

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

MARKEON PERSON,)	
)	
Appellant,)	
)	
v.)	Case No: 19-22-JJW
)	
ALABAMA DEPARTMENT OF CORRECTIONS,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

The employment termination of Markeon Person (hereinafter “Person”) by the Alabama Department of Corrections (hereinafter “DOC”) gives rise to this Recommended Order. DOC charges that Person, who in 2019 was employed as a Correctional Sergeant at Ventress Correctional Facility (“Ventress”), 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.4 – Employees shall exercise courtesy and tact.
- Section V.A.7 – Employees shall observe all laws, rules, and regulations.
- Section V.A.8 – Employees shall uphold, with integrity, the public’s trust involved in their position.

- 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.
- Annex H, Number 25 – Abuse or misuse of authority, including but not limited to departmental property and/or ADOC identification cards/items.
- Annex H, Number 30 – Abusive or excessive physical force in dealing with inmates.
- Annex H, Number 33 – Conduct that is disgraceful, on or off the job that does adversely affect an employee’s effectiveness on the job.

Person’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 a state employee.

...

On Tuesday, April 24, 2018, Inmate Daniel Beaty (“Beaty”) at Ventress said Person struck him, while he was in handcuffs, and broke his jaw.¹ The inmate required surgery to repair his broken jawbone.² Person denies he struck the inmate. However, Correctional Officer Ladarion Baldwin (“Baldwin”) was present and witnessed Person strike the inmate on the jaw.³

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

On July 9, 2019, the undersigned conducted a *de novo* hearing (“the hearing”) at the State Personnel Department Hearing Room 746 in the Folsom Administration Building in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. Bart Harmon, Esq. appeared on behalf of DOC. Person appeared *pro se*.

¹ DOC Exhibit 6, p. 1.

² DOC Exhibit 6, p. 3.

³ DOC Exhibit 4 and DOC Exhibit 6, p. 4.

At the beginning of the hearing, DOC introduced, without objection, DOC Exhibits 1-5, which were admitted. During the course of the hearing, DOC offered DOC Exhibit 6, which was admitted over the objection of Person. Person offered no exhibits during the hearing.⁴ The undersigned informed the parties, without objection, that Person's personnel file at the Alabama State Personnel Department would be included in the record as evidence in this matter.

DOC called four witnesses:

1. Ladarion Baldwin, DOC Correctional Officer;
2. James Ranson, DOC Investigation and Intelligence Investigator;
3. Michael Strickland, DOC Warden II; and
4. Markeon Person, Appellant.

Person called James Nolin, Correctional Officer at Ventress.

I. PROCEDURAL HISTORY AND CHARGES

Person was employed at DOC as a Correctional Officer Trainee on July 1, 2011. Person became a Correctional Officer on January 16, 2012. Person was a Correctional Sergeant at the time of his dismissal from employment. Person was terminated from his employment by the appointing authority effective May 1, 2019.

⁴ On May 29, 2019, Person filed copies of certain documents including body charts, incident reports, and statements from several inmates, correctional officers, and DOC personnel. Person did not seek to have these documents admitted during the hearing and did not otherwise refer to them. The documents are included as part of the case file.

Person appealed his dismissal to the State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). At the prehearing conference held on May 14, 2019, the appeal hearing was scheduled for July 9, 2019. It was heard on that date as scheduled.

In its Amended Statement of Facts filed on May 14, 2019, DOC alleged, in pertinent part:

...

On April 24, 2018, Mr. Person was involved in an unreported use of force incident with an inmate inside of Ventress Correctional Facility. The incident caused serious physical injuries to the inmate, requiring medical surgery to correct. During the investigation, it was discovered the inmate had been in a previous altercation with two other inmates. Sgt. Person escorted the inmate to the healthcare unit. He was found to have only minor injuries. Sgt. Person then escorted the inmate to the restrictive housing unit. The inmate ran from Sgt. Person. Sgt. Person ordered the inmate to stop and place his hands behind his back. The inmate complied. Sgt. Person escorted the inmate to a hallway before entering the restrictive housing unit. Sgt. Person then struck the inmate on the right side of his jaw. The inmate's mouth was bleeding profusely. Sgt. Person placed the inmate in restrictive housing without any medical attention. At a later time, Nurse Spann was conducting a pill call and observed the inmate bleeding. Nurse Spann immediately had the inmate escorted to the Healthcare Unit. After being examined in the healthcare unit, the inmate was transported to Troy Regional Medical Center and then to Baptist South Medical Center for treatment.

On April 4, 2019, Warden Michael Strickland conducted a pre-dismissal conference. Person attended the conference.

Person's actions violated ADOC's Administrative Regulation 208, Employee Standards of Conduct and Discipline, with respect to the following provisions of Section V:

- Section A – Employees should:
 - A/2 - Render full, efficient, and industrious service.
 - A/4 - Exercise courtesy and tact.
 - A/7 - Observe all laws, rules and regulations.
 - A/8 - Uphold with integrity, the public’s trust involved in their position.

- Section B – Each employee’s conduct shall, at all times, be consistent with the maintenance of proper security and welfare of the institution and/or the inmates under his/her supervision; and

- Section C – Employees shall not:
 - C/5 - Abuse inmates in any manner.
 - C/17 - 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.

Further, pursuant to Administrative Regulation 208, Annex H, the facts related above warranted an increase in the level of discipline (termination) due to Person’s actions.

- H/25 - Abuse or misuse of authority, including but not limited to departmental property and/or ADOC identification cards/items - 1st offense.
- H/30 - Abusive or excessive physical force in dealing with inmates - 1st offense.
- H/33 - Conduct that is disgraceful, on or off the job that does adversely affect an employee’s effectiveness on the job – 1st offense.

Additionally, Person’s actions violated State Personnel Rules, 670-X-19.01(b)(1) - Violation of Safety Rules; (b)(10) - Serious

violation of any other department rule; (b)(12) - Disruptive conduct of any sort; [and] (b)(13) - Conduct unbecoming a state employee.

A review of Person's prior disciplinary actions revealed the following:

Date Imposed	TYPE	OFFENSE
February 1, 2017	Written Reprimand	Failure to follow supervisor's instruction; Non-compliance with policies and procedures.
April 20, 2016	Warning	Late for work; failure to follow proper call-in procedures.
March 27, 2013	Two (2) Day Suspension	Failure to follow supervisor's instruction; Non-compliance with policies and procedures; Failure to report to work (unexcused absence).
...		

II. 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

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.

A. Employee's Personnel File⁶

Person's performance appraisals while at DOC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
06/01/2018	32.0	Exceeds Standards
07/31/2017	28.0	Exceeds Standards
05/01/2016	35.0	Exceeds Standards
05/01/2015	33.0	Exceeds Standards
05/01/2014	33.0	Exceeds Standards
05/01/2013	14.0	Partially Meets Standards
07/15/2012	27.0	Exceeds Standards
12/31/2011	36.0	Exceeds 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.

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).

...

13. Conduct unbecoming 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 ADOC employees shall adhere to the following standards:

...

2. Render full, efficient, and industrious service.

...

7. Observe all laws, rules and regulations.

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

...

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. Abuse inmates in any manner.

...

17. 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.

...

...

N. Nothing in this regulation is intended to abrogate authority granted the Commissioner under Section 36-26-27, Code of Alabama, 1975, and 670-X-18-.02, Rules of the State Personnel Board.

O. 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. To maintain consistency, the imposition of discipline that does not correspond with the table must be fully justified in writing and submitted to the ADOC Personnel Director who shall confer with the appropriate Deputy Commissioner. The Warden/Division Director requesting this variance shall be notified by the ADOC Personnel Director of the decision.

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

...

25. Abuse or misuse of authority, including but not limited to departmental property and/or ADOC identification cards/items. (First Offense: Written Reprimand; Second Offense: 3 days suspension; Third Offense: Dismissal)

...

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

...

33. Conduct that is disgraceful, on or off the job that does not adversely affect an employee's effectiveness on the job. (First Offense: 3 days suspension; Second Offense: Dismissal)

C. Facts Forming the Basis of Dismissal

This case is problematic because it involves the use of excessive force and serious injuries to an inmate. On the day of the alleged incident, April 24, 2018, Beaty was involved in an altercation with other inmates that resulted in minor injuries. Beaty was escorted to the Healthcare Unit at Ventress by Person. Beaty was examined and an Inmate Body Chart Documentation Form ("Body Chart") was completed reflecting that he had three lacerations under his nose, bruising on the side of his face, and pain upon opening his jaw.⁷ Nurse Teretha Spann ("Nurse

⁷ DOC Exhibit 6.

Spann”) told DOC I&I Investigator James Ranson (“Agent Ranson”) that when she observed Beaty on the afternoon of April 24, 2018, that he had only minor injuries and did not require further treatment.

Person determined after Beaty was examined in the Healthcare Unit that he should be taken to restrictive housing in Dorm B1 owing to the altercation he was involved in earlier. It is undisputed that Beaty pulled away from Person and ran after being told he was to be placed in Dorm B1. Beaty ran to the back door of the Administration Building and knocked on it. Baldwin, who was working inside, opened the door to ascertain the situation. Person appeared and asked Beaty why he ran from him. Beaty obeyed Person’s order to place his hands behind his back to be handcuffed. Person and Baldwin escorted Beaty to Dorm B without further incident.

Correctional Officers Tiffany Grey (“Grey”) and Bernard Marshall (“Marshall”) were both assigned to work in Dorm B at the time of the alleged incident. Both officers reported to Agent Ranson that prior to Person and Baldwin escorting Beaty to the area of Dorm B where inmates are strip searched before being placed into restrictive housing (*i.e.*, an area not observable by other inmates, DOC personnel or cameras) that he had only minor injuries.⁸ Beaty claims that Person,

⁸ DOC Exhibit 6.

unhappy that Beaty ran from him earlier, struck him in the jaw while his hands were cuffed behind his back. Baldwin reported that Person asked Beaty again why he had run from him and then struck him in the jaw. Marshall stated that Dorm B is a segregation unit so the doors are locked and can only be opened remotely by the cube officer who, at the time of the incident, was Grey. Accordingly, the area where the alleged incident occurred was not accessible to anyone other than Person and Baldwin at the time. Grey and Marshall both reported when they saw Beaty after he was returned to the lobby area of Dorm B that he was bleeding profusely from the mouth.⁹ Marshall stated that he told Person that Beaty needed medical attention. Beaty claims he requested medical assistance. The record reflects Person ordered that Beaty be immediately placed in Dorm B1.

Later that evening when relief arrived, Marshall, still concerned about Beaty, escorted him to the Healthcare Unit. Nurse Spann was still on duty conducting “pill call.” She observed Beaty had different, more significant injuries from those she had seen that afternoon. A second Body Chart was completed, and photos were taken. Nurse Spann reported Beaty was bleeding from the mouth and his jaw was displaced/deviated. Nurse Vanessa Johnson stated that Beaty had a “bone fragment/exposure protruding from the gum.”¹⁰ Beaty was transported to a local

⁹ *Id.*

¹⁰ DOC Exhibit 6.

hospital where he was examined and sent to a hospital in Montgomery for corrective surgery.

The preponderance of the evidence leads to the determination that Beaty was struck by Person on the jaw and subsequently required surgical repair. Baldwin testified that he observed Person hit Beaty. Person claims Baldwin is not telling the truth but presented no corroborating evidence. Person was clearly displeased with the inmate for running away from him. The Body Charts and the time-stamped photos of Beaty that were taken during both of his visits to the Healthcare Unit on April 24, 2018 establish that he received additional injury to his jaw after his first examination.¹¹ The subsequent injury to the inmate necessitated surgical repair. Aside from the direct evidence from Beaty and Baldwin, the surrounding circumstances and pertinent time frames establish Person struck the inmate. Person is adamant that he did not break Beaty's jaw and there is evidence suggesting Beaty, at a minimum, had "pain upon opening jaw" following his altercation with other inmates.¹² However, the question of whether the blow from Person alone broke Beaty's jaw is not relevant to the matter at hand. The central issue is Person's use of inappropriate and excessive force in striking Beaty and, thereafter, not getting the inmate immediate medical assistance.

¹¹ DOC Exhibit 6.

¹² *Id.* Body Chart completed on April 24, 2018, at 5:35 p.m.

III. ISSUE

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

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). 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).¹³

¹³ 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).

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 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).¹⁴

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*

¹⁴ 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.

Alcoholic Beverage Control Bd. v. Tyson, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

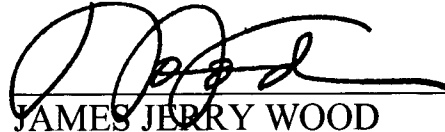
Person's use of physical force, in a situation not "necessary in self-defense, to prevent an escape, to prevent an injury to a person or the destruction of property, to quell a disturbance, or to restrain an inmate who exercises physical resistance to a lawful command" constitutes the use of abusive or excessive physical force in dealing with an inmate pursuant to DOC AR 208 Sections V.C.5 and V.C.17. Although Beaty apparently ran from Person in an attempt to avoid being placed in Dorm B1 (*i.e.*, restrictive housing), it is undisputed that once Person had Beaty back within his personal custody, Beaty cooperated with being placed in handcuffs and escorted into Dorm B. Accordingly, Beaty was not attempting to escape, injure anyone, destroy any property, cause a disturbance, or exercise physical resistance to a lawful command at the time of the incident.

DOC Commissioner Jefferson Dunn wrote in the dismissal letter, "Having reviewed the Warden's Notice of Intent to Recommend Dismissal including associated documents and your overall work record, I do hereby order your dismissal for the good of the service to be effective the close of business May 1, 2019." State Personnel Board Rule 670-X-18-.02 unambiguously states, "An appointing authority may dismiss a classified employee whenever he considers the good of the service will be served thereby." DOC AR 208 ratifies this principle under Section

V.N. which reads, “Nothing in this regulation is intended to abrogate authority granted the Commissioner under Section 36-26-27, Code of Alabama, 1975, and 670-X-18-.02, Rules of the State Personnel Board.”

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 Person knowingly violated DOC’s policies regarding excessive and unnecessary force in dealing with the inmate. Further, the undersigned finds DOC properly considered Person’s conduct pursuant to AR 208 Section V.O. which provides that Annex H merely serves as a “guide” and the imposed level of discipline may be increased depending on “aggravating circumstances.” Among the aggravating circumstances considered were, by his own admission, that Person failed to seek medical care for Beaty whose jaw was broken to the degree that he had bone protruding from his gum. 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 Person’s dismissal.

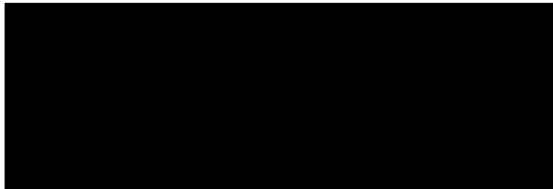
Done, this 29th day of July 2019.



JAMES JERRY WOOD
Administrative Law Judge
State of Alabama Personnel Department
64 North Union Street
Montgomery, Alabama 36130
Telephone: (334) 242-8353
Facsimile: (334) 353-9901

VIA E-MAIL, CERTIFIED AND FIRST-CLASS U.S. MAIL:

Markeon Person



VIA E-MAIL AND FIRST-CLASS U.S. MAIL:

Bart Harmon, Esq.
Alabama Department of Corrections
301 South Ripley Street
Montgomery, Alabama 36130-1501
Telephone: (334) 353-3881
Facsimile: (334) 353-3891
E-mail: bart.harmon@doc.alabama.gov