

with DOC be upheld.

On June 14, 2016, 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. Katherine Jessip, Esq., appeared as counsel on behalf of DOC. Wilkins was represented by Kimberly R. Dodson, Esq.

At the beginning of the hearing, DOC introduced, without objection, DOC Exhibits 1 – 8. Wilkins offered eight exhibits. The undersigned informed the parties, without objection, that Wilkins’s personnel file at the Alabama State Personnel Department would be included in the record as evidence in this matter.

The parties offered the following joint stipulation on the record:

1. On December 1, 2015, Mr. Wilkins consumed alcohol prior to coming to work.
2. That he gave both a breathalyzer and a urine sample on December 1, 2015, while at Easterling Correctional Facility, and he does not dispute the sufficiency of tests.
3. That the results of the urine sample were positive for alcohol.
4. That Mr. Wilkins was questioned by Warden Carter, and admitted to drinking vodka and taking Z-Quil and provided a written statement to that effect.
5. That Mr. Wilkins was driven home by Sergeant Williams on December 1, 2015.

DOC called as witnesses:

- (1) Derrick Carter, Correction Warden I, DOC;
- (2) Walter Myers, Correctional Warden III, DOC; and
- (3) Robert Wilkins, Appellant, former Correctional Officer.

Wilkins testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

DOC hired Wilkins in November 1996 as a Correctional Officer and he remained in that classification until DOC dismissed him effective March 8, 2016.¹ The dismissal letter signed by the appointing authority, DOC Commissioner Jefferson S. Dunn, is dated March 7, 2016.²

Wilkins 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 29, 2016, the appeal hearing was scheduled for May 2, 2016. The hearing was continued owing to an accidental injury suffered by Wilkins's counsel and rescheduled to June 14, 2016.

In its Statement of the Facts, DOC alleged, in pertinent part:

...

Robert Wilkins ("Wilkins") was a Correctional Officer at Easterling Correctional Facility ("Easterling") located in Clio, Alabama. He was employed with the ADOC for just over nineteen

¹ See DOC Exhibit 3.

² See DOC Exhibit 3.

years.

On December 1, 2015, Wilkins was observed by the Lieutenant staggering on the sidewalk and stumbling up the stairs to the segregation unit at Easterling. The Lieutenant then approached Wilkins to question him, at which time he smelled alcohol on Wilkins's breath. Wilkins denied drinking that day to the Lieutenant, but indicated he had taken some Z-Quil earlier that day to sleep. A breathalyzer test was performed, which tested positive for alcohol at a BAC level of .27. Additionally, Wilkins submitted a urine sample, which, too, tested positive for alcohol. Because Wilkins was in no condition to man any duty post, another staff member had to be taken off of his post to drive Wilkins to his residence. After being questioned by the Warden, Wilkins submitted a written statement admitting he had an alcohol problem, explaining he had signed up for the Employee Assistance Program ("EAP"), and admitting that he had taken some Z-Quil and taken three shots of vodka before coming to work on the day in question.

Wilkins was served with notice of a pre-dismissal and was given a pre-dismissal conference on January 14, 2016. In that conference, Wilkins again admitted he had taken sleep medicine and three shots of vodka before coming to work. He also submitted documentation that he was actively taking part in EAP. However, as a result of his violations of ADOC rules, Warden Myers made a recommendation of dismissal.

Wilkins's actions violated ADOC Administrative Regulation 208 - Employee Standards of Conduct and Discipline with respect to the following provisions:

Section V.A.1. - Employees shall report to work on time and in a condition to perform their job properly;

Section V.A.2. - Employees shall render full, efficient, and industrious service;

Section V.A.7. - Employees shall observe all laws, rules, and regulations;

Section V.C.1. - Report for duty or exercise supervision or control over inmates while under the influence of an intoxicant and/or illegal drug; and

Section V.C.3. - While on duty, use or be under the influence of intoxicants or illegal drugs.

Wilkins's prior disciplinary actions are as follows:

Pending	Written Reprimand	Failure to follow instructions
July 27, 2015	Suspension	Conduct that is Disgraceful ¹
Dec. 19, 2015	Warning	Late for Work
April 20, 2015	Suspension	Failure to report / Unexcused Absence

Based on the policy as set forth in Administrative Regulation 208, the Warden relied upon Annex H, the table establishing progressive discipline, to utilize H(33), which provides that the second offense for Conduct that is Disgraceful, on or off the job, that does adversely affect an employee's effectiveness on the job, is dismissal. Warden Walter Myers, Institutional Coordinator Gwen Mosley, and Associate Commissioner Grantt Culliver recommended the dismissal of Wilkins. Commissioner Jefferson S. Dunn, by and through his appointed designee, then approved the dismissal effective March 8, 2016. All policies and procedures prescribed by Administrative Regulation 208 were followed, and there was certainly enough evidence to support the fact that Wilkins did take part in disgraceful conduct, on and or off the job, that adversely affected his effectiveness on the job - namely reporting to work intoxicated. The ADOC specifically denies it violated any right or privilege bestowed on Wilkins under the EAP. While the EAP provides assistance to persons who may be suffering from substance abuse, nothing under the law or the EAP prohibits an employer from enforcing its own established rules, nor does it shield an employee from disciplinary action if he/she reports to work intoxicated.

Additionally, the ADOC submits that Wilkins's conduct also violates the General Work Rules of the Alabama State Personnel Department, Administrative Code Section 670-X-19-.01:

For violations which would normally result in suspension or termination in the first offense as enumerated in section (b) - 7. Possession and/or use of alcohol, narcotics, or other illegal substances and/in state property; and 13. Conduct unbecoming a state employee.

¹ This discipline was received as a result of a March 13, 2015, incident in which the Lieutenant was called by Wilkins to the perimeter truck (Wilkins's assigned duty post that day) because Wilkins could not locate the shotgun. Upon arrival, the Lieutenant smelled alcohol on Wilkins's breath. Wilkins admitted to drinking vodka and taking Z-Quil prior to coming to work and his urine test came back positive for alcohol. It is worth noting that the Warden could have recommended dismissal for a positive drug screen and reporting to work under the influence based upon this incident.

...

II. FACTUAL BACKGROUND

Having reviewed the documentary evidence, the parties' stipulation, 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.³

A. Employee's Personnel File⁴

Wilkins's performance appraisals while in State service at DOC reflect:

Date Ending	Total	Score Category
07/01/2015	15	Partially Meets Standards
07/01/2014	32	Exceeds Standards

³ 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.

⁴ See *generally* State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

07/01/2013	32	Exceeds Standards
07/01/2012	35	Exceeds Standards
07/01/2011	36	Exceeds Standards
07/01/2010	35	Exceeds Standards
07/01/2009	34	Exceeds Standards
07/01/2008	34	Exceeds Standards
07/01/2007	36	Exceeds Standards
07/01/2006	36	Exceeds Standards
07/01/2005	36	Exceeds Standards
07/01/2004	36	Exceeds Standards
07/01/2003	34	Exceeds Standards
07/01/2002	31	Exceeds Standards
07/01/2001	33	Exceeds Standards
07/01/2000	35	Exceeds Standards
07/01/1999	35	Exceeds Standards
07/01/1998	32	Exceeds Standards
09/15/1997	30	Exceeds Standards
03/15/1997	28	Exceeds Standards

Wilkins's prior disciplinary history at DOC includes:

- Pending Written Reprimand Failure to Follow Instructions
- 07/27/2015 Suspension Conduct that is Disgraceful
- 12/19/2015 Warning Late for Work
- 04/20/2015 Suspension Failure to Report/Unexcused Absence

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:

...

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

...

- 7. Possession and/or use of alcohol, narcotics, or other illegal substance on/in state property.

...

- 13. Conduct unbecoming a state employee.

...

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.

...

...

C. Employees shall **not**:

1. Report for duty or exercise supervision or control over inmates while under the influence of an intoxicant and/or illegal drug; and

...

3. While on duty, use or be under the influence of intoxicants or illegal drugs.

...

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

...

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

Wilkins was a long term Correctional Officer having served for over 19 years. His performance appraisals up until 2015 were excellent in that he exceeded standards. During the 2015 year, Wilkins's performance was not up to standard. In March 2015, Wilkins was suspended for conduct that is disgraceful. He admitted to drinking vodka and taking Z-Quil prior to coming to work on March 16, 2015. On December 1, 2015, Wilkins again came to work after consuming three shots of vodka and taking Z-Quil. Wilkins was too impaired to perform his job and had to be driven home by another officer. Wilkins made his first EAP appointment on December 3, 2015. Wilkins says he has been sober since December 2015. He

has continued with counseling and has attended Alcoholics Anonymous meetings on a regular basis. Wilkins lost his father three years ago which seriously affected him personally. Wilkins underwent a divorce, which caused great personal disruption and depression. Unfortunately, Wilkins only sought EAP help late in 2015. Wilkins believes his punishment is too severe considering his long service and his good prior work record.

The parties' stipulation establishes the rules, policies, procedures, and violations that undergird the decision by the appointing authority to terminate Wilkins's employment. DOC followed its procedures in deciding to discharge Wilkins. The evidence is undisputed as to the two disgraceful conduct infractions. The recommending authorities considered Wilkins's record and long service and determined that even considering these, Wilkins's employment with DOC should end. DOC followed progressive discipline in this case.

III. ISSUE

Did DOC produce sufficient evidence to sustain Wilkins'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).⁵

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*,

⁵ 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).

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 (5th Cir. 1976).⁶

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).

Wilkins’s conduct constituted violations of DOC’s AR 208, Employee Standards of Conduct and Discipline, V.A.1, 2, 7 and V.C.1 and 3. AR 208, Annex H, No. 33, warrants dismissal for the second offense of conduct that is disgraceful. That, considering Wilkins’s overall disciplinary history compels his separation from employment at DOC.

The undersigned has carefully observed and considered the witnesses’ demeanor, testimony, and all the documentary evidence in this case and finds that

⁶ 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.

procedures, and had a proper basis and the authority to discharge Wilkins from his employment.

The undersigned finds no appropriate basis for a lesser disciplinary action than dismissal. It may be possible that Wilkins, if he maintained sobriety, could be salvaged and could return to being the kind of Correctional Officer who “exceeded standards” for eighteen of his nineteen years of service. The appointing authority was in a better position to judge that. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.

Done, this the 29th day of June, 2016.



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