

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

DUSTIN JOHNSON,)	
)	
Appellant,)	
)	
v.)	CASE NO. 17-12-RCS
)	
ALABAMA DEPARTMENT OF TRANSPORTATION,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This Recommended Order arises from an employment termination action by the Alabama Department of Transportation (hereinafter "DOT"). DOT terminated the employment of Dustin Johnson (hereinafter "Johnson" or "employee") after he refused to give a second urine sample during a random, routine drug test. The evidence presented by DOT during the hearing showed that more probably than not, Johnson violated DOT rules and policies, and DOT's decision to dismiss Johnson was within its authority.

A hearing was held on May 23, 2017, at the DOT West Central Region Office in Tuscaloosa, Alabama. G. Robert Prescott, Esq., appeared as counsel on behalf of DOT. Adam P. Morel, Esq., appeared as counsel on behalf of Johnson.

At the beginning of the hearing, DOT introduced into evidence seven exhibits consecutively marked as DOT Exhibits 1-7. Johnson introduced into evidence five

exhibits consecutively marked as Employee Exhibits 1-5. The undersigned informed the parties that Johnson's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOT called the following individuals as witnesses:

(1) Edgar Reynolds, Drug Tester for Behavioral Health Systems/Safety First;

(2) Sam Martin, DOT Statewide Safety Coordinator;

(3) David Hand, DOT Operations Engineer for the Tuscaloosa Area; and

(4) J. D. Bonner, DOT Superintendent for District 2.

Johnson did not call any witnesses and did not testify during the hearing.

I. PROCEDURAL HISTORY AND CHARGES

DOT hired Johnson in June 2004 as a Laborer. Johnson's classification was changed from Laborer to Highway Maintenance Technician I in 2005. Johnson's classification was changed again in 2007 from Transportation Maintenance Technician I to Transportation Worker. In December 2008, Johnson was promoted to Transportation Maintenance Technician. In February 2009, Johnson's probationary period was extended to permit him time to obtain his Commercial Driver License ("CDL"). In December 2013, John was promoted to Transportation Maintenance Technician II. Johnson remained in that classification until his

dismissal on February 1, 2017. See February 1, 2017 termination letter signed by DOT Director John R. Cooper (“Cooper”), which states, in part:¹

A pre-dismissal conference was scheduled for you on Monday, January 9, 2017, however at your request the pre-dismissal conference was rescheduled for Tuesday, January 17, 2017. Present at the conference were Mr. David Hand and you. During this time, you were provided an opportunity to present any relevant information regarding your proposed dismissal, and you thus provided an oral response to the reasons for your dismissal. After considering your response, I have concluded that your dismissal is warranted.

Consequently, for the reasons stated below, you are hereby notified of your dismissal from the Alabama Department of Transportation effective at the close of business, Wednesday, February 1, 2017.

On December 13, 2016, you submitted a urine sample for a random drug test that showed irregularities. You were asked to submit an additional sample to be obtained while under supervision of the test administrator, and you refused to submit this sample for testing. Your actions represented a failure to comply with the Alabama Department of Transportation’s Alcohol and Drug Policy.

Your actions constitute violations of the following rules and policies:

- Violation of Alabama Department of Transportation Alcohol and Drug Policy.

...

Johnson timely appealed his dismissal to the State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). On May 23, 2017, the undersigned conducted

¹ See DOT Exhibit 3.

a *de novo* hearing (“the 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.²

A. Employee’s Personnel File³

Johnson’s annual performance appraisals while at DOT reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
04/16	6.3	Does Not Meet Standards
04/15	26.0	Meets Standards
06/14	24.0	Meets Standards
04/13	28.0	Meets Standards
04/12	27.1	Meets Standards
04/11	27.1	Meets Standards
04/10	25.0	Meets Standards
06/09	27.5	Meets Standards
03/09	18.9	Meets Standards
09/08	18.7	Meets Standards
09/07	25.7	Meets Standards
09/06	27.1	Meets Standards
10/05	20.0	Meets Standards
06/05	21.4	Meets Standards

² 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.

³ See generally State Personnel Board Rule 670-X-18-.02(5) (employee’s work record, including performance and disciplinary history, considered in dismissing employee).

Johnson's prior disciplinary history at DOT includes the following disciplinary actions:

- Written Warning on December 10, 2016 for violation of specific department rule.
- 5-day Suspension on February 22, 2016 for insubordination; leaving before end of shift/walking off job; and disruptive conduct.
- Written Reprimand on January 5, 2016 for absenteeism.
- Written Warning on February 12, 2015 for insubordination and poor housekeeping.
- Written Counseling on October 1, 2014 for absenteeism.
- Written Counseling on December 8, 2009 for a need to improve work habits and save leave time.
- Written Reprimand on July 14, 2008 for sleeping on the job; violating anti-idling [rules]; and improper use of State cell phone.

B. DOT Policies and Rules Forming the Basis of the Charges

DOT's Alcohol and Drug Policy provides, in part:

...

III. DRUG TESTING PUNISHMENT

A. Discipline Only for Positive Test Results

Any employee who commits any offense listed below will be subject to disciplinary action, up to and including termination of employment:

- a. A confirmed positive alcohol (0.04 or greater on breath alcohol test) and/or controlled substance test.

...

1. First Positive Alcohol or Drug Test

Employee will receive a 14-calendar day suspension and will be required to participate in an

EAP or other program ordered by an SAP [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.

...

C. Facts Forming the Basis of Dismissal

On or about December 13, 2016, Johnson was included on a list of names of DOT employees to be randomly drug tested in the Tuscaloosa Area. Johnson was required to submit to periodic random drug screenings to maintain his CDL. Johnson's supervisor, J. D. Bonner ("Bonner"), was present at the test site as well as Edgar Reynolds ("Reynolds"). Reynolds worked for a company hired by Behavioral Health Systems and was responsible for conducting the random drug tests. Also present at the test site was DOT Safety Coordinator Sam Martin ("Martin"). Martin had a meeting scheduled in the Tuscaloosa Area later that morning and took the opportunity to observe the drug test. Martin testified he initially sat in his car to observe the employees arriving at the site to gauge their reactions to the presence of the drug tester's automobile. Martin also testified he randomly attends drug tests to observe the drug tester, the process, and the employees.

While Martin was at the test site, Johnson's supervisor, Bonner, approached Martin and told him that Johnson expressed a concern he would not be able to

participate in the drug testing that morning. Martin asked Bonner if Johnson wanted to speak with him and Bonner indicated Johnson did. Martin and Johnson met in a side room. Martin testified he asked Johnson if there was any reason he could not participate in the testing. Johnson asked whether a current medical condition would excuse him from testing. Martin asked Johnson if he had a doctor's order or could get a doctor's order excusing him from testing. Johnson could not produce such a document. Martin warned Johnson that if Johnson failed to submit to the test then DOT would treat Johnson as though he tested positive. Johnson agreed to submit to testing that morning. Following his meeting with Johnson, Martin left the test site to attend a meeting elsewhere in Tuscaloosa.

Reynolds testified Johnson was one of the last employees tested that morning. Reynolds explained the testing procedure to Johnson and gave him a specimen bottle. After Reynolds showed Johnson the fill line, Johnson went into the restroom. A short time later, Johnson returned with his sample bottle and gave it to Reynolds. Reynolds testified the bottle felt hot to the touch. Reynolds looked at the temperature strip on the side of the bottle and it did not indicate a temperature. Reynolds testified that when a specimen bottle does not show a temperature then the sample is either too hot or too cold. Reynolds reasoned that since the bottle was hot to the touch, the temperature was too hot to register on the temperature strip. Reynolds told Johnson

he needed to provide another sample since the first sample tested out of the appropriate temperature range.

Johnson declined to give a second sample since he just went to the restroom and contended he did not have anything else in his system. Reynolds explained to Johnson that he needed to submit a second sample since his first sample was outside the normal temperature range. Reynolds also explained to Johnson that since the first sample had an irregular temperature, policy dictated that Reynolds had to observe Johnson provide the second sample. Johnson refused to allow Reynolds to observe him providing a second sample. Reynolds told Johnson that if he did not submit a second sample, his result would be treated as a positive and he could be subjected to discipline. Johnson still refused.

Once Reynolds determined Johnson was steadfast not to provide a second sample, Reynolds called Martin and advised him of the situation. Martin asked what protocol dictated and Reynolds told him that Johnson had to give a second sample under observation. Martin encouraged Johnson to give a second sample. Martin also spoke with Reynolds and Bonner by phone and encouraged them to work with Johnson within the rules to get him to provide another sample. Reynolds and Martin also discussed that if Johnson was insecure giving a second sample under Reynolds's observation, a DOT supervisor could observe instead.

Johnson went outside to smoke with his father as he contemplated his options. Johnson's father is a former DOT employee who worked in the Tuscaloosa Area. Johnson's father offered to observe Johnson give the second sample. Reynolds told him that would be a conflict of interest. Reynolds testified that Johnson's father told him, "[i]f you have to watch him naked, then you have to be naked also." Reynolds informed Johnson's father that his stipulation was not policy. Ultimately, Johnson refused to give a second sample under observation. Bonner even offered to serve as the observer, but Johnson still refused. Reynolds testified that testing ends three hours after it begins. At 10:30 a.m., after Johnson remained steadfast in his decision not to submit a second sample, Reynolds concluded the site testing, collected his materials and left the premises.

Reynolds called Martin later in the day to inform him of Johnson's failure to submit a second specimen sample. On December 20, 2016, Martin informed James Brown ("Brown"), DOT West Central Region Engineer, *via* written memorandum, of Johnson's positive test result for failure to test.⁴ Martin informed Brown in the memorandum that Brown should refer to DOT's Alcohol and Drug Policy for recommended disciplinary action. That same date, Martin wrote a letter to Johnson informing him of his violation of DOT's Alcohol and Drug Policy. Martin informed Johnson that he could no longer perform any duties that required a CDL until he

⁴ See DOT Exhibit 7, p. 244.

completed a substance abuse evaluation by a qualified professional. Martin informed Johnson that after he completed the required treatment, Johnson would be scheduled for a Return to Duty Drug and Alcohol Test.⁵

Also on December 20, 2016, Kevin Williamson (“Williamson”), DOT District 52 Administrator, recommended Johnson’s dismissal from State service by letter to the DOT Tuscaloosa Area Maintenance Engineer, Shane Trippany (“Trippany”).⁶ Both Williamson and Trippany were in Johnson’s chain of command. Williamson based his recommendation on Johnson’s refusal to submit a second specimen sample during the December 13, 2016 drug test giving consideration to Johnson’s prior disciplinary history. The recommendation was approved and forwarded to David Hand (“Hand”), DOT Area Operations Engineer for the Tuscaloosa Area. Hand conducted a pre-dismissal conference with Johnson on or about January 17, 2017. Following the conference, Hand recommended Johnson’s dismissal to Cooper.

Johnson did not testify at the hearing, but rather argued that: (1) Reynolds failed to notate the temperature on the Federal Drug Testing Custody and Control Form (“CCF”); (2) Martin’s December 20, 2016 letter indicated if he completed the required drug and alcohol treatment he would be scheduled for a return to duty test;

⁵ See DOT Exhibit 7, pp. 245-246.

⁶ See DOT Exhibit 6.

and (3) other employees who had a positive test result were permitted to return to work after they completed a treatment program.

Reynolds testified he did not place a temperature on the CCF because ultimately, he did not have a specimen. The first specimen tested out of the temperature range. Step 2 of the CCF reads, in part, “Temperature between 90° and 100° F? Yes No, Enter Remark.”⁷ Reynolds did not mark the box “Yes” or “No,” but he did write a remark that appears to read, “10:27 a.m. Donor refused to test, didn’t want to be observed.” Martin testified the box “No” should have been marked; however, he contended he relied on Reynolds and did not see the CCF.

Johnson argued the December 20, 2016 letter he received from Martin indicated he would be permitted to return to work if he completed treatment.⁸ The letter is not quite that clear. The letter outlined Johnson’s rule violation and explained his CDL job responsibilities were suspended until he completed a treatment program. While the letter does mention a return to work drug test, Martin testified that his communication with employees is based upon the area he oversees, safety, and not discipline. Martin testified he has no say regarding discipline and did not have the authority to recommend any discipline in this matter. Furthermore,

⁷ See DOT Exhibit 7, p. 248.

⁸ See Employee Exhibit 1, p. 245.

nothing in Martin's letter absolves Johnson of discipline regarding his failure to submit a second sample.

Johnson argued he was disciplined differently than two other DOT employees who also failed one drug test. On cross-examination, Bonner testified that two DOT employees, Bradley Junkins ("Junkins") and Mark Lee ("Lee"), both failed a drug test and, after completing treatment, were allowed to return to work following a suspension. Johnson argues that his refusal to submit a sample was his first "positive" drug result and he should be given a suspension and allowed to return to work following treatment. Bonner testified he did not know the disciplinary history of Junkins or Lee.

ISSUE

Did DOT produce sufficient evidence to warrant Johnson's dismissal?

III. 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).⁹

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. 1997, 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).¹⁰

⁹ 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).

¹⁰ 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.

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).

In the present case, DOT presented sufficient evidence warranting Johnson’s dismissal. Johnson 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.”¹¹ 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.¹² Johnson’s disciplinary history is abysmal. Johnson had progressive discipline imposed on him up to and including a 5-day suspension earlier in 2016. Johnson’s staunch refusal to submit a second specimen on December 13, 2016, is analogous to his prior discipline which included insubordination and disruptive conduct.

¹¹ See DOT Exhibit 5, p. 213, DOT Alcohol and Drug Policy, III.A.b.

¹² See DOT Exhibit 5, p. 213, DOT Alcohol and Drug Policy, III.A.1.

Based upon a totality of the evidence, Johnson violated DOT's Alcohol and Drug Policy and dismissal from State service is appropriate.

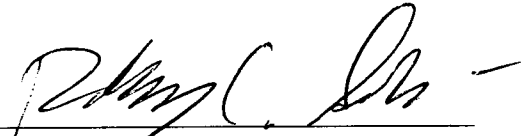
The undersigned has carefully considered mitigation in this case. Reynolds should have marked the "No" box on the CCF; however, he credibly testified that Johnson's first sample was irregular. Failing to mark the appropriate box did not dispute the temperature of Johnson's first sample. Furthermore, Martin's December 20, 2016 letter was not in contradiction with Williamson's December 20, 2016 recommendation for Johnson's dismissal. Martin's focus was safety and Williamson's focus was discipline. The two DOT employees were communicating their ideas within their respective responsibilities. Martin had no say over discipline; therefore, Johnson was still subject to whatever discipline his supervisors believed was appropriate.

Finally, Johnson offered two employees as comparators, Junkins and Lee. Johnson had a lengthy disciplinary history of progressive discipline, up to and including a 2016 suspension. There is no evidence that Junkins and/or Lee had prior discipline. There is insufficient evidence to prove that Junkins and Lee were valid comparators or that they were treated more favorably than Johnson based upon prior discipline.

The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal. 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 17th day of July, 2017.



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