

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

<b>RANDALL CONWELL,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>CASE NO. 17-17-JJW</b>
	)	
<b>ALABAMA DEPARTMENT OF</b>	)	
<b>CORRECTIONS,</b>	)	
	)	
<b>Appellee.</b>	)	

**RECOMMENDED ORDER TO THE  
STATE PERSONNEL BOARD**

The employment termination of Randall Conwell (hereinafter “Conwell”) by the Alabama Department of Corrections (hereinafter “DOC”) gives rise to this Recommended Order.

DOC charges that Conwell violated DOC Administrative Regulation 208 (hereinafter “AR 208”), Employee Standards of Conduct and Discipline, Annex H, No. 7 – Late for work (tardiness)/Failure to follow proper call-in procedures; and Annex H, No. 27 – Failure to report to work (unexcused absence). Conwell was dismissed from employment with DOC by the appointing authority effective at the close of business on March 10, 2017. Conwell testified at the end of his appeal hearing he did not want his job back, but only wanted to be eligible for re-employment by the State of Alabama in another capacity should he reapply.

Based on observation of the witnesses, the witnesses' testimony and demeanors and the documentary evidence, the undersigned recommends the termination of Conwell's employment with DOC be upheld.

On May 11, 2017, the undersigned conducted a *de novo* hearing ("the hearing") at the offices of the State Personnel Department in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. Bart Harmon, Esq., appeared on behalf of DOC. Conwell was represented by Jason Manasco, Esq.

At the beginning of the hearing, DOC introduced, without objection, DOC Exhibits 1-6. Conwell offered two exhibits, telephone records and his overtime schedule, marked as Employee Exhibits 1-2, which were received, although untimely, for such weight as they might have. The undersigned informed the parties, without objection, that Conwell's personnel file at the Alabama State Personnel Department would be included in the record as evidence in this matter.

DOC called as witnesses:

- (1) Randall Charles Conwell, the Appellant;
- (2) Correctional Warden Willie Thomas, Bibb Correctional Facility; and
- (3) Correctional Captain John Harvey Hutton, Bibb Correctional Facility.

Conwell testified on his own behalf.

## I. PROCEDURAL HISTORY AND CHARGES

DOC hired Conwell on January 6, 2015 as a Correctional Officer Trainee. Conwell was appointed a Correctional Officer on August 1, 2015. DOC dismissed Conwell on March 10, 2017.<sup>1</sup> The dismissal letter signed by the appointing authority, DOC Commissioner Jefferson S. Dunn, is dated March 6, 2017.<sup>2</sup>

Conwell 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 March 28, 2017, the parties agreed to set the hearing for May 4, 2017. Subsequently, the parties jointly agreed to reset the matter to May 11, 2017.

In its Position Statement (*i.e.*, Short Statement of Facts), DOC alleged, in pertinent part:

The basis for the Department's termination of this former employee is the fact that on or about August 4, 2016, Mr. Conwell was scheduled [to work]. On August 4, 2016, [he was] scheduled to report to work on the B-Day Shift, 6:00 a.m. to 2:00 p.m., at the Bibb Correctional Facility. [He] did not report for duty. At approximately 6:15 a.m., [he] called the facility and stated to the Sergeant that [he] would not be reporting to work because [he] did not have [his] vehicle. [He was] given advance notification of the dates [he was] scheduled to work. [He] failed to report for duty and did not utilize proper call-in procedures.

Specifically, Mr. Conwell was found to have committed the following violations of the Administrative Regulation 208, Employees Standards of Conduct and Discipline:

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<sup>1</sup> See DOC Exhibit 3.

<sup>2</sup> See DOC Exhibit 3.

1. Employees shall report for work on time and in a condition to perform their job properly. (Section V, Paragraph A1).
2. Employees shall render full, efficient, and industrious service. (Section V, Paragraph A2).
3. Employees shall observe all laws, rules and regulations. (Section V, Paragraph A7).
4. Employees shall obtain approval for any absence from work. Tardiness, failure to follow proper call-in procedures, and unexcused absences shall subject the employee to disciplinary action. (Section V, Paragraph A18).

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

1. Late for work (tardiness)/Failure to follow proper call-in procedure. (Administrative Regulation 208, Annex H, Number 7).
2. Failure to report to work (unexcused absence). (Administrative Regulation 208, Annex H, Number 27).

A review of Mr. Conwell's overall work record revealed the following corrective actions:

1. September 16, 2016: Suspension Failure to report to work (5/7/16).
2. September 15, 2016: Warning Late for work.
3. August 19, 2016: Suspension Failure to report to work (5/3/16).
4. March 9, 2016: Suspension Failure to report to work; [Failure to] follow supervisor's instructions (10/12/15).

5. October 13, 2015: Warning Non-compliance with policies [and] procedures (10/6/15).

## II. FACTUAL BACKGROUND

Having reviewed the documentary evidence, 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>3</sup>

### A. Employee's Personnel File<sup>4</sup>

Conwell's performance appraisals while at DOC reflect:

<u>Date Ending</u>	<u>Total</u>	<u>Score Category</u>
12/01/2015	12	Partially Meets Standards
01/31/2016	22	Meets Standards
07/05/2015	20	Meets Standards

Conwell's prior disciplinary history at DOC includes:

- 09/16/16 – Suspension – Failure to report to work (5/7/16).
- 09/15/16 – Warning – Late for work.
- 08/19/16 – Suspension – Failure to report to work (5/3/16).
- 03/09/16 – Suspension – Failure to report to work (10/12/15).
- 10/13/15 – Warning – Non-compliance with policies and procedures (10/6/15).

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<sup>3</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>4</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).

**B. State Personnel Board General Work Rules and DOC Regulations, Policies and Procedures Forming the Basis of the Charges**

State Personnel Board Rule 670-X-19-.01 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:

1. Absenteeism – Unexcused absence, unreported absence, a pattern of absences, or excessive absences.

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

...

**AR 208, provides in pertinent part:**

...

**V. PROCEDURES**

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

1. Report for work on time and in a condition to perform their job properly.

2. Render full, efficient, and industrious service.

...

7. Observe all laws, rules and regulations.

...

18. Obtain approval for any absence from work. Tardiness, failure to follow proper call-in procedures, and unexcused absences shall subject the employee to disciplinary action.

...

**AR 208, Annex H: TABLE OF INFRACTIONS and LEVEL OF DISCIPLINE:**

...

7. Late for work (tardiness)/failure to follow proper call-in procedures. First Offense: Warning; Second Offense: Written Reprimand; Third Offense: 3 Days Suspension; Fourth Offense: 3 Days Suspension; Fifth Offense: 3 Days Suspension; Sixth Offense: 3 Days Suspension; Seventh Offense: Dismissal.

...

27. Failure to report to work (unexcused absence). First Offense: 2 Days Suspension; Second Offense: 3 Days Suspension; Third Offense: 3 Days Suspension; Fourth Offense: Dismissal.

...

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

This case involves the dismissal of Conwell from his employment with DOC after less than three years of employment as a Correctional Officer. Conwell's latest work performance appraisal was a "12," partially meeting the required standards.

Conwell had a pre-dismissal conference with Correctional Warden Willie Thomas ("Thomas") on January 10, 2017. Thomas asked Conwell for any documentation to support his unexcused absences and Conwell reportedly said,

“There are no documents.”<sup>5</sup> Conwell did not show Thomas any documentation of his attempts to call-in in compliance with AR 220 (Call-In Procedures). Conwell was aware of the proper procedures.<sup>6</sup> Thomas testified that during Conwell’s relatively short tenure with DOC, Conwell had a pattern of unexcused absences and tardiness. Thomas said that during the pre-dismissal conference, Conwell did mention his problems with his transportation and with his mother’s situation (*i.e.*, surgery and hospice).<sup>7</sup> Thomas recessed the conference to check Conwell’s file for any documentation (*e.g.*, doctor’s excuses, etc.). There were none in the file. Correctional Captain John Harvey Hutton testified that Conwell was aware of the proper procedures for call-in.

Conwell introduced Employee Exhibits 1 and 2 at the hearing. The exhibits show Conwell’s overtime schedule and a segment of his phone records. Conwell made three calls to the Bibb Correctional Facility on August 4, 2016, around the 6:09 a.m. to 6:13 a.m. time frame. Conwell’s shift would have started at 6:00 a.m. Conwell says he called in and talked to Central Control and talked to Urian Davis, and to Lieutenant Carl Johnson. Sergeant Ann Fulgham told Conwell, when he spoke with her, that she “didn’t see a call-in from him.”<sup>8</sup>

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<sup>5</sup> See DOC Exhibit 4, p. 1.

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

<sup>7</sup> See DOC Exhibit 4, p. 2.

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



The evidence is disputed. No evidence was presented by Conwell, at the hearing, to support his need to assist his mother (*e.g.*, doctors' excuses, etc.). Conwell was an intelligent, articulate witness. He presents and carries himself well. Unfortunately for him, the preponderance of the evidence supports the DOC's decision to terminate his employment based on his disciplinary record of multiple unexcused absences and tardiness in a relatively short tenure. Specifically, his failure to report to work on August 4, 2016, was his fourth unexcused absence in a 12-month period. AR 208, Annex H, No. 27, which addresses unexcused absences, mandates that the level of discipline for a fourth offense is dismissal.

Conwell said he did not want this job back. He only desires to be eligible for re-employment with the State of Alabama.

### **III. ISSUE**

Did DOC produce sufficient evidence to sustain Conwell's dismissal based upon violations of DOC rules, regulations, policies and procedures and State Personnel Board General Work 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 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>9</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 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

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<sup>9</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” 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>10</sup>

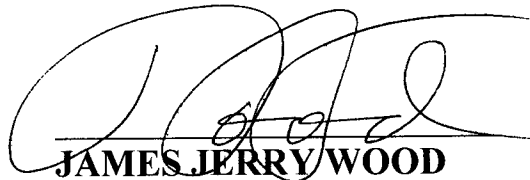
An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla 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 undersigned has carefully observed and considered the witnesses’ demeanor, testimony, and all the documentary evidence in this case and finds that the preponderance of the evidence standard was met by DOC to support its dismissal of Conwell. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be sustained.

Done, this the 18<sup>th</sup> day of May, 2017.

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<sup>10</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.



**JAMES JERRY WOOD**

Administrative Law Judge

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