BEFORE THE STATE PERSONNEL BOARD
IN THE MATTER OF

RICK THOMAS,  
Appellant,  
v.  
ALABAMA DEPARTMENT
OF PUBLIC HEALTH,  
Appellee.

CASE NO. 22-12-RCS

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This recommended order arises from an employment termination action by the Alabama Department of Public Health (hereinafter “ADPH”). ADPH terminated the employment of Rick Thomas (hereinafter “Thomas” or “the employee”) after he tested positive for Cannabis/THC, in violation of ADPH policy. The evidence presented by ADPH during the hearing showed that Thomas violated the ADPH Drug-Free Workplace Policy and its decision to dismiss Thomas should be upheld by the State Personnel Board.

A hearing was held on April 19, 2022, at the State Personnel Department in Montgomery, Alabama. Carol Gerard, Esq., appeared as counsel on behalf of ADPH. Jason Manasco, Esq. appeared as counsel on behalf of Thomas.

At the beginning of the hearing, ADPH introduced into evidence exhibits consecutively marked as ADPH’s Exhibits 1 - 16. Thomas
introduced two additional exhibits into the record marked as Employee’s Exhibits 1 - 2. The undersigned informed the parties that Thomas’s personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

ADPH called as witnesses:

(1) Regina Patterson, Director of the Bureau of Information Technology; and

(2) Jamey Durham, Director of the Bureau of Professional and Support Services.

Thomas testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

ADPH hired Thomas in February 2015 as a “Warehouse Supervisor.” In January 2019, Thomas was promoted to Warehouse Superintendent. Thomas remained in that classification until his dismissal on February 1, 2022. See February 1, 2022, dismissal letter (“dismissal letter”) signed by State Health Officer, Scott Harris, M.D., M.P.H..¹

In the dismissal letter, Harris stated:

...

On January 28, 2022, Mr. Corey Kirkland served as the Precertification Conference Chair and heard your response to the charges. He provided me with a written recommendation. In summary, Mr. Kirkland recommended that the termination of your employment be upheld, and I have accepted his

¹ See ADPH’s Exhibit 3.
recommendation.

Therefore, as your appointing authority, and for the good of the Department, I hereby officially notify you that your employment as a Warehouse Superintendent is terminated at the close of business today, February 1, 2022...

...

In ADPH’s short statement of facts, they alleged that a complaint was received in December 2021, wherein Thomas and another employee were accused of smoking marijuana on ADPH property. The complaint was investigated, and Thomas agreed to a drug screening. Thomas’s drug screening came back positive for THC.²

Thomas timely appealed his dismissal to the Alabama State Personnel Board, pursuant to Ala. Code 1975, § 36-26-27(a). On April 19, 2022, 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.³

² See ALJ file.

³ 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 File

Thomas's annual performance appraisals ("APA") while at ADPH reflect:

<table>
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<th>Date Ending</th>
<th>Total Score</th>
<th>Category</th>
</tr>
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</tr>
<tr>
<td>05/20</td>
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<td>07/19(^5)</td>
<td>23.3</td>
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<td>Exceeds Standards</td>
</tr>
<tr>
<td>07/16</td>
<td>25.0</td>
<td>Meets Standards</td>
</tr>
<tr>
<td>08/15(^6)</td>
<td>24.4</td>
<td>Meets Standards</td>
</tr>
</tbody>
</table>

Thomas's prior disciplinary history at ADPH includes the following disciplinary actions (in reverse chronological order):

- Written Reprimand on October 4, 2021, for violating ADPH's Policy against Workplace Threats and Violence, ADPH Employee Handbook and the ADPH Professional Conduct Policy.

- Counseling on July 31, 2020, for Inappropriate and Offensive Language toward a coworker.

- Counseling on September 28, 2016, for using State equipment in an unsafe manner.

B. SPB General Work Rules Forming the Basis of the Charges

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

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\(^4\) 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).

\(^5\) Thomas's Probationary Performance Appraisal for Warehouse Superintendent.

\(^6\) Thomas's Probationary Performance Appraisal for Warehouse Supervisor.
(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 a state employee.

...  

ADPH's Drug-Free Workplace Policy states, in pertinent part:

It is the policy of the Alabama Department of Public Health to provide employees with a safe, professional work environment and to provide the public with safe and efficient facilities. To that end, it is the Department’s policy to maintain a drug-free workplace.

The following rules are not negotiable:

1. Employees shall not use unauthorized drugs or chemical substances, including alcohol, on the Department’s premises at any time.

2. Employees shall not report to work with detectable levels of unauthorized drugs or chemical substances, including alcohol, in their systems.

...  

Employees found to have violated these rules will be disciplined. Failure to conform to this policy will be considered deliberate misconduct. Accordingly, the discipline may be severe and may result in suspension or dismissal, even on a first offense. The Alabama Department of Public Health reserves the right to require any employee to submit to drug or alcohol testing or both, when there is good reason
to believe that the employee has violated this policy.

C. Facts Forming the Basis of Dismissal

On or about December 15, 2021, Regina L. Patterson ("Patterson"), ADPH Director of the Bureau of Information Technology, met with Warehouse Worker Samuel Rose, III ("Rose"). Patterson met with Rose to ask about the work environment at the ADPH warehouse. During the course of the conversation, she asked Rose if marijuana was being used on the warehouse property. Rose told Patterson marijuana was in fact being used on warehouse property. Rose identified Thomas and another employee from the Emergency Preparedness warehouse as those he witnessed smoking marijuana on warehouse property. Later that day, Patterson held a meeting with Rose, Warehouse Worker Christopher Davis ("Davis") and Jamey Durham ("Durham"), ADPH Director of the Bureau of Professional and Support Services. In that meeting, Davis denied seeing anyone smoke marijuana on warehouse property, but stated Rose told him it happened. Rose told Davis about Thomas and another employee smoking marijuana to "help him out" because of the way Davis was treated.

On December 15, 2021, Patterson met with the other employee accused

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7 See Patterson notes, ADPH Exhibit 6, Bates #383.

8 See Patterson notes, ADPH Exhibit 6, Bates # 384.
of smoking marijuana on warehouse property. The employee denied smoking marijuana on state property and accused Rose of causing a lot of problems in the warehouse. Patterson asked the employee if he would be willing to submit to a drug test and initially, he agreed. Shortly thereafter, the employee asked where the test would be conducted, and Patterson told him at LabCorp. The employee then told Patterson he did not want to waste her time, he admitted smoking marijuana the night before and the prior weekend and was sure his test would come back positive. Patterson referred his admission to ADPH Human Resources.\textsuperscript{9}

Also, on December 15, 2021, Durham and Health Services Administrator I, April Mullins, met with Thomas. Durham told Thomas there was an allegation Thomas was seen smoking marijuana on warehouse property. Thomas denied smoking marijuana on state property. Durham asked Thomas to consent to a drug test, which he did. Durham also instructed Thomas not to drive or use any equipment until he received the results of the drug test. Thomas told Durham, “I don’t smoke pot on the premises. I smoke cigarettes at the tree but it is off property. When I smoke pot, it is in privacy and not at work.”\textsuperscript{10}

\textsuperscript{9} ADPH Exhibit 8, Bates #389-390.

\textsuperscript{10} ADPH Exhibit 10, Bates #392.
Thomas consented to a drug test.\textsuperscript{11} Thomas was tested on December
16, 2021. On December 22, 2021, Thomas’s test results showed that he was
positive for Cannabinoid and THC.\textsuperscript{12}

Patterson testified at the hearing and confirmed her notes from
December 2021 were based on her recollection of meetings she held with
Thomas and others. Patterson testified her concern was to ensure employees
were not operating equipment and vehicles while influenced by drugs or
alcohol. Patterson testified she started the investigation because she had
allegations against her employees. Patterson brought Durham into the
process once an accusation was made against Thomas because Durham
supervised Thomas. Patterson supervised the other accused employee not
named during the hearing. Patterson also testified that pursuant to ADPH
policy, she could not order a drug screening unless she had someone allege
they saw the employee use drugs on the premises. Patterson testified that
Rose alleged he saw Thomas and Patterson’s employee smoke marijuana,
therefore, she requested a drug screening of her subordinate. Patterson’s
employee ultimately admitted he smoked marijuana the night before and
would test positive. He was placed on mandatory leave and then given the

\textsuperscript{11} ADPH Exhibit 12.

\textsuperscript{12} ADPH Exhibit 16, Bates #403.
option to resign or have a hearing. Patterson’s employee chose to resign.

Thomas was in Durham’s chain of command. Durham also testified at the hearing. Durham described his investigative process and recounted many of the details contained in the written documentation provided by ADPH as exhibits. Durham testified he recommended dismissal because Thomas tested positive for THC and ADPH has a zero-tolerance policy regarding positive drug tests.

Thomas made two arguments in his defense. First, Thomas argued that he never smoked marijuana on state property. Both Thomas and Patterson’s employee denied smoking marijuana on state property. Thomas testified he used to smoke marijuana but had not smoked it within the last several years. Thomas testified he used an over-the-counter CBD oil, KOI Naturals, he purchased from the Marathon gas station in Prattville, Alabama. He provided the container and its packaging as an exhibit.\textsuperscript{13} The outside of the packaging reads, “Full Spectrum Blend with no THC!” Thomas also provided a lab sheet on KOI Naturals that showed there was no detection for THC. Thomas also recalled that when his drug test came back positive, the lab technician who called him told him the CBD oil was not regulated by the United States Food and Drug Administration and the information on the

\textsuperscript{13} Employee’s Exhibits 1 and 2.
packaging did not have to reflect what was actually in the product.

Thomas’s second argument is that he was accused by Rose, because Rose was unhappy with Thomas. Thomas alleged Rose’s allegation was unfounded, but Rose targeted Thomas because Thomas previously turned Rose in for hitting the warehouse gate with his truck. During his pre-dismissal conference, Thomas described a disagreement between he and Rose regarding a forklift test and a time when Rose cussed out a female co-worker because she refused to go out with Rose. Thomas believed Rose was protected because Patterson is best friends with Rose’s mother, ADPH’s Equal Employment Opportunity Coordinator, Danita Rose.

III. ISSUE

Did ADPH produce sufficient evidence to warrant Thomas’s dismissal?

IV. DISCUSSION

“[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).\(^{14}\)

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).\(^{15}\)

An administrative agency must act within its constitutional or statutory

\(^{14}\) 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).

\(^{15}\) 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.
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

In the present case, ADPH provided substantial evidence that Thomas
violated ADPH’s Drug-Free Workplace Policy because he tested positive for
THC during a drug screening. ADPH has a zero-tolerance policy for
employees that test positive for drugs. There was no evidence that Thomas
was treated differently than other employees who also tested positive for
drugs. The undersigned considered mitigation in this case. Thomas either
smoked marijuana recently or chose to walk a fine line by ingesting CBD oil
he purchased over the counter from a gas station. It was his responsibility to
make sure he was not under the influence of illegal drugs while at work,
especially since he drives state vehicles and machinery. No grounds exist to
support mitigation in this matter.

Wherefore Premises Considered, the undersigned recommends to the
State Personnel Board that Thomas’s dismissal be UPHELD.
Done this the 2nd day of June 2022.

Randy C. Sallé
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VIA EMAIL AND FIRST-CLASS U.S. MAIL

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