

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

ANTHONY STONEWALL,)	
)	
Appellant,)	
)	
v.)	Case No: 16-24-JJW
)	
ALABAMA DEPARTMENT OF CORRECTIONS,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

The employment termination of Anthony Stonewall (hereinafter “Stonewall”) by the Alabama Department of Corrections (hereinafter “DOC”) gives rise to this Recommended Order. DOC charges that Stonewall, who in 2016 was employed as a Corrections Officer at the Fountain Correctional Facility (“Fountain”), violated its Administrative Regulation 208 (hereinafter “AR 208”), Employee Standards of Conduct and Discipline, with respect to the following:

- Section V.A.2 – Employees shall render, full, efficient, and industrious service;
- Section V.A.7 – Employees shall observe all laws, rules, and regulations;
- Section V.C.5 – Employees shall not abuse inmates in any manner;
- Section V.C.17 – Employees shall not apply physical force to an inmate, except and only to the degree that is reasonably necessary in self-defense, to prevent an escape, to prevent an injury to a person or the destruction of property, to quell a disturbance, or to restrain an inmate who exercises physical resistance to a lawful command.

- Failure to perform job properly, not resulting in actual consequences. Annex H, Number 10.
- Serious violations of rules, policies, procedures, regulations, laws or reasonable conduct expectations. Annex H, Number 18.
- Abusive or excessive physical force in dealing with inmates. Annex H, Number 30.

Stonewall's actions also violated Alabama State Personnel Board Work Rules

670-X-19-.01, with respect to the following:

(a) Violations that normally result in disciplinary actions of increasing severity:

...

(8) Violation of specific department rules.

...

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

...

(10) Serious violation of any other department rule;

...

(13) Conduct unbecoming of a state employee.

...

On April 15, 2016, an investigation into abusive and excessive force was completed at Fountain. Stonewall admitted using force on an inmate in I-Dorm by pulling the inmate from his top bunk causing the inmate to fall approximately five

feet on the concrete, which caused serious injuries to the inmate.¹ Stonewall was terminated and reinstated in a prior use of force incident involving an inmate.²

Based on observation of the witnesses, the testimony, and the documentary evidence, the undersigned recommends the termination of Stonewall's employment by DOC be upheld.

On April 15, 2019, the undersigned conducted a *de novo* hearing ('the hearing') at the State Personnel Department Hearing Room 746 in the Folsom building in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. Bart Harmon, Esq. appeared on behalf of DOC. Stonewall appeared *pro se*.

At the beginning of the hearing, DOC introduced, without objection, DOC Exhibits 1-7, which were admitted. During the course of the hearing, DOC offered DOC Exhibit 8, which was admitted over the objection of Stonewall. Stonewall offered no exhibits. The undersigned informed the parties, without objection, that Stonewall's personnel file at the Alabama State Personnel Department would be included in the record as evidence in this matter.

DOC called five witnesses:

1. Inmate Matthew Lischke;

¹ DOC Duty Officer Report dated September 26, 2013. Stonewall provided the information to charge Lischke with disorderly conduct and failure to obey a direct order of a DOC employee.

² DOC Exhibit 1, pp. 115-118.

2. David Jones, DOC Investigation and Intelligence (“I & I”) Investigator;
3. Terry Raybon, DOC Warden II;
4. Cynthia Stewart, DOC Warden III; and
5. Anthony Stonewall, Appellant and former DOC Correctional Officer.

I. PROCEDURAL HISTORY AND CHARGES

Stonewall was employed at DOC as a Correctional Officer Trainee on January 14, 1991. Stonewall was subject to a layoff in 1992 because of budget proration. Stonewall resigned in 1995 and was reemployed in 1999. Stonewall resigned in January 2005 and was rehired in July 2005. Stonewall was dismissed in 2011 and was reinstated in 2011 with back pay and benefits. Stonewall was terminated from his employment by the appointing authority effective on May 12, 2016.

This case is problematic because it involves the use of excessive force resulting in catastrophic injuries to an inmate. It is also problematic because of the long delays between actionable events, investigations, and resolutions. Stonewall insists he does not clearly recollect the event due to the passage of time. The excessive force alleged occurred on September 26, 2013, at approximately 7:40 a.m.³

Stonewall appealed his dismissal to the State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). At the pre-hearing conference held on June 7, 2016, the appeal hearing was scheduled for June 20, 2016. The case was

³ DOC Duty Officer Report dated September 26, 2013.

subsequently stayed pending the completion of possible criminal proceedings.

This matter was returned to the undersigned's active docket on February 22, 2019.

The hearing was set for April 15, 2019 and was heard on that date as scheduled.

In its Position Statement (*i.e.*, Short Statement of Facts) dated June 8, 2016,

DOC alleged, in pertinent part:

The basis for the Department's termination of this former employee is the fact that on or about April 15, 2016, an investigation into abusive and excessive use of force was completed at Fountain Correctional Facility. During the investigation Correctional Officer Stonewall admitted to using force on an inmate in J-Dorm by pulling the inmate from his top bunk, causing him to fall approximately five (5) feet and landing on his back onto the concrete floor, which caused serious injuries to the inmate. This incident occurred on September 26, 2013 and involved inmate Matthew Lischke (AIS 289232).

Specifically, Mr. Stonewall was found to have committed the following violations of the Administrative Regulation 208, Employee Standards of Conduct and Discipline:

1. Employees shall render full, efficient, and industrious service. (Section V, Paragraph A2)
2. Employees shall observe all laws, rules and regulations. (Section V, Paragraph A7)
3. Employees shall not abuse inmates in any manner. (Section V, Paragraph C5)
4. Employees shall not apply physical force to an inmate, except and only to the degree that is reasonably necessary in self-defense, to prevent an escape, to prevent an injury to a person or the destruction of property, to quell a disturbance, or to restrain an inmate who exercises physical resistance to a lawful command. (Section V, Paragraph C17)

In determining the appropriate corrective action for violating the standards of conduct, the following infractions under Administrative Regulation 208 [were considered]:

1. Failure to perform job properly, not resulting in actual consequences. (Administrative Regulation 208, Annex H, Number 10)
2. Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations. (Administrative Regulation 208, Annex H, Number 18)
3. Abusive or excessive physical force in dealing with inmates. (Administrative Regulation 208, Annex H, Number 30)

A review of Stonewall's work record revealed the following corrective actions:

1. December 18, 2013, Suspension, Late for work (3/9/13)
2. July 22, 2010, Written Reprimand, Non-compliance (3/23/10)
3. December 11, 2009, Warning, Non-compliance (11/4/09)
4. March 25, 2011, Pre-dismissal, Abusive or excessive force/giving false information (1/28/08)
5. January 24, 2008, Warning, Non-compliance (unknown date)
6. March 17, 2006, Warning, Minor violation (2/6/06)
7. October 19, 1995, Written Reprimand, Unexcused absence (10/4/95)
8. April 24, 1993, Suspension, Failure to report an arrest (2/12/93)

The inmate against whom Stonewall allegedly used excessive force is Matthew Lischke ("Lischke"). The incident occurred on September 26, 2013, at

approximately 7:40 a.m. The incident report indicates that Lischke was in I-dorm in bed I-44B when the encounter with Stonewall occurred.⁴

I. FACTUAL BACKGROUND

Having reviewed the documentary evidence, 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.⁵

A. Employee's Personnel File⁶

Stonewall's performance appraisals while at DOC reflect:

Date Ending	Total Score	Category
05/01/2016	38	Consistently Exceeds Standards
05/01/2015	36	Exceeds Standards
05/01/2014	19	Meets Standards
05/01/2013	34	Exceeds Standards
05/01/2012	34	Exceeds Standards
2011 – Dismissed and Reinstated		
05/01/2010	34	Exceeds Standards
05/01/2009	36	Exceeds Standards
05/01/2008	36	Exceeds Standards
05/01/2007	36	Exceeds Standards
05/01/2006	36	Exceeds Standards

⁴ Some DOC documents refer to J-dorm while others refer to I-dorm; however, there is no question the alleged incident involved Lischke and Stonewall on this date, at this time, at Fountain.

⁵ 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.

⁶ See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

2005 – Resigned and Rehired		
10/01/2005	36	Exceeds Standards
10/01/2004	38	Consistently Exceeds Standards
10/01/2003	38	Consistently Exceeds Standards
10/01/2002	38	Consistently Exceeds Standards
10/01/2001	38	Consistently Exceeds Standards
10/01/2000	38	Consistently Exceeds Standards
12/07/1999	32	Exceeds Standards
06/08/1999 – Re-employed after 1995 Resignation		
11/01/1995	35.3	Consistently Exceeds Standards
11/01/1994	37.7	Consistently Exceeds Standards
11/01/1993	23.2	Meets Standards
01/06/1993	24.4	Meets Standards
04/03/1992 – Laid Off (Proration)		
07/13/1991	21.1	Meets Standards

B. State Personnel Board General Work Rules and DOC Policies/

Procedures Forming the Basis of the Charges

State Personnel Board Rule 670-X-19-.01(1) provides, in pertinent 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:

...

8. Violation of specific departmental rules.

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

...

10. Serious violation of any other department rule.

...

13. Conduct unbecoming of a state employee.

...

(2) The listing of violations above is not meant to be all inclusive and does not imply that discipline may not be imposed for other sufficient reasons nor does it mean that termination cannot occur for the first violation.

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. Observe all laws, rules and regulations.

...

B. Each employee's conduct shall, at all times, be consistent with the maintenance of proper security and welfare of the institution and of the inmates under his/her supervision.

C. Employees shall not:

...

5. Employees shall not abuse inmates in any manner.

...

17. Employees shall not apply physical force to an inmate, except and only to the degree that is reasonably necessary in self-defense, to prevent an escape, to prevent an injury to a person or the destruction of property, to quell a disturbance, or to restrain an inmate who exercises physical resistance to a lawful command.

...

DOC AR 208, Annex H provides, in pertinent part:

...

10. Failure to perform job properly, not resulting in actual consequences. (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)

...

30. Abusive or excessive physical force in dealing with inmates. (First Offense: 3 days suspension; Second Offense: Dismissal)

...

C. Facts Forming the Basis of Dismissal

Inmate Lischke testified that on the morning of September 26, 2013, he was in his “rack” waiting for “chow” to be called because his trade school small motors class had been cancelled. Lischke testified that he was on his bunk with a sheet pulled over his head with ear plugs in when he was approached by Stonewall who asked him if he worked in the kitchen. The accounts of Stonewall and Lischke as to what happened next are in dispute. Lischke avers that he simply told Stonewall that he did not work in the kitchen and explained why he was still in the dorm. According to Stonewall, he gave Lischke several direct orders to get out of his bunk and exit the dorm, but Lischke was noncompliant, disrespectful and aggressive. Lischke testified that after they spoke, Stonewall first walked away, but then came back to his “rack” and snatched him over the rail dropping him approximately five and one-half feet to the concrete floor.

The record reflects that Lischke received catastrophic injuries to his spine. He is currently in a wheel chair, has a titanium plate in his neck to stabilize several “C” vertebrae, is incontinent (*i.e.*, lacking control of his bowels and bladder), and has involuntary seizures and spasms.⁷ Lischke testified his current condition is a direct result of Stonewall’s use of excessive force on September 26, 2013. While the severity of Lischke’s injuries is tragic, the central issue is whether Stonewall

⁷ DOC Exhibit 6 and testimony of Lischke.

violated DOC AR 208 V.C.17; Annex H, No. 30; and the other rules and regulations DOC cited by using excessive force during the incident.

Warden III Cynthia Stewart (“Warden Stewart”) testified that she observed a video of Stonewall engaged in using excessive force on Inmate Lischke on September 26, 2013 by snatching him from his top bunk (I-44) causing him to fall approximately five feet landing on his head, shoulders and back. Warden Stewart’s testimony was credible. She said that Stonewall engaged in the use of unnecessary and excessive force. Warden Stewart said Stonewall was a good officer normally and had received good performance appraisals; however, his use of excessive force could not be condoned. Warden Stewart made the recommendation to the appointing authority that Stonewall’s employment be terminated.

Warden II Terry Raybon (“Warden Raybon”) was a Captain at Fountain when this incident occurred on September 26, 2013. Warden Raybon conducted the “Use of Force Investigation.” Warden Raybon reviewed the Duty Officer Incident Report for the date in question. He also testified that he reviewed camera footage, which he said showed Stonewall pull Lischke off his bunk in an inappropriate use of force. Warden Raybon said DOC policy required Stonewall to call a supervisor if an inmate refused to follow a lawful order. Stonewall did not follow protocol. Warden Raybon referred this matter to DOC’s I & I Division.

Investigator David Jones (“Investigator Jones”) conducted an investigation of this matter. He interviewed Stonewall and a number of witnesses whose testimony was recorded and subsequently transcribed.⁸ Investigator Jones turned his information over to the Escambia County District Attorney.

The Escambia County Grand Jury indicted Stonewall. However, District Attorney Stephen Billy (“DA Billy”) subsequently moved to *nolle pros* the indictment which Judge David Jordan granted on February 13, 2019.⁹ DA Billy later explained his actions in dismissing the indictment against Stonewall in a letter stating, in part, “This does not in any way exonerate Stonewall...”¹⁰

Stonewall testified he could not remember the details of this incident, that he did not know Lischke was in a wheelchair, that he heard Lischke hurt himself lifting weights, and that the actions he took on September 26, 2013 were because he “feared for his safety.” In his statement to Investigator Jones on February 12, 2016, Stonewall reported that during the 2013 incident he gave Lischke several direct orders to exit the dorm. He stated that Lischke became irate, started cursing and began frantically moving his hands around his bunk under the pillow as though he

⁸ DOC Exhibit 6.

⁹ DOC Exhibit 7.

¹⁰ DOC Exhibit 8.

might be attempting to retrieve something, and that Lischke began aggressively kicking his legs.

Other than Stonewall's testimony, no evidence of Lischke being hurt while weightlifting was introduced. There is no mention of such an accident within Lischke's medical records. The only trauma noted within Lischke's records is repeated reference to an injury in 2013 from being pulled from a top bunk and dropped to the floor.¹¹

Stonewall complains that after the 2013 incident he continued to work at Fountain until 2016 and that "no one" said anything to him about the *Lischke* matter during that time frame. Stonewall believes he should have his job restored, sick and annual leave time benefits restored, and should receive back pay. He insists he was a good correctional officer who did his job well over a long period of time. Stonewall currently works for Labor Finders at a General Electric Plant assembling motors on big wind turbines.

I. ISSUE

Did DOC produce sufficient evidence to sustain Stonewall's' dismissal based upon violations of the State Personnel Board Rules and DOC rules, regulations, policies and procedures?

¹¹ DOC Exhibit 6.

II. 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).¹²

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. There must be more than a mere possibility or one

¹² 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).

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).¹³

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).

While Stonewall and Lischke’s recollections vary somewhat concerning the details leading up to the incident on September 26, 2013, it is undisputed that Stonewall ultimately pulled Lischke from a top bunk and dropped him some five feet to the concrete floor of the dorm. This action by Stonewall, in a situation not

¹³ 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.

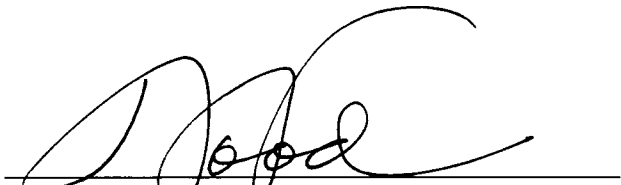
“necessary in self-defense, to prevent an escape, to prevent an injury to a person or the destruction of property, to quell a disturbance, or to restrain an inmate who exercises physical resistance to a lawful command” constitutes the use of abusive or excessive physical force in dealing with an inmate pursuant to DOC AR 208, V.C.17. Even assuming that Stonewall’s account of Lischke cursing, moving his hands and kicking his legs after being given a direct order to exit the dorm is true, these actions do not rise to the level of “physical resistance to a lawful command” because Lischke was on his bunk while all of these alleged actions occurred. Although Stonewall claims he feared for his safety, there was no evidence introduced to suggest Lischke presented any physical threat to Stonewall.

The undersigned has observed and carefully considered the witnesses’ demeanor, testimony, and all the documentary evidence in this case and finds that the preponderance of the evidence establishes Stonewall knowingly violated DOC’s policies regarding excessive and unnecessary force in dealing with Inmate Lischke and did not follow DOC protocol requiring him to call a supervisor when dealing with an inmate who refuses a lawful order.

The record does not make clear why DOC waited until May 12, 2016 to dismiss Stonewall for his actions on September 26, 2013. Stonewall is troubled by this lapse in time and the fact that he was allowed to continue working over two and a half years before his dismissal. Nonetheless, in terminating Stonewall’s

employment, DOC followed its own rules and procedures and those of the State Personnel Board and established to the satisfaction of the undersigned that the preponderance of the available direct, circumstantial and testimonial evidence supports Stonewall's dismissal.

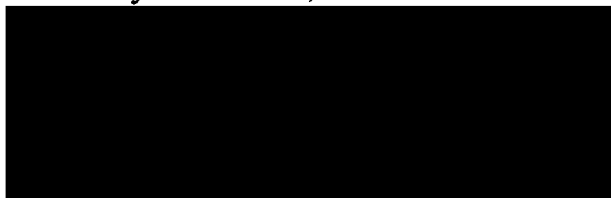
Done, this the 14th day of May 2019.



JAMES JERRY WOOD
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