

DMH introduced into evidence seven exhibits consecutively numbered DMH Exhibits 1 – 7. Hagler did not provide any additional exhibits. The undersigned informed the parties Hagler’s personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DMH called as witnesses:

- (1) Ebony Hughuley, a contract sitter;
- (2) Twilene Hughes, Registered Nurse;
- (3) James Swain, Registered Nurse assigned to Staff Development; and
- (4) Shelia Penn, Bryce Hospital Director.

Hagler testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

Hagler began State employment in June 2014 as a Mental Health Worker I when he was hired by DMH at Bryce Hospital. Hagler remained in that classification until his dismissal.

Following the pre-dismissal conference conducted on December 10, 2015, DMH terminated Hagler’s employment, effective close of business December 14, 2015. *See* DMH Exhibit 2 (dismissal letter dated December 14, 2015, signed by Shelia Penn, Bryce Hospital Director). DMH determined Hagler violated: DMH Policy 19-10, Abuse, Neglect, Mistreatment and Exploitation; Physical Abuse as defined in DMH’s Incident Management Plan; and DMH Policy 70-5, Employee

Conduct and Accountability; II Standards 1(a), Client Abuse, Mistreatment, Neglect or Exploitation. See dismissal letter. DMH further determined:

...

An allegation was made by a patient that you physically abused him. An investigation into the incident was conducted and camera data reviewed. On October 8, 2015, the patient stated he attacked staff because he believed someone was choking him in his sleep. A witness stated the patient attacked you and you pushed the patient to the floor, placed him in a choke hold and a physical altercation occurred between you and the patient.

Id.

Hagler timely appealed his employment dismissal to the State Personnel Board and requested a hearing, pursuant to ALA. CODE § 36-26-27(a) (1975).

In its Short Plain Statement of Facts, DMH reiterated its charges against Hagler and cited the same DMH policies listed in the charge and dismissal letters.

A prehearing conference was held on January 19, 2016. The parties selected February 5, 2016 for the hearing. On February 5, 2016, the undersigned conducted a *de novo* 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 fact.¹

A. Employee's Personnel File²

Hagler's annual performance appraisals while at DMH reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
10/15	0.0	Does Not Meet Standards
12/14 ³	27.0	Exceeds Standards

Hagler's prior disciplinary actions include, in reverse chronological order:

- 3-day Suspension August 25, 2015 – August 27, 2015 for using a cell phone during 1:1 assignment.
- Written Reprimand on August 16, 2015 for sitting in a chair with his shoes off and covered in a blanket.
- Written Reprimand on August 13, 2015 for punctuality.
- 1-day Suspension on August 3, 2015 for refusing to work a mandatory overtime shift.
- Written Reprimand on July 10, 2015 for punctuality.
- 1-day Suspension on July 8, 2015 for absenteeism.
- Written Reprimand on June 12, 2015 for insubordination.
- Written Warning on May 18, 2015 for punctuality.
- Verbal Counseling on May 3, 2015 for punctuality.

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 State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, and length of service considered in dismissing employee).

³ First Probationary Performance Appraisal.

- Written Reprimand on May 1, 2015 for insubordination.
- Written Reprimand on April 15, 2015 for absenteeism.
- Written Warning on February 26, 2015 for absenteeism.
- Written Reprimand on February 21, 2015 for insubordination.
- Written Warning on February 2, 2015 for unacceptable job performance.
- Verbal Counseling on January 19, 2015 for absenteeism.
- Written Reprimand on January 15, 2015 for refusing to work overtime on a major holiday.

B. DMH Policies/Procedures Forming the Basis of the Charges

DMH's Policy #19-10 provides, in pertinent part:

I. POLICY:

Any form of recipient abuse, neglect, exploitation or mistreatment will not be tolerated. The DMH will immediately investigate and provide for appropriate legal and administrative actions based upon such investigation in any state-operated facility.

...

III. STANDARDS

...

2. Employees found in violation of this policy shall be subject to disciplinary actions as follows. Facilities will utilize progressive discipline as appropriate and to the extent possible (see DMH Policy Number 60-40, "Progressive Discipline"); however, the DMH reserves the right to take more

or less stringent disciplinary action as applicable to the offense(s) by the employee.

- a. **Physical Abuse** as defined in the DMH Incident Management Plan shall result in disciplinary action of termination.

...

DMH's Incident Management Plan, IV. Definitions, B. Definitions Concerning Incidents, 2. Abuse defines (i) **Physical Abuse** as, "Any assault by an employee/agent upon a recipient and includes, but is not limited to, hitting, kicking, pinching, slapping, or otherwise striking a recipient or using excessive force regardless of whether an injury results. Assault as defined by this Policy implies intent."

DMH's Policy #70-5 provides, in pertinent part:

I. POLICY:

All Department employees will adhere to accepted standards of professional and personal conduct. Violation of these standards may result in disciplinary action.

II. STANDARDS:

1. The listing of violations below is not meant to be all inclusive and does not imply that discipline may not be imposed for other sufficient reasons. Unacceptable conduct is defined as, but not limited to, the following:
 - a. Client abuse, mistreatment, neglect or exploitation.

...

C. Facts Forming the Basis of Dismissal

On October 8, 2015, Hagler was assigned to work a 1:1 assignment with patient J.B. Hagler and J.B. were in J.B.'s room along with another patient and his

sitter, Ebony Hughuley (“Hughuley”).⁴ At approximately 3:30 a.m., J.B. woke up and asked Hughuley for a Tylenol. Hughuley reminded J.B. she was not his sitter and told him he needed to ask Hagler. Hagler was seated close to J.B.’s bed. J.B. then turned and asked Hagler for a Tylenol. Hagler instructed J.B. to roll over and go back to sleep. J.B. then threw off his bed covers, jumped out of bed and attacked Hagler. According to Hughuley, J.B. punched Hagler in the face. Hagler grappled with J.B. and then placed him in a choke hold. J.B. freed himself from the hold and he and Hagler hit each other until Hagler placed J.B. in another choke hold.⁵ At that point, other staff came in and separated the two individuals. Hagler was escorted outside the room by another worker. Hagler returned briefly and asked J.B. why he attacked him. During that exchange, Registered Nurse Twilene Hughes (“Hughes”) entered the room and checked on J.B.

Hughes testified J.B. did not say much after the initial incident. Hughes wrote in her statement that J.B. stated he wanted Hagler removed from the room. Hughes examined J.B. after he showered and noted J.B.’s right jaw was swollen. Hughes also saw redness on J.B.’s chest. J.B. told Hughes he was injured during a fight with Hagler.⁶ Hughes reported the statement to the Director of Nursing, Mary

⁴ Hughuley was not an employee of Bryce Hospital. She was a contract worker with A & P Services Company assigned to work at Bryce Hospital.

⁵ DMH Exhibit 5, p. 2 and testimony of Hughuley.

⁶ DMH Exhibit 5, p. 4.

Jones, who then instructed Hughes to clarify J.B.'s characterization of "in the fight." Hughes questioned J.B. about the incident and J.B. told her Hagler hit him in the face twice on the right side of his face with a closed fist. Hughes asked Hagler if he placed a manual hold on J.B. Hagler told Hughes he did not touch the patient.

James Swain ("Swain") testified during the hearing. Swain testified Hagler was well trained on non-violent crisis intervention techniques.⁷ Swain reviewed Hagler's training records and found no less than four occasions that Hagler was instructed on how to deal with an aggressive patient. Swain testified choke holds and punching are not appropriate intervention techniques.

Facility Director Shelia Penn ("Penn") testified she ordered an investigation of the incident as soon as the facts were brought to her attention. Following the investigation, the Investigative Review Committee concurred with the investigator's findings and proposed a pre-dismissal conference for Hagler. Penn conducted Hagler's pre-dismissal conference on December 10, 2015. Penn testified that she did not hear anything from Hagler during the conference that warranted mitigation in his discipline. Penn testified she concluded Hagler placed J.B. in a choke hold twice and hit J.B. which caused an injury. Penn was also convinced that J.B.'s allegations matched the eyewitness report of Hughuley.

⁷ Hagler did not have a significant employment record at Bryce Hospital. He was hired in June 2014.

Hagler testified he did not recall placing J.B. in a choke hold. Hagler also denied punching J.B. in the face. Hagler testified he is being made to sound like an abuser and a monster and he was adamant those conclusions are improper. Hagler was clearly frustrated by the testimony and statements against him during the hearing.

III. ISSUE

Did DMH produce sufficient evidence to warrant dismissal of Hagler?

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). 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).⁸

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 (5th Cir. 1976).⁹

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

⁸ 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).

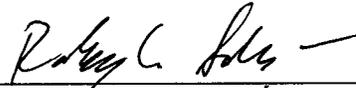
⁹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

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, DMH provided substantial evidence Hagler violated DMH Policy 70-5 Employee Conduct and Accountability; II Standards 1(a) Client abuse, mistreatment, neglect or exploitation and DMH Policy 19-10, abuse. The allegations of J.B. along with the eyewitness account of Hughuley proved Hagler, more probably than not, choked J.B. on two occasions during the incident and also exchanged blows with J.B. These actions are in violation of DMH’s non-violent crisis intervention training and also amount to infractions of DMH Policy 19-10 and 70-5, II(1)(a). Based upon Hagler’s prior disciplinary record, any infraction he committed was enough under the State’s progressive discipline policy to dismiss him from employment at Bryce Hospital. Hagler failed to adhere to DMH policy and procedures on multiple prior occasions and was disciplined with verbal counseling sessions, written reprimands, and multiple suspensions. Hagler’s actions on October 8, 2015 were in violation of DMH policy and, therefore, are grounds for his dismissal from employment.

Accordingly, the undersigned finds the totality of the evidence warrants dismissal in this cause. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.

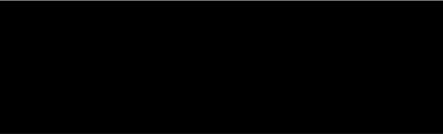
Done this the 23rd day of February, 2016.



RANDY C. SALLÉ
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VIA CERTIFIED AND FIRST CLASS U.S. MAIL

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Thompson, Tracy

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Attached is a copy of Judge Sallé's recommendation to the State Personnel Board. You will also receive a copy by regular mail.

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