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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF ROBESON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 OSP 01175

Joe T Locklear Petitioner, v. North Carolina Department of Public Safety Respondent.	**AMENDED FINAL DECISION**

Michael C. Byrne, Administrative Law Judge, heard this contested case on January 31, 2022, in Fayetteville, North Carolina.

APPEARANCES

Mr. J. Michael McGuinness
The McGuinness Law Firm
Post Office Box 952
Elizabethtown, North Carolina 28337-0952
Attorney for Petitioner

Ms. Bettina J. Roberts
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
Attorney for Respondent

WITNESSES

For Petitioner:

Joe T. Locklear (Petitioner)

For Respondent:

Sgt. Philip Collins
Lt. Brett Snotherly
Lt. Col. Jeff Gordon (retired)

EXHIBITS

Petitioner's exhibits ("Pet. Ex.") 1, 2, 3, and 4.

Respondent's exhibits ("Res. Ex.") 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 23, 24, 28, 29, 32, 33, 34, and 39.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner Joe T. Locklear. Respondent's party representative was First Sergeant Thomas Van Dyke.

ISSUE

Whether Respondent had just cause to dismiss Petitioner, a career status State employee, from the North Carolina Highway Patrol.

BURDEN OF PROOF

The burden of proof was on Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct. N.C.G.S. 126-34.02; N.C.G.S. 126-35; N.C.G.S. 150B-25.1.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, including documents admitted into evidence, the Tribunal makes the following **FINDINGS OF FACT**. In making the findings of fact, the Tribunal has weighed all the admissible evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know, or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in this contested case.

FINDINGS OF FACT

Parties and Witnesses

1. Petitioner Joe Travis Locklear ("Petitioner"), prior to his termination, was a Master Trooper with the North Carolina Highway Patrol ("Highway Patrol"), which is a part of Respondent North Carolina Department of Public Safety ("Respondent" or "Highway Patrol," as appropriate). Petitioner was a credible witness unless otherwise described.

2. Sergeant Philip Collins ("Sgt. Collins") is a Sergeant with the Highway Patrol. T. 24. He has served in the Highway Patrol since 1997. Id. Sgt. Collins is a "district first line supervisor" managing eight to ten troopers in a district. Id. He has known Petitioner for more than

ten years. T. 29. At the time of the incidents giving rise to this case, Sgt. Collins was Petitioner's direct supervisor. T. 25. Sgt. Collins was a credible witness unless otherwise described.

3. Lieutenant Brett Snotherly ("Lt. Snotherly") has worked for the Highway Patrol since 2000. T. 32. As of August 2020, Lt. Snotherly was assigned to the Internal Affairs Unit. T. 32. Lt. Snotherly was a credible witness unless otherwise described.

4. Lt. Col. Jeff Gordon ("Col. Gordon") is the recently retired Deputy Commander of the Highway Patrol. T. 54. He was employed by the Patrol for 28 years. He oversaw the Internal Affairs section. Id. Lt. Col. Gordon recommended Petitioner's dismissal. (Res. Ex. 14); T. 58. Lt. Col. Gordon was present at Petitioner's pre-disciplinary conference. T. 58-59. Lt. Col. Gordon was a credible witness unless otherwise described.

Petitioner's Work History and Performance

5. Petitioner was born in 1974 and was 47 years old at the time of hearing. T. 77. Petitioner grew up in Robeson County, North Carolina and is a lifelong resident. At the time of the incidents giving rise to this contested case, Petitioner worked in the Robeson County area.

6. Petitioner began employment as a State Trooper on May 31, 2006. T. 78. Petitioner served with the Highway Patrol for over thirteen years until his termination on October 30, 2020. Id. Petitioner was promoted to Master Trooper. Id. Petitioner also served in the Motor Carrier Division. T. 79. Petitioner enjoyed his service as a Trooper. T. 80.

7. Prior to the incidents in this case, the Highway Patrol had never charged Petitioner with any untruthfulness. T. 99.

8. Prior to the incidents in this case, Petitioner never received any disciplinary action from the Highway Patrol. T. 81.

9. Petitioner received annual performance reviews. Sgt. Collins testified that Petitioner had earned a good personnel record and that he (Collins) had found that to be true as Petitioner's supervisor. T. 30.

10. Petitioner's performance reviews for the three years prior to his dismissal (2016-2019) are in evidence. (Pet. Ex. 2). Petitioner has no individual or overall performance rating less than "meets expectations." Id. "Meets expectations" job performance is: "An employee performing at this level is dependable and makes valuable contributions to the organization. His/her judgments are sound, and he/she demonstrates knowledge and mastery of duties and responsibilities." (Id.)

11. Specific observations in the performance reviews include: Petitioner "exceeds expectations" on ethics and integrity. See Pet. Ex. 2, pages 215 and 216 (Bates stamp numbering) He is an "asset" to the Patrol. Id. at 218. He represents the Patrol "very well." Id. at 219. He sets a good example for others. Id. at 223, 228, 224, 236. He has a good work ethic. Id. at 224, 232. He has commendable "professionalism and leadership." Id. at 256, 259, 263.

12. Petitioner's performance evaluations state, repeatedly, that he "aggressively" enforces North Carolina's motor vehicle laws (Id. at 239, 240, 253, 258) and that he uses "his knowledge of motor vehicle laws" for "issuing citations for clear-cut and substantial violations" while issuing warnings for "lesser offenses." Id. at 239, 250, 253, 257, 260.

13. Petitioner's performance reviews, even the limited three-year sample produced, feature positive ratings by multiple supervisors. Petitioner's 2016-2017 review is by Horace Smith (Direct Supervisor) and Timothy Daniels (Indirect Supervisor). Id. at 205. Petitioner's 2017-2018 review is by Emery Brown (Direct Supervisor) and Steven Kirby (Indirect Supervisor). Petitioner's 2018-2019 review is by Horace Smith (Direct Supervisor) and John Bobbit (Indirect Supervisor). Thus, a variety of Highway Patrol managers praised and commended Petitioner's performance as a State Trooper.

14. Petitioner's work history also shows various awards and commendations for meritorious performance, including an award from Mothers Against Drunk Driving ("MADD"). T. 82.

Specific Incidents Leading to Dismissal

15. On or about August 20, 2020, at approximately 2:30 p.m., Petitioner was on routine patrol traveling east on NC 72. T. 21-23. Petitioner noticed a tan vehicle. The driver of the tan vehicle was not wearing a seat belt, and the passenger appeared to be drinking a Bud Lite beer. Id.

16. Petitioner activated his blue lights and pulled alongside of the tan vehicle. After stopping the vehicle, Petitioner noticed that the driver had put on his seat belt. T. 21-23; 83.

17. Petitioner did not exit his patrol vehicle or otherwise conduct a formal traffic stop. Petitioner visually determined that the passenger who appeared to be drinking a Bud Lite was in fact drinking a Red Bull, which is non-alcoholic energy drink. T. 21-23; 85.

18. Sgt. Collins testified credibly that the proper procedure for a traffic stop was:

> A trooper would activate the blue lights for – after observing a traffic violation. The trooper would activate his blue lights, siren if needed. The vehicle usually would pull to the right shoulder of the road. The trooper would stop behind him, exit his patrol vehicle, walk up to the suspect vehicle, identify himself, state a reason that he stopped them, ask for driver's license, registration, things of that nature.

T. 25.

19. Per Sgt. Collins, a trooper would not properly conduct a stop without exiting his patrol vehicle. Id. However, Sgt. Collins also testified that there was nothing inappropriate in Petitioner giving a verbal warning to the driver about the seat belt violation. T. 29. Further, Sgt. Collins confirmed that State Troopers may exercise discretion and give verbal or written warnings in lieu of a formal citation. T. 29.

20. Although Petitioner had observed the driver without a seat belt, Petitioner did not issue a citation to the driver. "I was not going to take any enforcement action because they were in compliance in my opinion." T. 84. Both the driver and the passenger were polite and cooperative. T. 21-23; 85. Petitioner gave the driver, Cornelius Callahan ("Callahan"), and the passenger a verbal warning and allowed them to leave. Id.

21. On or about August 20, 2020, after allowing Callahan to drive away, Petitioner turned the vehicle around and traveled westbound on Melinda Road. Petitioner noticed a small camouflage bag in the ditch line. T. 87. Petitioner stopped his car and did a cursory examination of the bag. Id. Petitioner smelled an odor of marijuana coming from the bag. T. 21-22.

22. Petitioner opened the camouflage bag and saw marijuana. He did not thoroughly investigate the contents of the bag at the time, an action he now regrets. T. 87. Petitioner believed that the bag was associated with the vehicle he had recently stopped. Id. Petitioner determined that the proper action was to take the bag, search for the vehicle, and make inquiries. Petitioner never saw the bag in the possession of either the driver or the passenger of the vehicle he had stopped. T. 87-88, 115.

23. Petitioner placed the camouflage bag into his patrol vehicle and attempted to find the vehicle he had previously stopped. T. 88-89. Failing to do so, Petitioner returned to the scene where he had found the bag in the hopes that the persons would return to retrieve the bag. They did not. T. 90. By this time, Petitioner was close to the end of his shift. Id.

24. Eventually, Petitioner decided to leave the scene. Instead of retaining the bag, searching it, and bringing it back to be logged as evidence, Petitioner threw the camouflage bag with the marijuana into the woods. T. 90. Petitioner acknowledges that submitting the bag to the Patrol station to be logged as evidence would have been the correct course of action. T. 90. He did not remove anything from the bag. T. 90.

25. Petitioner explained his actions with the bag to the Tribunal as, "My mindset was I didn't have anyone to charge. I assumed it was Mr. Callahan's, but I wasn't for sure it was." T. 113. Petitioner continued: "Was I wrong? Yes sir. Should I have put it in safekeeping and take it back to the office? Yes sir; I should have." T. 113.

26. Between 7:30 p.m. and 7:45 p.m. on August 20, 2020, Callahan called in a citizen complaint related to Petitioner's stop of Callahan's vehicle. (Res. Ex. 3, p. 1). In this complaint, Callahan alleged, falsely, that the "cop" who stopped him had "stolen" his bag. T. 92.

27. Sgt. Collins contacted Callahan by telephone about Callahan's citizen complaint. Id. Callahan informed Sgt. Collins that Callahan had thrown his bag from his vehicle when Callahan noticed Petitioner's patrol vehicle. (Id. at pp. 1-2; Res. Ex. 7, p. 1). It is important to note that according to Sgt. Collins' interview, Callahan at the time of his complaint *specifically told Sgt. Collins that his bag contained marijuana* (Res. Ex. 3, bates stamp 573).

28. In short, this case presents a fact pattern where a citizen called the Highway Patrol to complain that a trooper had stolen his bag of illegal drugs.

29. Callahan also told Sgt. Collins that after the traffic stop, Callahan observed Petitioner activate his blue lights and pull to the side of the road where Callahan had thrown his bag of illegal drugs. (Res. Ex. 3, p. 2; Res. Ex. 7, p. 1). Callahan eventually returned to the location where Callahan had thrown out his bag of drugs but found that the bag was no longer there. (Res. Ex. 7, p. 2). Callahan did not testify. His statements are taken from his interview and per corroboration from Patrol witnesses. Callahan's statements are given appropriate weight under N.C.G.S. 150-29.

30. Sgt. Collins sent a text message to the troopers who had been on duty that day to see who had stopped Callahan's vehicle. Petitioner truthfully responded that he was the trooper who stopped Callahan's vehicle. (Res. Ex. 3, p. 4; Res. Ex. 5, p. 14; T. pp. 90-91).

31. Sgt. Collins asked Petitioner what happened, and Petitioner described the traffic stop. Petitioner initially said nothing about Callahan's bag. (Res. Ex. 3, p. 4; Res. Ex. 5, pp. 14-17).

32. Sgt. Collins asked Petitioner, "Anything else happen?" Petitioner said "No, sir." Sgt. Collins asked again "Nothing unusual, other than that, Joe?" Petitioner said "No, nothing." (Res. Ex. 3, p. 4).

33. When Sgt. Collins informed Petitioner that Callahan had alleged Petitioner had stolen his bag, Petitioner was, "scared, got scared, panic, because I'm thinking, I know I didn't steal a bag." T. 92.

34. Petitioner told Sgt. Collins that he (Petitioner) had not picked up the bag. Petitioner also told Sgt. Collins "I didn't even get out of the car." (Id.; Res. Ex. 5, pp. 16-17). Petitioner's claim that he had not taken the bag was untruthful. Petitioner at the hearing stated that he had "panicked" and become "scared" over the (false) allegation that he had stolen property from a citizen. T. 92. Petitioner now wishes that he had been immediately forthcoming as opposed to being untruthful regarding his actions involving the bag. Id.

35. After the telephone conversation with Sgt. Collins, at approximately 10:00 p.m., Petitioner went to the home of a resident who lived near the scene of the traffic stop. Petitioner asked the resident to allow Petitioner to review his security camera footage, but the resident told Petitioner that his cameras do not record and store video footage. (T. 21-23); (Res. Ex. 5, pp. 22-26; Res. Ex. 8; Res. Ex. 39). The resident did not testify. His statements are hearsay.

36. The following day, August 21, 2020, at approximately 6:00 a.m., at Sgt. Collins' direction, Petitioner met Sgt. Collins at the scene of the traffic stop and walked Sgt. Collins through what happened on the previous day. Petitioner and Sgt. Collins also searched for the bag. (Res. Ex. 3, pp. 8-13; Res. Ex. 5, pp. 27-35; Res. Ex. 11; Res. Ex. 39, ¶¶ 19-20, 22).

37. Petitioner found the bag where he had thrown it the day before but implied to Sgt. Collins that this was the first time that he had seen the bag. T. 21-23. This representation was untruthful; Petitioner had seen the bag, and handled the bag, on the previous day.

38. Sgt. Collins instructed Petitioner to prepare a statement about the incident. (Res. Ex. 3, p. 13) (Pet. Ex. 4); T. 94. Sgt. Collins retained possession of the bag. Despite Callahan (per Sgt. Collins' interview) having previously told Sgt. Collins that his bag contained marijuana (Res. Ex. 3, 573), there is no evidence that Sgt. Collins contacted Callahan to return and pick up his "stolen" bag of marijuana and then place him under arrest. T. 117.

The Internal Investigation

39. Upon further inspection, Callahan's bag contained an amount of marijuana sufficient to constitute a felony if a person was convicted of its possession. The bag also included drug paraphernalia (a grinder and digital scales). The bag also contained some quantity of cash, as well as some miscellaneous (not illegal) items. T. 52-53

40. As Sgt. Collins was logging the bag and contents into evidence, he received a call from Major William A. Hook, Director of Professional Standards for the Highway Patrol ("Major Hook"). Major Hook did not testify at the contested case hearing. Major Hook ordered Sgt. Collins to bring Petitioner to Raleigh for interview by Internal Affairs.

41. During their travel to Raleigh, Sgt. Collins advised Petitioner to tell the truth about the bag incident to Internal Affairs. T. 97.

42. In Petitioner's first interview with Internal Affairs, Petitioner admitted being untruthful to Sgt. Collins as described above. (Resp. Ex. 5, pp. 36, 38-39). There is no evidence that Petitioner did anything to hinder or interfere with the Internal Affairs investigation or made any untruthful or misleading statements during the Internal Affairs investigation. Respondent at no time charged Petitioner with any untruthfulness regarding his Internal Affairs interview or the written "Member Statement" he submitted in that process. T. 98.

43. Petitioner admits he "made several mistakes" involving this incident. T. 98. One mistake was initially discarding the bag of marijuana. Id. Another was being untruthful with Sgt. Collins. T. 98-99. Petitioner admits his actions were wrong, and "[i]f I had to go over with it, I would do things totally different." T. 99.

44. Petitioner regrets his actions. "There's not a day that don't go by that I don't think about different outcomes if I had done things different." T. 99. Petitioner admits that truthfulness is a "very important" matter for law enforcement officers.

45. Lt. Snotherly was the lead officer in the Internal Affairs investigation of Petitioner.

46. In the Internal Affairs investigation, Lt. Snotherly and First Sergeant Thomas Van Dyke ("Sgt. Van Dyke") interviewed Petitioner, Callahan, and a Mr. Parnell, who owned the home with the video cameras that Petitioner visited in the course of the incidents of August 20-21. T. 35. Petitioner's interview was admitted as Res. Ex. 6. Callahan's interview was admitted as Res. Ex. 7. Parnell's interview was admitted as Res. Ex. 8. Callahan did not testify at the contested case hearing. T. 35.

47. During his interview with Lt. Snotherly, Callahan admitted he threw his bag of marijuana out the window when he realized he had been seen by Petitioner to be not wearing a seat belt. (Res. Ex. 7, p. 1).

48. During his interview, Lt. Snotherly asked Callahan whether he believed Petitioner had seen him throw the bag out the window of his vehicle. Callahan replied, "No, sir." (Res. Ex. 7, p. 4).

49. During his interview with Lt. Snotherly, Callahan admitted that "the large amount of marijuana" found in the bag was, in fact, his. T. 40:

> It was **some grass, a couple of ounces**, my gold, my stimulus check money, umm, bag of chips, a charger cord and I'm not sure for what else.

(Res. Ex. 7, p. 4) (emphasis supplied). Following this admission, Lt. Snotherly and Sgt. Van Dyke did not arrest Callahan, nor was there any evidence at the contested case hearing that the admission was turned over to the District Attorney or other law enforcement organizations. The interview at no point contains any law enforcement representative promising or implying to Callahan that he would have immunity from prosecution for any statements he made.

50. At a later point in the interview, Callahan again admitted that the marijuana in the bag was his, and that there was "about five ounces" of it. Id. at 562. Lt. Snotherly, after an apparent attempt to discern how much that was in pounds, stated, "I'm not good on drugs and stuff." Id. at 563. Neither officer hearing this second admission, concerning marijuana that was in the Highway Patrol's possession, initiated any enforcement action.

51. Callahan then admitted a third time that the marijuana was his, and that "[i]t was a nice bag" of "about four or five ounces." Id. at 563. Callahan stated that the street value of the marijuana was "about a thousand [dollars]." Once again, neither Highway Patrol officer initiated any law enforcement action. Following Callahan's admission as to the value of his marijuana, the interview terminated. Id. at 564.

52. Lt. Snotherly knew that Callahan's bag contained approximately 207 grams of marijuana, and also knew that possession of more than 42 and ½ grams of marijuana "is considered a felony." T. 71.

53. There is no evidence that Lt. Snotherly's repeated lack of enforcement action on Callahan's marijuana, despite Callahan's repeated admissions, drew attention from anyone in the Highway Patrol.

54. Callahan claimed in his interview that he was subsequently close enough to Petitioner's car to see Petitioner stop in the vicinity of where Petitioner picked up Callahan's bag of marijuana. (Res. Ex. 7, 553). He did not see Petitioner pick up the bag. Id. at 553-554. Callahan does not state, despite his supposedly being close enough to Petitioner to see him, why he then did not approach Petitioner regarding Callahan's supposedly missing property.

55. Following the investigation, $997 in cash, jewelry, and other items in Callahan's bag were returned to him. T. 53. The marijuana and paraphernalia were destroyed. Id. Callahan was never arrested or prosecuted. T. 40.

56. The Internal Affairs investigation resulted in a "personnel charge sheet" alleging that Petitioner violated Highway Patrol policies involving "neglect of duty," "truthfulness," and "unbecoming conduct." T. 39-40 (Res. Ex. 11).

57. The factual basis of the "neglect of duty" violation involved two issues. First, that Petitioner neglected his duty, in that he "failed to exit his patrol car during a traffic stop he initiated so he could conduct a thorough investigation of the driver and passenger as he was trained to do." (Res. Ex. 11, bates 341). Second, that he threw Callahan's bag of marijuana into the woods rather than logging it into evidence. Id.

58. The factual basis of the "truthfulness" violation also involved two issues. First, that Petitioner denied to Sgt. Collins that he had picked up Callahan's bag or taken any action with it. (Res. Ex. 11, 342). Second, that he again lied to Sgt. Collins the following morning regarding his actions with Callahan's bag. Id.

59. The "unbecoming conduct" violation also involved two issues. First, that Petitioner initially failed to tell Sgt. Collins that he had driven to Parnell's house to look at Parnell's video cameras. (Res. Ex. 11, 343). Second, that Petitioner failed to tell Sgt. Collins that he had thrown the bag into the woods the previous day and represented to Sgt. Collins the following day that Petitioner had not seen the bag before. Id.

60. The "personnel charge sheet" makes no allegation that Callahan not being charged regarding the marijuana and/or paraphernalia either was the fault of Petitioner or stemmed from Petitioner's violation of Highway Patrol policy.

61. The Tribunal discerns no evidence from the contested case hearing supporting the charge that Petitioner engaged in unbecoming conduct by initially failing to tell Sgt. Collins that he had driven to Parnell's house. The charge sheet itself states that Petitioner answered truthfully and in the affirmative on this issue the first time Sgt. Collins asked him about it. Neither Sgt. Collins nor Lt. Snotherly testified that Petitioner's initial omission of this information was in violation of Highway Patrol policy, or, if so, why.

Petitioner's Dismissal

62. Lt. Col. Gordon reviewed the results of the investigation and the recommendation of Internal Affairs and recommended, in concurrence with Internal Affairs (Res. Ex 13), that Petitioner be dismissed. (Res. Ex. 14); T. 59.

63. Petitioner attended a pre-disciplinary conference. The pre-disciplinary conference letter is Respondent's Exhibit 15. It does not state specific acts and omissions by Petitioner, but instead incorporates the allegations in the "personnel charge sheet." Id.

64. Lt. Col. Gordon held the pre-disciplinary conference with Petitioner; nothing in that conference changed his mind regarding his recommendation that Petitioner should be dismissed. T. 59.

65. Lt. Col. Gordon considered whether lesser disciplinary action than dismissal was appropriate for Petitioner. T. 67.

66. Lt. Col. Gordon considered Petitioner's performance evaluations (Pet. Ex. 2) as a part of his recommendation for Petitioner's dismissal. T. 62-63. Only the three performance reviews were considered. T. 63. No performance reviews for the previous ten years of Petitioner's work history with the Highway Patrol were retrieved, reviewed, or considered, at least by Lt. Col. Gordon. T. 66.

67. Lt. Col. Gordon concluded that "[b]ased on the severity of the incident and in the integrity of the organization as a result of these allegations, it was my opinion that the best disciplinary action was the dismissal." T. 67.

68. Lt. Col. Gordon's memorandum supporting Petitioner's dismissal states that he considered: the severity of Petitioner's violation(s); the subject matter involved; the harm resulting from the violation(s); Trooper Locklear's prior work history; and the discipline imposed in other cases involving similar violations. (Res. Ex. 17).

69. Lt. Col. Gordon did not identify in his memorandum, or in his testimony, any other disciplinary cases that he considered in reaching the decision that Petitioner should be dismissed.

70. Respondent's claims that it considered Petitioner's work history and other cases of discipline in reaching its decision are, under the evidence, not credible.

71. Lt. Col. Gordon did not testify that due to untruthfulness, Petitioner was Brady/Giglio impaired, or that any other organization, such as a District Attorney's office, had reached that conclusion. Petitioner has not received a Giglio letter. T. 101.

72. Following his dismissal, Petitioner timely initiated and completed the Highway Patrol's internal grievance process. (Res. Ex. 18-24).

73. The Colonel of the Highway Patrol, Col. Glenn McNeill, made the final decision to dismiss Petitioner. T. 64 (Res. Ex. 24). His letter sets out his reasoning. His letter also states, unlike the "personnel charge sheet," that Petitioner's actions led to Callahan not being prosecuted.

74. The evidence fails to support this allegation. No witness testified on behalf of the Robeson County District Attorney's Office that Petitioner's conduct led to Callahan's non-prosecution. Neither the "personnel charge sheet" nor the pre-disciplinary conference and dismissal letters to Petitioner reference this allegation, which appears only, in terms of written notice, in the final agency decision letter. (Res. Ex. 11, 15).

75. Col. McNeill did not testify at the contested case hearing. Accordingly, the Tribunal has no admissible, first-hand testimony from Col. McNeill on what the Patrol's final decision-maker considered in upholding Petitioner's dismissal.

76. This is notable given that Lt. Col. Gordon had no direct conversations with Col. McNeill about the matter, including any details of the investigation. T. 64-65. Col. McNeill, for his part, never explained his reasoning to Lt. Col. Gordon. T. 65. He never explained to or discussed with Lt. Col. Gordon any comparative cases he may have considered in making his final agency decision. T. 65. This included discussion of any Highway Patrol member who was disciplined for failure to get out of his car during a traffic stop.

77. At no time did Petitioner's supervisor, Sgt. Collins, testify that he had lost trust and/or confidence in Petitioner regarding the incidents for which he was dismissed, nor did any other manager or colleague of Petitioner.

On the basis of these Findings of Fact, the Tribunal makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case. N.C.G.S. 150B, Article 3; N.C.G.S. 135-48.24.

2. All parties have been correctly designated and there is no question of misjoinder or nonjoinder.

3. All parties received Notice of Hearing in accordance with N.C.G.S. 150B-23(b).

4. To the extent the Findings of Fact contain Conclusions of Law, and vice versa, they should be considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946). The Tribunal need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

5. The burden of proof is on Respondent to show just cause for dismissing Petitioner, a career status State employee subject to the North Carolina Human Resources Act, from employment with the Highway Patrol. N.C.G.S. 150B-25.1; N.C.G.S. 126-34.02; N.C.G.S. 126-35.

6. A "career State employee" is, in pertinent part:

> a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:
>
> (1) Is in a permanent position appointment; and,

(2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the State Personnel Act for the immediate 24[1] preceding months.

N.C.G.S. 126-1.1; Wetherington v. N. Carolina Dep't of Pub. Safety, 368 N.C. 583, 590-91, 780 S.E.2d 543, 547 (2015).

The Just Cause Framework: Carroll

7. Petitioner, as a career State employee, had a vested property interest conferring a reasonable expectation of continued employment created and protected by State law and further protected by the Due Process Clause of the United States Constitution, as well as Article 1, Section 19 of the Constitution of North Carolina. Peace v. Emp. Sec. Comm'n of N. Carolina, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998).

8. A career State employee subject to the North Carolina Human Resources Act may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C.G.S. 126-35(a). "Just cause" for the dismissal, suspension, or demotion of a career State employee may be established only on a showing of "unsatisfactory job performance, including grossly inefficient job performance," or "unacceptable personal conduct." Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 102-03, 798 S.E.2d 127, 134, aff'd per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017).

9. This contested case involves only allegations of "unacceptable personal conduct." (Res. Ex. 11). "Unacceptable personal conduct" is defined by rule in Title 25 of the North Carolina Administrative Code. See N. Carolina Dep't of Just. v. Eaker, 90 N.C. App. 30, 38, 367 S.E.2d 392, 398 (1988), overruled on other grounds by Batten v. N. Carolina Dep't of Correction, 326 N.C. 338, 389 S.E.2d 35 (1990) (Rules promulgated by State Personnel Commission have "force of law" in State personnel cases).

> "Unacceptable personal conduct" includes: (a) conduct for which no reasonable person should expect to receive prior warning; (b) job-related conduct which constitutes a violation of state or federal law; (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State; (d) the willful violation of known or written work rules; (e) conduct unbecoming a state employee that is detrimental to state service; (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State; (g) absence from work after all authorized leave credits and benefits have been exhausted; and/or, (h) falsification of a state application or in other employment documentation.

25 N.C.A.C. 1J .0614.

[1] Currently 12 months.

10. The fundamental question in a case brought under N.C.G.S. 126-35 is whether the disciplinary action taken was "just". Whitehurst v. E. Carolina Univ., 257 N.C. App. 938, 945, 811 S.E.2d 626, 632 (2018). Not every instance of unacceptable personal conduct will "give rise to 'just cause' for employee discipline." Id. at 945, 632.

11. Our Supreme Court emphasizes that "[j]ust cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." Thus, not every incident of conduct that constitutes a violation of State law gives rise to just cause for employee discipline. N.C. Dep't of Env't & Nat'l Res. v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900-01 (2004) (park ranger violation of State laws regarding speeding and emergency lights not just cause for disciplinary action). "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." Carroll at 669, 900.

12. Petitioner's status as a law enforcement officer, or his employment by the Highway Patrol, does not create a lower standard for his dismissal than for other State employees subject to the North Carolina Human Resources Act. Whitehurst at 948, 634. In Whitehurst, the employer cited petitioner's "status as a supervising law enforcement officer" in support of its termination decision. The Court of Appeals rejected this reasoning: "We agree that Whitehurst's position as a law enforcement officer imposed duties upon him which are not commonly shared by other State employees. Nonetheless, Whitehurst is entitled to the exacting protections given to all career State employees pursuant to N.C. Gen. Stat. § 126-35." Id. at 948, 634.

13. There is no "per se" or "automatic" dismissal of career State employees for unacceptable personal conduct under North Carolina law. In Wetherington v. N. Carolina Dep't of Pub. Safety, 368 N.C. 583, 780 S.E.2d 543 (2015) ("Wetherington I"), our State Supreme Court specifically rejected the concept of "a fixed punishment of dismissal for any violation" of a given policy. Id. at 592, 548. Such an approach is "antithetical to the flexible and equitable standard described in Carroll," as "application of an inflexible standard deprives management of discretion." Id.

14. Lack of just cause may also be established by disparate treatment of employees in disciplinary decisions. See Wetherington II and Warren II, below. Indeed, multiple cases, over many years, have rejected arbitrary and capricious personnel decisions. See, e.g., Toomer v. Garrett, 155 N.C. App. 462 (2002); Owens v. N.C. Department of Public Safety, N.C. Highway Patrol, 245 N.C. App. 230, 782 S.E.2d 787 (2016).

15. In this specific case, the "personnel charge sheet" states three alleged violations of Highway Patrol policy by Petitioner cited as "unacceptable personal conduct" violations: "Truthfulness," "Unbecoming Conduct," and "Neglect of Duty." (Res. Ex. 11; definitions Ex. 29). These implicate the following elements of the governing rule's "unacceptable personal conduct" definition: (a) conduct for which no reasonable person should expect to receive prior warning; (d) the willful violation of known or written work rules; and (e) conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 1J .0614.

16. The Tribunal discusses the established just cause framework of holdings for each of the Highway Patrol's asserted policy violations in turn.

The Just Cause Framework: Truthfulness

17. In addition to its general rejection of "automatic" dismissal, Wetherington I is of specific pertinence to this case, which involves allegations of untruthfulness by a member of the Highway Patrol. So too did Wetherington I, which held, clearly and unambiguously, that the Highway Patrol's "automatic dismissal" policy for any act of untruthfulness "was an error of law." Id. at 593, 548. The correct approach was "to allow for a range of disciplinary actions in response" to untruthfulness. Id.

18. After providing the Highway Patrol with a list of required factors in making a proper disciplinary decision, Wetherington I remanded the matter back to the Highway Patrol for reconsideration. Id. The eventual result of that reconsideration was Wetherington v. NC Dep't of Pub. Safety, 270 N.C. App. 161, 840 S.E.2d 812 review denied, stay dissolved, 374 N.C. 746, 842 S.E.2d 585 (2020) ("Wetherington II").

19. In Wetherington II, the Court of Appeals emphasized that neither it nor the Supreme Court "suggest that the Highway Patrol should tolerate and foster a reputation for lack of honesty among its personnel, but only that some instances of untruthfulness may call for some discipline short of dismissal." Id. at 746, 585 (internal citations omitted). Indeed, Wetherington II emphasized, and this Tribunal fully agrees, that "law enforcement officers must uphold the highest standards of truthfulness, particularly in the course of their official duties." Id. at 746, 585.

20. However, in line with Wetherington I, Wetherington II again held (in accord with Carroll on unacceptable personal conduct generally), that not all acts of untruthfulness by law enforcement officers justify dismissal. Id. at 161, 835 ("Respondent has never been able to articulate how this particular lie [over the manner in which the trooper lost his campaign hat] was so harmful.").

21. Wetherington I is also in accord with Carroll's holding that just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon **an examination of the facts and circumstances of each individual case**." Carroll at 649, 699, 900-01 (emphasis supplied). Proven material untruthfulness by Highway Patrol members is unacceptable personal conduct. However, not *every* incident of unacceptable personal conduct justifies dismissal. Therefore, neither does *every* incident of untruthfulness.

The Just Cause Framework: Conduct Unbecoming a State Employee

22. This case also involves allegations of "conduct unbecoming a State employee." (Res. Ex. 11). Carroll likewise addressed that issue, finding that the petitioner park ranger's "lashing out" (using unbecoming or unprofessional language) at fellow law enforcement officers did not, under the facts of that case, constitute "conduct unbecoming a state employee" that was just cause for disciplinary action. Carroll at 675, 904.

23. More specific to the Highway Patrol, the Court of Appeals in 2012 affirmed dismissal of a trooper who engaged in an adulterous relationship involving repeated sexual encounters "in his patrol car, behind his patrol car, and in the Alexander County Highway Patrol office." Poarch v. N.C. Dep't of Crime Control & Pub. Safety, 223 N.C. App. 125, 127, 741 S.E.2d 315, 317 (2012). On each occasion, the trooper was in uniform.

24. Poarch held that these repeated dalliances, featuring misuse of Highway Patrol equipment, arose to the level of "conduct unbecoming a State employee," as a member of the public witnessing these activities would assume, given the trooper was in uniform and "the use of patrol facilities is so intertwined with the acts of misconduct," that he was engaged in sexual intercourse on duty, or vice versa, "to the detriment of the Patrol's reputation." Id. at 131, 319.

25. In 2012, the Court of Appeals decided another Highway Patrol appellate case addressing "conduct unbecoming a State employee." The facts were:

> Shortly after midnight on 9 September 2007, petitioner stowed an open bottle of vodka in the trunk of his Patrol-issued vehicle and drove to a party. He could have used his personal vehicle, but he elected not to because he was concerned that he would wake his aunt (with whom he was residing at the time) in an effort to get the keys to his personal vehicle. After petitioner arrived at the party, deputies of the Nash County Sheriff's Office were called because of an altercation between two women. The deputies arrested petitioner, who had consumed a significant amount of alcohol at some point that evening, because they believed he was already impaired before driving to the party. After an investigation by Internal Affairs, the Patrol dismissed Petitioner for violating the Patrol's written policies on "conformance to laws" and "unbecoming conduct."

Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 221 N.C. App. 376, 377, 726 S.E.2d 920, 922 (2012); disc. rev. denied, 366 N.C. 408, 735 S.E.2d 175 (2012).

26. Warren found, "the evidence shows that petitioner did engage in conduct that established a violation of the Highway Patrol policy relating to unbecoming conduct. Petitioner placed an open bottle of vodka in his patrol vehicle and—through his own admission and without prior authorization—drove the vehicle to a private residence to engage in 'drinking and hanging out' while off duty." Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 267 N.C. App. 503, 507, 833 S.E.2d 633, 637 (2019). Therefore, this was unacceptable personal conduct.

27. Following a remand, the Court of Appeals again took up Trooper Warren's case in Warren v. N.C. Dep't of Crime Control & Pub. Safety/N. Carolina Highway Patrol, 267 N.C. App. 503, 833 S.E.2d 633 (2019) ("Warren II"). Warren II squarely addressed the "conduct unbecoming" aspect of Trooper Warren's actions. While again finding that these actions were "conduct unbecoming" and thus unacceptable personal conduct, Warren II determined that just cause did not exist for the trooper's dismissal. Id. at 503, 833 S.E.2d at 638.

28. A primary reason for this determination, significant in this case due to the lack of both testimony and documentary evidence about any identified prior disciplinary cases Lt. Col. Gordon and Col. McNeill considered in reaching their decision to dismiss Petitioner, was:

> Our review of the disciplinary actions [DPS] has taken for unbecoming conduct typically resulted in either: a temporary suspension without pay, a reduction in pay, or a demotion of title. In fact, **where the conduct was equally or more egregious than that of petitioner** (i.e., threats to kill another person, sexual harassment, assault), **the employee was generally subjected to disciplinary measures other than termination**.

Warren II, 267 N.C. App. 503, 509, 833 S.E.2d 633, 638 (2019) (emphasis supplied). Warren II made this determination largely based on the Wetherington factors, discussed below.

29. Like the Highway Patrol in this case, Warren II did not identify any cases it considered in reaching its conclusion regarding the Patrol's prior disparate treatment of "conduct unbecoming" disciplinary action. However, in Paul Brian Evington v. North Carolina Criminal Justice Education and Training Standard Commission, 2009 WL 4912691, 09 DOJ 3070 (November 13, 2009), the Hon. Beecher R. Gray found as facts multiple past examples of unbecoming conduct cases suggesting the same conclusion as Warren II (emphasis supplied as to disciplinary action imposed):

> Trooper "A"[2] engaged in willful sexual misconduct against a female prosecutor and a female attorney. The misconduct included physical contact, unsolicited social visits and solicitation to improperly reduce speeding charges. The female prosecutor victim felt "threatened" by Trooper A as a result of his repeated harassment. The Highway Patrol disciplined Trooper A in the form of a **two (2) day suspension**.
>
> Trooper "B" had a sexual affair. The affair was facilitated by Trooper B's multiple uses of the Highway Patrol's computers. Trooper B had a prior disciplinary history with the Highway Patrol prior to this incident. The Highway Patrol disciplined Trooper B in the form of a **demotion**.
>
> Trooper "C" engaged in sexual activities while on duty, which endangered children because he left his loaded service weapon in the vehicle following the sexual activities. Trooper C's sexual activities included multiple women. The Highway Patrol disciplined Trooper C in the form of a **five (5) day suspension**.
>
> Trooper "D" had an affair with the wife of a subordinate who served under his command. The affair occurred while Trooper D was on duty, in uniform, and operating a marked Patrol car. Trooper D would meet the woman and engage in personal conversations not related to Patrol business. Trooper D regularly utilized Patrol time, facilities, and equipment to engage in the affair. Trooper D admitted

[2] The actual names of the individuals in question appear in the Evington decision. After careful consideration, the Tribunal sees no reason to repeat them here.

the affair took him away from his duties. Trooper D placed multiple calls to the female; met her in his marked Patrol car; called her from the Internal Affairs' office; and rented a hotel room to engage in sex with her. Trooper D violated the Patrol's policy of circumventing the chain of command by going directly to the Colonel to discuss the matter. The Highway Patrol disciplined Trooper D in the form of **a demotion and transfer**.

Trooper "E" exposed his penis to a female while she exposed her breasts as they were kissing, all while Trooper E was on duty. On another occasion, a second female occupied his Patrol car for other than Patrol business. Trooper E was ordered not to discuss the matters which E violated by telephoning witnesses. The Colonel acknowledged E's actions arguably interfered with an Internal Affairs investigation. The Highway Patrol disciplined Trooper E in the form of a **three (3) day suspension**.

Trooper "F" continued an extramarital affair after the Patrol ordered him to stop, whereby he defied the Patrol's order and was insubordinate. Trooper F also violated another order from the Patrol when he inappropriately contacted witnesses. The Highway Patrol disciplined Trooper F in the form of a **5% reduction in pay**.

Trooper "G" engaged in an extramarital affair, which was not his first affair (a prior one occurred in 1992). The Highway Patrol disciplined Trooper G in the form of a **three (3) day suspension**.

30. Judge Gray's Evington decision issued in 2009. It does not locate all the incidents in time. The Court of Appeals stated in Poarch that "we will not shackle the Patrol to the worst personnel decisions that they have made." Poarch v. N.C. Dep't of Crime Control & Pub. Safety, 223 N.C. App. 125, 132, 741 S.E.2d 315, 320 (2012).

31. Poarch, however, was prior to Wetherington I. Since Wetherington I, consideration of comparative disciplinary action is a "necessary" requirement in just cause cases. This includes a specific duty, recently stated by the Court of Appeals, for the Tribunal to do so. Richardson v. NC State Bureau of Investigation, 274 N.C. App. 249, 849 S.E.2d 367 (2020). This is particularly so where the agency employer, as here, fails to present any examples of prior cases it considered in deciding there was just cause to dismiss the Petitioner.

32. Wetherington II emphasized that while the Highway Patrol need not "look back through history to find a lowest common denominator for assessing punishment" its decision-maker must consider if there is some *relevant* denominator in the Highway Patrol's prior history for comparison: "There is no particular time period set for this factor, [and] we find no legal basis for relying only upon disciplinary actions during a particular commander's tenure. If this were the rule, during the first week, or month, or any time period of a new colonel's tenure until a disciplinary action based upon a particular violation has occurred, there would be no history at all, and the disparate treatment factor would have no meaning." Wetherington II at 199, 837.

The Just Cause Framework: Neglect of Duty

33. The Tribunal identifies no North Carolina appellate cases addressing "neglect of duty" in the State employee just cause context. The Highway Patrol defines the term as, *"Members shall not be inattentive to their duty nor neglect their duties. Members shall not engage in any activities or personal business which would cause them to neglect or be inattentive to duty or which would impair their ability to perform such duty."* (Res. Ex. 29).

34. Our State Supreme Court, in a case involving a schoolteacher, defined "neglect of duty" as follows:

> Review of cases from our sister states reveals that the term "neglect of duty" is uniformly accorded a common-sense definition: **failure to perform some duty imposed by contract or law**. See, e.g., State ex rel. Hardie v. Coleman, 115 Fla. 119, 155 So. 129 (1934); State ex rel. v. Ward, 163 Tenn. 265, 43 S.W.2d 217 (1931); State ex rel. Knabb v. Frater, 198 Wash. 675, 89 P.2d 1046 (1939). In Ward, the Tennessee Supreme Court stated, "The terms 'malfeasance' and 'neglect of duty' are comprehensive terms and include **any wrongful conduct that affects, interrupts or interferes with the performance of official duty**." 163 Tenn. at 266, 43 S.W.2d at 219. The Florida courts have also adopted a functional definition of the term: "Neglect of duty has reference to the **neglect or failure on the part of a public official to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law**." State ex rel. Hardie v. Coleman, 155 So. at 132.

Overton v. Goldsboro City Bd. of Ed., 304 N.C. 312, 318-19, 283 S.E.2d 495, 499 (1981) (emphasis supplied).

35. In making this analysis, however, the Supreme Court warned, "[a]lthough the term is susceptible to definition, it is, as a California appellate court said, "**an abstraction until viewed in light of the facts surrounding a particular case**," Id., citing Gubser v. Department of Employment, 271 Cal.App.2d 240, 242, 76 Cal. Rptr. 577, 579 (1969) (emphasis). Thus, as with truthfulness, appellate treatment of neglect of duty dovetails with Carroll's requirement that just cause is a *case-specific* inquiry.

36. In the absence of appellate examples of neglect of duty cases, the Tribunal turns to decisions involving the Highway Patrol and neglect of duty from the Office of Administrative Hearings ("OAH"). These rulings, while not binding on the Tribunal, are instructive.

37. Judge Gray, in Evington, also discussed multiple past instances where the Highway Patrol, in incidents involving neglect of duty, took disciplinary action well short of termination:

> Trooper "A" had sex on the hood of his patrol vehicle while others witnessed the encounter. There were allegations of three (3) instances of neglect of duty by Trooper A because he was at the homes of two (2) women while on duty. One (1) of those three (3) instances was sex by Trooper A in his patrol car. Trooper A also

admitted to having cheated in Patrol School. The Highway Patrol disciplined Trooper A in the form of a **one (1) day suspension**.

Trooper "B" had allegations of misconduct in 1990, 1998 and 2002. The 1990 allegations involved violations of truthfulness and neglect of duty for which he received a third level reprimand and three (3) day suspension without pay. In 1998, Trooper B was caught having an affair, for which the Highway Patrol suspended him for one (1) day. In 2002, Trooper B allegedly made threatening calls to his wife, in which he threatened to kill her on 22 different occasions. He stalked his wife with his Patrol vehicle by intentionally surveilling her and wrongfully stopping her to confront her. The Highway Patrol disciplined him in the form of a **5% reduction in pay**.

Trooper "C" allegedly had an extramarital affair in which he admitted telephone conversations both on and off duty which interfered with his duties and responsibilities as a member of the Patrol (over 70 telephone conversations). Trooper C's actions resulted in a neglect of duty. The Highway Patrol disciplined Trooper C in the form of a **written warning**.

Trooper "D" allegedly had an affair with egregious conduct of neglect of duty by engaging in personal telephone conversations for 2,566 minutes while on duty. The Highway Patrol disciplined him in the form of **one (1) day suspension**.

38. In David W Morgan v. North Carolina Department of Public Safety; North Carolina Highway Patrol, 2013 WL 8116101, 12 OSP 07543 (August 29, 2013), a Highway Patrol trooper refused to arrest a suspect "handed over" to him by Duplin County Sheriff's Office deputies, all of whom had determined, by multiple means, that the suspect (known to the trooper to have eight (8) prior DWI charges), was driving while impaired. The trooper admitted that his actions became the subject of considerable discussion among law enforcement in Duplin County, and that the incident affected his reputation and the Highway Patrol's reputation with the Duplin County Sheriff's Office. Further, the trooper was "willfully untruthful" to local law enforcement and, additionally, with Internal Affairs. OAH affirmed the trooper's dismissal.

39. In Michael T. Faison v. N.C. Department of Crime Control & Public Safety; N.C. Highway Patrol, 2013 WL 10255989, 11 OSP 08850 (February 4, 2013), a Highway Patrol lieutenant was terminated on multiple grounds, including Untruthfulness and Neglect of Duty, taking extensive personal telephone calls while on duty and being paid by the State. This included 150 hours of personal cell phone use, only two hours and fifty-eight minutes of which could be determined to be calls made to or from Patrol-related personnel. Petitioner had an excellent disciplinary history. OAH overturned the dismissal, finding that "Respondent failed to present any actual evidence, by testimony, exhibit or otherwise, that established that Petitioner was inattentive to his duties, or neglected his duties while talking on his personal cell phone, while on duty for the Patrol."

40. In Richard Westmoreland v. N.C. Department of Crime Control and Public Safety/NC Highway Patrol, 2004 WL 3375676, 04 OSP 0409 (December 31, 2004), a trooper left

work while on duty and failed to report sickness or check off duty status. He drove 25 miles to his residence. He then failed to answer a duty call, thus forcing other troopers to take his duty and search for his whereabouts. He gave evasive and misleading answers about his actions to a Sergeant who contacted him at his residence. The Highway Patrol did not dismiss the trooper, instead imposing a three-day suspension without pay. OAH affirmed this disciplinary action.

41. In 18 OSP 07196, Maurice A. DeValle v. N.C. Highway Patrol, OAH found that in the case of petitioner, a Highway Patrol Sergeant, substantial evidence at hearing proved that Petitioner was not present at his duty station in Wayne County from September 22, 2016, through October 6, 2016, at times when he claimed that he was present and on-duty. A senior officer had previously told petitioner that "he was to be where he was supposed to be and doing what he was supposed to be doing." This meant that petitioner should be in Wayne County when he was supposed to be working. Subsequently, petitioner checked in "on-duty" but remained at his residence, where he was confronted by a superior. The matter received considerable media attention (see Poarch). The Patrol dismissed Petitioner for neglect of duty, and OAH affirmed the dismissal.

Analysis: The Warren Test and the Wetherington Factors

42. Having reviewed the just cause framework both generally and for the specific allegations by the Highway Patrol in this case, the Tribunal turns to analysis of whether just cause exists for Petitioner's dismissal. Our State Supreme Court and Court of Appeals provide clear instructions on how to conduct this analysis.

43. After reiterating Carroll's holding that "not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline" (Id. at 382, 925), Warren I announced a framework, now known as the "Warren test," to analyze unacceptable personal conduct cases in accord with the Supreme Court's direction in Carroll:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to **balance the equities** after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to **first determine whether the employee engaged in the conduct the employer alleges**. **The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct** provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. **If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken**. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

Warren at 382-83, 925 (emphasis supplied). Simplified, this test is:

1. Did the employee engage in the conduct?

2. If so, was it unacceptable personal conduct?
3. If so, was that unacceptable personal conduct just cause for the disciplinary action imposed?

See Bulloch v. N. Carolina Dep't of Crime Control & Pub. Safety, 223 N.C. App. 1, 5, 732 S.E.2d 373, 377 (2012); disc rev. denied, 418, 735 S.E.2d 178 (2012); see also N. Carolina Dep't of Pub. Safety v. Shields, 245 N.C. App. 131, 781 S.E.2d 718 (2016); dis. rev. denied, 784 S.E.2d 176.[3] ("A just and equitable determination of whether the unacceptable personal conduct constituted just cause for the disciplinary action taken requires consideration of the facts and circumstances of each case, **including mitigating factors**.") (emphasis supplied).

44. With respect to "balancing the equities," the principles of "equity and fairness" (Carroll) are not "balanced" between agency and employer. Rather, as Judge Zachary wrote in Whitehurst, "just cause" is a concept "embodying notions of equity and fairness" to the *employee*. 257 N.C. App. 938, 946-47, 811 S.E.2d 626, 633 (2018) (emphasis in original).

45. Whether just cause existed for disciplinary action against Petitioner is a question of law, reviewed de novo. In that review, the Tribunal owes no deference to Respondent's just cause decision or its reasoning therefore, and is free to substitute its judgment for the agency's on whether just cause exists for the disciplinary action taken. Harris at 102, 134.

46. Further, if the matter satisfies the first two prongs of Warren, but just cause does not exist for the particular disciplinary action imposed by the agency, the Tribunal may impose an alternative sanction within the range of allowed dispositions – demotion, suspension without pay, or written warning. Id. at 109, 808. See also Davis v. NC Dep't of Health & Hum. Servs., 269 N.C. App. 109, 836 S.E.2d 344 (2019) (ALJ acted "well within its statutory authority to '[r]einstate any employee' and '[d]irect other suitable action to correct the abuse' resulting from respondent's erroneous decision" in reversing dismissal and imposing two-day suspension without pay); see also N.C.G.S. 126-34.02(a)(3).

47. Use of the Warren test as the proper analytical method for determining just cause in "unacceptable personal conduct" cases is well established. N. Carolina Dep't of Pub. Safety v. Tucker, 241 N.C. App. 399, 775 S.E.2d 36 (2015); disc. rev. denied, 782 S.E.2d 895 (2016); Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 96, 798 S.E.2d 127, 130, aff'd per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017); Hardy v. N. Carolina Cent. Univ., 260 N.C. App. 704, 817 S.E.2d 495 (2018); Belcher v. N. Carolina Dep't of Pub. Safety, State Highway Patrol, 2021-NCCOA-277, ¶ 14, 278 N.C. App. 148, 858 S.E.2d 629 (2021).

48. Subsequent to Warren, in Wetherington I, the Supreme Court provided specific instruction on factors that employers and courts must consider in imposing disciplinary action. They are:

A. The severity of the violation;

[3] Bulloch appears to be the Court of Appeals' first application of the Warren test. Shields was unpublished. However, Shields was cited in Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 108, 798 S.E.2d 127, 137, aff'd per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017).

B. The resulting harm [from the violation];
C. The employee's work history; and
D. The discipline imposed in other cases involving similar violations.

The Supreme Court held, "we emphasize that consideration of these factors is an appropriate **and necessary** component of a decision to impose discipline upon a career State employee for unacceptable personal conduct." Wetherington I at 592, 548 (emphasis supplied).

49. These factors are now known as the "Wetherington factors." See Brewington v. N. Carolina Dep't of Pub. Safety, State Bureau of Investigation, 254 N.C. App. 1, 25, 802 S.E.2d 115, 131 (2017), disc. rev. denied, 371 N.C. 343, 813 S.E.2d 857 (2018) ("We conclude that the Wetherington factors were sufficiently addressed"); Davis ("The five Wetherington factors inform our analysis"); and (recently), "Precedent from our Supreme Court also requires the review of certain factors to determine whether unacceptable personal conduct warrants the discipline imposed . . . . collectively, the 'Wetherington factors.'" Belcher v. N. Carolina Dep't of Pub. Safety, State Highway Patrol, 2021-NCCOA-277, ¶ 15, 278 N.C. App. 148, 858 S.E.2d 629.

50. As Belcher demonstrates (along with the Wetherington holdings) "all of these factors, at least to the extent there was any evidence to support them," must be considered, and that agencies may "not rely on one factor while ignoring the others." Wetherington II at 161, 832. Indeed, in Wetherington II, the Court of Appeals conducted a detailed analysis of the Wetherington factors and concluded that the Highway Patrol, after remand with specific instructions to consider the factors, instead considered only two of them. This was a significant factor, immediately apparent from the opinion, in the court's finding a lack of just cause.

51. Considering the Wetherington factors is not a task solely reserved for employing agencies. The Court of Appeals has emphasized that the Tribunal's task is "to determine the facts, and to make findings and conclusions based thereupon." Richardson v. NC State Bureau of Investigation, 274 N.C. App. 249, 849 S.E.2d 367 (2020). That specifically includes the duty to conduct a thorough analysis of each Wetherington factor. Id.

52. Therefore, whether the Highway Patrol did so or not, the Tribunal must also analyze each proven incident of unacceptable personal conduct according to each of the Wetherington factors to determine what, if any, formal disciplinary action is appropriate against a career status State employee. Wetherington II at 190, 832.

Warren 1: Did the employee engage in the conduct?

53. Answering this question requires reviewing precisely what the Patrol indicates that Petitioner did. The Tribunal reviews each allegation in turn.

54. For "Neglect of Duty," the Highway Patrol alleged:

It is charged that on or about 20 August 2020, on or near Melinda Rd. around 2:30pm in Robeson County, Trooper Joe T. Locklear did violate State Highway Patrol Policy Directive H.01, SECTION XXVI (Neglect of Duty) in that he/she:

By his own admission:

- *Failed to exit his patrol car during a traffic stop he initiated so he could conduct a thorough investigation of the driver and passenger as he was trained to do. Trooper Locklear originally claimed he observed the tan Lexus at an intersection where he observed what he thought was the passenger drinking a Bud Light and observed the driver not wearing a seatbelt.* ***("Neglect Allegation 1")***

- *Observed and located a camouflage gym bag in the ditch line on the shoulder of Melinda road. Trooper Locklear admitted to exiting his patrol car and picking up the bag and looking into it and seeing marijuana. Trooper Locklear claimed he never looked to see what else was in the bag and failed to secure the found property in evidence before the end of his shift as required by policy. Trooper Locklear made the decision to throw the bag in the woods claiming he did not know there was $997 and jewelry also inside the bag with the 207 grams of marijuana.* ***("Neglect Allegation 2")***

(Personnel Charge Sheet/Disposition, 000341; Resp. Ex. 11)

55. With respect to the Neglect Allegation 1, the answer is, "yes," at least largely so. Petitioner did not exit his patrol car when he stopped the Lexus, nor did he conduct a "thorough search" of it. With respect to Neglect Allegation 2, the answer is also, "yes," at least with respect to finding the bag, failing to search it despite seeing and smelling marijuana, and throwing the bag in the woods instead of logging it into evidence.

56. For "Truthfulness," the Highway Patrol alleged:

It is charged that on or about 20 August 2020 thru 21 August 2020, at or near Robeson County, Trooper Joe T. Locklear did violate State Highway Patrol Policy Directive H.01, SECTION VII (Truthfulness) in that he/she:

By his own admission admitted:

- *During a telephone conversation on 20 August 2020 with Sergeant Philip Collins on Thursday evening; that he told Sergeant Collins "I didn't pick the bag up." This statement was made after Sergeant Collins had explained to Trooper Locklear that a complainant had alleged a Trooper had stopped and picked up a bag that had been thrown out a window that had drugs and money in it on Melinda road. Trooper Locklear advised "the reason why I didn't tell him that I picked the bag up is because I was scared." While on the phone with Sergeant Collins Trooper Locklear led Sergeant Collins to believe after the traffic-stop he had turned around and never got out of his patrol car too [sic] pick up a bag, stopped at the stop sign on Melinda Rd., and made a right tun [sic] and went home for the day.* ***("Truthfulness Allegation 1")***

- *While meeting and driving Sergeant Collins around on the morning of 21 August 2020 on Melinda Rd.; Trooper Locklear intentionally lied to Sergeant Collins about the actual events that took place on the previous afternoon on 20 August 2020. Trooper Locklear again lied by never telling Sergeant Collins he got out of his patrol car on Melinda Rd to pick up the bag containing a large amount of marijuana and failed to advise Sergeant Collins he placed it in his patrol car, never telling Sergeant Collins he made a U-turn in an attempt to go back after the violator, never telling Sergeant Collins that he waited for the driver to possibly return to pick the bag up, never telling Sergeant Collins he threw the bag into the wood line, and by pretending to search the area for the bag in which he had placed in the woods himself the previous day and leading Sergeant Collins to believe he found the bag for the first time.* ***("Truthfulness Allegation 2")***

(Personnel Charge Sheet/Disposition, 000342; Resp. Ex. 11)

57. On Truthfulness Allegation 1, the answer is, "yes." Petitioner did tell Sgt. Collins that he did not pick up the bag and did lead Sgt. Collins to believe that he had not. Petitioner also made a false statement regarding his actions with the bag. He did not tell Sgt. Collins that he threw the bag in the woods, though he was not, by the evidence, asked that. He also, as noted, led Sgt. Collins to believe he had "found" the bag for the first time.

58. On Truthfulness Allegation 2, the Tribunal finds that Petitioner did lie to Sgt. Collins about the events of the previous afternoon, including that he did not get out of his car. The answer to that portion is, "Yes." However, Petitioner did not know, by the evidence, that the bag contained "a large amount of marijuana," so the answer to that inquiry is, "No." Sgt. Collins also asked Petitioner about what he did with the bag, and Petitioner responded that he never picked it up. This was false, as he had thrown it into the woods. The answer to that inquiry is, "Yes."

59. Petitioner did not tell Sgt. Collins about his attempted enforcement action in trying to hunt down the driver/suspect, Callahan, including both an attempted pursuit and waiting for Callahan to return. However, there is no evidence Petitioner was asked about enforcement efforts by Sgt. Collins, and thus cannot conclude that Petitioner was "untruthful" about those particular events. Thus, the answer to this portion of Truthfulness Allegation 2, as written, is "No."

60. Parenthetically, the Tribunal finds it incongruous that the Highway Patrol would attribute unacceptable personal conduct to the only attempted law enforcement action present in this case, contrasting the lack of enforcement action (on stronger evidence), by both Sgt. Collins and, later, by Lt. Snotherly. In making this conclusion, the Tribunal is not focusing on "the conduct of third parties," Richardson at 249, 367, but on what the Petitioner did – in short, conducted the only efforts in this case to actually catch the bad guy.

61. For "Unbecoming Conduct," the Highway Patrol alleged:

It is charged that on or about 20 August 2020 thru 21 August 2020, at or near Robeson County, Trooper Joe T. Locklear did violate State Highway Patrol Policy Directive H.01, SECTION V (Unbecoming Conduct) in that he/she:

By his own admission admitted:

- *To driving his personal vehicle over to Mr. Parnel's[4] residence around 10:00pm on the night of 20 August 2020 to review Mr. Parnel's video cameras. Trooper Locklear failed to inform Sergeant Collins the next morning he had visited Mr. Parnel's the previous night. When Trooper Locklear was asked by Sergeant Collins, "Joe, did you go to that man's (Mr. Parnel) house last night?" Trooper Locklear replied, "Yeah." When asked by Sergeant Collins if he didn't think it was important to tell him, Trooper Locklear replied, "No. I didn't think it was important." Trooper Locklear had been around Sergeant Collins for approximately 20-25 minutes before Mr. Parnel approached Sergeant Collins and told him Trooper Locklear had came by the night before to look at his cameras.* ***("Unbecoming Conduct 1")***

- *While meeting and driving Sergeant Collins around on the morning of 21 August 2020 on Melinda Rd.; Trooper Locklear failed to tell Sergeant Collins he had thrown the bag into the wood line the previous day and pretended to search the area for the bag in which he had placed in the woods himself. Trooper Locklear led Sergeant Collins to believe he found the bag for the first time. Trooper Locklear stated, "I mislead him to believe that's what took place."* ***(Unbecoming Conduct 2")***

(Personnel Charge Sheet/Disposition, 000343; Resp. Ex. 11)

62. On Unbecoming Conduct 1, while it is true that Petitioner did not initially inform Sgt. Collins that he had visited Parnell's house the night before, it is equally evident that he was not asked about that. While the sin of omission is recognized in some quarters, such as in the "tenets of the Catholic church," Doe v. Diocese of Raleigh, 242 N.C. App. 42, 56, 776 S.E.2d 29, 40 (2015), Respondent points to no authority incorporating that concept into North Carolina personnel law. When asked about visiting Parnell's house, Petitioner immediately confirmed he did. Finally, the Tribunal finds no untruthfulness in Petitioner's attributed statement that he had not, prior to his being asked, considered the matter important – the evidence is that there was no video footage to review. The answer to Unbecoming Conduct 1, then, is "No." No further inquiry is necessary on this allegation. Warren I, II.

63. On Unbecoming Conduct 2, the answer is "yes" – as Petitioner admitted, he misled Sgt. Collins about throwing the bag into the woods and likewise did so in pretending to find the bag for the first time when he and Sgt. Collins returned to the scene. However, this is for practical purposes the same allegation as under "Truthfulness," bootstrapped to support a separate violation of policy. While there is no authority preventing this action, it is emphasized that this is not separate acts of conduct, but rather the same conduct, used twice.

64. Absent from these allegations is Col. McNeill's claim, not present in the "personnel charge sheet" and dismissal letter, that Petitioner's conduct led to Callahan's non-prosecution.

[4] The actual last name of the gentleman in question is "Parnell." See Res. Ex. 8.

Based on the evidence, Petitioner's conduct did not lead to Callahan's non-prosecution. Petitioner, despite never having had the chance to see Callahan in possession of the marijuana, still attempted to take enforcement action – while others, who (a) knew the marijuana was Callahan's and (b) had the marijuana in custody, took none. The answer to that inquiry, then, is "No."

65. Moreover, the Tribunal will not consider the "failure of prosecution" allegation in support of Petitioner's dismissal. In addition to providing that career state employees may only be discharged for just cause, N.C.G.S. 126-35 requires that "[i]n cases of such disciplinary action, the employee shall, **before the action is taken**, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights." N.C.G.S.126-35(a); Barron v. Eastpointe Hum. Servs. LME, 246 N.C. App. 364, 378, 786 S.E.2d 304, 314 (2016) (emphasis supplied). Respondent's allegation regarding Callahan's non-prosecution, raised for the first time in its final decision letter, violated both N.C.G.S. 126-35(a) and N.C.G.S. 126-34.02, and it may not support Petitioner's dismissal.

Warren 2: Was The Proven Conduct Unacceptable Personal Conduct?

Neglect Allegation 1: No

66. The Tribunal cannot conclude that Petitioner's failure to exit his patrol car during a seat belt ticket stop constituted neglect of duty under any reasonable interpretation of that term.

67. First, even if Petitioner had stopped the vehicle for the seat belt ticket, a seat belt violation does not provide legal justification for the "thorough investigation of the driver and passenger" the Patrol describes. A seat belt violation is an infraction. N.C.G.S. 20-135.2A(e). That statute also provides: "(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers." Id.

68. Second, assuming that a seat belt stop does provide an opportunity for this "thorough investigation," by the time Petitioner stopped the car, there was no marijuana to find – Callahan had thrown it out the window, and Petitioner never saw it. Callahan had his seat belt on at the time of the actual stop, and Petitioner determined that the passenger was not drinking alcohol. There is zero evidence that there was any other illegal substance or activity connected with the car stop. Moreover, there is no evidence that any Highway Patrol member was ever seriously disciplined, let alone dismissed, for failure to exit his patrol car during a traffic stop for a seat belt violation.

69. In 2020, our State Supreme Court held, "In the seminal case of Terry v. Ohio, the Supreme Court of the United States recognized that law enforcement officers need discretion in conducting their investigative duties. 417 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Since Terry, this discretion has been judicially broadened, equipping law enforcement officers with wide latitude within which to effectively fulfill their duties and responsibilities." State v. Reed, 373 N.C. 498, 499, 838 S.E.2d 414, 416-17 (2020). Petitioner exercised his judgment and discretion in determining that a seat belt violation, remedied, was a matter for a verbal warning.

To dismiss him for failing to get out of his car, under these facts, would be enshrinement of form over both discretion and common sense. The inquiry into this allegation is concluded.

Neglect Allegation 2: Yes

70. Petitioner knew that his duty required him to take the marijuana and log it into evidence. Instead, he threw the bag, which turned out to contain a felony amount of marijuana, into the woods. This was wrong, and Petitioner admitted it was wrong. This was a willful violation of known or written work rules, and thus was unacceptable personal conduct.

Truthfulness Allegation 1: Yes

71. Petitioner admitted at the hearing, and to Internal Affairs, that he lied to Sgt. Collins about his dealings with the bag, as found above. This violated the Highway Patrol's Truthfulness Policy, was a willful violation of a known or written work rule, and was unacceptable personal conduct.

Truthfulness Allegation 2: Yes

72. Petitioner did lie to Sgt. Collins about the events of the previous afternoon, including that he did not get out of his car. This violated the Highway Patrol's Truthfulness Policy, was a willful violation of a known or written work rule, and was unacceptable personal conduct.

Unbecoming Conduct Allegation 2: Yes

73. The Highway Patrol's policy states that "any conduct that constitutes unacceptable personal conduct pursuant to State Personnel Policy" (Res. Ex. 29) is unbecoming conduct. As Petitioner's false statements were willful violations of known or written work rules, they are unbecoming conduct, and was unacceptable personal conduct.

Warren 3: Was the Unacceptable Personal Conduct Just Cause for Dismissal?

This inquiry requires analysis of the Wetherington factors. The Tribunal considers each, in turn:

The Severity of the Violation

Neglect of Duty

74. Petitioner should have logged the bag of marijuana into evidence. He did not, and so neglected his duty. He instead threw the bag into the woods. Whatever may be the importance of drug interdiction in the Highway Patrol vis a vis enforcement of motor vehicle laws and safety, law enforcement officers may, barring the discretion discussed above, not "pick and choose" which laws to enforce.

75. However, that applies to all law enforcement officers – including Sgt. Collins and Lt. Snotherly. Both ignored compelling evidence of Callahan's ownership, freely admitted, of a felony amount of marijuana. Sgt. Collins did not arrest Callahan, but rather focused solely on having Petitioner write a statement. Lt. Snotherly was three times told the marijuana was Callahan's in Callahan's presence and took no action – other than charging Petitioner with, among other things, Neglect of Duty regarding the same marijuana. (Res. Ex. 11). The only person in the case who took enforcement action regarding Callahan's marijuana was Petitioner himself. Comparatively, Petitioner's neglect of duty was not particularly severe or significant.

76. Finally, as discussed above, the Highway Patrol has many times, in many cases, punished with discipline significantly less than termination acts of neglect of duty and unbecoming conduct that the Tribunal concludes were significantly worse, in terms of duration and significance (to say nothing of disrepute to the Patrol) compared to Petitioner's single mishandling of a bag of marijuana and his false statements, subsequently corrected, about his actions.

Truthfulness and Conduct Unbecoming

77. Neither our appellate courts nor OAH, even when finding a lack of just cause for dismissal in such cases, support untruthfulness by law enforcement officers. Petitioner lied, two times, to his Sergeant about the bag and his conduct. This is severe. It is conduct unbecoming a law enforcement officer.

78. However, it is less severe than in other cases, and for more than one reason. It did not occur in court. It did not, as found, cause a criminal to escape justice. The false statements were not the "elaborate story" cited by the Patrol in Wetherington about the trooper's lost hat, nor were they protracted in nature – as Trooper Wetherington's were, over a period of three weeks. Rather, they were two false statements made over a short time period, prompted in part by "panic" on the part of Petitioner.

79. On the latter, Petitioner testified credibly that when confronted about "stealing" Callahan's bag, he panicked. Panic is a sudden uncontrollable fear or anxiety, often causing wildly unthinking behavior. "Panic" is "a sudden, overpowering terror." American Heritage Dictionary, Second Edition. This does not excuse Petitioner's false statements, but it helps to explain them – at least, in part.

80. Finally, and most importantly, when brought into Internal Affairs, Petitioner came clean. He admitted that his statements to Sgt. Collins were false. (Res. Ex. 5, 6) The cases cited above feature law enforcement officers who lied, and continued to lie, through Internal Affairs investigations and in the Office of Administrative Hearings. Petitioner by contrast admitted on the record that he lied, and that his actions were wrong – both internally and before this Tribunal. Discounting that difference would be the precise opposite of the "equity and fairness" to the employee required by just cause law.

81. Telling the truth in Internal Affairs does not constitute a license to lie outside of that process – quite the contrary. The Tribunal merely holds that some lies, in some places, are worse than others (the "flexible" approach mandated by a long line of appellate rulings). Internal

Affairs, where Petitioner told the unvarnished truth, is one of those places. Making no distinction between the Internal Affairs process and other circumstances not only demonstrates lack of flexibility, but also suggests that acting honestly during an investigation, and admitting one's earlier *dis*honesty, is immaterial – one is fired regardless. What incentive would officers have to remedy their initially wrongful conduct?

The Resulting Harm From The Violation

82. While it is easy in any just cause case to imagine quantum amounts of inchoate harm flowing from an act of unacceptable personal conduct, the question here is: what actual, quantifiable harm resulted from Petitioner's actions? The answer is: very little, if any.

83. No malefactor escaped justice because of Petitioner's actions. The Patrol was not cast into public disrepute (Poarch). Petitioner is not Brady-Giglio impaired. Callahan's marijuana was destroyed. The Internal Affairs process was not compromised. Sgt. Collins did not testify that he had lost trust and confidence in Petitioner's ability to do his duty.

84. The Tribunal does not suggest that untruthfulness and neglect of duty is harmless. Rather, the Tribunal concludes that the actual harm caused by this conduct, in this case, under these facts, is minimal. As in Wetherington II, "Respondent has never been able to articulate [perhaps more pertinently, prove] how this particular lie was so harmful." Id. at 161, 835.

Petitioner's Work History

85. Petitioner had a 13-year history of unblemished service to the Highway Patrol. He had no prior disciplinary action of any kind. He had, even to the limited extent considered by Respondent, good performance reviews full of numerous accolades regarding his enforcement of North Carolina laws. There is nothing in Petitioner's work history remotely resembling untruthfulness, neglect of duty, or unbecoming conduct.

86. As the Court of Appeals held in another case involving allegations of police misconduct, "Whitehurst had worked for ECU for twelve years, with no disciplinary action. This factor also mitigates against a finding that just cause existed to dismiss Whitehurst from employment based on his conduct the night of 17 March 2016." Whitehurst v. E. Carolina Univ., 257 N.C. App. 938, 947-48, 811 S.E.2d 626, 634 (2018). And, in Wetherington II, also dealing with trooper untruthfulness, "**nothing in Petitioner's work history would support termination**. He had no prior disciplinary actions and a "good" performance rating and work history. **This factor could only favor some disciplinary action short of termination**." Id. at 196, 835-36 (emphasis supplied). The Tribunal so concludes here.

87. However, as with comparative discipline (below), Respondent erred in its consideration of Petitioner's work history. The evidence shows that Respondent, in the person of Lt. Col. Gordon, considered three years of Petitioner's performance reviews in making the Patrol's disciplinary decision. Petitioner worked for the Highway Patrol for thirteen years. Thus, the Highway Patrol is less than one third of Petitioner's performance record.

88. This is insufficient. Wetherington says nothing about partial consideration of an employee's work history. "Work history" means exactly what it says – the performance of an employee throughout the course of his employment. This means considering Petitioner's 13 years of service, not three. The Tribunal concludes as a matter of law that in failing to consider Petitioner's entire work history, the Highway Patrol failed to comply with Wetherington's direction, and thus failed to act as required by law or rule. N.C.G.S. 150B-23.

Discipline Imposed In Other Cases

89. The Highway Patrol failed to show that it considered discipline in other cases. The Tribunal knows nothing about any cases considered by Col. McNeill, and nothing of any specific case considered by Lt. Col. Gordon. There was simply no evidence on this factor – other than the conclusory statement from both that it was "considered." This is not enough. As Wetherington II makes clear: each factor must be considered as part of the just cause process, and a failure to show that consideration (in some meaningful way other than a bald "I considered it") means that the employer has failed to show just cause for the disciplinary action. Wetherington and its subsequent holdings compel no other conclusion.

90. Thus, as with Petitioner's work history, the Tribunal concludes as a matter of law that "Respondent failed to use proper procedure . . . and failed to act as required by law or rule in that it should have considered the factors as directed by the Supreme Court." Wetherington II at 200, 838.

91. The Tribunal, however, has considered other cases relevant to these matters, as our appellate courts direct. Based on that consideration, and consideration of all of the Wetherington factors, there is just cause for Petitioner to receive significant discipline – but not termination.

Imposition of Appropriate Discipline

92. Balancing the equities, the appropriate discipline imposed in this case is (a) demotion of Petitioner from Master Trooper to Trooper, and (b) an additional five-day disciplinary suspension without pay.

93. Why this combination? There were two incidents of misconduct. Reviewing the Wetherington factors, especially comparative discipline and Petitioner's work history, his mishandling of the bag of marijuana is just cause for a five-day suspension without pay. Through the same review, Petitioner's untruthfulness merits the far more severe sanction of demotion.

94. This is no light discipline. It reflects the view of the Tribunal, and our appellate courts, that Truthfulness, Unbecoming Conduct, and Neglect of Duty are serious issues. However, it reflects consideration and balancing of the equities (Warren) and the Wetherington factors, including without Petitioner's laudable and discipline-free work history. It includes consideration of Whitehurst's requirement of equity and fairness "to the *employee*." Truthfulness violations can, and often do, warrant dismissal. But in this individual case, under these specific facts, these violations do not.

95. As Judge Beecher Gray of OAH noted:

> The undersigned takes judicial notice of the proposition that Troopers serving the North Carolina Highway Patrol have challenging, difficult, stressful and dangerous jobs. Troopers, like other public employees and officials, will occasionally say things that they probably should not say. Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard.

Andreas K. Dietrich v. NC. Highway Patrol; N.C. Department of Crime Control & Public Safety, 2001 WL 34055881. In this decision, the Tribunal attempts to reflect the same thinking as Judge Gray's wise counsel.

No Remand Is Appropriate

96. The Highway Patrol's failure with respect to comparative cases, as well as its failure to consider Petitioner's entire work history, raises the question of whether a remand would be appropriate so that the Patrol may properly conduct that consideration. The Tribunal's answer is, "no." Wetherington I told the Highway Patrol what to consider on remand. Wetherington II revealed that it failed to do so, despite the Supreme Court's direction. Judge Stroud's reaction was: "Our Courts rarely grant parties in cases two bites at the apple, but Respondent here has already had the opportunity for two bites." The Tribunal joins with Judge Stroud in holding that for this same agency, there should not be a third.

97. Repeated "apple bites" are not the only reason. Carroll states that in such circumstances, cases "may" be remanded. Id. at 664, 897. At all times, the burden of proof is on Respondent to show just cause. N.C.G.S. 126-35. This includes a showing that it followed the law as directed by our appellate courts, law on which this agency received repeated and specific direction. Further, the Highway Patrol's failure to fully consider all Wetherington factors is not the fault of Petitioner. Yet it is *employees* who bear the consequences (continued loss of employment, deprivation of wages, and legal costs) when cases ping-pong up and down the judicial system through courts providing agencies yet another opportunity to comply with well-established law – an opportunity not granted to employees, who may not "go back in time" to correct the mistakes that caused their disciplinary action in the first place.

98. Such a situation, which effectively punishes the innocent party with no practical effect on the other, is inequitable. Moreover, the Tribunal, again as directed by our appellate courts, considered multitudes of comparative cases in reaching its decision after conducting its own Wetherington factor analysis.

CONCLUSION

99. Just cause did not exist for the Highway Patrol's disciplinary action against Petitioner.

100. The disciplinary action imposed by the Highway Patrol must be reversed, and appropriate disciplinary action imposed.

FINAL DECISION

The termination of Petitioner from the Highway Patrol is **REVERSED**. Respondent shall retroactively reinstate Petitioner to employment with the Highway Patrol with back pay and benefits, including service credit and leave balances. Respondent shall demote Petitioner from Master Trooper to Trooper. Respondent shall also suspend Petitioner for five days without pay. Petitioner's back pay shall be at the demoted rate and shall reflect the suspension without pay. Respondent shall remove all termination documents from Petitioner's personnel file, and Respondent shall substitute appropriate disciplinary documents reflecting this Final Decision.

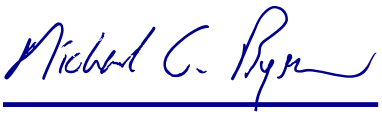
As the Tribunal has ordered both reinstatement and back pay, Petitioner is entitled to reimbursement by Respondent of his attorney's fees and costs pursuant to N.C.G.S. 150B-33. Petitioner's counsel shall, within **30 days** of this Final Decision, submit indicia of proof on the attorney's fees and costs incurred in his representation of Petitioner in this contested case.

NOTICE OF APPEAL

This Final Decision is issued under the authority of N.C.G.S. 150B-34. Pursuant to N.C.G.S. 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. 7A-29(a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

SO ORDERED.

This the 9th day of May, 2022.



Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Joseph Michael McGuinness
McGuinness Law Firm
jmichael@mcguinnesslaw.com
Attorney For Petitioner

James B Trachtman
North Carolina Department of Justice
jtrachtman@ncdoj.gov
Attorney For Respondent

Tammera S Hill
North Carolina Department of Justice
thill@ncdoj.gov
Attorney For Respondent

Bettina J Roberts
North Carolina Department of Justice
bjroberts@ncdoj.gov
Attorney For Respondent

This the 9th day of May, 2022.

Jerrod Godwin
Law Clerk
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850