

Rommie G. Wheeler, Jr., Esq. T. Dudley Perry, Jr., Esq., appeared as counsel on behalf of DYS.

DYS introduced into evidence nine exhibits consecutively numbered as 1-9. Davis did not introduce any additional exhibits.

DYS called Dr. Fatima Johnson, DYS Facility Director of Vacca Campus to testify. Davis testified on his own behalf and called Tom Vanderwal, DYS Investigator, as a witness.

I. PROCEDURAL HISTORY AND CHARGES

Davis began State employment on June 4, 2019 as a Youth Services Aide when he was hired by the Alabama Department of Youth Services. Davis remained in that classification until his dismissal.

Davis was dismissed by letter dated June 16, 2020. In the termination letter, DYS Executive Director Steven Lafreniere (hereinafter “Lafreniere”) notified Davis of his dismissal based upon the following:

As you are aware, an administrative factfinding hearing was held on June 9, 2020, to determine what disciplinary action should be taken concerning your YS Aide position with this department.

Based on the testimony and documents presented during the hearing, there was evidence to support that there was a Violation of the Rules of the State Personnel Board 670-X-19-.01(1)(a)(4) – Failure to perform job properly; Violation of the Rules of the State Personnel Board 670-X-19-.01(1)(b)(12) – Disruptive

conduct of any sort; Violation of the Rules of the State Personnel Board 670-X-19-.01(1)(b)(10) – Serious violation of any other department rule; and Violation of the Department of Youth Services Policy 9.7 – Physical intervention and use of physical force.

Based on the evidence and a review of your personnel file, I hereby order your dismissal from the Department of Youth Services effective at the close of business June 17, 2020...

Davis timely appealed his dismissal to the Alabama State Personnel Board, pursuant to *Ala. Code 1975, § 36-26-27(a)*. On August 11, 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.¹

A. Employee’s Personnel File²

Davis’ annual performance appraisals (“APA”) while at DYS reflect:

¹ 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.

² *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>
12/19 ³	22.0	Meets Standards

Davis' prior disciplinary history at DYS includes the following disciplinary action:

- A Written Reprimand on December 4, 2019 for Failure to perform job properly and violation of safety rules which endanger life or property.

B. SPB General Work Rules and DYS Policies/Procedures Forming the Basis of the Charges

SPB 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:

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

....

4. Failure to perform job properly.

....

³ Final Probationary Evaluation.

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

....

10. Serious violation of any other department rule.

....

12. Disruptive conduct of any sort.

....

DYS's Departmental Policies provide, in part:

....

9.7 - Physical Intervention and Use of Physical Force

I. POLICY:

The use of Physical Intervention and/or the Use of Force is restricted to instances of justifiable self-defense, protection of Youth or others, protection of property, prevention of escapes, and to maintain or regain order and then only as a Last Resort consistent with appropriate statutory authority (criminal law).

II. DEFINITIONS

....

Inappropriate Force: Use of Force that exceeds the reasonable and justifiable response based on the totality of the circumstances or the use of physical techniques that exceed procedurally authorized and trained responses.

Examples of Inappropriate Force techniques include full nelson, half nelson, choke holds, punching and kicking.

....

III. PROCEDURES

Staff will monitor and supervise Youth so as to be alert for possible signs of impending unrest and use prevention and De-escalation Interventions to provide Youth an avenue to resolve problems. The purpose of staff early Intervention is to provide an opportunity for the Youth to self-regulate his/her behavior and learn pro-social behavior skills and to protect persons or the safety, security and order of the facility.

A. When intervention is necessary, staff will assess the situation to determine the most appropriate type of Intervention. Before using Physical Intervention or physical force, staff will:

- 1) Attempt to gain control of the Youth by using verbal De-escalation Techniques.
- 2) As much as and as soon as is possible, access and use other team members, including treatment and security personnel, to assist in the verbal De-escalation and redirection of youth.
- 3) When possible, avoid use of Physical Intervention until another staff is able to assist. Staff who have not received training as outlined in Departmental policy, may not attempt to apply physical holds or use other physical force.

....

D. Physical Intervention is prohibited when it is punishment or retaliation.

....

C. Facts Forming the Basis of Dismissal

On Wednesday, April 22, 2020, Davis was assigned to work as a Youth Services Aide in Smith Hall of the Vacca Campus. During his shift, two students got into a verbal altercation. One of the students, I.S., tossed a towel at Davis and then took off running down a hallway. Davis pursued I.S. and threw a punch at I.S. The punch missed I.S., however, as I.S. fell, his head was struck by an open door that caused an injury above his eye.⁴

The Video:

DYS produced a video that showed several different camera angles of the incident. The video is the best evidence of what occurred.⁵ At the beginning of the incident, Davis was seen escorting a male student toward the front hall desk area of Smith Hall. As Davis neared the front desk, I.S. walked out of a bathroom across from the desk with a towel in one hand, a blue bucket in his other hand and stood by the bathroom door as Davis and the other student approached. It appeared I.S. motioned into the bathroom while looking at another employee indicating something. I.S. and the student Davis escorted stood a few feet apart. As the students looked in the same general direction, toward Day Room 2B, Davis forcibly

⁴ DYS Exhibit 6.

⁵ There was no audio with the video.

grabbed I.S. by the back of his neck.⁶ Davis held the back of I.S.'s neck until I.S. dropped the blue bucket into a box containing similar buckets just outside the bathroom door. After I.S. dropped his blue bucket into the box, Davis released the back of I.S.'s neck and gently pushed him in his chest, backward into a trash can, redirecting I.S. away from the day area. At that point, I.S. was facing Davis. I.S. tossed his towel at Davis, striking him high on his chest, around his chin, and then turned to run. Davis pursued I.S. toward Day Room 1A. The video does not show the moment Davis caught up with I.S.; however, it does show I.S. falling to the ground, Davis grabbing him and then throwing a punch toward I.S. The punch missed I.S., but I.S.'s head hits an open door which caused a head injury. Davis stood over I.S., watched as I.S. entered the open door and then Davis walked away as Security looked in on I.S. briefly and then also walked away. Davis returned to the desk area of Smith Hall, picked up his papers and sat on the desktop.

Testimony:

The Vacca Campus Facility Director, Dr. Fatima Johnson ("Johnson"), testified at the hearing. Johnson based her testimony off her observations of the incident after she watched the video and her knowledge of DYS policies and

⁶ It appeared I.S. was arguing with another student just out of frame who entered the camera view as Davis and I.S. interacted with one another. Another staff member intercepted the student who was moving toward I.S.

procedures. Johnson testified about training for DYS personnel; specifically, about de-escalation. Employees are trained to take protective stances, not aggressive in any nature, in order to minimize physical interaction between DYS employees and students.⁷ Johnson also explained that employees are trained to minimize potential injury to students if employees must engage students physically. Johnson testified that DYS utilizes controlled force tactics training which teaches staff mock moves. This training is a week-long and taught to staff to help them gain control of unruly students. These tactics are used to prevent injury to the student. Johnson testified the punch thrown by Davis was not part of his training.

Johnson testified that mock moves are defensive in nature, not offensive. In the video, I.S. ran away from Davis after he threw a towel at Davis. Johnson testified that the student did not pose a threat to Davis at that point and therefore, Davis should not have engaged the student physically. Johnson testified employees have a three-week orientation period where they learn how to interact with students, including mock moves and have an annual refresher. Johnson testified she evaluates rule violations on a case by case basis. Johnson did not have a previous employee and student interaction that resulted in an injury. Johnson did have previous reports of physical interaction between employees and students.

⁷ Testimony of Johnson.

Davis testified on his own behalf. Davis testified two students began arguing and as they neared each other he feared they would fight. Davis testified his actions were intended to prevent a fight. Davis testified he verbally instructed I.S. on multiple occasions to stop arguing and return to his room. Davis testified he used his hands to re-direct I.S. away from the other student. Davis also testified I.S. threw a towel at him, thereby assaulting staff. Davis believed that once he was assaulted by I.S. he had authority to take I.S. to timeout in another building.⁸ Davis testified he was shocked when I.S. threw the towel at his face. Davis thought he needed to apprehend I.S. and took off running after him.

Davis believed his dismissal should be mitigated because he has a proven track record during his time on the job. Davis testified this was his first time going through a situation like this. Davis was then asked about his prior written reprimand and he testified he was disciplined because he did not take preventative measures in another incident. Davis testified he learned from this incident with I.S. to expect the unexpected and think before you act.

Tom VanderWal (“VanderWal”), DYS Investigator, also testified at the hearing. VanderWal conducted an investigation on behalf of DYS. He

⁸ DYS contended the thrown rag was not assault on staff pursuant to DYS policies and the situation did not warrant a time-out pursuant to DYS policy.

concluded that the injury I.S. sustained occurred as a result of his head striking his room door. VanderWal testified the video showed Davis throw a punch but it did not show the punch connect with I.S. VanderWal testified that Davis initially denied throwing a punch at I.S. VanderWal testified Davis acknowledged at the DYS pre-dismissal hearing he did throw a punch at I.S., but hit him in the shoulder.

Mr. Davis: Right there I hit him in the shoulder.

Hearing Officer: Okay.

Mr. Davis: He hit his head on the door.

Hearing Officer: Okay. You hit him in the shoulder?

Mr. Davis: Yes ma'am.

Hearing Officer: Okay. With your fist?

Mr. Davis: Yes ma'am.⁹

During his pre-dismissal explanation, Davis also admitted I.S. was not aggressive toward him at this point in the video.

III. ISSUE

Did DYS produce sufficient evidence to warrant dismissal of Davis?

⁹ DYS Exhibit 7, page 38.

IV. DISCUSSION

Standard of Review

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).¹⁰

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

¹⁰ 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).

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).¹¹

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, DYS presented sufficient evidence establishing Davis more probably than not violated Alabama State Personnel Board Rules and DYS’s departmental policies. The evidence showed that more probably than not, Davis

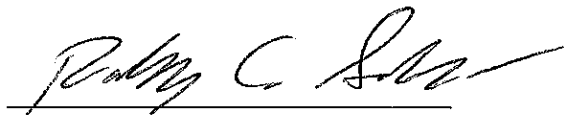
¹¹ In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

escalated the incident with I.S. who was not posing an imminent threat. The video evidence clearly showed Davis grabbed I.S. by the back of his neck, pushed I.S., chased I.S. down a hallway, and threw a punch at I.S. that either hit I.S.'s shoulder or missed completely. There was no credible evidence that this incident required physical force to be used by Davis. When Davis engaged I.S. he did not utilize the controlled force tactic training and he did not use the defensive mock moves; rather Davis engaged in offensive tactics that jeopardized the health, welfare and safety of I.S. Based on the foregoing, Davis more probably than not violated SPB Rules 670-X-19-.01(1)(a)(4) – Failure to perform job properly; 670-X-19-.01(1)(b)(12) – Disruptive conduct of any sort; and 670-X-19-.01(1)(b)(10) – Serious violation of any other department rule, specifically DYS Policies 9.7 (Physical intervention and use of physical force).

Davis previously received a Written Reprimand for failure to perform his job properly and violating safety rules which endanger life or property. Davis has only been employed by DYS since June 4, 2019. He does not have a long, clear track record to use for mitigation in this matter. In fact, Davis was not truthful with VanderWal during the initial investigation. Davis initially told VanderWal he did not throw a punch. Later, when video evidence was shown during the pre-dismissal conference and again at his appeal hearing, he admitted he did throw a punch.

The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal. Accordingly, the undersigned finds the totality of the evidence warrants termination in this cause. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.

Done, this the 28th day of September 2020.



RANDY C. SALLE'
Administrative Law Judge
State of Alabama
Personnel Department
64 North Union Street
Montgomery, Alabama 36130
Telephone: (334) 242-8353
Facsimile: (334) 353-9901

VIA FACSIMILE AND FIRST-CLASS UNITED STATES MAIL

Rommie G. Wheeler, Jr., Esq.
The Wheeler Law Firm
2107 5th Avenue, Suite 401-f
Birmingham, Alabama 35203
Telephone: (205) 881-1641
E-Mail: rommie@wheelerlaw.biz

T. Dudley Perry, Jr., Esq.
General Counsel
Alabama Department of Youth Services
P.O. Box 66
Mt. Meigs, Alabama 36057
Telephone: (334) 215-3803
E-Mail: dudley.perry@dys.alabama.gov