

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

<b>Douglas Prater,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO. 21-01-RCS</b>
	)	
<b>Sam Thomas and Patricia Jones,</b>	)	
<b>In Their Official Capacities as</b>	)	
<b>Employees of the Alabama</b>	)	
<b>Department of Transportation,</b>	)	
	)	
<b>Respondents.</b>	)	

**RECOMMENDED ORDER OF DISMISSAL**

**I. Procedural and Factual Background**

On October 15, 2020, Douglas Prater (“the Complainant” or “Prater”), a retired Transportation Maintenance Technician, III for the Alabama Department of Transportation (“ALDOT”) filed a complaint with State Personnel Director Jackie Graham (“Graham”) against District 76 Administrator Sam Thomas (“Thomas”) and Administrative Support Assistant II (“ASA II”) Patricia Jones (“Jones”). Prater charged Thomas and Jones with falsification of records and conduct unbecoming a state employee. Prater brought his charges as a citizen, taxpayer under Alabama Code §36-26-27(b).

Prater maintained in his citizen, taxpayer complaint that he was issued a written warning by Thomas on May 27, 2020, after Thomas had information that

Prater believed exonerated Prater from any violation of State Personnel Board work rules or ALDOT policies and procedures. Prater also charged Jones with falsification of records and conduct unbecoming a state employee alleging she helped Thomas draft the written warning well after Thomas received the exculpatory evidence. Prater alleged in his complaint, that on May 26, 2020, Prater carpooled to work with a close friend, Tina Zacher (“Zacher”). Over the weekend, Zacher received a phone call from MainStreet Urgent Care (“Urgent Care”) that informed Zacher she tested positive for COVID-19. Prater indicated the call was a mistake on Urgent Care’s part since Zacher had not been to Urgent Care to be tested for COVID-19. When Prater and Zacher arrived to work on Tuesday, May 26, 2020, Zacher informed her immediate supervisor, Rodney Reeves (“Reeves”) that on Saturday, May 23, 2020, she received a phone call from Urgent Care stating she tested positive for COVID-19. Reeves informed Prater and Zacher that they were to go home. Prater alleged Zacher dropped him off at home and then went straight to Urgent Care (“Urgent Care”) to get written confirmation that she was not tested for COVID-19. Zacher had Urgent Care fax confirmation to Reeves and Thomas that same day. Reeves told Prater that he and Zacher could both return to work on May 27, 2020. Upon arriving at work on May 27, 2020, Prater alleged he was taken to Thomas’ office and given a written warning, stating Prater “[k]nowingly came to work with a possible exposure to COVID-19 virus...”

Prater alleged Thomas and Jones both knew there was an Urgent Care apology letter that explained the mishap.<sup>1</sup>

The Alabama Legislature placed within the laws of the State Personnel Board, Ala. Code §36-26-27(b), which states:

In addition to the removal by an appointing authority, persons in the classified service may be removed or disciplined in the manner described in this subsection. Charges may be filed by any officer, citizen or taxpayer of the state with the director who shall, within five days, cause a copy to be served upon the person complained against and shall set a day not less than 10 nor more than 20 days after such charges have been served on such employee for public hearing of such charges. This hearing may be before the director; a special agent appointed for the purpose by the director or the board itself. If before the director or a special agent, the director or special agent shall take testimony offered in support and denial of such charges and from the same submit to the board, within five days, a findings of facts and law involved and a recommended decision.

In this case, Prater filed a complaint as a citizen/taxpayer against two classified employees of the State alleging they violated State Personnel Board General Work Rules. The language in the statute is broad and does not specifically preclude state employees who are citizens and taxpayers of Alabama from filing complaints against other state employees.

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<sup>1</sup> A brief summation of Prater's complaint. ALJ File, Tab 1.

## **II. Hearing**

A hearing was held on Friday, October 30, 2020 in the Alabama State Personnel Department, 1<sup>st</sup> floor Hearing Room. Prater proceeded *pro se*. Kaasha Griffin, Esq. and Allison Taylor, Esq. represented Thomas and Jones on behalf of ALDOT. Prater offered a total of ten exhibits into the record. ALDOT objected to Complainant Exhibits 4-A, 4-B, 6-A, 6-B, 7-A, 8-A and 10; largely on relevance. After consideration of the parties' arguments and a review of the exhibits, Complainant Exhibits 1-A, 1-B, 2-A, 3-A, 5-A, 9-A and 10 were admitted into the record. Respondents offered two exhibits into the record which were admitted, consecutively marked as Respondents Exhibits 1-2.

Prater called as witnesses: Tina Zacher, Rodney Reeves, Thomas, Jones, and Kyle Mathews Leverette. Prater also testified on his own behalf. ALDOT did not call any additional witnesses.

## **III. Findings of Fact<sup>2</sup>**

On Saturday, May 23, 2020, Zacher received a telephone call by Urgent Care stating she tested positive for COVID-19. Zacher argued with the Urgent Care representative stating it was impossible because she had not been to Urgent Care and had not tested for COVID-19. At that point, the Urgent Care representative hung

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<sup>2</sup> These findings of fact are compiled from the documentary evidence presented by the parties' and the testimony given at the hearing.

up on Zacher. Zacher called Urgent Care back and an Urgent Care representative told Zacher the phone call was made by mistake. After hearing she was not positive for COVID-19, Zacher spoke with co-worker and good friend, Prater. Zacher and Prater spent time together over the weekend. Zacher and Prater discussed how to proceed. They ruled out calling a supervisor because they knew Zacher had not possibly been exposed to COVID-19. On Monday, Zacher attempted to get something in writing from Urgent Care explaining the mistaken call, but Urgent Care was closed when she went there.

On Tuesday, May 26, 2020, following the Memorial Day holiday, Zacher carpooled to work with Prater. As soon as Zacher arrived, she walked up to her rating Supervisor, Reeves, and told him what transpired on the phone with Urgent Care over the weekend. Prater testified he heard Zacher tell Reeves, "Don't go crazy, there's no way this can be true" before he entered a building. Zacher testified she told Reeves, "Rodney, I need to tell you something. First of all, please do not jump to conclusions or get upset. There's no way possible this is true." Zacher testified she alerted her Supervisor, because she was worried Urgent Care may call ALDOT.

Reeves recalled in his testimony that Zacher approached him on the morning of May 26, 2020 when she arrived at work. According to Reeves, Zacher walked toward him and said, "Whoa! [and held up her hand as if motioning him to stop] I

received a phone call from Urgent Care that I tested positive for COVID-19.” Reeves recalled that after that statement, Zacher followed it up by telling him she had not been to Urgent Care. Reeves testified he called his supervisor and was told to send Prater and Zacher home. Reeves testified Zacher told him she felt like the phone call from Urgent Care was in error, but she did not elaborate to him that morning why she believed the call was a mistake. Reeves said Zacher may have indicated to him she had not been tested for COVID-19. Reeves also recalled Zacher telling him at some point that morning, she did not know why they called her. Reeves testified he told Thomas that Zacher received a call from Urgent Care and she tested positive for COVID-19.

Thomas testified he first heard of the Urgent Care phone call to Zacher early in the morning on May 26, 2020. Thomas testified that while he was still at home getting ready for work, Reeves told him about his conversation with Zacher and indicated she tested positive for COVID-19. Thomas instructed Reeves to send Zacher and Prater home.

That morning, Reeves wrote a memorandum to the file that recorded his recollection of events.<sup>3</sup> Reeves testified the memorandum was a document he authored. Reeves created the original document, a handwritten document, and then

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<sup>3</sup> Complainant Exhibit 5/A.

gave it to Jones to type and place in the file. Reeves testified the document in evidence did not have any substantive changes to his original document. Jones testified she took Reeves handwritten document and typed it just as he wrote it. Reeves document explained his action, but omitted any additional information offered by Zacher.

That same morning, Thomas arrived to work and drafted a written warning to be issued against Prater. The warning stated, "On May 26, 2020, Mr. Prater knowingly came to work with a possible exposure to COVID-19 virus..."<sup>4</sup> Thomas testified that the warning was written based upon the facts he knew at that time. Thomas presented a draft of the written warning to Jones, who typed the document for him. Thomas testified the words in the written warning were only his and Jones did not make any substantive changes to the document.

After Zacher left work, she dropped Prater off at home and then went to Urgent Care to receive written evidence that the call she received over the weekend was erroneous. While there, Prater called Zacher and told her about a call he had with Reeves where Reeves told him Thomas wanted written confirmation from Urgent Care. Urgent Care faxed confirmation to the Eufaula office that same day.

The letter stated:<sup>5</sup>

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<sup>4</sup> Complainant Exhibit 2-A.

<sup>5</sup> Complainant Exhibit 1-B.

To Whom it May Concern:

Tina Zacher contacted the MainStreet Family Care clinic in Eufaula, Alabama this morning stating that she had received a phone call regarding positive COVID-19 results. However, it appears that this call was made in error since Ms. Zacher has not visited our office requesting COVID-19 testing. In fact, I have no record of Ms. Zacher visiting our clinic this year.

I sincerely apologize for any issues this mistake has caused and will thoroughly investigate the situation in an effort to determine the cause and prevent similar issues in the future...<sup>6</sup>

Thomas, Reeves, and Jones all saw the apology letter from Urgent Care around lunchtime on May 26, 2020. That same afternoon, Prater called Reeves to ask when he and Zacher may return to work. Reeves told Prater that both could return to work the next day, on May 27, 2020. When Zacher and Prater arrived at work the next day, Reeves told Prater that Thomas wanted to see him. Prater met with Thomas and Reeves. During the meeting, Prater recalled small talk at the beginning and then he noticed a piece of paper on Thomas' desk. Prater implored Thomas to essentially get to the point of the meeting and Thomas slid the written warning across his desk to Prater.<sup>7</sup> Prater reviewed the piece of paper, signed

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<sup>6</sup> Complainant Exhibit 1-B.

<sup>7</sup> Complainant Exhibit 2-A.



receipt, and then stated to Thomas, “This is crazy!”<sup>8</sup> Prater recalled Thomas telling him, “it came from above.”<sup>9</sup> Zacher was also disciplined.

On May 29, 2020, Zacher and Prater filed a “Joint Rebuttal, Request for Appeal, and Expungement from Record Request” because they believed Thomas did not forward the Urgent Care letter up the chain of command. Thomas testified he forwarded the Urgent Care letter up the chain of command immediately. According to Thomas, Prater’s written warning was ultimately served due to the disruption at work on May 26, 2020. Thomas testified he was instructed to go ahead and serve the written warning by two employees at the Troy Regional Office. Thomas identified the employees by their last names, Ms. Uptain and Ms. Ellis. Reeves testified the other employees were dispatched for work later in the morning because Reeves and Thomas were addressing the Zacher and Prater situation. Reeves testified that on the morning of May 26, 2020, ALDOT’s normal work cycle in Eufaula was disrupted because he and Thomas had to address Zacher’s remarks to Reeves.

Following Zacher and Prater’s joint rebuttal, ALDOT assigned then Assistant Region Engineer Kyle M. Leverette (“Leverette”) to investigate the matter. Leverette concluded there was miscommunication between Reeves and Thomas on

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<sup>8</sup> Testimony of Prater.

<sup>9</sup> Indicating the written warning was directed by the Region office in Troy, Alabama.

the morning of May 26, 2020, which resulted in Zacher's discipline.<sup>10</sup> After Leverette concluded his investigation, Prater's written warning was expunged from his record and his leave was restored.<sup>11</sup>

#### **IV. Discussion**

COVID-19 is a global pandemic that has had a remarkable impact on the health, welfare, and safety of citizens and employees throughout the world. The illness is not yet fully understood and guidance on best practices continues to change at a rapid pace. The State of Alabama has a duty and responsibility to care for the public and its employees, as well as possible, by following Federal mandates and guidelines, Center for Disease Control recommendations, and State Health Officials rules and procedures. Many State Agencies have issued guidelines and directives for its employees to utilize in the event they are exposed or potentially exposed to this horrible virus. It is impossible for an employer to consider every potential issue/dispute that may arise from newly created guidelines since those guidelines were implemented and altered at a rapid pace. In Alabama there were multiple statewide orders issued by the Governor and the State Health Officer, namely the Stay at Home order and subsequently the Safer at Home orders. In response to the

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<sup>10</sup> Complainant Exhibit 10. Leverette's investigations focused on Zacher but ultimately affected Prater.

<sup>11</sup> After Prater's written warning was expunged, Thomas was ordered to remove and shred any documents in Prater's file at the Eufaula office.

rapid changes COVID-19 caused, ALDOT implemented guidelines and amended those guidelines as it deemed appropriate.

On May 15, 2020, such a document was created by ALDOT Management and disseminated to Region Engineers, Bureau Chiefs, and Points of Contact.<sup>12</sup> The guidelines take into account various scenarios, such as if the employee: (1) states they are sick with certain symptoms, (2) has a temperature above 100.4 degrees Fahrenheit, (3) is under a healthcare professional's order to quarantine, (4) if the employee suspects he or she has been exposed to someone with COVID-19, (5) if an employee reports another employee has symptoms of COVID-19, (6) exhibits COVID-19 symptoms, has possibly been exposed to COVID-19, has definitely been exposed to COVID-19, (7) if an employee has contracted the COVID-19 virus, and (8) if an employee has a family member who is ill with the virus. None of these carefully articulated scenarios applied directly to Prater's unique situation. On May 23, 2020, Zacher was misinformed by Urgent Care she tested positive for COVID-19, an issue she cleared up with Urgent Care later that day on the phone. Zacher went to work and told her immediate supervisor, Reeves, what happened on May 23, 2020. Reeves called Thomas and told him Zacher tested positive for COVID-19. Reeves drafted a memorandum recording the events of that morning and presented it to Jones to type. Jones typed the contents of Reeves' draft that morning, before

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<sup>12</sup> Complainant Exhibit 9.

lunch. Reeves' memorandum did not include any explanatory remarks made by Zacher.

Thomas arrived at work and drafted a written warning against Prater for knowingly coming to work with a possible exposure to COVID-19. That morning, Thomas presented the draft to Jones who typed the document as written. Jones did not make any substantive changes to either document. Jones did not remove any information from either document. Jones typed what was presented to her. Later that day, after lunch, Thomas saw the apology letter from Urgent Care. Thomas forwarded the letter up the chain of command (the Troy Regional Office). Thomas was still instructed to discipline Prater because of the disruption that occurred on the morning of May 26, 2020. Thomas served Prater with the written warning he originally drafted on May 26, 2020, unaltered.

Prater was audibly upset about receiving a written warning after exculpatory evidence was presented to Thomas. His anger is understandable. Prater did not knowingly come to work after potential exposure to COVID-19. That fact is now clear. Prater seeks to hold Thomas and Jones accountable for serving him a written warning. Hindsight is 20/20. Prater could have chosen to do things differently to better protect himself on May 26, 2020, i.e., make sure Zacher obtained a copy of the Urgent Care letter before returning to work, or more simply to call Reeves on Saturday, Sunday, or Monday to inform him of the unusual event and seek guidance.

Prater is focused on himself and how these events affected him. ALDOT is responsible for approximately 4,000 employees plus many contract workers. The ALDOT COVID-19 guidelines allow ALDOT management an opportunity to assess the risk, if any, and determine the best course of action for all employees since most situations are handled on a case by case basis. Prater's failure to call before arriving to work on May 26, 2020, prohibited Thomas and Reeves from making a proactive plan to address the Urgent Care phone call that was allegedly made in error.

Regardless, in the early afternoon hours of May 26, 2020, Urgent Care sent a letter to Thomas clearing Zacher, and thereby clearing Prater. The testimony during the hearing showed that there was initial miscommunication between Reeves and Thomas which led to the creation of Prater's written warning. Reeves failed to explain Zacher's complete story to Thomas. Thomas drafted a written warning against Prater based upon the information he had at the time, which was limited to Zacher communicating to Reeves that Urgent Care called her over the weekend and told her she tested positive for COVID-19. Thomas also knew Zacher and Prater were together over the holiday weekend.

Prater brought charges against two employees, Jones and Thomas in their official capacities as ALDOT employees. In order to succeed in his action, he had to prove, by a preponderance of the evidence, that the employees violated State Personnel Board General Work Rules. 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>

In the present case, Prater failed to prove that Jones violated State Personnel Board, General Work Rule 670-X-19-.01(b)(6) Falsification of records or General Work Rule 670-X-19-.01(b)(13) Conduct unbecoming a state employee. Jones acknowledged she typed Reeves’ memorandum to the file and the written warning Thomas intended to serve on Prater; but Jones did not author either document and she testified she typed exactly what was on the rough drafts. No evidence implicates Jones of any wrongdoing in this case.

Prater charged Thomas with violating State Personnel Board, General Work Rule 670-X-19-.01(b)(6) Falsification of records and General Work Rule 670-X-19-

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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.

.01(b)(13) Conduct unbecoming a state employee. Thomas testified he drafted Prater's written warning during the morning hours, before lunch, on May 26, 2020. Thomas had an incomplete understanding of the discussion Reeves had with Zacher because Reeves did not tell Thomas Zacher's position. When Thomas drafted the written warning, it was not false. That fact was supported by the evidence and the testimony. After lunch, exculpatory evidence was received that showed Zacher did not test positive and Urgent Care made a mistake; thereby, establishing Prater did not come to work after a possible COVID-19 exposure. Thomas went ahead with issuing Prater the written warning because he was following a directive from the Troy Region Office. Customarily, the language contained within a disciplinary action should be written for the actual charge and consist of the facts pertaining to that charge. The language of Prater's written warning was not changed and ultimately, ALDOT recognized the error and expunged the discipline from Prater's record.

Incidents such as this do not occur in a vacuum. COVID-19 presents a credible threat to the health, welfare and safety of all Alabamians. Thomas took the events seriously and took the actions he believed were necessary to protect the other employees under his supervision. Thomas also followed an order from the Troy Region Office to serve the written warning on Prater, even after he and the Region Office received a copy of the Urgent Care letter. Evidence supported the fact that

there was disruption in Eufaula that morning because Reeves and Thomas had to decide how to proceed which delayed their assignment of workers that day.

There is no evidence that Thomas engaged in conduct unbecoming a state employee. Such charges are serious, and while not specifically defined in the State Personnel Board rules, there was no evidence that Thomas' conduct adversely affected his ability to perform his job; adversely affected his co-workers ability to perform their jobs; affected management's trust and confidence in Thomas or his performance of his duties; or that Thomas' actions in this matter interfered with ALDOT's overall mission and objective.

Prater requested both Thomas and Jones be fired from ALDOT. There is no evidence to support such a heavy-handed punishment in this matter. Jones committed no wrongful act. The testimony and evidence of the hearing exonerated her of any charges. Thomas served a written warning on Prater which was not accurate but did not negatively affect Prater's performance appraisal. In fact, Prater's disciplinary action was ultimately expunged, and his leave reinstated. Prater suffered no irreparable harm as a result of the written warning. As a matter of fact, Prater chose to retire on his own and is in good standing with ALDOT.

Thomas' personnel file shows over 40 years of service to ALDOT and no documented disciplinary history. COVID-19 has been a stern taskmaster and has taught many valuable lessons to supervisors and employees throughout its duration.



However, the danger it presents is unprecedented in our lifetime and supervisors must take every situation seriously. While this series of events was not contemplated in ALDOT's COVID-19 guidelines, it appears from the evidence that each supervisor attempted to act in the best interest of ALDOT and the other employees.<sup>14</sup>

It is unfortunate that Prater was issued a written warning that was later expunged from his record. He expressed a significant amount of frustration. He alleged a scheme or a concerted effort to "get him," but there was no evidence to support that notion. ALDOT, like other state agencies, is working its way through a pandemic that creates unusual, unprecedented issues. The evidence in this case does not support disciplinary action against Jones or Thomas.

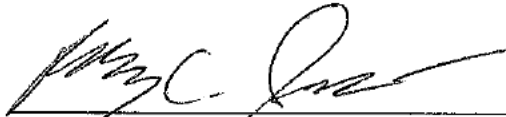
#### **V. Recommendation**

WHEREFORE PREMISES CONSIDERED, the undersigned hereby recommends that the State Personnel Board Dismiss Prater's complaint against Jones and Thomas, WITH PREJUDICE.

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<sup>14</sup> The Board is well aware that supervisors who failed to act or failed to take COVID-19 related statements seriously have previously been dismissed from state service.

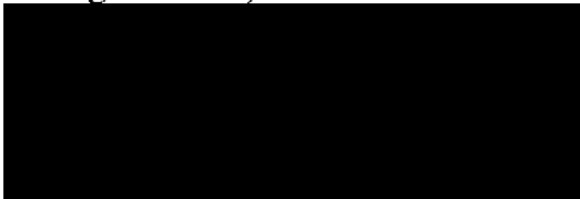
Done this 4th day of November 2020.



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

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