

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 OSP 02740

<p>Heather Piantino Johnson Petitioner,</p> <p>v.</p> <p>N C Department of Public Safety, State Highway Patrol Respondent.</p>	<p>FINAL DECISION</p>
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THIS CONTESTED CASE came on for hearing before the Honorable Karlene S. Turrentine, Administrative Law Judge, on February 16-18, 2022 at the North Carolina Office of Administrative Hearings (“OAH”) in Wake County, North Carolina, pursuant to N.C. Gen. Stat. § 150B-23 and Petitioner’s contested case petition appealing Respondent’s discharge for just case pursuant to N.C. Gen. Stat. §§ 126-34.02 and 126-35. However, due to unforeseeable and tragic circumstances, the hearing was not able to continue on February 18, 2022 and had to be continued to an uncertain date in the future. The matter returned to hearing for completion before the Undersigned at OAH in Wake County on May 27, 2022.

EXTRAORDINARY CAUSE

Pursuant to N.C. Gen. Stat. §126-34.02(a) a final decision must be filed within 180 days after the commencement of the personnel case. Ordinarily, the 180-day deadline in this contested case would have been March 14, 2022. However, this deadline may be extended upon a showing of extraordinary cause. Extraordinary cause is defined in 26 NCAC 03 .0118(b) as “...out of the ordinary; exceeding the usual, average, or normal measure or degree; not usual, regular, or of a customary kind.” In the case at bar, the Petition was filed on June 15, 2021 and the matter assigned to Judge Randall Ward. The parties filed three (3) Joint Motions for Extension of Time (on July 29, 2021, August 31, 2021 and, September 15, 2021) and the case was reassigned to the Undersigned on September 16, 2021. Thereafter, the matter was set for trial and, in the middle of trial, Respondent’s counsel had a death in her immediate family which was both unexpected and heartbreaking. This constituted extraordinary cause in this matter and required the matter to be continued for several months. Petitioner agreed on the record that such continuance was both appropriate and necessary.

THE PARTIES

The parties to this contested case are the Petitioner Heather Piantino Johnson (herein, “Petitioner” or Ms. Johnson) and Respondent State Highway Patrol (herein, “Respondent,” “SHP” or, “Agency”) of the North Carolina Department of Public Safety.

APPEARANCES

For Petitioner: Mikael R. Gross
Law Offices of Mikael R. Gross
Attorney for Petitioner Heather Johnson

For Respondent: Bettina J. Roberts
North Carolina Department of Justice
Assistant Attorney General

Also: Captain Chad Parks, Agency Representative

EXHIBITS

For Petitioner:

EXHIBIT NO.	PETITIONER’S EXHIBITS ADMITTED WITHOUT OBJECTION
1	Performance Evaluations: 2016-17, 2017-18 and, 2018-19
2	Memorandum from Gould to Slemenda re: dismissal, April 16, 2020
3	Personnel Charge Sheet/Disposition, April 15, 2020
4	FINAL AGENCY DECISION, June 9, 2021 (same as Resp Exh 42)
5	EEO Investigation Extension Agreement, May 11, 2020
6	Memorandum from Snotherly to Moore re: SHP case review, July 10, 2020
7	Resp’s Answers to Petitioner’s First Request for Admissions, Interrogatories & First Request for Document Production, November 30, 2021

For Respondent:

EXHIBIT NO.	RESPONDENT’S EXHIBITS ADMITTED WITHOUT OBJECTION
3	Employee Grievance – Step I Mediation
9	Letter to Lt. Col. Gordon re receipt of EEO Informal Complaint
18	EEO Case Determination by EEO Investigator Christopher McCord
31	Petitioner’s Pre-dismissal Conference attachment

32	Blue Team Personnel Complaint Report (signed 12/13/2019)
35	Rules of Personal Conduct and Job Performance Directive H.01
36	Investigation of Complaints and Charges Against Highway Patrol Employees Directive H.02
37	Personnel Charge Sheet/Disposition (Unbecoming Conduct, Truthfulness, Violation of Rules)
41	Report of Investigation 1.31.20
42	Final Agency Decision 6.9.21
43	Memo from Maj. C. D. Gould, Jr. to Capt. C. J, Slemenda Re Administrative Duty 4.3.20
44	Memo from Lt. Col. Jeff D. Gordon to Maj. William A. Hook Re Complaint made by Sgt. Joshua M. Thomas against Petitioner (04/15/2020)
45	Memo from Lt. Col. Jeff D. Gordon to Maj. William A. Hook Re Complaint made by Sgt. Joshua M. Thomas against Petitioner (04/08/2020)
49	Memo from Maj. William A. Hook to Lt. Col. Jeff D. Gordon re Complaint Made by Sgt. Joshua M. Thomas Against Petitioner (04/07/2020)
51	Memo from Maj. W. A. Hook to Lt. Col. Jeff D. Gordon with Summary of Pre-Disciplinary Conference (04/14/2020)
52	Performance Evaluation Fiscal Year 2016-2017
53	Performance Evaluation Fiscal Year 2017-2018
54	Performance Evaluation Fiscal Year 2018-2019
78	State's Disciplinary Policy
79	Employee Grievance Policy
80	Interview of Sgt. Thomas by Internal Affairs (audio)
81	Audio Interview of Petitioner by Lt. Sharpe (12/11/2019)
82	Audio Follow-up Interview of Petitioner by Lt. Sharpe (12/17/2019)
83	Audio of the Third Interview of Petitioner by Lt. Sharpe (12/17/2019 at 5:59 p.m.
84	Audio of Fourth Interview of Petitioner by Perry Marshall and Kimberly Brown (01/08/2020 at 2:53 p.m.
85	Notification of Pre-Disciplinary Conference
88	HJ-20190830-0930-D965-19758461 (video)
89	HJ-20190918-1025-D965-197224208 (video)
90	HJ-20190918-1025-D965-19722420 (video)
91	HJ-2019081908191100-D965-197106032 (video)
92	HJ201908300930-D965-197158461(2)
94	04/09/2020 Memorandum signed by Petitioner and Perry Marshall
95	12/11/2019 Memorandum to Capt. C. J, Slemenda from Maj. C. D. Gould, Jr. Re Special Assignment

ISSUES

1. Did Respondent discharge Petitioner without just cause on April 15, 2020, in violation of N.C. Gen. Stat. § 126-35(a).
2. If the answer to issue #1 is affirmative, to what remedy is Petitioner entitled?

BURDEN OF PROOF

Pursuant to N.C.G.S. § 126-25.1(c), the burden of proof lay with Respondent to show by a preponderance of the evidence that Petitioner, a career State employee subject to Chapter 126 of the General Statutes, was discharged for just cause. *See also* N.C.G.S. § 126-34.02 and § 126-35.

APPLICABLE STATUTES AND REGULATIONS

N.C. Gen. Stat. § 150B *et seq.*
N.C. Gen. Stat. §§ 126 *et seq.*
25 N.C.A.C. 1J.0600 *et seq.*

BASED UPON the pleadings all the documents and exhibits received and admitted into evidence and, having carefully considered the sworn testimony of the witnesses presented at the hearing, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law. In making the following Findings of Fact, the Undersigned weighed all the evidence and assessed the credibility of the many witnesses, taking into account the appropriate factors for judging credibility including but not limited to: a) the demeanor of each witness; b) any interests, bias, or prejudice the witness may have; c) the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; d) whether the testimony of the witness is reasonable, and; e) whether the witness' testimony is consistent with all other believable evidence in the case.

AFTER CAREFUL CONSIDERATION of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following:

FINDING OF FACTS

1. At the beginning of trial, the parties stipulated to the following:
 - a) Both parties received proper notice of the date, time, and place of hearing;
 - b) Petitioner received proper notice of the agency's final decision¹ and her appeal

¹ During the parties' on-record stipulations, Petitioner raised the issue that Respondent's final agency decision took longer than it should have due to the EEO investigation having taken almost a year to complete. Petitioner asserted she "had only approved the 60-day extension of time and no other extension was requested and no reason was given. So, we'll stipulate that everything did end up with a final agency decision, but we would like to be able to discuss why it took so long for the EEO investigation to be completed when there [sic] was only supposed to be 105 days. ...But as to the timeline, Your Honor, we will stipulate to that." T1.14:23-1.15-12. However, Petitioner did not revisit this issue at any time during the trial. Thus, any objection intended to be raised about this issue has been waived.

- thereof to this Tribunal was timely;
- c) Petitioner exhausted her administrative remedies;
 - d) This Tribunal has both subject matter and personal jurisdiction in this matter;
 - e) The parties had no objection to the Undersigned overseeing this matter;
 - f) At the time of her dismissal, Petitioner held the rank of Master Trooper;
 - g) The pre-disciplinary conference was conducted with Petitioner on April 14, 2020; and,
 - h) An employee advisory hearing was held on April 28, 2021.

2. The parties further stipulated that Petitioner had been continuously employed by the State Highway Patrol (“SHP”) a division of the North Carolina Department of Public Safety (“DPS”) from November, 2008 until she was terminated on April 15, 2020. T3.616:14-15.

3. At the time of her dismissal, Petitioner was a sworn Motor Carrier Enforcement trooper, a permanent State employee having served approximately 12 years. T1.47:12-14, 3.616:11-13, 3.617:9-12. Our statutes define a “career State employee” to mean, in pertinent part, “a State employee...who: (1) Is in a permanent position with a permanent appointment, and (2) Has been continuously employed by the State of North Carolina...in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.” N.C. Gen. Stat. § 126-1.1.

4. Respondent is a state agency within the government of North Carolina and, at all times herein relevant, has been subject to N.C. Gen. Stat. § 126-1, *et seq.*

Petitioner’s Work History:

5. At the time of her termination, and at all times herein relevant, Petitioner worked in either Troop D, District 9 or Troop D, District 6 of the SHP.

6. The Parties stipulated that, prior to her termination, Petitioner had never been disciplined.

7. Performance evaluations for State employees run with the State’s fiscal year, from July 1 – June 30.

8. Through a series of “observations,” Petitioner was found to “meet expectations” in her performance review for FY 2016-17. Pet. Exh. 1, p. 172.

9. Through another series of “observations,” Petitioner was found to “exceed expectations” in her performance review for FY 2017-18. Pet. Exh. 1, p. 219.

10. Again, through a series of “observations,” Petitioner was found to “meet expectations” in her performance review for FY 2018-19. Pet. Exh. 1, p. 241.

11. The Office of State Human Resources’ (“OSHR”) performance evaluations provide that, to meet expectations, an employee’s

“[p]erformance consistently meets and occasionally exceeds the defined job expectations and measurements. The employee performs according to expectations. The employee does the job at the level expected for this position and consistently meets what is expected in terms such as quantity, quality, timeliness, cost, and customer satisfaction. The performance is due to the employee’s own effort and skills. An employee performing at this level is dependable and makes valuable contributions to the organization. H[er] judgments are sound, and [s]he demonstrates knowledge and mastery of duties and responsibilities. Most employees should meet expectations in a functional, performing work unit.”

Id. at p. 140.

Impetus for Investigation:

12. In December 2019, Respondent’s witness First Sergeant² Joshua Thomas (“Sgt. Thomas”) “was a sergeant assigned to Troop D, District 9...” T1.46:9-13. Petitioner “was not directly assigned as [Sgt. Thomas’] squad, but she was in Troop D, District 9.” T1.50:11-12. Nevertheless, although he was not regularly her supervisor, if they worked the same weekend, Petitioner would have to call Sgt. Thomas “if she had something arise.” *Id.* at lines 12-14.

13. Troop D “encompasses Rockingham, Caswell, Person, Guilford, Alamance, Orange, Chatham, Lee and Randolph counties[.]” with its headquarters in Greensboro. T1.46:16-21. Each district covers a county or more within the troop; however, “District 9 [being SHP’s] motor carrier unit...[is] troop-wide.” T1.46:21-1.47:1.

14. The motor carrier enforcement Unit is tasked with conducting federal motor carrier safety inspections of tractor-trailers and commercial vehicles that are “in commerce”—cross state lines, transporting goods that originate from one state and are being delivered to another. T1.47:18-1.48:15. The Unit also does weight inspections, enforcing North Carolina’s weight law limits. T1.48:16-22. Most of the troopers in the Unit are dual certified to be able to do both weight and safety inspections. *Id.* at lines 23-25.

15. One of Sgt. Thomas’ duties was “to check cameras in [sic] a random basis.” T1.49:13-16. The Unit members do not have body cameras but they do have two (2) in-car cameras—“one facing outward...[which is positioned] just to the right of [the rearview mirror]” and, a second “interior camera, which faces inwards towards the passenger/driver’s area[. It.] is over to the right...of the...passenger side visor.” T1.51:20-1.52:4. The purpose of the outward facing camera is to observe/record any stop a trooper makes in front of her vehicle and, the purpose of the interior facing camera is to “see the entire interior of the vehicle[.]” T1.52:5-7. This interior camera is particularly important because if a trooper makes an arrest, the arrestee is placed in the front passenger’s seat of the patrol vehicle due to the fact that trooper vehicles do not have cages that contain arrestees as often are found in local law enforcement vehicles. T1.49:15-24, 1.53:12-1.54:4.

² At the time of the hearing, Sgt. Thomas had been promoted to First Sergeant. However, in December 2019, his title was “Sergeant.” T1.42:17-20, 1.46:9-11.

16. In December 2019, Sgt. Thomas began a random review of various troopers' vehicle videocam footage. In doing so, he picked the date of August 17, 2019 to review. As he reviewed footage from Petitioner's interior view camera, he noticed the visor was down such that the interior view was blocked. T1.58:13. Sgt. Thomas' initial belief was simply that "maybe the[trooper] pulled it down [and] just forgot to put it back up..." so he kept watching. *Id.* at lines 13-16. "If you put the visor down—because it's mounted on the overhead forward of the visor...it's going to block the view of the camera." T1.61:9-11.

17. Sgt. Thomas was able to review footage from Petitioner's outside-view camera and he "observed Trooper Bunce come out of [Petitioner's] vehicle and on the front camera." T1.58:17-19. Sgt. Thomas stated it was not unusual to see another trooper riding with Petitioner for cross-training or cross-helping purposes "if we were made aware." *Id.* at lines 20-25. However, at the time he observed Bunce on the video, Sgt. Thomas did not know who he was. T1.64:4-7.

18. Trooper Bunce was not a member of Troop D. If he was supposed to be riding with Petitioner, "a supervisor would have been made aware..." T1.59:11-21. Sgt. Thomas, therefore, started reaching out to the other sergeants to find out who he was and whether they had been made aware of his riding with Petitioner. *Id.*

19. Sgt. Thomas watched more videos to see if he could identify this trooper who was "getting out, assisting [Petitioner] with the stops[and] inspections on a truck." T1.60:2-6. While watching a video, Sgt. Thomas called for Sgt. Cannaday and Sgt. Jenkins to come and observe the video with him. Sgt. Thomas testified that as they watched, Trooper Bunce got into Petitioner's vehicle, "[t]he visor is up so the camera view is not obstructed...then I could see his name tag. It said 'Bunce.' I was like, 'Oh, okay. I know who this guy is now.' ...I ran his name through our computer [and it came back that] he was a Troop B...District 9 trooper." *Id.* at lines 15-21.

20. Even knowing *who* the trooper was, Sgt. Thomas still did not know if Bunce was *supposed to be* with Petitioner training or helping. Continuing to watch the video, Sgt. Thomas then observed Petitioner "reached over to [Bunce] and started massaging his shoulders. ...And then [Bunce] reached over and started rubbing the back of [Petitioner's] neck and playing with her hair. At that point, [Petitioner] reached up with her right hand and went like a camera 'click, click' twice[and Bunce] reached up and threw the visor down to block—obstruct the view of the camera. [It] was suspicious." T16.61:13-22.

21. Sgt. Thomas also reviewed a video from August 30, 2019 (HeatherJohnson_201908300930_D965_197158461) in which Trooper Brian Walker was driving Petitioner's trooper vehicle (Tahoe) "[w]hen Trooper Walker reached over and started massaging [Petitioner's] shoulders, put his hand back there, six to eight seconds of him rubbing and then taking his hand down...to me that looked inappropriate." T1.87:3-7, 1.84:9-24, 1.86:15-20. Trooper Walker was assigned a Dodge Charger. T1.87:8-12. Resp. Exh. 88.

22. Sgt. Thomas reviewed two (2) September 18, 2019 videos from Petitioner's vehicle, the first of which (HeatherJohnson_201909181025_D965_197224208(2)) "showed

Trooper Bunce...assisting [Petitioner] in Troop D when he was assigned to Troop B. He was with her inspecting that vehicle.” T1.89:3-12, 1.90:13-17, Resp. Exh. 89.

23. Sgt. Thomas testified that the second September 18, 2019 video (HeatherJohnson_201903181025_D965_197224208) was the first video in which he “observed [Bunce’s] name in the video and [him] putting the visor down as well.” T1.91:12-15, Resp. Exh. 90. In this video, the visor was down for a minimum of 2 ½ minutes, that last 30 seconds of which, Petitioner’s blue lights came on indicating they were making a traffic stop. T1.93:22-1.94:6.

24. Sgt. Thomas reviewed video footage - (HeatherJohnson_201908191100_D965_197106032) from Petitioner’s vehicle dated August 19, 2019. Therein, Petitioner is seen to make a “click click” camera motion with her finger and Trooper Walker “...took the visor and covered the camera for approximately ten seconds, then lifted the visor back up.” T1.97:1-2, Resp. Exh. 91.

25. Sgt. Thomas reviewed a second video - (HeatherJohnson_201908300930_D965_197158461(2)) from Petitioner’s vehicle dated August 30, 2019, which showed Petitioner and Trooper Walker getting out of Petitioner’s vehicle. Sgt. Thomas believed the two had been riding together but had no knowledge at the time of whether Trooper Walker was supposed to be training Petitioner. T1.98:4-25.

26. After showing the various videos up the chain of command, it was determined the matter should be turned over to Internal Affairs (“IA”) for investigation. T1.100:13-14, 23-1.101:2.

27. Initial allegations against Petitioner began December 11, 2019 when Sgt. Thomas completed the personnel complaint form detailing the events as he observed them on the videos and forwarded it to IA. *Id.* Petitioner signed and dated the complaint December 13, 2019. T1.101:19-20. The complaint was against Troopers Johnson (Petitioner), Walker and Bunce. T1.103:8-10.

28. At the time IA began its investigation into Petitioner’s and the other troopers’ actions, Captain (now Major) William Moore³ was the IA Unit Commander. T1.140:9-18.

29. Trooper Walker was also investigated and was recommended for termination for untruthfulness and unbecoming conduct. However, he voluntarily resigned prior to being terminated. T1.141:3-1.142:4.

30. In December 2019, Lieutenant Brian Sharpe was the investigation team leader and was assisted by then-first Sergeant (now Captain) Perry Marshall. T1.146:2-10.

³ At the time in question, Major Moore was still a captain but has since been promoted to Major. T1.140:9. With no disrespect intended but, solely for ease of following the chain of command during the time in question, this Tribunal utilizes the officers’ rank applicable at the time of each occurrence.

31. Petitioner was accused of covering her vehicle's interior camera, engaging in inappropriately touching with Trooper Walker and Trooper Bunce and patrolling outside of Troop D without permission. T1.49:10-1.50:10.

32. The IA team interviewed Sgt. Thomas, Sgt. Robert E. Cannaday, Trooper Brian Walker and, Trooper James Bunce. T1.152:9-11. The team also interviewed Petitioner four (4) times—although the last interview with Petitioner was completed by Lieutenant (now Captain) Kimberly Brown. *Id.* at lines 13-25.

33. IA's initial interview with Petitioner was on December 11, 2019 at 12:56pm⁴ (Resp. Exh. 81); the second on December 17, 2019 at 1:37pm (Resp. Exh 82); the third was also held on December 17, 2019 (Resp. Exh. 83), and; the fourth and final interview with Petitioner was on January 8, 2020. T1.153:12-17, Resp. Exh. 84.

34. In her first interview, Petitioner blamed the other troopers for the visor's being down, stating either Bunce or Walker put the visor down. Even though video recorded her clicking her fingers like a camera to which the troopers each responded by lowering the visor, Petitioner refused to admit she was at fault in or had anything to do with the lowering of the visor. Such refusal seriously tarnished Petitioner's credibility. *See* Resp. Exhs. 81, 88 and 89.

35. Prior to her second interview with IA, Petitioner acknowledged she was

“furnished with [and had opportunity to review] a memorandum from Captain Moore to Captain Slemenda in reference to th[e] complaint, as well as the attached personnel complaint[...and] excerpts of policy, specifically Directive H. 02, Investigation of Complaints and Charges Against Highway Patrol Members, which includes the subsections pertaining to investigation of complaints at the commander's office level, Internal Affairs investigation procedures, and the responsibility and rights of members being investigated. ...

[She was] also provided with Patrol Directive H. 01, Highway Patrol Rules of Personal Conduct and Job Performance, subsection 2, General Policy and Procedures. ...And also [she was] given subsection 4, Violation of Rules; subsection 7, Truthfulness; subsection 25, Conduct While Under Investigation; subsection 35, Obstruction of Investigation; and, Directive H. 01, § B, Unbecoming Conduct, which is the specific policy [she is] charged with violating.”

T1.155:17-1.156:19, Resp. Exh. 82. Petitioner further acknowledged that she read and understood all the documents, had initialed and dated her receipt of the documents and had been given a copy to retain for herself. Finally, Petitioner advised she had not ingested any substance which would interfere with or prevent her answering the investigators' questions.

36. IA's third interview with Petitioner, at 5:15pm on December 17, 2019, took place after the IA team had interviewed Trooper Walker a second time. T1.157:13-1.158:3, Resp. Exh. 83). IA's fourth and final interview with Petitioner on January 8, 2020 began at 2:53pm, with Sgt.

⁴ IA's first interview with Petitioner lasted until 1:13pm.

Marshall introducing himself again to Petitioner along with Lieutenant Kimberly Brown. Sgt. Marshall again confirmed with Petitioner that, on December 17, 2019, she had been provided the memorandum from the unit commander of IA and a copy of the revised complaint against her. Petitioner again confirmed her receipt of the documents and further confirmed that the two had discussed the documents in that meeting. T1.159:11-1.160:4, Resp. Exh. 84.

37. First Sgt. Marshall was present for the entirety of Petitioner's first three (3) interviews. During those interviews, Petitioner admitted that she and Trooper Walker had been in a relationship since 2017. T1.162:14-21. The two regularly rode together for two years (2017-2018). T1.163:7. At some point, while on duty, Petitioner picked Walker up from his residence in Randolph County, drove to an undisclosed location outside of her designated troop area of responsibility (into Troop E area) and the two attempted to have sexual intercourse in the back seat of Petitioner's trooper vehicle. T1.162:19-1.163:4. The only reason the two did not complete their sex act was because Walker was unable to obtain an erection. *Id.* at line 5. So, in their continued effort, the two got out of the back seat of Petitioner's vehicle and instead attempted to have sex on the trunk of the vehicle. However, Trooper Walker still could not get an erection to complete the act. *Id.* at 1.163:5-7.

38. On December 11, 2019 in IA's first interview with Petitioner, the investigators inquired about Trooper Walker and Petitioner responded that:

- a) Petitioner met Walker when he trained her for her motor carrier duties;
- b) Petitioner admitted that she let Trooper Walker drive her Tahoe (assigned vehicle) a lot, they worked together a lot "finding weight", and the scales were heavy, and Walker helped her carry the scales;
- c) Petitioner stated they "went through a spell where we had feelings for each other[]" but, when asked, Petitioner denied that she and Walker had had an affair.
- d) Then when asked if the two had ever been intimate, Petitioner responded, "I'm not going to say that. ...Not on duty."
- e) Despite having denied having an affair and, saying she did not remember exactly when they were intimate, Petitioner later admitted the two had had sex... "months ago... maybe May [of this year, 2019]...could be at the race." She admitted they had sex in her State-paid-for room while she was working the Charlotte race but she could not remember when she worked a race last—either this year or last year. Petitioner did not know if Walker had a roommate but she did not. She stated Walker initiated it but the two only had sex that one time. (In the second interview, Petitioner stated she was not on duty at the time they had sex. (Resp. Exh. 82)).
- f) Although she did not remember clicking for the visor to be put down in her vehicle, Petitioner admitted it would have been done to prevent the camera from recording her and Trooper Walker touching each other, holding hands, or kissing but they did not touch each other's genitals. (Resp. Ex. 81, 82, 88, 89).

- g) Petitioner said she didn't remember making any action to tell Walker to pull down the visor but, she admitted they kissed in the car while on duty.
- h) By the time of the first interview, she and Walker were no longer flirting, kissing, or having sex. "It was just a couple months."

Resp. Exh 81 (video).

39. Yet, Petitioner admitted she and Walker started flirting with one another *before* she moved to D9, she had been with D9 for a year and, Sgt. Thomas obtained various videos dated June to September 2019 in which the two were seen rubbing on each other in her vehicle.

40. Also in that first interview, regarding Trooper Bunce, Petitioner stated:

- a) Petitioner met Bunce at "cargo tank" [phonetic] class in Raleigh;
- b) Bunce came across the county line to ride with Petitioner often;
- c) Petitioner admitted she had been kissing Bunce in her patrol vehicle, he touched her breasts and they had touched each other's genitals while on duty but, she had never had sex with him;

Resp. Exh 81 (video).

41. On December 17, 2019 at 1:37pm in IA's second interview with Petitioner, the investigators inquired further about Trooper Walker and Petitioner responded that:

- a) Petitioner has been friends with Trooper Walker her "whole career"—eleven (11) years;
- b) Petitioner stated she had been out of work for some time the year before, having had surgery on her fingers, but her transfer to the motor carrier unit was effective December 3, 2018;
- c) Trooper Walker began training her upon her return in December 2018;
- d) Petitioner did size and weight training first, then inspections but did not remember when she finished up the training—believed it was earlier in the 2019 year;
- e) Purpose of having Walker put the visor down was to keep anyone from seeing Walker touch Petitioner or Petitioner touch Walker. "We did kiss but it was mostly touched" but not genitals;
- f) Contrary to her earlier interview statement, Petitioner stated she and Walker had sex in his State-paid-for room at the race in May the year before (2018);

- g) She was trained to turn off her camera when making enforcement truck stops but tried to remember to turn it on when she stopped cars;
- h) Petitioner met Walker at a church several times while off duty to talk, hug and, 'may have' kissed;
- i) Walker did all her field training including cargo and hazmat training;
- j) Their flirting relationship started when the two worked the FBI conference in Asheboro; and,
- k) Contrary to her earlier interview testimony that she and Walker had only been involved for a couple of months, in her second interview, having changed the timing of the sexual intercourse she had with Walker from May 2019 to May 2018, and still engaging in intimate touching with Walker at the church in December 2018 and in her work vehicle in the summer/fall of 2019, Petitioner's timeline set her relationship with Walker to have lasted more like eighteen (18) months.⁵

Resp. Exh. 82.

42. Also in that second interview, regarding Trooper Bunce, Petitioner stated:

- a) Bunce helped her a lot even though he was in another troop;
- b) She confirmed the visor going down was to hide their touching;
- c) Bunce touched her genitals inside her vehicle, but she stated she only remembered touching his genitals while "fully clothed" outside the vehicle but not in the vehicle;
- d) First time she recalled having Bunce ride with her was in the summer of 2019 and ended sometime in October 2019;
- e) They met south of Sanford on I-421, usually at the fire department near Carolina Trace to engage in their touching but they did not go inside of the fire department;
- f) She never had sex with Trooper Bunce and never had sex on-duty with Trooper Walker;
- g) Out of an abundance of caution, Lt. Sharpe and Sgt. Marshall plainly inquired again about whether Petitioner's husband knew about her relationships with the two troopers because the three men carry guns as part of their jobs. (Petitioner's husband is a wildlife officer.)
- h) Petitioner stated very clearly in her first interview that her husband did not know about her relationship or sexual encounters with these two troopers. However, when asked in her

⁵ By the end of trial, Petitioner had pushed her attempted sexual intercourse with Trooper Walker back to "May, June or July" of "2017." T3.661:14-20. If this new timeline is to be believed, Petitioner's "flirtations" with Walker spanned some thirty (30) months or more.

second IA interview whether Bunce or Walker knew about the other in relation to her, the following exchange took place:

Petitioner: “I don’t think so... [I never told them about each other]...’cause, ‘cause Walker was, I mean, it seems forever ago.

IA, Lt. Sharpe: ...Yeah, you said earlier Bunce came [after Walker].... I take it your husband’s not aware either?

Petitioner: Oh yeah, he knows. We’ve been...we’ve been through this. We already...

IA, Lt. Sharpe: Since we’ve spoken?

Petitioner: Oh, he knew. [Crying]...We’d been through this before all this happened.

IA, First Sgt. Marshall: When did you tell [your husband]?

Petitioner: We’ve been through this...we went through this thing with Walker way back...yeah. ...When all this happened [when my husband and I were building our house].

IA, First Sgt. Marshall: Does he know what’s going on now? ...What’d you tell him?

Petitioner: Yes...what the allegations were. Yeah...it’s been hard.

IA, First Sgt. Marshall: Is there any issues with Walker and your husband where something could happen? ...I’m asking for your safety and for Walker’s.⁶

Petitioner: Nah, no. It’s fine. We saw him in Lowes the other day. My husband and him talked. ...It’s fine. They speak. [They’re cordial.] It’s good.”

Resp. Exh. 82.

- i) Petitioner stated her husband knew about the affair with Walker way back. Then Petitioner stated her husband does not know she and Trooper Walker had sex. “I don’t think his [and my] conversation should be part of this...I’m not trying to give any details.... ...We’re not going to have any issues. ...He knows about Walker...just not that. My husband

⁶ Contrarily, at trial Petitioner testified that in that second interview the investigators never expressed any concern for her safety or about the fact her husband was an armed law enforcement officer. T3.632:7-17.

forgave me for everything I did. ...He's forgiven me for *whatever happened* between me and Walker and we left it at that.”

- j) Petitioner met Bunce at his home to pick up cotton candy and kissed on him.
- k) At the end of the interview, when asked if there is anything else that is relevant that she thinks the investigators should know, Petitioner said, “no.”

43. In IA's third interview with Petitioner on December 17, 2019 at 5:15pm, Lt. Sharpe began by telling Petitioner the investigators had conducted a second interview with Trooper Walker during which Walker gave them substantially more information—“it was eye-opening!” stating there were “a bunch more times” when the two (Walker and Petitioner) engaged in sex. Petitioner was then given the opportunity to fill in or add to her testimony from the prior two (2) interviews. At which time, Petitioner admitted that while on duty one night in 2018, she picked up Walker from his home, they drove off the Black Ankle exit and Parked. Petitioner dropped her pants to her ankles, climbed on top of Walker and they attempted to have sexual intercourse in the back of her trooper vehicle. When Walker could not “get it to work” (later clarified that he could not get an erection), the two got out of the back seat and moved to the trunk where they attempted to have intercourse on the trunk but Walker still could not get an erection.

Resp. Exh. 83 (video).

44. When told that Walker advised the two had met in many places other than the church, Petitioner asked “off duty?”

IA, Lt. Sharpe: Off duty and on duty.

Petitioner: Well, on duty we meet at the cemetery at Sea Grove.

IA, Lt. Sharpe: What occurs at the cemetery?

Petitioner: We would hug...and kiss...and that's it.

IA, Lt. Sharpe: That's all you did?

Petitioner: Yes.

IA, Lt. Sharpe: What about any other places you met?

Petitioner: ...The cemetery was the biggest...I mean the one place that we met [while on duty] the most...and that church. ...

IA, Lt. Sharpe: Why didn't you tell us about the other places [before]?

Petitioner: I thought you said, 'off duty'. I misunderstood you.

Resp. Exh. 83 (video).

45. Petitioner admitted leaving the troop district twice while on duty—once was to pick up cotton candy from Bunce for her daughter’s birthday (October 2019) and the second time she went and met Bunce a second time at Smithfield’s in Smithfield. Each time they only talked and kissed. Resp. Exh. 83 (video).

46. Petitioner admitted meeting Trooper Walker in the cemetery some thirty times while on duty. Resp. Exh. 83 (video).

47. When asked whether she could think of anything else she should tell the investigators, Petitioner responded, “No. That’s it. I have nothing else. I can’t think of anywhere else we met off duty. ... You got all I know.” Resp. Exh. 83 (video).

48. IA’s fourth and final interview with Petitioner was on January 8, 2020 at 2:53pm. (About two-thirds way through the interview, Lt. Brown took a break in the interview and restarted at 3:53pm. She did not record the time at the break stop.) First Sgt. Marshall was present with Lt. Kimberly Brown. After confirming that Petitioner had received the appropriate documents prior and would not be hindered by any substance but could move forward with the interview, Sgt. Marshall excused himself and left Petitioner to be interviewed solely by Lt. Brown. Resp. Exh. 84.

49. Petitioner confirmed that her flirtatious relationship with Walker began about 1 ½-2 years prior when she was still part of D6 and the two were on special assignment in Asheboro for an FBI summit.

50. The two met often “just to talk” or to get a “bear hug.” She was on permanent day shifts, usually from 5:00 a.m. to 3:00 p.m. so she could pick her children up from school. She did work the night shift every now and then.

51. Regarding the particular night she picked Walker up from his residence, Petitioner remembered it was dark—perhaps 10:30 or 11:00 p.m. She picked him up and they drove around a little when the two (2) mutually decided to stop and “park.” She stated the two had talked about having sex but had not done so before and “this particular night was [their] opportunity.” They parked and got out and kissed on the passenger’s side, then Walker got into the back seat on the driver’s side and they “attempted to have sex but it didn’t work. [Then they] got out, tried outside the car...it didn’t work.” After which, Petitioner said she thinks they gave up but she “just d[o]n’t remember.” (After the break, Petitioner acknowledged, in this instance, Walker’s penis touched her vagina and “backside” but nothing else.) Resp. Exh. 84 (video).

52. When “walked through” the statements she gave to the other investigators, Lt. Brown asked how the two were dressed at the time. Petitioner stated Walker had his shirt and t-shirt on but pants and briefs down *or off*, she had her pants down and *may have* taken off her shirt but didn’t remember. She says she was confident in the idea that she had on her vest that night, but the question was not asked as to whether she removed it as well. Walker could not get an

erection in the car or outside of the car and the two did not attempt oral sex at any time. Resp. Exh. 84 (video).

53. Although Petitioner was on duty at the time she picked Walker up, the two spent 1-2 hours of her shift together before she returned him to his residence. This occurred prior to “the race.” Resp. Exh. 84 (video).

54. Although the comment was made that Walker had some sort of medical condition which prevented him from having an erection, it was established in the 4th interview that Petitioner and Walker did consummate their relationship at some point *after* this incident in the patrol vehicle. Resp. Exh. 84 (video).

55. Petitioner admitted working many race events. She transferred into D9 on December 3, 2018 and the particular race during which she and Walker spent the night was the last race she worked before being transferred. Resp. Exh. 84 (video).

56. The all-star races are on Saturday nights and are short races. The 600-races are longer, bigger race event weekends—with races running on Sundays, too. She believed she worked Moreheaden 49 (phonetic spelling) and Walker worked with her. She believed she had her room to herself with no roommate. She “assumed” Walker did not have a roommate. Resp. Exh. 84 (video).

57. After being relieved from her shift, Petitioner went into the hotel and got showered. The two messaged via computer and, sometime late that night, she went to Walker’s room. They drank beer and had sexual intercourse. She took another shower there in his room and, after Walker fell asleep, Petitioner went back to her room. That was the one time she and Walker had sexual intercourse. Resp. Exh. 84 (video).

58. After that time, the two talked and may have hugged and kissed. Resp. Exh. 84 (video).

59. In that final interview with Lt. Brown, Petitioner clarified some of the statements she made in earlier interviews (i.e., In her first interview, Petitioner stated she and Walker had sex in her room [at the race] but in this 4th interview, she said “...when I left, I thought about it. I was wrong. It’s [sic] his room...I remember...it was...his room.” Resp. Exh. 84 (video).

60. Lt. Brown advised Petitioner that Bunce had stated she sent him “inappropriate” Facebook messenger messages. Petitioner stated she never sent any nude photographs but she did send him pictures with her panties on but “nothing was ever naked.” *Id.* She sent a video of her in the shower to Bunce “...but it wasn’t naked just...head up.” She has never sent any photos or video to Walker. Resp. Exh. 84 (video).

61. Lt Brown pointed out that at each time Petitioner motioned for Walker and Bunce (during the ride along) to flip the visor down in her vehicle, there was already some sexual touching going on. Petitioner agreed.

Lt. Brown: “When you motion for them to flip the visor down, what actions take place once the visor goes down? Because, obviously, there’s touching going on before the visor goes down so, ...is there more intimacy that takes places once you motion for the visor to go down....?”

Petitioner: With Bunce there is! ...I have not kissed Walker since I got on the ‘9-side’. ...[Since I transferred,] We do hug. We’ve held hands or pinkeys. ...But we have not done anything else because of my husband.”

Lt. Brown: ...So visor down with Walker, it’s mainly handholding or he may put his hand on your shoulder. With Bunce, you’ve motioned Bunce to put the visor down because ya’ll were kissing and being more intimate in your car?”

Petitioner: Right.

Resp. Exh. 84 (video).

62. Petitioner went to see Bunce at his secondary employment while she was on duty and, a second time, she went to pick up cotton candy from him while on duty. She acknowledged that in both instances she knew she was outside her jurisdiction without permission.⁷ Bunce was off duty on both occasions. Resp. Exh. 84 (video).

63. Petitioner admitted that her behavior violated the State Highway Patrol rules and policies.

64. In each and every one of the four interviews with Petitioner—including the one conducted by Lt. Brown—the investigators inquired as to whether there might be any reason to worry about Petitioner’s husband learning the full scope of the investigation and of his wife’s (Petitioner’s) actions. Due to Petitioner’s husband being an armed law enforcement officer,⁸ the investigators were clearly concerned about the ongoing welfare and well-being of Petitioner as well as Walker and Bunce. Petitioner’s response over and over was that her husband knew about the touching (between her and Walker), and she had also told him of the allegations in the investigation but “he will not find out [the remainder of the issues]. There is nothing to worry about.” Resp. Exh 84.

65. At trial, Petitioner testified that in her first interview, when she was initially asked by “the Internal Affairs investigators...whether or not [she was] intimate with Trooper Walker” she responded, “Not on duty[...b]ecause when he said intimate [she] thought he was talking about

⁷ Respondent did not cite the Petitioner’s first admitted violation of leaving her assigned duty station in Lee County to visit Bunce in its Personnel Charge Sheet and Final Agency Decision but did cite her out-of-district visits to Bunce for cotton candy and to Walker for sex. At trial, Petitioner also admitted she was “outside of [her] troop” while on duty when she picked up Walker to have sexual intercourse. T3.620:5-18; *see also* Petitioner’s Exhs 3-4.

⁸ Petitioner’s husband is a law enforcement officer with the NC Wildlife Commission and carries a firearm. T3.632:13-21.

sex[...a]nd at that point [she] had not had sexual intercourse with Trooper Walker on duty[.]”⁹
T3.621:7-18.

66. Although Petitioner admitted at trial that none of the investigators ever defined the word ‘intimate’ or described what they meant by it (T3.621:19-3.622:1), the record reveals that in later interviews Petitioner answered other questions regarding intimacy clearly without believing ‘being intimate’ only meant having sex, including when asked about her kissing Bunce in her patrol vehicle. *See* Respondent’s Exhs 81-84 (videos); *also see* FOF #37(e), FOF #40(k) and FOF #60 above.

67. Petitioner attempted unconvincingly to assert she had not been dishonest in failing to reveal her attempted sexual intercourse with Walker to the investigators until her third interview because the investigators did not ask her about any “on duty” intimacy until then. T3.622:12-22.

68. Petitioner’s Performance Evaluations for FY 2016-2017, FY 2017-2018, and FY 2018-2019, which reference “observations” of Petitioner in her work, all show her graded at meeting or exceeding the expectations of the State Highway Patrol during those observations. However, none of Petitioner’s admitted rule violations or alleged unbecoming conduct was observed during any of her evaluations.

69. Petitioner argued that because it had been (by her second or third timeline) “[a]lmost two and a half years[.]” between her attempted sexual intercourse with Walker and the initiation of the internal investigation, too much time had lapsed. Thus, Respondent should not be allowed to use that incident as part of its reason for terminating her. Yet her intimate behavior with Walker continued.

70. IA interviewed Trooper Walker two (2) times and also interviewed Trooper Bunce two (2) times. T2.384:3-8. However, with each of their interviews, IA learned new information Petitioner had not disclosed. IA had to conduct four (4) interviews with Petitioner before Petitioner was completely forthcoming, confirming what the two male troopers had already told them.

71. At the conclusion of all the interviews, the IA investigators compiled a Report of Investigation, which was ultimately given to Lt. Col. Jeff Gordon, along with the entire investigatory file. Resp. Exh. 41. The IA investigators had no further involvement in determining what action, if any, would be taken against Petitioner, as the IA investigators are only fact finders. T1.182.

72. In addition to the entire investigatory file, Lt. Col. Gordon considered the state’s Disciplinary Action Policy as well as the state’s Employee Grievance Policy. Lt. Col. Gordon also received a memo from Major William Hook, director of Professional Standards, recommending Petitioner’s dismissal. Major Hook’s memo stated that in evaluating the appropriate level of discipline, he had considered the severity of the policy violation, the subject

⁹ Even though Petitioner testified she defines intimacy as “sex”, somehow her attempted sex with Walker did not count as having been intimate. T3.663:12. Yet Petitioner further testified that, at no point, did she ever “fabricate any information[...or] omit information to mislead or to divert the investigation....” T3.664:9-14.

matter involved, the harm resulting from the violation, Petitioner's work history, and discipline imposed in other cases involving similar violations. *See* Resp Exhs. 49, 78, and 79.

73. In addition to reviewing the investigatory file and relevant policies, Lt. Col. Gordon considered Petitioner's last three (3) years' work history, the fact that she had met or exceeded expectations during her observations and, that she had no prior disciplinary action against her. T2.402:7-2.403:2; *see also* Pet. Exh 1. He considered the severity of Petitioner's policy violations. At trial, he testified that both truthfulness and unbecoming conduct were major factors in his determination. T2.384: 3-19. He was concerned about the fact that while other troopers were out working and could have needed assistance, Petitioner was busy having inappropriate contact with Walker and Bunce while on duty.

74. Lt. Col. Gordon testified that he also considered the harm resulting from the violation and; although the Highway Patrol's reputation remained intact *externally* (only because the matter had not made it to the media), there was organizational harm done by Petitioner's rule violations because when she *was not under observation*, Petitioner was not doing the duties for which she was being paid by the citizens of the state. T2.404:11-16.

75. Lt. Col. Gordon determined that the relevant SHP policies that Petitioner violated were: State Highway Patrol Directive H.01, Section V Unbecoming Conduct; State Highway Patrol Directive H.01, Section VII Truthfulness; State Highway Patrol Directive H.01, Section XXVI Neglect of Duty; and the State Human Resources Manual Disciplinary Action Policy regarding Unacceptable Personal Conduct. Resp. Exhs. 29, 35, 36.

76. Lt. Col. Gordon further considered discipline that had imposed in other cases involving similar violations. He testified he did not have the benefit of the EEO investigation report but he instructed IA to pull any trooper violations they could find that were similar to Petitioner's. His staff found no other cases that involved similar violations of inappropriate sexual contact while on duty. T2.428:16-21, T2.429:1-7, 25-2.430:4.

77. Nevertheless, based on his thorough review and consideration, Lt. Col. Gordon recommended Petitioner's dismissal and instructed Major Hook to proceed with a Pre-Disciplinary Conference. Resp. Exh. 45.

78. A Pre-Disciplinary Conference was held on April 14, 2020, conducted by Major Hook. Petitioner prepared a written statement, which was read aloud at the conference. A summary of the conference was provided to Lt. Col. Gordon, including the written document prepared by Petitioner. Resp. Exhs. 31, 51. After reviewing the documents, Lt. Col. Gordon issued a Memorandum to Major Hook advising he had concluded that he "believe[d] *dismissal* from the North Carolina State Highway Patrol...is the most appropriate discipline [to be applied to Petitioner] under the circumstances." Resp. Ex. 44 (emphasis in original); *see also* T2.391:13-2.392:3.

79. After being terminated, Petitioner properly appealed her dismissal through the internal grievance process. Resp. Exh. 3. Petitioner also filed a DPS Equal Employment Opportunity Office ("EEO") complaint alleging discrimination on the basis of her gender.

Specifically, Petitioner alleged she received disparate treatment “[b]ecause [she] felt like [she] was treated differently than male troopers that have done similar things. [She stated, o]ther troopers having sex on duty keep[] their jobs[and are] not being terminated.” T3.667:10-20.

80. EEO Investigator Christopher McCord was assigned to investigate Petitioner’s gender discrimination claim. Petitioner provided Investigator McCord with the names of eleven (11) male troopers whom she described to have committed similar or more egregious violations but none of whom were terminated by Respondent. In turn, the EEO investigator requested the SHP provide the IA case files for each of the troopers.

81. Lt. Colonel Jeff Gordan was named SHP Director of Field operations on October 7, 2019. Pet. Exh. 6, p.12. He had his staff pull the specific files and found that out of the 11 incidents, only 10 IA investigations had been conducted. *Id.* All 10 investigations occurred between 2001 and 2014 and in that time, there had been four (4) different Commanders and Deputy Commanders. *Id.*

82. When Investigator McCord reviewed the case files, he found that out of the 10 investigations, *none* involved troopers having sex on duty and untruthfulness like Petitioner’s. More pointedly, none involved on-duty sex. (Petitioner’s allegations of what happened in the other cases only asserted that one of the troopers had had sex on duty—Mouzon—but Mouzon’s IA file, like all the other sexual cases, only revealed an off-duty sexual relationship.)

83. Comparing the 10 incidents:

- Trooper Allred: Petitioner alleged Allred was caught sleeping with a secretary and was transferred as a result. Actual allegations were that he made and received an excessive number of personal phone calls to a female driver’s license examiner which distracted him from his work.
~Charged with: Neglect of Duty; Outcome: Written warning.
- Trooper Fort: Petitioner alleged Fort was caught having sex with a secretary in the district office and was transferred as a result. Actual allegations—Fort admitted to an off-duty extra-marital affair.
~Charged with: Unbecoming Conduct; Outcome: 1-day Suspension without pay.
- Sgt. Catherwood: Petitioner alleged Catherwood was caught sleeping with his Trainee’s wife and was demoted and transferred as a result. Actual allegations were that he left his assigned duty station without permission to travel to a meeting with the wife of a former trooper.
~Charged with: Neglect of Duty, Violation of Rules/Unauthorized Use of Patrol Vehicle, and Unbecoming Conduct; Outcome: Demoted from Sgt. to trooper.
- Trooper Howell: Petitioner alleged Howell was caught having an affair. Actual allegations were that Howell admitted to meeting with a subordinate

female trooper to engage in inappropriate sexual conduct and also that he had directed an immediate subordinate to facilitate the affair.

~Charged with: Unbecoming Conduct and Truthfulness; Outcome: Howell resigned in lieu of dismissal.

- Trooper Coley: Petitioner alleged Colley was caught sleeping with a secretary and was transferred as a result. Actual allegations were that Coley lied and attempted to cover up off-duty extramarital affair.
~Charged with: Truthfulness; Initial Outcome: Dismissed but dismissal was overturned by the Court of Appeals. Final outcome thereafter: Demotion from the rank of First Sergeant to the rank of Master Trooper.
- Trooper Scott: Petitioner alleged Scott was caught having an affair while his vehicle was parked in the garage of the lady's home. Actual allegations were that Scott admitted to an extramarital affair. On one occasion, while on duty, Howell visited the home of the woman he was having the affair with and parked his car in her garage. The woman's husband came to the house, armed with a gun and physically assaulted her while Scott hid in the backyard. When Sheriff Deputies arrived, Scott failed to disclose the extramarital affair, that he hid in the backyard and that he moved his patrol car prior to the deputies' arrival.
~Charged with: Unbecoming Conduct, Violation of Rules/Operation Guidelines to video recording devices; Abuse of Position; Insubordination, and Neglect of Duty; Outcome: Initially, Demotion and 15% reduction in salary. Following reassignment, Scott appealed to the Secretary of DPS, was found to have made false statements at the time of the initial allegation and on appeal, and attempted to "involuntarily resign on the basis of duress, coercion and intolerable conditions" during the pre-dismissal conference. However, the Secretary terminated his employment thereafter. Final Outcome: OAH reversed the Secretary and ordered Scott reinstated to his demoted rank and salary and the State Personnel Commission upheld the decision. *See Scott v. NC Dept. of Crime Control & Public Safety*, 222 N.C. App. 125, 730 S.E.2d 806 (2012).
- Trooper Wetherington: Petitioner alleged Wetherington was accused of lying about losing his campaign hat. Actual allegations were that Wetherington lied to his supervisors about his campaign hat being blown off his head during a traffic stop when in truth he did not know what happened to the hat.
~Charged with: Truthfulness; Outcome: Dismissed but dismissal was overturned by the Court of Appeals. Final outcome thereafter: 10-day suspension without pay.
- Trooper Smith: Petitioner alleged 1) Smith shot a deer while on duty with a SHP issued shotgun, then covered up his trooper uniform to take a picture with the buck; and, 2) used excessive force by pulling a young boy off a

four-wheeler causing the boy's head to hit the ground. Actual allegations: Failing to properly investigate a vehicle collision where a woman was struck and killed by a drunk driver.

~Charged with: No record of any charges after preliminary investigation was completed. Outcome: Smith was transferred from D6 Randolph County to A1 Currituck County.

- Trooper Mouzon: Petitioner alleged Mouzon had sex with a subordinate trooper's wife while on duty. Actual allegations: Mouzon admitted to the extramarital affair.
~Charged with: Unbecoming Conduct; Outcome: Mouzon was demoted from First Sergeant to Master Trooper.
- Trooper West: Petitioner alleged West had an extramarital affair and no action was taken but instead, West was later promoted and became Deputy Commander of the Patrol. Actual allegations: An anonymous letter was sent to the SHP alleging West had been involved in two separate extramarital affairs. West admitted to the affairs during an investigation.
~Charged with: Unbecoming Conduct; Outcome: West was demoted with a 5% reduction in salary.

Resp Exh. 18, p.15-21.

84. In the present matter, like Petitioner, Trooper Brian Walker was also charged with Unbecoming conduct, Truthfulness and Violation of Rules: General rules of video recording devices, and; following IA's investigation, Trooper Walker was likewise recommended for termination. However, unlike Petitioner, Walker decided to resign in lieu of dismissal. Pet. Exh. 6, p.14-15.

85. EEO determined that there was no reasonable cause to believe Respondent had unlawfully discriminated against Petitioner based on her gender.

86. An NCDPS Employee Advisory Hearing was held on April 28, 2021 to hear Petitioner's internal appeal and the hearing officer recommended that Petitioner's dismissal be upheld. Resp. Exh. 2.

87. After the recommendation of the hearing officer, Petitioner's entire investigatory file was given to Colonel Freddy Johnson, Jr. to make a final agency decision. Col. Johnson reviewed the initial IA investigation file, the relevant policies, the various recommendations of Major Hook and Lt. Col. Gordon, the hearing officer's recommendation, and the report of the EEO investigation. Col. Johnson also discussed the matter with NCDPS Legal and Human Resources Departments. T3.548-3.549.

88. Col. Johnson considered the severity and subject matter of Petitioner's conduct and was particularly troubled by Petitioner's continued pattern of deception, stating that credibility is the crux of Petitioner's job. Resp. Ex. 42.

89. Col. Johnson considered Petitioner’s work history, including that Petitioner met expectations and had no prior disciplinary actions against her. But despite Petitioner’s clean work history, Col. Johnson determined that dismissal was the appropriate discipline in this case. T3.549, Resp. Exh. 42.

90. Col. Johnson further considered discipline which had imposed in similar cases. To this end, he reviewed the detailed findings of the EEO investigation, and agreed that none of the cases Petitioner cited involved sexual conduct while on duty. Resp. Exh. 42.

91. After completing his independent review of the case, and having discussions with Legal and Human Resources Departments, Col. Johnson concurred with the recommendation for Petitioner’s dismissal and issued his Final Agency Decision of dismissal to Petitioner on June 9, 2021.

BASED UPON the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Parties are properly before the Office of Administrative Hearings (“OAH”) in that the OAH has personal and subject matter jurisdiction over this contested case, the parties received proper notice of the hearing in this matter and Petitioner exhausted her administrative remedies before appealing to the OAH. N.C. Gen. Stat. § 126-34.02(a).

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep’t of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. A court 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).

4. Petitioner is a career status State employee entitled to the protections of the North Carolina State Human Resources Act (“the Act”), N.C. Gen. Stat. § 126-1 *et seq.*

5. The Act outlines the procedures the State must follow in separating an employee such as the Petitioner from employment for cause due to unacceptable personal conduct, specifically:

“No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In 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. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the agency through the agency grievance procedure for a final agency decision. However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. If the employee is not satisfied with the final agency decision or is unable, within a reasonable period of time, to obtain a final agency decision, the employee may appeal to the Office of Administrative Hearings. Such appeal shall be filed not later than 30 days after receipt of notice of the final agency decision. The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause.

N.C. Gen. Stat. § 126-35(a).

6 Moreover, “[i]n contested cases conducted pursuant to [N.C.G.S. § 126-35], the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer.” N.C. Gen. Stat. § 126-34.02(d). The weight of Respondent’s burden is “by a preponderance of the evidence.” N.C. Gen. Stat. § 150B-25.1(c).

7 “There are two categories of just cause for discipline: ‘unsatisfactory job performance’ and ‘unacceptable personal conduct.’” *Warren v. N. Carolina Dep’t of Crime Control & Pub. Safety, N. Carolina Highway Patrol*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (2012) (*citation omitted*). In determining whether the agency has met its burden of proof, our appellate courts have long held that “[j]ust cause may be supported by either unsatisfactory job performance or personal misconduct which is detrimental to State service.” *Amanini v. North Carolina Dept. of Human Resources*, 114 N.C. App. 668, 679, 443 S.E.2d 114, 120 (1994).

8 In the present case, SHP dismissed Petitioner for unacceptable personal conduct.

9 If Petitioner’s alleged conduct meets the definition of unacceptable personal conduct (“UPC”), this “tribunal must [further] examine two things:

- (i) ‘whether the employee engaged in the conduct the employer alleges’ and
- (ii) ‘whether that conduct constitutes just cause for the disciplinary action taken.’”

N. Carolina Dep’t of Env’t & Nat. Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (quoting *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 194 (9th Cir.1990), *cert. denied*, 500 U.S. 917, 111 S.Ct. 2014 (1991)).

10. In considering an employee’s dismissal for UPC, 25 N.C.A.C. 1J. 0614 provides in pertinent part:

“(8) Unacceptable Personal Conduct means, in pertinent part:

- (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) . . . 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[.]

25 .C.A.C. 1J. 0614(8).

11. Moreover,

- (a) Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action.
- (b) Prior to dismissal of a career employee on the basis of unacceptable personal conduct, there shall be a pre-dismissal conference between the employee and the person recommending dismissal. This conference shall be held in accordance with the provisions of 25 NCAC 1J .0613.
- (c) Dismissals for unacceptable personal conduct require written notification to the employee. Such notification must include specific reasons for the dismissal and notice of the employee's right of appeal.
- (d) Failure to give specific written reasons for the dismissal, failure to give written notice of applicable appeal rights, or failure to conduct a pre-dismissal conference constitute procedural violations with remedies as provided for in 25 NCAC 1B .0432. Time limits for filing a grievance do not start until the employee receives written notice of any applicable appeal rights.

25 .C.A.C. 1J. 0608.

12. In the case at bar, Respondent alleged Petitioner:

- (a) engaged in an inappropriate sexual relationship with Trooper Walker which included kissing, touching, and attempting sexual intercourse while on duty;
- (b) engaged in an inappropriate sexual relationship with Trooper Bunce which included kissing, hugging, holding hands, and touching each other's genitals over clothing while on duty;
- (c) was untruthful during the IA investigation by failing to be forthright about the extent of her relationship and activities with Trooper Walker, including being untruthful when she stated she had not been intimate with Walker on duty.

(d) denied she instructed the male troopers to lower the sun visor in order to conceal her inappropriate touching with them.

(e) left her assigned duty area twice without gaining a supervisor's permission—once to pick up Walker from his home so the two could engage in sexual intercourse and, once to meet Bunce to pick up cotton candy for Petitioner's daughter's birthday—both times while on duty.

13. Applying the definitions of unacceptable personal conduct to the alleged actions listed in Conclusions of Law (“COL”) ¶ 11 above, engaging in sexual behavior of any type while on duty (11a&b) and, making false statements to IA investigators (11c&d) are conduct “. . . for which no reasonable person should expect to receive prior warning; . . . the willful violation of work rules; [and] . . . conduct unbecoming an employee that is detrimental to the agency's service[.]” 25 N.C.A.C. 1J. 0614 (7) and (8)(a), (d) and (e).

14. It is well settled that an employer may discipline an employee for just cause based upon one instance of unacceptable personal conduct. To that end, one (or perhaps a second) instance of a person leaving her duty station without permission, on its own, *may* be conduct for which a reasonable person could expect to receive prior warning. COL ¶ 11e.

15. However, just because the *allegations* of ¶ 11a-e fit within the definition of UPC, does not necessarily support a conclusion that Petitioner actually engaged in the conduct alleged, in answer to our first *Carroll* inquiry. *Carroll* at 665, 599 S.E.2d at 898. That “is a question regarding the sufficiency of the evidence to support [the] factual finding” *Follum v. N. Carolina State Univ.*, 204 N.C. App. 369, 696 S.E.2d 203 (2010).

16. Looking to the whole record in the present case, while leaving her duty station without permission *may possibly* be conduct requiring prior warning, this conduct was a small part of the many *repeated* violations admitted to by Petitioner. Though it required four (4) full interviews with Petitioner, she did finally admit to *regularly* engaging in intimate behavior with Troopers Walker and Bunce *while on duty* and *while being paid for a job she was not doing*.

17. As for the sexually charged behavior, as the interviews went on, Petitioner admitted she had been meeting a trooper regularly at a church and at Sea Grove cemetery to hug and kiss and talk *after* the two had clocked in. She admitted to taking 1-2 hours of her work night to pick up Walker from his home with the sole purpose of the two having sex. (Petitioner argued that this one instance of attempted sexual intercourse on duty with Walker was too remote and should not be considered. However, the evidence revealed her inappropriate relationship with Walker continued for some eighteen (18) months thus making that instance as relevant as all the rest.) Petitioner admitted to the many occasions of inappropriate touching between her and Walker and her and Bunce in her patrol vehicle. She admitted to meeting Bunce for cotton candy and the two hugging and kissing. All this unacceptable personal conduct occurred while Petitioner was on duty.

18. In fact, Petitioner admitted she committed all alleged rule violations *except* for being untruthful, and; as to that allegation, *res ipsa loquitur*—the interview recordings speak for

themselves. Petitioner was untruthful when: a) in the first interview, she told the IA investigators she had not been intimate with Trooper Walker while on duty, and; b) she initially blamed Troopers Walker and Bunce for lowering the sun visor, saying she had nothing to do with the lowering of the visor in her vehicle when they (she and Walker and/or she and Bunce) engaged in inappropriate touching and kissing while on duty, then later feigned a lack of memory that it happened at all.

19. Petitioner was cagey and did all she could to avoid telling the IA investigators anything she did not have to tell them. She did not come forward with the truth about the attempted sexual intercourse with Walker until her third interview when she realized *Walker had already told* the investigators. At trial, Petitioner attempted to convey she was uncomfortable in the earlier interviews and she only asked the questions that were asked but the evidence tells a different story. Her speech patterns were the same in the various interviews with no hesitation in answering questions. Just as Petitioner told the investigators her husband would never know about her having had sex with Trooper Walker, Petitioner did all she could to avoid divulging truthful answers to many of the IA investigators' questions, until it became apparent that the investigators had already gained the information from one of the other troopers.

20. Although Petitioner presented evidence from prior performance reviews that she had a "can-do" attitude and met expectations on ethics and integrity in conducting investigations and completing the accompanying paperwork in support of the mission and vision of the SHP, her several instances of unacceptable behavior thereafter, do not support a finding that it was either ethical, done with integrity, or in support of the mission or vision of the SHP.

21. Moreover, where Petitioner argued that several of her supervisors praised and commended her performance as a State Trooper, the evidence plainly shows that those commendations were based on their *observing* Petitioner in doing the job she was being paid to do. None of those supervisors had any knowledge of Petitioner's overt sexual behavior while on duty. None of those "observations" were had while Petitioner was talking, hugging, and kissing on another trooper at a church or in the middle of cemetery on government time. Thus, is it undeniable that had any of her supervisors observed the alleged conduct for which Petitioner was terminated, Petitioner's performance reviews would have been much different.

22. A preponderance of the evidence, therefore, supports that Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to terminate Petitioner for unacceptable personal conduct because Petitioner repeatedly violated the expected rules of conduct and then lied about it during the internal affairs investigation. The requirements of her job were reasonable, and Petitioner made little effort to fulfill them when she believed she was not being watched or observed. *Id.*

23. Nevertheless, Petitioner argues that termination is too harsh a penalty, that the discipline does not fit the conduct. *Warren* requires the Undersigned consider it. *Warren* at 379, 726 S.E.2d at 923. According to 25 N.C.A.C. 1J. 0604, in pertinent part:

"Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by the appointing authority. Such actions may be taken against career employees as defined by the State

Human Resources Act, only for just cause. The provisions of this section apply only to employees who have attained career status. The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are:

- (1) Written warning;
- (2) Disciplinary suspension without pay;
- (3) Demotion; and
- (4) Dismissal.

Either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct as defined in 25 NCAC 1J. 614 of this Section constitute just cause for discipline or dismissal. The categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case. No disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly.”

25 .C.A.C. 1J. 0604(a) and (c).

24. In the present case, Major Hook and Col. Gordon both considered (and Col. Gordon testified to his having considered) the complete range of discipline available to them but believed Petitioner’s consistent conduct violations and untruthfulness tarnished her credibility and brought into question her reliability to do the job citizens were paying her to do when no one was looking. The measure of a person is not what they say or do while being observed but what they say and do when they believe no one is watching. Troopers need to be able to be trusted in both their word and deeds. “...Law enforcement officers must uphold the highest standards of truthfulness, particularly in the course of their official duties[].... *Wetherington v. NC Dep’t of Pub. Safety*, 270 N.C. App. 161, 194, 840 S.E.2d 812, 834, review denied, stay dissolved, 374 N.C. 746, 842 S.E.2d 585 (2020).

25. “...P]etitioner’s conduct is clearly conduct unbecoming of a state employee that is detrimental to state service[...as ‘p]etitioner failed to conduct h[er]self in a manner to reflect most favorably on the Highway Patrol, and in keeping with the high standards of professional law enforcement, and was a discredit to h[er]self and the Patrol.” *Poarch v. N.C. Dep’t of Crime Control & Pub. Safety*, 223 N.C. App. 125, 131–32, 741 S.E.2d 315, 319 (2012).

26. Additionally, none of the instances (of other troopers’ unacceptable personal conduct) proposed by Petitioner to EEO were similar enough to her case to require the exact same discipline. The most similar case to Petitioner’s was that of Trooper Walker and he received the exact same disciplinary recommendation of dismissal that she received. Thus, as he (a male) having received the same disciplinary recommendation as she (a female), Petitioner failed to show Respondent utilized disparate treatment in Petitioner’s discipline. The *only* difference between the

two is that Walker *chose to resign* while Petitioner *chose otherwise*. Respondent cannot be held to account for a difference in outcome resulting *only* from the employee's unilateral choosing to quit or appeal.

FINAL DECISION

Respondent's decision to dismiss Petitioner for just cause on the basis of unacceptable personal conduct is supported by a preponderance of the evidence. Therefore, Respondent's decision is hereby **AFFIRMED**.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Pursuant to N.C. Gen. Stat. § 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 parties' notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

IT IS SO ORDERED.

This the 5th day of December, 2022.



Karlene S Turrentine
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.

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This the 6th day of December, 2022.



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