

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

**RICKIE A. DURHAM,** )  
 )  
 **Appellant,** )  
 )  
 **v.** )  
 )  
 **ALABAMA ALCOHOLIC** )  
 **BEVERAGE CONTROL** )  
 **BOARD,** )  
 )  
 **Appellee.** )

**Case No: 20-38-JJW**

**RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD**

The employment termination of Rickie A. Durham (hereinafter “Mr. Durham”) by the Alabama Alcoholic Beverage Control Board (hereinafter “ABC”) is the subject of this Recommended Order.

Mr. Durham was an employee of ABC, having served since October 8, 2016, as an ABC Sales Associate. He was promoted to a Sales Associate II position on September 1, 2019. Mr. Durham worked at ABC Store 48 in District 12, in Madison County. ABC dismissed Mr. Durham from State service effective September 8, 2020, by letter from the appointing authority.

The testimony, observation of the witnesses’ demeanor, documentary evidence and Mr. Durham’s employment history lead to a recommendation, based

on a preponderance of the available credible evidence, that the termination of Mr. Durham's employment with ABC should be upheld.

On October 23, 2020, the undersigned conducted a *de novo* hearing ("the hearing") at the offices of the Alabama State Personnel Department in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. The hearing was scheduled to begin at 9:00 a.m., Mr. Durham was late. Robert L. Martin III, Esq. appeared on behalf of ABC. Mr. Durham appeared *pro se*.

At the beginning of the hearing, ABC introduced, without objection, Exhibits 1-5. Mr. Durham did not introduce any exhibits. The undersigned informed the parties, without objection, that Mr. Durham's personnel file at the Alabama State Personnel Department would be included in the record and reviewed as evidence in this proceeding.

ABC called two (2) witnesses: ABC Store 48 Manager Asa Jackson, who had managed the store since June 2019 and Lisa Yarbrough, the ABC District 12 Supervisor of eleven stores and 56 employees.

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

Mr. Durham timely appealed his dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). At the prehearing conference held on September 28, 2020, the parties selected October 23, 2020, for the hearing.

In the pre-dismissal analysis, ABC alleged, in pertinent part:

Mr. Durham is accused of violating the following ABC Board Policies:

**ABC-4-10-.02 GENERAL WORK RULES**

**(1) Minor Violations**

**(c) Tardiness – not on the job ready to work at the beginning of the shift.**

**(e) Failure to perform the job properly**

**(2) Serious Violations**

**(b) Insubordination-failure to follow an order.**

**ABC-4-10-.03 Employee Standards of Conduct**

**(4) Hours of Work – Employees are required to comply with work hours established by his/her supervisor.**

**Discussion:**

On August 24, 2020 at 7:08 a.m., Mr. Durham called Ms. Asa Jackson, saying HIS ALARM DID NOT GO OFF AND THAT HE WAS ON HIS WAY. When he got to work at 7:25 a.m., he immediately started to work. Ms. Jackson told him to go clock-in. Mr. Durham told her it didn't matter and continued putting a case in line. Ms. Jackson told him again to go clock-in, which he did not do. Ms. Jackson told him for the third time to clock in and that Ms. Jackson was not going to do it for him. Mr. Durham told Ms. Jackson "oh well, it don't matter."

A review of Mr. Durham's overall work history reveals the following disciplinary actions:

- Counseling – Failure to perform job properly- June 20, 2020.
- One day Suspension – Tardiness January 29, 2020;
- Reprimand – Tardiness – January 13, 2020;
- Warning – Tardiness, December 13, 2019;
- Counseling failure to follow sick leave rules March 28, 2018;
- Warning for ABC 4-10-.02(1)(c), Tardiness on October 31, 2017
- Mr. Durham had a warning for failure to perform job properly on August 15, 2017
- Counseling for failure to perform job properly on July 1, 2017.

## II. FINDINGS OF FACT

Having reviewed the documentary evidence, having heard the witnesses' testimony, having observed the witnesses' demeanor, and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of fact.<sup>1</sup>

### A. Employee's Personnel File<sup>2</sup>

Mr. Durham's performance appraisals while working for ABC reflect:

<u>Date Ending</u>	<u>Score</u>	<u>Category</u>
08/31/2020	22.5	Meets Standards
05/31/2020	10.5	Partially Meets Standards
02/29/2020	9.3	Partially Meets Standards
02/01/2019	24.3	Meets Standards
02/01/2018	22.9	Meets Standards
04/07/2017	24.3	Meets Standards

### B. State Personnel Board General Work Rules and ABC Policies and Procedures Forming the Basis of the Charges

State Personnel Board General Work Rule 670-X-19-.01(1)(a)(2)(4)(8); and (1)(b)(2) provides, in pertinent parts:

(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:

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<sup>1</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>2</sup> See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

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

...

2. Tardiness – not on the job ready to work at the beginning of the shift.

...

4. Failure to perform job properly.

...

8. Violation of specific department rules.

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

2. Insubordination – Failure to follow an order; disobedience; failure to submit to authority as shown by demeanor or words, with the one exception of not following an order which the employee has good reason to believe is unsafe or illegal.

...

(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.

...

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

The following facts are undisputed: Mr. Durham was tardy for work on three (3) consecutive "Truck Days" after having been counseled, warned and reprimanded. Mr. Durham failed to follow Ms. Jackson's direct orders to "clock-in" after he showed up late and began to unload the truck. Mr. Durham does not deny that he failed to follow Ms. Jackson's directives and he did so in front of other employees.

Mr. Durham is now apologetic for his actions and insists he meant no disrespect to Ms. Jackson and intended no disregard for her authority. He says Ms. Jackson was a good supervisor. He would like to get his job back. He asks for compassion. He was dealing with family issues, his mother's dementia and his caregiving responsibilities, the death of an uncle and other emotional and distressing family issues. He said: "I love my job, I miss my job and I would love to have it back."

### **III. ISSUE**

Did ABC, as the appointing authority, have sufficient evidence to sustain the dismissal of Rickie Durham for insubordination and failure to perform his job properly based upon violations of ABC Policies and Procedures and State Personnel Board Rules?

#### 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 ABC 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>3</sup>

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

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<sup>3</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 § 41-22-20(k) (1975); *State Dept. of Human Res. v. Gilbert*, 681 So. 2d 560, 562 (Ala. Civ. App. 1995).

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 (5<sup>th</sup> Cir. 1976).<sup>4</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 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

The preponderance of the undisputed evidence supports the action taken by ABC in terminating Mr. Durham’s employment. The exercise of progressive discipline and the overall disciplinary record show Mr. Durham has been given ample opportunity to comply with ABC’s policies, rules and regulations.

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<sup>4</sup> 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.



The undersigned has carefully considered all the evidence in this case and finds no basis for a lesser disciplinary action than dismissal. ABC followed its rules and procedures and all applicable laws. ABC considered Mr. Durham's disciplinary history. The undersigned finds the preponderance of the evidence warrants dismissal in this case.

The undersigned finds no mitigation leading to a lesser punishment. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.

Done, this 18<sup>th</sup> day of November 2020.



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JAMES JERRY WOOD  
Administrative Law Judge  
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VIA E-MAIL AND FIRST-CLASS MAIL



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