

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

**ESPANOLIA NICHOLSON ROWE, )**

**Appellant, )**

**v. )**

**CASE NO. 15-33-RCS**

**ALABAMA DEPARTMENT OF )  
CORRECTIONS, )**

**Appellee. )**

**AMENDED RECOMMENDED ORDER TO THE  
STATE PERSONNEL BOARD**

This Amended Recommended Order arises from an employment termination action by the Alabama Department of Corrections (hereinafter “DOC”). DOC terminated the employment of Espanolia Nicholson Rowe (hereinafter “Rowe” or “the Employee”) after it alleged she: (1) failed to report two incidents to her supervisors, an incident with a male coworker where she told him to squelch inmate rumors about him, and a conversation she had with an inmate on December 14, 2015; and (2) retaliated against an inmate at the Montgomery Women’s Facility (“MWF”). The evidence presented by DOC during the hearing failed to support DOC’s allegation that Rowe retaliated against an inmate. The evidence showed Rowe failed to report two incidents that were approximately six years apart. The discipline imposed was aggravated to termination because of retaliation and the Employee’s habitual failure to report. The evidence did not support the aggravation

of discipline from suspension to termination. Based on the totality of the evidence, Rowe's dismissal is due to be reversed and she should be reinstated with full back pay and benefits, offset by a three day suspension and any interim earnings.

The undersigned conducted a *de novo* hearing ("the hearing") on October 21, 2015, at the State Personnel Department in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. Elizabeth Sees, Esq., appeared as counsel on behalf of DOC. John M. Bolton, III, Esq. and Elizabeth B. Carter, Esq., appeared as counsel on behalf of Rowe.

At the beginning of the hearing, DOC introduced into evidence exhibits consecutively marked as DOC Exhibits 1 – 16.<sup>1</sup> Rowe introduced into evidence exhibits consecutively marked as Employee Exhibits 1 – 15.<sup>2</sup> The undersigned informed the parties Rowe's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOC called as witnesses:

- (1) Kelley Smith, Correctional Investigative Service Officer for DOC;
- (2) Margaret Bentford, Correctional Lieutenant;
- (3) Edward Ellington, Correctional Warden II; and

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<sup>1</sup> Please note that there is no DOC Exhibit 6.

<sup>2</sup> Due to the sensitive nature of, and/or the privacy protected material contained in portions of some exhibits, Employee Exhibits 3, 4, 13, 14, and 15 are hereby placed UNDER SEAL and are not available for public inspection without appropriate Court Order, an Order from the Administrative Law Judge acting under the authority of the State Personnel Board, or an order of the State Personnel Board.

(4) Wendy Williams, Deputy Commissioner for DOC.

Rowe called Latoya Boggan, Correctional Officer, to testify on her behalf.

Rowe also testified on her own behalf.

## I. PROCEDURAL HISTORY AND CHARGES

DOC hired Rowe in September 1999 as a “Correctional Officer I.” In 2007, Rowe’s job classification name changed from “Correctional Officer I” to “Correctional Officer.” Rowe remained in that job classification until DOC dismissed her July 31, 2015. *See* July 22, 2015 dismissal letter (“dismissal letter”) signed by DOC Commissioner Jefferson S. Dunn.<sup>3</sup>

In the dismissal letter, Dunn stated:

On June 23, 2015, you appeared at a Pre-dismissal Conference held by Warden Edward D. Ellington to allow you an opportunity to answer charges that you violated the following standards under Administrative Regulation 208, Employee Standards of Conduct and Discipline:

...

In determining the appropriate corrective action for violating the standards of conduct, I have considered the following infractions under Administrative Regulation 208:

1. Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations. (Administrative Regulation 208, Annex H, Number 18).
2. Harassment or discrimination as defined in Administrative Regulation 206, Harassment and

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<sup>3</sup> *See* DOC Exhibit 3.

Discrimination Policy. (Administrative Regulation 208, Annex H, Number 31).

3. Conduct that is disgraceful, on or off the job that does adversely affect an employee's effectiveness on the job. (Administrative Regulation 208, Annex H, Number 33).

On December 12, 2014, at approximately 4:30 p.m., an inmate advised the Warden at the Montgomery Women's Facility that she was involved in a sexual relationship with one (1) of the Officers assigned to the facility. An investigation was conducted by the Investigation and Intelligence Division (I & I) concerning the allegations of Custodial Sexual Misconduct between the inmate and the Officer. The inmate also alleged that you have been retaliating against her for reporting the relationship.

On March 16, 2015, the I & I Investigator interviewed you concerning the alleged Custodial Sexual Misconduct and you admitted that the inmate told you about the relationship between her and the officer. You also admitted that you failed to report the incident of their relationship to a supervisor. You and the Officer both admitted to being involved in a relationship while working together at the facility. You further admitted that you had a confrontation with the Officer regarding the relationship between him and the inmate and you again failed to report the incident to a supervisor. According to the Investigator, you were dishonest throughout the interview.

During the interview you stated that you did recall confiscating a pair of weightlifting gloves and a knee brace from the inmate, but you could not recall what happened to those items. Since the inmate had permission to have the weightlifting gloves and the knee brace was approved by the Health Care Unit, she should have been allowed to maintain those items. You confiscated the items without following policies and procedures; therefore, you[r] actions of confiscating the items were a form of harassment and retaliation.

...

Your behavior was unprofessional and you failed to report two (2) incidents to your supervisors pertaining to an inappropriate relationship

between the inmate and the officer along with the confrontation you admittedly had with the officer while you were both at work.

...

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 July 31, 2015.

I regret this action is necessary, but Alabama Department of Corrections' employees are expected to maintain reasonable standards of conduct. Your failure to meet these standards cannot be condoned.

...

Rowe timely appealed her dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975).

## 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 fact.<sup>4</sup>

### A. Employee's Personnel File<sup>5</sup>

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<sup>4</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>5</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).

Rowe's annual performance appraisals while at DOC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
02/15	35.0	Exceeds Standards
02/14	35.0	Exceeds Standards
02/13	32.0	Exceeds Standards
02/12	32.0	Exceeds Standards
02/11	22.0	Meets Standards
02/10	25.0	Meets Standards
02/09	19.0	Meets Standards
02/08	19.0	Meets Standards
02/07	36.0	Exceeds Standards
02/06	36.0	Exceeds Standards
02/05	35.0	Exceeds Standards
02/04	35.0	Exceeds Standards
02/03	17.0	Meets Standards
02/02	36.0	Exceeds Standards
02/01	32.0	Exceeds Standards
03/00 <sup>6</sup>	28.0	Exceeds Standards

Rowe's prior disciplinary history at DOC includes the following disciplinary actions:

- January 17, 2013 – Written Reprimand for late for work.
- January 4, 2012 – Warning for late for work.
- January 28, 2011 – Written Reprimand for abusive or profane language.
- April 8, 2010 – Warning for non-compliance with policies.
- December 10, 2009 – Warning for failure to follow Labor Management.
- October 28, 2009 – Written Reprimand for failure to follow Supervisor's instructions.

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<sup>6</sup> Final Probationary Evaluation.

- April 30, 2009 – Written Reprimand for abusive or profane language.
- October 5, 2008 through October 9, 2008 – 5-day suspension for abusive or excessive physical force.
- February 12, 2008 – Warning for non-compliance with rules.
- July 16, 2007 through July 23, 2007 – 6-day suspension for fighting, assault, physical violence or disruptive behavior.
- May 15, 2002 through May 17, 2002 – 3-day suspension for abusive or excessive physical force and serious violations of other rules, procedures, laws, or reasonable conduct expectations.
- March 13, 2002 – Warning for use of abusive language.
- February 4, 2002 – Supervisory Instruction for use of force.

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

Administrative Regulation 208, Employee Standards of Conduct and Discipline, provides, in part:

...

**V. PROCEDURES**

A. All ADOC employees shall adhere to the following standards:

...

2. Render full, efficient, and industrious service.
3. Respond promptly to directions and instructions of supervisor.

...

7. Observe all laws, rules and regulations.

8. Uphold, with integrity, the public's trust involved in their position.

...

12. Promptly report any incidents of sexual misconduct.

...

C. Employees shall not:

...

8. Show partiality toward or become emotionally involved with an Alabama State inmate or parolee.

...

#### ANNEX H

...

18. Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations. (First Offense – Written Reprimand; Second Offense – 2 days suspension; Third Offense – 3 days suspension and Fourth Offense - Dismissal).

...

31. Harassment or discrimination as defined in Administrative Regulation 206, Harassment and Discrimination Policy. (First Offense – 3 days suspension; Second Offense – Dismissal).

...

33. Conduct that is disgraceful, on or off the job that does adversely affect an employee's effectiveness on the job. (First Offense – 3 days suspension; Second Offense – Dismissal).

...

### **C. Facts Forming the Basis of Dismissal<sup>7</sup>**

On Friday, December 12, 2014, Inmate Jennifer Brown (“Brown”) reported a sexual relationship she had with Correctional Officer Isaac McMillian (“McMillian”) to Warden Edward Ellington (“Ellington”) of MWF. Ellington had Brown draft a written complaint and forwarded it to Prison Rape Elimination Act (“PREA”) Correctional Sergeant Felecia Blanding (“Blanding”). Blanding conducted an in-depth interview with Brown on Monday, December 15, 2014. Based upon the information Brown gave during her interview with Blanding, an investigation was launched by the DOC Investigations and Intelligence Division. DOC Investigator Kelley Smith (“Smith”) was responsible for investigating the allegations further. Smith interviewed a number of officers and inmates. Based upon her initial round of interviews, Smith launched several separate investigations involving officers’ action or inaction. Rowe was the subject of one of the investigations.

Following Smith’s investigation, she submitted a report finding that Rowe violated DOC policies and regulations.<sup>8</sup> Smith’s report was reviewed by Ellington who decided to impose discipline on Rowe. Ellington’s basis for discipline was based upon three fact patterns.

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<sup>7</sup> This case is factually intensive. The evidence contains various written statements and transcribed interviews. The record lacks a clearly defined timeline which causes significant factual disputes. The undersigned has addressed the facts as carefully as possible, trying to piece a timeline together based upon a totality of the evidence.

<sup>8</sup> DOC Exhibit 15.

**Fact Pattern 1: Rowe's failure to report a conversation with Brown and interaction with McMillian.**

In his proposal for discipline, Ellington concluded Rowe committed a serious violation of rules, policies, procedures, regulations, laws or reasonable conduct expectations by failing to report two separate situations: (1) a conversation she had with Brown on December 14, 2014; and (2) a "confrontation" Rowe had with McMillian about his relationship with Brown.

Rowe's Conversation with Brown

During Brown's initial interview with Blanding, Brown explained that on Sunday, December 14, 2014, she got out of bed and immediately began looking for Officer Rowe. Brown knew Rowe and McMillian were friends and Brown wanted to make sure Rowe did not "... see [her] differently."<sup>9</sup> Brown was worried Rowe would be upset with her reporting McMillian. Brown first spoke to Correctional Officer Latoya Boggan who told her she and Rowe were told about the PREA report earlier that morning by Correctional Officer Grecu. Brown then met with Rowe in the law library and they had a discussion about the crochet club supervised by Rowe in which Brown was a participant. Brown characterized the conversation with Rowe as, "...she was talking to me umm I, I ... felt like I was talking to my mother,

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<sup>9</sup> DOC Exhibit 7, p. 16.

ok.”<sup>10</sup> Rowe acknowledged speaking with Brown on the morning of December 14, 2014. Rowe testified that during the discussion, Brown made sure Rowe knew about her complaint against McMillian. Brown told Rowe she did not want her to be upset because she filed a complaint against McMillian. Rowe told Brown she could not talk to her about the investigation since there was an ongoing investigation. Rowe did not report her conversation with Brown to a supervisor immediately. During Rowe’s second interview with Smith, on March 31, 2015, Ellington and Deputy Commissioner Dr. Wendy Williams (“Williams”) participated. It was during that interview that Rowe acknowledged Brown also shared with her that Officers Haywood and Grecu were harassing her.<sup>11</sup> Following the conversation Rowe went to Haywood and Grecu and told them Brown alleged they were harassing her.<sup>12</sup> Rowe acknowledged during her testimony and during the March 31, 2015 interview she should have reported the conversation with Brown to a supervisor. Rowe testified she did not feel obligated to report the conversation since Brown already reported it to Ellington, McMillian had been transferred and a PREA officer was investigating the circumstances. Rowe told Brown if she wanted to talk to someone about the situation, she should talk to someone in the mental health department.

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<sup>10</sup> DOC Exhibit 7, p. 17.

<sup>11</sup> DOC Exhibit 12, pp. 17-18.

<sup>12</sup> DOC Exhibit 12, p. 18.

During one of her interviews, Brown indicated she had a conversation with Rowe in the law library where she went into detail about her relationship with McMillian. Brown opined this conversation took place around November 16, 2014. Rowe credibly denied this. Rowe testified the first time she was approached by Brown about Brown's relationship with McMillian was Sunday, December 14, 2014. Based upon a totality of the evidence, and particularly the testimony during the hearing, it appears Rowe found out about the relationship following Brown's report to Ellington.

#### Rowe's Interaction with McMillian

During the March 24, 2015 interview, Brown told Smith that she and Rowe had a conversation and Rowe acknowledged she knew about the relationship and confronted McMillian.<sup>13</sup> Rowe categorically denied knowing anything about the relationship until Brown told her in the law library on December 14, 2014. Rowe explained her interaction with McMillian. Rowe testified she was transferred from Tutwiler Correctional Facility to MWF in 2007. Sometime in 2008 Brown was transferred to MWF. Rowe testified she heard constant rumors about inmates having crushes on different male officers. Rowe testified she warned several male officers about rumors and told them to take the inmate to a supervisor and straighten

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<sup>13</sup> DOC Exhibit 9, p. 1. The word "confronted" was used by Brown. Smith used the term when she asked Rowe about Rowe's interaction with McMillian. Rowe testified there was never a confrontation and that was an inaccurate description of the interaction.

the rumor out. On one occasion during 2008, Rowe approached McMillian and told him there were rumors about him and Brown and he needed to “take care of his business.” Rowe testified she used that language to indicate McMillian needed to take Brown to a supervisor and have the rumor squelched. Rowe testified McMillian blew her off. Rowe was adamant the interaction was not a confrontation and the officers did not argue or raise voices. The only two people in the vicinity of the conversation was Rowe and McMillian.<sup>14</sup> DOC contended that since the interaction dealt with a rumor, Rowe should have reported it to a supervisor to be documented. Rowe contended she did not have an indication anything was going on, merely rumors.<sup>15</sup>

### **Fact Pattern 2: Brown’s Complaint of Retaliation**

Brown talked a lot about retaliation in her multiple statements and interviews. In her December 15, 2014 interview with Blanding, Brown initially told Blanding she was concerned because Officer Haywood and Officer Grecu, “... have put their little digs in me cause, ummm, they was aware of a relationship that I had with Mr. McMillian...”<sup>16</sup> Then, later in her statement when Brown was telling

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<sup>14</sup> McMillian did not testify at the hearing.

<sup>15</sup> Brown disclosed that her relationship with McMillian began in 2010, almost two years after this interaction. No evidence supported a relationship between Brown and McMillian until 2010. During the interaction between Rowe and McMillian, it was only talk around the facility.

<sup>16</sup> DOC Exhibit 7, p. 11.

Blanding about her confession to Ellington, Brown said she told Ellington, “I said ... I ain’t scared of retaliation anything like that ...” She then stated, “I said yeah, I said nobody gone hurt me[,] I ain’t[,] I don’t fear that[,] and it was going ... pretty good[,] nobody knew anything.”<sup>17</sup>

Brown then told Blanding she woke up Sunday morning and decided to go look for Rowe. Brown and Rowe had what she described as a pretty good relationship and she did not want the fact that she reported McMillian to cause Rowe to “see [Brown] differently.”<sup>18</sup> Brown heard that Grecu told Boggan and Rowe about her report against McMillian. Brown concluded it was an effort by Haywood to turn Rowe against her, “...to sick her on me per say.”<sup>19</sup> However, Brown concluded Rowe and Boggan were both professional and very nice to her after she spoke with them on Sunday, December 14, 2014.<sup>20</sup> Brown then accused Haywood and Grecu of retaliating against her.

On Tuesday, December 16, 2014, Brown met with Smith and answered questions about her PREA report. Brown did not mention retaliation during that interview and largely told Smith the same things she told Blanding about her relationship with McMillian.

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<sup>17</sup> DOC Exhibit 7, p. 15.

<sup>18</sup> DOC Exhibit 7, p. 16.

<sup>19</sup> DOC Exhibit 7, p. 16.

<sup>20</sup> DOC Exhibit 7, pp. 16-17.

On March 24, 2015, Smith interviewed Brown again. It appears that between December 16, 2014 and March 24, 2015, Smith became aware that Rowe and McMillian had previously been engaged in a personal relationship. During this interview, Smith started off by telling Brown the interview was about Brown's feeling that Rowe had acted indifferent, if not ugly to her. Brown agreed and the interview commenced.<sup>21</sup> During this interview, Brown told Smith what she knew about Rowe's relationship with McMillian. At the end of the interview, Smith mentioned Rowe went from doing regular pat downs to full naked examinations.<sup>22</sup> Rowe did not describe any specific reprisal or retaliatory acts Rowe committed during that interview.<sup>23</sup> Smith had Rowe take a polygraph examination on March 25, 2015. During the exam, Rowe was asked, "Did you lie when you stated that you were not picking on Inmate Brown?" Rowe responded "No."<sup>24</sup> The polygraph examiner determined Rowe answered truthfully. Smith testified she believed the polygraph result on that question.

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<sup>21</sup> DOC Exhibit 9, p. 1.

<sup>22</sup> Smith brought this up during the interview, not Brown. The evidence indicated Brown did a lot of work outside MWF. The evidence indicated Officers are supposed to conduct thorough examinations of inmates returning from outside a correctional facility. This issue was not discussed by DOC's witnesses as they discussed the charges against Rowe or aggravation of punishment.

<sup>23</sup> The record does not contain the full investigative file. DOC submitted certain exhibits, but not the entire file. Smith obtained information from multiple sources; however, the origin of much of her information was unclear. Smith also testified she uses deception during interviews in an attempt to elicit information from witnesses.

<sup>24</sup> DOC Exhibit 13, p. 13 and DOC Exhibit 14, p. 2.

On March 31, 2015, Smith interviewed Rowe for a second time, in the presence of Ellington and Williams. Smith accused Rowe of lashing out at Brown and Rowe denied it.<sup>25</sup> Smith later became more specific with her accusation. Smith told Rowe, “[y]ou wouldn’t let her do things you normally would let her do.”<sup>26</sup> Smith also told Rowe that Brown believed Rowe began treating her differently around Thanksgiving 2014 because she knew about her relationship with McMillian. Some of the incidents Smith finally referred to included: Rowe changing shower time to inconvenience Brown; and Rowe confiscating Brown’s knee brace and workout gloves. Smith attributed the information regarding the changed shower time to “some inmates.”<sup>27</sup>

Rowe responded to both allegations during her testimony. Rowe testified she prevented Brown from showering on one particular occasion because the showers were being cleaned; however, Rowe testified she did let Brown shower when the rest of the inmates showered. Rowe also recalled the facts surrounding Brown’s allegation that Rowe took her workout gloves and knee brace. Rowe recalled the incident much more clearly during her dismissal appeal hearing. Rowe testified the incident occurred several years before and she recalled conducting a shakedown of Brown where she found workout gloves and a knee brace. Following the

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<sup>25</sup> DOC Exhibit 12, p. 4.

<sup>26</sup> DOC Exhibit 12, p. 7.

<sup>27</sup> DOC Exhibit 12, p. 14.

shakedown, Rowe asked Brown to bring her permission slips for the items. Rowe then returned to the shift office. Rowe recalled that at some point, shortly thereafter, another inmate brought Brown's knee brace and workout gloves to the Shift Office and Rowe instructed her to return the items to Brown.

Ellington initially sent a disciplinary memorandum to Williams for approval. His initial recommendation was not for dismissal.<sup>28</sup> Williams returned the memorandum to Ellington and told him to aggravate the discipline to dismissal.<sup>29</sup> Williams testified she wanted to protect the reporting culture for inmates and believed Rowe's harassment or retaliation of Brown was grounds for aggravation. Williams also testified Rowe habitually failed to report unusual interactions with staff and inmates.

During Rowe's March 31, 2015 interview, Williams made an interesting comment. While interviewing Rowe, Williams acknowledged that inmates are not always 100% truthful. She stated, "And I know that probably 100% of this is not true. But somewhere in the middle, there's truth."<sup>30</sup> Furthermore, Rowe acknowledged during her second interview the reality of the varying facts regarding

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<sup>28</sup> Testimony of Ellington.

<sup>29</sup> DOC Administrative Regulation 208 permits the mitigation or aggravation of discipline imposed by Annex H of the regulation. Reasons for mitigation or aggravation are to be in writing, explaining the variance in discipline. DOC Exhibit 5, p. 14.

<sup>30</sup> DOC Exhibit 12, p. 6.

the investigation. Rowe stated, “I see the cross-fire I’m in.”<sup>31</sup> The clearest picture of facts appeared at the hearing. Both Ellington and Williams testified they heard things for the first time during Rowe’s dismissal appeal hearing. The timeline was not well established during the investigation phase and it appeared Ellington and Williams took disciplinary action without a full understanding of all the facts in light of when they actually occurred.

### III. ISSUE

Did DOC produce sufficient evidence to warrant Rowe’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). 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>32</sup>

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<sup>31</sup> DOC Exhibit 12, p. 14.

<sup>32</sup> The Alabama Court of Civil Appeals went further to hold: “both this court and the circuit court must take

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>33</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*

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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).

<sup>33</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.

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

In the present case, DOC presented sufficient evidence to prove that Rowe more probably than not violated Administrative Regulation 208, Annex H, Number 18 – Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations; and Administrative Regulation 208, Annex H, Number 33 – Conduct that is disgraceful, on or off the job that does adversely affect the employee’s effectiveness on the job. The evidence showed that Rowe engaged in a conversation with Brown on December 14, 2014 in the law library. During the course of that conversation, Brown told Rowe about her reported relationship with McMillian and her belief that Haywood and Grecu were harassing her. Rowe should have reported this conversation to her supervisor immediately. Rowe failed to do so. The appropriate discipline for these charges under DOC’s regulations include a written reprimand for Administrative Regulation 208, Annex H, Number 18 – Serious violations of rules, policies, procedures, regulations, laws, or reasonable conduct expectations; and a three-day suspension for Administrative Regulation 208, Annex H, Number 33 – Conduct that is disgraceful, on or off the job that does adversely affect the employee’s effectiveness on the job.

DOC failed to present sufficient evidence to support its allegation that Rowe retaliated or harassed Brown after she engaged in a protected activity, namely after

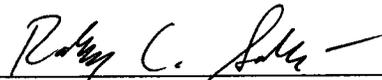
Brown reported her sexual misconduct with McMillian to Ellington. Brown reported her relationship with McMillian to Ellington on Friday, December 12, 2014. The incident involving Rowe's shakedown occurred before that date. Rowe was also accused of not allowing Brown to shower at her usual time, however Rowe recalled the showers were closed for cleaning and she did not allow any inmates to shower during that time. The exact date on this allegation was not clear in the record; however, absent more, Rowe's action was not retaliatory.

Ellington testified he initially recommended a discipline less than dismissal and Williams sent his recommendation back and asked him to aggravate the discipline to dismissal. The reasons Ellington and Williams used to aggravate the charges were primarily based upon the allegations of harassment and retaliation. They were concerned that retaliation would not support a safe reporting environment for inmates. DOC's failure to prove harassment or retaliation negated the aggravated discipline on this basis. Williams also testified the discipline was aggravated because Rowe habitually failed to report rumors, suspicions or unusual discussions she had with inmates. The only two conversations Rowe failed to report were an interaction she had with McMillian about inmate rumors in 2008 and her discussion with Brown in December 2014. These occurrences do not show habitual behavior since they are approximately six years apart. Habitual is

generally defined as “doing something regularly or repeatedly.”<sup>34</sup> A violation six years apart is not constant. Furthermore, the timeline in this case was very convoluted and Smith’s failure to nail down specific dates or points in time made it extremely difficult for DOC to support its position in this matter.

Following a careful and thorough review of all the facts and circumstances in this particular case, including mitigation, the undersigned recommends to the State Personnel Board that Rowe be REINSTATED with full back pay and benefits offset by a three-day suspension and any interim earnings.

Done this the 8<sup>th</sup> day of January, 2016.



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

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<sup>34</sup> Merriam Webster Online Dictionary.

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## Thompson, Tracy

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**From:** Thompson, Tracy  
**Sent:** Friday, January 08, 2016 8:31 AM  
**To:** 'John Bolton'; Sees, Elizabeth (DOC)  
**Subject:** Espanolia Nicholson Rowe v. DOC  
**Attachments:** 01-08-16 Amended Recommended Order to the State Personnel Board.pdf

Attached is the Amended Recommended Order to the State Personnel Board being issued this date by Judge Sallé. Please note that the only changes to the Amended Recommended Order appear on page 2 and deal with the clarification of exhibit numbers. Footnote 1 has been added to reflect there is no DOC Exhibit 6 and the footnote regarding the exhibits placed under seal has been revised to correctly list the exhibit numbers under seal.

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