

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

<b>ARMMAND R. BULLOCK,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>CASE NO. 20-16-RCS</b>
	)	
<b>ALABAMA ALCOHOLIC</b>	)	
<b>BEVERAGE CONTROL BOARD,</b>	)	
	)	
<b>Appellee.</b>	)	

**RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD**

This recommended order arises from an employment termination action by the Alabama Alcoholic Beverage Control Board (hereinafter "ABC"). ABC terminated the employment of Armmmand R. Bullock (hereinafter "Bullock" or "the employee") after he allegedly witnessed a co-worker steal liquor and failed to report it. ABC failed to present substantial evidence that Bullock saw or knew that his co-worker stole liquor from the ABC Warehouse. The evidence presented by ABC during the hearing failed to show Bullock violated State Personnel Board Rules and policies as well as ABC Departmental rules and policies and its decision to dismiss Bullock should be reversed by the State Personnel Board.

A hearing was held on June 24, 2020, at the State Personnel Department in Montgomery, Alabama. Robert Martin, III, Esq., appeared as counsel on behalf of ABC. H. Lewis Gillis, Esq., appeared as counsel for Bullock.

At the beginning of the hearing, ABC introduced into evidence exhibits consecutively marked as ABC's Exhibits 1 - 7. Bullock did not introduce any additional exhibits into the record, however, he did bring a bottle of B-622 Hennessy Privilege and a bottle of B-792 Remy Martin 1738 to use to demonstrate the size of the bottles in question.<sup>1</sup> The undersigned informed the parties that Bullock's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

ABC called as witnesses:

- (1) Orlando Ball, ABC Warehouse Manager;
- (2) John Kilpatrick ABC Warehouse Security; and
- (3) Lance Kelley ABC Director of Logistics.

Bullock testified on his own behalf.

## **I. PROCEDURAL HISTORY AND CHARGES**

ABC hired Bullock in February 2018 as an "ABC Warehouse Worker." Bullock completed his probationary period in August 2018. Bullock remained in that classification until his dismissal on April 14, 2020. *See* April 14, 2020, dismissal letter ("dismissal letter") signed by ABC Administrator H. M. Gipson.<sup>2</sup>

In the dismissal letter, Gipson stated:

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<sup>1</sup> The bottles remained sealed throughout the hearing and during the short recesses.

<sup>2</sup> *See* DOC's Exhibit #3.

In correspondence dated March 17, 2020, you were notified of my receipt of a recommendation that you be terminated as a Warehouse Worker (10920) assigned to Warehouse Operations in Montgomery (51) County. The specific violations of ABC Board Personnel Policy were outlined on the initial letter of recommendation from your reporting official(s) dated March 13, 2020...

The March 13, 2020 letter, written by Orlando Ball, ABC Warehouse Manager to Gipson stated, in part:

DISCUSSION: On Wednesday, February 26, 2020 multiple empty boxes of B-622 Hennessy Privilege / B-792 Remy Martin 1738 were found inside the case-flow bins by security and management personnel. Security was notified of the findings and camera footage was reviewed and determine that Armand Bullock appeared to have direct knowledge of the theft being committed by Jeremy Williams. Upon questioning Mr. Bullock[,] he stated that he had no knowledge of the theft being committed by Mr. Williams. However, video footage contradicts Mr. Bullock['s] statement.

RECOMMENDATION: Due to the severity of Mr. Bullock['s] actions[,] I recommend **Termination**. For the following policy violations;

...

**ABC-4-2-.08 EMPLOYEE RESPONSIBILITY**

All employees are responsible and accountable for avoiding any behavior which might violate any provision of these policies, **for reporting any violation of this policy**, and for cooperating in the investigative or remedial action under this policy.

**ABC-4-10-.03 EMPLOYEE STANDARD OF CONDUCT**

(1) Professional Behavior and Conduct.

...

(8) Accountability for Money and Property

...

In ABC's short statement of facts, they included a charge under ABC 4-10-.02 General Work Rules (2) Serious violations, (c) Theft or the unauthorized possession of agency property.<sup>3</sup> Counsel for ABC dropped that charge on the record during the appeal hearing.<sup>4</sup>

Bullock timely appealed his dismissal to the Alabama State Personnel Board, pursuant to *Ala. Code 1975*, § 36-26-27(a). On June 24, 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.<sup>5</sup>

### A. Employee's Personnel File<sup>6</sup>

Bullock's annual performance appraisals ("APA") while at ABC reflect:

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<sup>3</sup> See ALJ file.

<sup>4</sup> T.R. at pages 7 and 8.

<sup>5</sup> 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.

<sup>6</sup> 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).

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
06/19	25.0	Meets Standards
08/18 <sup>7</sup>	27.5	Exceeds Standards

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

- Reprimand effective 3/10/20, for absenteeism.
- Warning effective 11/18/19, for failure to perform job properly.
- Reprimand effective 6/26/19, for tardiness.
- Warning effective 3/12/19, for tardiness.

**B. ABC Policies/Procedures Forming the Basis of the Charges**

ABC Personnel Work Rules, Chapter ABC-4-10-.03 provides, in part:

(1) Professional Behavior and Conduct - Professional conduct requires compliance with Agency policies and procedures, the Rules of the State Personnel Board, Alabama Ethics Laws, and other standards of conduct which members of the public expect of State employees. Agency employees are expected to demonstrate high standards of personal integrity and must conduct themselves in a professional manner. An attitude of cooperation and respect is expected of every employee. Interaction with fellow employees must not cause dissention or discord. Malicious or excessive griping; loud, disruptive talking that affects the activities of other employees; vulgar, abusive, or threatening language; and emotional outbursts at another individual of the Agency are examples of inappropriate conduct from employees that will not be tolerated, Employees are cautioned against the use of profanity in general conversation as such language is inappropriate, unprofessional, and offensive.

Employees are expected to perform their assigned duties conscientiously and to respond readily to the direction of supervisors. Failure to comply with a supervisor's instructions, arguing with a

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<sup>7</sup> Bullock's Probationary Performance Appraisal.

supervisor, and resisting authority are unacceptable and will subject the employee to disciplinary action.

...

(8) Accountability for Money and Property - All State property including official documents and data may only be used for officially approved activities. Employees are expected to protect and conserve all State property entrusted or issued to them; promptly report the loss of, or damage to property entrusted to them; and return all State property upon separation from the Agency.

Any money, property, or other items of value received by or coming into the custody of an employee in connection with the performance of his/her job must be accounted for, deposited, or otherwise disposed of in accordance with established procedures.

...

### **C. Facts Forming the Basis of Dismissal**

On Wednesday, February 26, 2020, ABC Warehouse security and management personnel found multiple empty boxes of B-622 Hennessy Privilege (“Hennessy”) and B-792 Remy Martin 1738 in and around the case flow bins behind tall trash bags. Security was notified of the empty boxes and they reviewed video footage. John Kilpatrick (“Kilpatrick”) was in charge of the security surveillance room at the ABC Warehouse and personally reviewed the footage.<sup>8</sup> Kilpatrick made it clear during his testimony, he just looked for suspicious activity on video footage from February 25, 2020 and February 26, 2020. Kilpatrick testified there are 112 video surveillance cameras set up in the ABC Warehouse.

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<sup>8</sup> T.R. page 67.

Based upon the video surveillance footage, ABC Warehouse employee Jeremy Williams (“Williams”) was fired for theft. Both ABC Warehouse Manager Orlando Ball (“Ball”) and ABC Director of Logistics Lance Kelley, testified that Williams was seen clearly in video surveillance over February 25, 2020 and February 26, 2020 stealing liquor from the Warehouse. Kelley testified that Williams was using his sweatshirt to hide the liquor and move it from his hand down his sweatshirt and into his pants where he could move it elsewhere undetected. Kelley testified Williams was seen in the video surveillance doing this motion many times over the two days that were reviewed by management. Ball confirmed Kelley’s testimony as he also explained how Williams stole liquor from the ABC Warehouse.

During their review of the video surveillance footage, they saw a 27 second clip that showed a similar movement by Williams in front of Bullock.<sup>9</sup> The short video clip was the only video used against Bullock. Ball testified that Williams activity with his sweatshirt in the video was suspicious and Bullock should have reported it; he concluded Bullock saw Williams steal a bottle of Hennessy or Remy Martin and should have reported that to management.

However, Ball and Kelley testified they did not see a bottle in Williams’

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<sup>9</sup> ABC Exhibit 7.

hand in the video. Kelley testified that since Bullock worked on the same 3-man crew with Williams that he would have had to see Williams make a similar motion with his sweatshirt over the two-day period.<sup>10</sup> Kelley conceded in his testimony that he had an opportunity to watch multiple days' worth of video on Williams while Bullock only had this one instance seeing Williams reach into his sweatshirt.<sup>11</sup>

When Ball questioned Bullock about the 27 second video clip, Bullock denied seeing Williams steal anything. Bullock's denial was unwavering.

During his testimony, Bullock denied seeing Williams engage in theft at the ABC Warehouse. Bullock testified he understood that ABC Warehouse employees are supposed to help management keep an eye out for potential theft. Bullock testified that a month before this incident he notified a member of the management team, Hawk, that a box was open on the backside of a bin. That tip led to an investigation and the dismissal of another Warehouse employee.

Bullock acknowledges now that looking back, after hearing how

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<sup>10</sup> This was complete speculation. Kelley could not state with certainty that Bullock previously saw Williams manipulate his sweatshirt as he did in the 27 second clip. Kelley testified that when he began work at the ABC Warehouse, crews of three were actively engaged in stealing liquor from the Warehouse. Kelley was proud that through his efforts the groups ceased and now employees steal by themselves or with the help of one other employee. In this case, Williams was fired, and another employee named Doug Stinson did not return to work after Williams was caught and Stinson was asked to meet with management. Both of those men worked with Bullock during this timeframe.

<sup>11</sup> It is important to note that Williams turned his back to Bullock as Bullock walked up to him in the video clip.

Williams was stealing liquor, he has a different interpretation on Williams actions; however, he testified that at the time portrayed in the video, he thought nothing of Williams' movement with his sweatshirt. Bullock concluded it did not catch his attention.

### III. ISSUE

Did ABC produce sufficient evidence to warrant Bullock's 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).<sup>12</sup>

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<sup>12</sup> 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).

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 (5<sup>th</sup> Cir. 1976).<sup>13</sup>

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

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<sup>13</sup> 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.

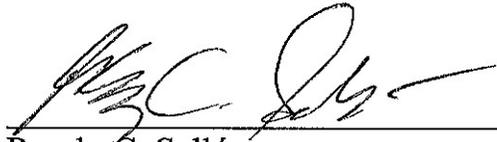
So.2d 1124, 1125 (Ala. Civ. App. 1986).

In the present case, ABC failed to present sufficient evidence to warrant Bullock's dismissal. Bullock's co-worker, Williams, was engaged in a scheme to steal liquor from the ABC Warehouse. It appears from the evidence that Stinson, another co-worker of Bullock's, was aware of the scheme. There was no evidence that Bullock knew Williams was engaged in such activity. Furthermore, while Bullock did walk up on Williams while Williams was fidgeting with his sweatshirt, there is no evidence that Williams stole liquor on that occasion and there is no presence of a bottle in Williams' hand in the video. Management was able to deduce Williams was stealing liquor using his sweatshirt after watching two days of surveillance video. They cannot hold Bullock accountable for a 27 second period where there was not a clearly identifiable theft in progress, without more credible evidence that Bullock knew something nefarious was happening. Ball and Kelley "believed" that Williams was engaged in theft during the 27 second video clip based off the other surveillance they saw from prior acts and they "believed" Bullock saw it. It was merely one possibility of many possibilities, too many to meet the "preponderance of the evidence" standard.

Wherefore Premises Considered, the undersigned recommends to the State Personnel Board that Bullock's dismissal be REVERSED, and Bullock be REINSTATED with FULL BACKPAY AND BENEFITS, less interim

earnings.

Done this the 23<sup>rd</sup> day of July 2020.



Randy C. Sallé  
Administrative Law Judge Division  
State Personnel Department  
64 North Union Street  
Montgomery, Alabama 36130  
Telephone: (334) 242-8353  
Facsimile: (334) 353-9901

**VIA FACSIMILE AND FIRST-CLASS U.S. MAIL**

H. Lewis Gillis, Esq.  
Means Gillis Law, P.C.  
P.O. Box 5058  
Montgomery, Alabama 36103-5058  
Telephone: (334) 270-1033  
Facsimile: (334) 260-9396  
Email: [hlgillis@meansgillislaw.com](mailto:hlgillis@meansgillislaw.com)

Robert Martin, III, Esq.  
2715 Gunter Park Drive, West  
Montgomery, AL 36109  
Telephone: (334) 260-5442  
Facsimile: (334) 277-2150  
E-mail: [bob.martin@abc.alabama.gov](mailto:bob.martin@abc.alabama.gov)