days to file a response. The written exceptions will be the only documentary material allowed at oral argument. The parties are cautioned that no other material or evidence will be allowed at oral argument other than the written exceptions.

Also, the parties have the same five (5) working days after the date of receipt of this report to request oral arguments before the State Personnel Board. Upon the receipt of a request for oral argument, the oral arguments will be scheduled on the docket of the State Personnel Board. Oral arguments before the Board will be limited to ten (10) minutes per side. Since the State agency bears the burden of proof, the agency will be given first opportunity to argue followed by argument by the employee, followed by a rebuttal by the agency. These arguments should be as succinct as possible and bring to the Board's attention the facts that the parties deem to be most important. **These arguments must also be within the evidence that was presented before the Hearing Officer.**

If you have any further questions concerning the procedures to be followed before the State Personnel Board, please contact Lynn Donahey at (334) 242-3451.

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

DARAYLE ATKINS,)
)
 Appellant,)
)
 v.)
)
 ALABAMA DEPARTMENT OF)
 CORRECTIONS,)
)
 Appellee.)

Case No: 21-10-RCS

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

The recommended order arises from an employment termination action by the Alabama Department of Corrections (hereinafter “DOC”). DOC terminated Darayle Atkins (hereinafter “Atkins” or “the Employee”) after he failed to perform his job properly and was inattentive at his post which resulted in injury to multiple inmates. The evidence presented by DOC during the hearing showed that more probably than not, Atkins violated multiple rules and policies and his actions warranted his dismissal from State service.

A hearing was held on March 4, 2021, at the offices of the Alabama State Personnel Department in Montgomery, Alabama. Bart Harmon, Esq., appeared as counsel on behalf of DOC. Kenneth Shinbaum, Esq., appeared as counsel on behalf of Atkins.

At the beginning of the hearing, DOC introduced into evidence, without objection, exhibits consecutively marked as DOC's Exhibits 1 - 6. The Employee submitted eighteen additional exhibits during the hearing, consecutively marked as Employee's Exhibits 1 - 18. The undersigned informed the parties that Atkins' personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOC called Correctional Warden II Carl Clay ("Clay"), retired; and Correctional Warden III Christopher Gordy ("Gordy") to testify on its behalf. Atkins testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

Atkins was dismissed from employment with DOC on December 31, 2020. *See* December 28, 2020, dismissal letter ("dismissal letter") signed by DOC Commissioner Jefferson S. Dunn.¹ Jones timely appealed his dismissal to the Alabama State Personnel Board, pursuant to *Ala. Code 1975*, § 36-26-27(a).

In the dismissal letter, DOC alleged:

On December 10, 2020, you appeared at a Pre-dismissal Conference held by Warden Christopher Gordy to allow you an opportunity to answer charges that you violated the following standards under Administrative Regulation 208, Employees Standards of Conduct and Discipline.

¹ *See* DOC's Exhibit #3.

...

On October 25, 2020, you were assigned as Tower 12 Officer, which is at the Backgate of Draper Quarantine Intake Facility. At approximately 7:16 p.m., a use of force occurred where a sergeant struck three inmates with a baton causing serious injuries. Due to the use of force incident, you were interviewed by Law Enforcement Services Division. You reported that you did not see or hear any use of force incident. Due to your failure to detect or observe the excessive use of force incident, it was not immediately reported nor did the inmates receive medical attention due to your inattentiveness on the tower. Your inattentiveness during your tour of duty will not be tolerated.

....

On March 4, 2020, 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 facts.²

A. Employee’s Personnel File³

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 SPB 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 employee).

Atkins began his employment with DOC on March 18, 2019, as a “Correctional Officer Trainee” and assigned to Elmore Correctional Facility (“Elmore”). On November 1, 2019, Atkins was promoted to Correctional Officer at Elmore. Atkins remained in that job classification until DOC dismissed him in December 2020.

Atkins’ annual performance appraisals (“APA”) while at DOC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
04/20 ⁴	23.0	Meets Standards
09/19 ⁵	20.0	Meets Standards

Atkins’ prior disciplinary history at DOC includes the following disciplinary action (in reverse chronological order):

- Written Reprimand, served on June 2, 2020, for Failure to perform job properly, not resulting in actual consequences; Serious violation of rules, policies, procedures, regulations, laws, or reasonable conduct expectations (Committed on March 3, 2020); and
- 3-day suspension, (Pending) for Failure to report violation of safety/security rules; Conduct that is disgraceful, on or off the job.

See generally State Personnel Board Rule 670-X-18-.02(5); State Personnel Board Rule 670-X-19-.01(1)(b) (prior work record, including performance and

⁴ Final probationary Appraisal as Correctional Officer.

⁵ Final probationary Appraisal as Correctional Officer Trainee.

disciplinary history, and length of service considered in dismissing employee).

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

DOC Administrative Regulation 208 provides, in pertinent part:

V. PROCEDURES

A. All DOC employees shall adhere to the following standards:

...

2. Employees shall render full, efficient, and industrious service.

...

7. Employees shall observe all laws, rules and regulations.

8. Employees shall uphold, with integrity, the public's trust involved in their position.

...

20. Employees shall cooperate with investigations to include, but not limited to, providing information or verbal/written statements in connection with employment, investigation, or incident reports.

...

ANNEX H

...

2. Non-compliance with policies, procedures, and regulations.
(First Offense – Warning; Second Offense –

Written Reprimand; Third Offense – 3 days suspension; Fourth Offense – Dismissal).

...

14. Failure to immediately report to proper authority (supervisor) the violation of any rule, practice, or policy that results in minor consequences. (First Offense – Written Reprimand; Second Offense – 2 days suspension; Third Offense – 3 days suspension; Fourth Offense – Dismissal).

...

16. Inattention to job. (First Offense – Written Reprimand; Second Offense – 2 days suspension; Third Offense – 3 days suspension; Fourth Offense – Dismissal).

...

18. Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations. (First Offense – Written Reprimand; Second Offense – 2 days suspension; Third Offense – 3 days suspension; Fourth Offense – Dismissal).

...

32. Failure to report violation of safety/security rules that result in injury to persons or significant damage to property. (First Offense – 3 days suspension; Second Offense – Dismissal).

33. Conduct that is disgraceful, on or off the job that does adversely affect an employee's effectiveness on the job. (First Offense – 3

days suspension; Second Offense – Dismissal).

SPB General Work Rules Forming the Basis of the Charges

Rule 670-X-19-.01 provides, in 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.

...

8. Violation of specific department rules.

...

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

...

10. Serious violation of any other department rule.

...

12. Leaving job station without permission.

...

13. Conduct unbecoming a state employee.

...

C. Facts Forming the Basis of Dismissal

On October 25, 2020, Atkins worked an overtime shift from 2:00 p.m. until 10:00 p.m. at Draper Correctional Facility (“Draper”). Atkins volunteered to work the overtime which occurred prior to his regular shift. Atkins regular shift was 10:00 p.m. until 6:00 a.m. Atkins was assigned to work in Tower 12 which was located at the back gate of Draper near the Quarantine Intake Facility. On October 25, 2020 at approximately 7:16 p.m. Correctional Officer Carroll (“Carroll”) escorted three inmates into the back-gate area just outside the shift office. Correctional Sergeant Mills (“Mills”) approached the inmates, argued with them and then struck all three of them with his baton. The area outside the shift office is within clear view of Tower 12.⁶ Atkins testified he did not see nor hear the inmates beaten in front of the shift office on October 25, 2020.

Clay worked at Draper as a part-time Warden. Clay testified that on October 27, 2020, Lieutenant Pettway brought an inmate to Clay who reported he was assaulted. Initially, Clay thought it was an inmate on inmate assault, however when

⁶ DOC Exhibit 6, pages a-e.

he asked the inmate who assaulted him, the inmate told him it was Mills. The inmate also told Clay that two other inmates were also assaulted by Mills. Clay instructed Pettway to take the inmate to medical to get an evaluation of his injuries.

Clay reviewed video evidence of the incident. Based upon his review of the video, he determined that on October 25 around 7:00 p.m., Carroll escorted three inmates into the back-gate area. Mills emerged from the Shift Office with a baton, argued with the inmates and then struck one with the baton. After the first inmate fell to the ground, Mills struck the second inmate with the baton and then struck the third inmate. Clay testified the camera inside the Shift Office picked up the audio of the incident, while a different camera on a metal sided building showed the incident. Clay testified this was a serious incident that resulted in at least one serious injury to an inmate. Clay also testified criminal charges were filed against Carroll and Mills.

Clay testified it was Atkins responsibility as the Tower 12 officer to observe all activities visible from Tower 12. Clay believed Atkins should have observed the incident on October 25 because of the proximity of Tower 12 to the back-gate shift office. Clay testified officers that work in the Towers rarely need to leave their post since there are bathrooms in the Tower and they eat at their post.

Correctional Warden III Christopher Gordy (“Gordy”) also testified at the

hearing. Gordy testified he reviewed the video of the incident as well and it appeared the incident lasted 2 to 3 minutes. Gordy testified the Tower officer is responsible for ensuring the entire area around the tower is secure and the officer should observe the area the entire shift. Gordy testified he supports the dismissal of Atkins for this one violation, because of the severity of the incident. While Atkins had other discipline, one served and one pending, Gordy believed this incident was sufficient grounds to dismiss Atkins from service. Gordy testified the Deputy Warden, Correctional Warden II Camille Cargle (“Cargle”), recommended Atkins dismissal and after a pre-dismissal conference, Gordy concurred and sent his recommendation for Atkins dismissal to Commissioner Dunn.⁷ Ultimately, Commissioner Dunn ordered Atkins dismissal from State service after receiving Gordy’s recommendation.

Atkins appealed his dismissal on several grounds: he contended his pending suspension should not be considered since he was not aware he had a pending suspension; he contended Carroll and Mills did not comply with radio rules, therefore Atkins was unaware they entered his area of observation; he contended that he worked a lot of overtime because the prison was short-handed and he was tired; he contended he cannot report what he does not see; and finally, while admitting he

⁷ Compare Employee Exhibits 3 and 4.

was inattentive, he does not believe his offense is severe enough to result in his dismissal from State service.

Pending Suspension:

Atkins testified his pending suspension should not have been considered in determining what level of discipline should be imposed because he was unaware he was recommended for suspension. Atkins testified he was not asked to write a statement which is typical of proposed suspensions and there was nothing in his file regarding a proposed suspension. Gordy testified he did not consider prior discipline when coming up with his recommendation to Commissioner Dunn. Gordy testified it was used in the calculation because all disciplinary actions both active and inactive are weighed, but Gordy testified he concurred with dismissal because of the severity of the injuries to the inmates based upon Atkins inattentiveness. Atkins' 201 (personnel) file at DOC does not contain any paperwork regarding his pending suspension; however Gordy testified the recommendation paperwork stays with the Commissioner until he makes a final decision and then if the suspension is served on the Correctional Officer, it is at that point placed in his 201 file.

Radio Rules:

Atkins contended that the officers at Draper have an unwritten policy whereby

they radio the tower if they are escorting inmates within view of the tower. Atkins testified that on October 25, neither Carroll nor Mills contacted him over the radio to let him know they were bringing three inmates to the back-gate area. Atkins admitted the policy was unwritten, it was a work around the officers created. Atkins also acknowledged on cross-examination that officers with ill-intent toward inmates will not radio another officer to watch their malfeasance.

Overtime:

Atkins contended he worked extensive overtime for DOC because the prison system is so short-staffed. Atkins described his daily routine which includes approximately 4 or 5 hours of sleep. Atkins blamed his number of overtime hours for being inattentive on October 25, 2020. Atkins acknowledged the overtime he worked was voluntary. Atkins testified if he did not work voluntary overtime he would get “bad looks” from supervisors. Atkins never turned down mandatory overtime, but admitted he had turned down voluntary overtime in the past.

Failure to Report an Incident:

Atkins testified he cannot report what he does not see. This statement was not refuted. Gordy testified the reason he recommended Atkins dismissal was because Atkins did not observe what occurred within clear view of his Tower. Atkins testified the door to the Tower was not open, therefore, his view to the back-

gate was obstructed. Both Gordy and Clay testified it is the Tower officers' responsibility to be able to observe the entire area within sight from the Tower.

Inattentiveness not a Serious Infraction:

Finally, Atkins admitted he was inattentive, but believes the appropriate discipline is only a short suspension per DOC Administrative Regulation 208, Annex H, #16. Atkins did not believe his rule violation was serious even though he understood his violation led to a serious injury; but rather contended he was a good officer and should not lose his job over being inattentive.

III. ISSUE

Did DOC produce sufficient evidence to warrant Atkins' 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). Recently, 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).⁸

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 APA’s preponderance of the evidence standard. *See also Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).⁹

⁸ 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 1975, § 41-22-20 (k); *State Dept. of Human Res. v. Gilbert*, 681 So.2d 560, 562 (Ala.Civ.App. 1995).

⁹ In *Bonner v. City of Pritchard*, 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.

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, DOC presented sufficient evidence to warrant Atkins’ dismissal.

Atkins admitted he was inattentive on the job on October 25, 2020, around 7:16 p.m. His inattentiveness resulted in his failure to observe three inmates assaulted by two other officers and a significant delay in the reporting of the incident. The assault involved an argument and beating a short distance from Tower 12. Atkins responsibility on Tower 12 was to observe the entire area surrounding his Tower. Atkins believes that because the assault lasted only 2-3 minutes that his punishment should be mitigated because he had other areas to observe. This belief is untenable. Tower officers are responsible, among other things, for preventing escape and monitoring exterior fence lines for individuals who throw contraband over the fence for inmates. Those actions are intended by the perpetrators to be

discreet and occur just as quickly as a 2 to 3-minute assault of three inmates by two officers. Atkins completely missed three inmates being escorted into his area by Carroll, missed Mills come out of the Shift Office with a baton, missed Mills arguing with the inmates and missed Mills beating the inmates with a baton. This conduct cannot be condoned by DOC.

Atkins failed to render full, efficient and industrious service in violation of DOC Administrative Regulation 208, V.A.(2); he violated DOC Administrative Regulation 208, Annex H #2 by failing to comply with DOC policies, procedures and regulations by not properly observing the area around Tower 12 on October 25, 2020; he was inattentive on the job in violation of DOC Administrative Regulation 208, Annex H #16; his inattentiveness violated DOC Administrative Regulation 208, Annex H # 18 - a serious violation of rules, policies, procedures, regulations, laws, or reasonable conduct expectations because inmates were severely injured. Atkins actions also violated several State Personnel Board General Work Rules, including Failure to perform job properly (670-X-19-.01(1)(a)(4)), violation of specific department rules (670-X-19-.01(1)(a)(8)), and serious violation of any other department rule (670-X-19-.01(1)(b)(10)).

Atkins' violations include violations under DOC Administrative Regulation 208, Annex H that generally contemplates progressive discipline. Gordy testified he

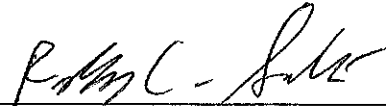
aggravated the discipline because three inmates were injured and at least one suffered broken bones as a result of the incident. DOC Administrative Regulation 208 V. Procedures, O states, in part:

The Annex H table, Table of Infractions/Level of Discipline, is intended to promote consistent discipline within the ADOC and guide supervisors at all levels when the imposition of discipline becomes necessary. At times, there are mitigating or aggravating circumstances surrounding the infraction, and as such, the appropriate level of discipline may be increased or decreased in relation to the table.

The undersigned has carefully considered mitigation in this case. The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal. It appears Gordy and Clay have lost trust in Atkins to an extent that is irretrievable. 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.¹⁰

¹⁰ Having found sufficient evidence to uphold the dismissal, any/all remaining issues are moot.

Done, this the 20th day of April 2021.



RANDY C. SALLÉ
Administrative Law Judge
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