

**BEFORE THE PERSONNEL BOARD OF THE STATE OF ALABAMA**  
**IN THE MATTER OF THE APPEAL OF**  
**DUSTIN JOHNSON**

**ORDER**

**August 16, 2017**

This matter came before the Board upon the dismissal of the Employee from his employment with the Alabama Department of Transportation (“DOT”). The Employee was dismissed from employment on February 1, 2017, based upon charges contained in a letter to the Employee dated the same. This matter was assigned to Administrative Law Judge Randy C. Sallé and a hearing was held on May 23, 2017. The Administrative Law Judge’s Recommended Order is now before the Board for consideration.

DOT charges that the Employee violated DOT’s Alcohol and Drug Policy, which provides in part: Drug Testing Policy III.A.(a)(1)- (First Positive Alcohol or Drug Test—the “[e]mployee will receive a 14-calendar day suspension and will be required to participate in an EAP or other program ordered by a Substance Abuse Professional, if applicable. Stiffer disciplinary action may be imposed for violating general work rules, policies, procedures, and/or any previous disciplinary actions taken against the employee.”)

A review of the Employee’s recent work history shows: Two (2) Written Counseling sessions between December 2009 and October 2014 for a need to improve work habits, save leave time, and absenteeism; two (2) Written

Warnings between February 2015 and December 2016 for insubordination, poor housekeeping, and violations of a specific department rule; two (2) Written Reprimands between July 2008 and January 2016 for sleeping on the job, violating anti-idling rules, improper use of a State cell phone, and absenteeism; and one (1) five-day Suspension in February 2016 for insubordination, walking off the job, and disruptive behavior.

On or about December 13, 2016, the Employee was included on a list of names of DOT employees to be randomly drug tested in the Tuscaloosa Area. The Employee was required to submit to periodic random drug screenings to maintain his Commercial Driver's License ("CDL"). The Employee's Supervisor was present at the test site.

The Supervisor testified that the Employee expressed a concern he would not be able to participate in the drug testing that morning. The Employee was asked if there was any reason he could not participate in the testing. The Employee asked whether a current medical condition would excuse him from testing. The Employee was advised that if he had a doctor's order or could get a doctor's order excusing him from testing. The Employee could not produce a document to excuse him from the drug testing. The Employee was advised that if he failed to submit to the drug test then DOT would treat this as though he tested positive. The Employee agreed to submit to testing that morning.

The Employee was one of the last to be tested that morning. The Employee had the test procedure explained to him and the fill line on the specimen bottle was pointed out to him. The Employee then went to the restroom and returned a short time later. Upon his return, the specimen was evaluated and found that it did not indicate a temperature that was within the required range. The Employee was then told he would need to submit a second specimen to be tested.

The Employee declined to submit a second sample. The Employee contended he had just used the restroom and had nothing else in his system. It was further explained to the Employee that since his first sample tested outside the temperature range, standard procedure required that he be observed by a technician or an ALDOT supervisor as he produced the sample. The Employee declined to allow the Supervisor observe him providing the sample. The Employee was further advised that if he did not provide a second sample, this result would be treated as an automatic report of positive, the Employee continued to decline.

In the present case, DOT presented sufficient evidence warranting the Employee's dismissal. The Employee refused to submit a second specimen after his initial specimen's temperature was irregular. Pursuant to DOT's Alcohol and Drug Policy, discipline is warranted for an employee for "[r]efusing to or impairing participation in an alcohol and/or controlled substance process." The discipline for a first-time offense contemplates a 14-

calendar day suspension; however, the rule permits a stiffer penalty considering prior disciplinary action taken against the employee. Johnson's disciplinary history is abysmal. The Employee had progressive discipline imposed on him up to and including a 5-day suspension earlier in 2016. The Employee's staunch refusal to submit a second specimen on December 13, 2016, is analogous to his prior discipline which included insubordination and disruptive conduct.

The Administrative Law Judge found the totality of the evidence does warrant dismissal in this cause and recommended that the Employee's dismissal be upheld. The Board hereby adopts by reference the findings of fact and conclusions of law as found by the Administrative Law Judge as a part of this Order as if fully set forth herein.

The Board has carefully considered the Administrative Law Judge's Recommended Order and is of the opinion that the decision of the appointing authority to dismiss the Employee is supported by the evidence and that the termination is warranted.

It is therefore the Order of this Board that the decision of the appointing authority to dismiss the Employee is hereby affirmed.

  
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JACKIE GRAHAM  
SECRETARY

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JOE N. DICKSON  
CHAIRMAN

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FAYE NELSON  
MEMBER

*Liane Kelly*

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LIANE KELLY  
MEMBER

*Myron Penn*

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MYRON PENN  
MEMBER

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*Evan M Thornton*

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EVAN M. THORNTON  
MEMBER