

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 5950

PETER DUANE DEEVER,)
Petitioner,)
)
v.)
)
N.C. DEPARTMENT STATE BUREAU OF)
INVESTIGATION and NORTH CAROLINA)
DEPARTMENT OF JUSTICE)
Respondents.)

DECISION

This matter was heard by Temporary Administrative Law Judge James L. Conner II on April 2, 3 and 4, 2014 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Philip R. Isley
Philip R. Miller, III
Blanchard, Miller, Isley & Lewis, P.A.
1117 Hillsborough Street
Raleigh, NC 27603

For Respondent: Charles G. Whitehead
Special Deputy Attorney General
Lars F. Nance
Special Deputy Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

WITNESSES

Witnesses called by Petitioner

1. Robin Pendergraft
2. Marshall Tucker
3. Randy Myers
4. Bill Weis
5. Kevin West

Witnesses called by Respondent

1. Gregory S. McLeod
2. Kristi Jones Hyman

EXHIBITS

Exhibits admitted on behalf of Petitioner

1. Materials submitted to the Grievance Committee by Respondents-Bates numbers 1 to 382
2. Materials submitted to the Grievance Committee by Respondents-Bates numbers 383 to 1270
3. Petitioner's tax returns for 2010, 2011, 2012 and 2013 (submitted under seal)
4. April 1, 2011 Recommendation from Step 3 Internal Grievance Committee
5. April 19, 2011 final agency decision from Kristi Hyman
6. International Crime Investigative Analysis Fellowship ("ICIAF") Understudy Program, revised March 27, 2003
7. Petitioner's Petition for a Contested Case filed with OSP
8. Internal Grievance Supplemental materials
9. July 6, 2010 letter from Eric Hooks
10. NOT OFFERED
11. Videotaped Deposition of Kristi Jones Hyman and any exhibits thereto
12. NOT OFFERED

Exhibits admitted on behalf of Respondent

1. NOT OFFERED-Duplicative of Petitioner's Exhibit 1
2. NOT OFFERED-Duplicative of Petitioner's Exhibit 3
3. NOT OFFERED-Duplicative of Petitioner's Exhibit 5
4. February 23, 2011 Step 2 Grievance letter from Greg McLeod
5. February 2, 2011 Step 1 Grievance letter from Marshall Tucker
6. August 23, 2010 Bloodstain Analysis Internal Investigation letter from Erik Hooks
7. State Bureau of Investigation Policy and Procedure Manual, Policy 05 dated May1, 2008
8. Professional Services Agreement between NCDOJ and Jon Perry
9. Deposition of Duane Deaver and any exhibits thereto
10. NOT OFFERED
11. NOT OFFERED
12. Peter Duane Deaver projected income at the SBI for 2011, 2012, 2013 and the first three months of 2014

PRELIMINARY MATTERS AND PRE-TRIAL MOTIONS

At the beginning of the hearing, the Petitioner made a motion to seal his tax returns, admitted as Petitioner's Exhibit 3. There was no objection. The court granted the motion and entered Petitioner's Exhibit 3 into evidence under seal.

Petitioner filed a motion *in limine* pursuant to N.C. Gen. Stat. §126-35 and N.C.R. Evid., Rule 403 requesting the court exclude any reference to the matter of *State v. Peterson*, and any subsequent proceedings in the appellate courts. Respondents opposed the motion *in limine* asserting that the North Carolina Court of Appeals decision affirming the lower court's findings that the Petitioner had given deliberately false and misleading testimony as a blood spatter expert witness for the State in a murder trial was relevant to Petitioner's damages including, back pay, reinstatement and attorney fees pursuant to N.C. Gen. Stat. §126-4(11); 25 NCAC 01B.0421, .0426, .0428 and .0431.

After hearing argument on the written motion, the court DENIED Petitioner's motion *in limine*.

Respondent filed a Request for Judicial Notice pursuant to N.C. Gen. Stat. § 8C-1, Rule 201 and 26 NCAC 03.0122 and .0127 asking the court to take judicial notice of the published North Carolina Court of Appeals decision *State v. Peterson*, 2013 N.C. App. LEXIS 756. Petitioner opposed the request for judicial notice asserting *State v. Peterson* was irrelevant and immaterial.

After hearing argument on the Request for Judicial Notice, the court GRANTED Respondent's request and took judicial notice of *State v. Peterson*, 2013 N.C. App. LEXIS 756 and the NC Court of Appeals findings and affirmations of the lower court decision. The court further ordered that the findings and affirmations in *Peterson* were not being judicially noticed for the purpose of determination of the just cause dismissal but were accepted for the issue of whether reinstatement is a proper remedy. The Office of Administrative Hearings is bound by the NC Court of Appeals' decision to the extent it bears upon matters before this Office. (T pp. 204-206)

ISSUES

Did Respondent have just cause to dismiss Petitioner from employment for unacceptable personal conduct, pursuant to N.C. Gen. Stat. § 126-35 and the applicable regulations?

Alternatively, if Respondent did not have just cause to dismiss Petitioner from employment for unacceptable personal conduct, is Petitioner entitled to back pay, reinstatement and/or attorney fees?

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Temporary Administrative Law Judge (“ALJ”) makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

I. Introduction

1. This matter is properly before the Office of Administrative Hearings (“OAH”), which has both personal and subject matter jurisdiction. The parties were properly noticed for hearing.
2. On May 16, 2011, Petitioner Peter Duane Deaver (“Petitioner” or “Deaver”) filed a Petition for a Contested Case Hearing with OAH, alleging that he was discharged without just cause from his position as an Assistant Special Agent in Charge (“ASAC”) with the North Carolina State Bureau of Investigations (“SBI”) on April 19, 2011. (P Ex. 5)
3. At all times relevant to this proceeding, Petitioner was a career state employee, as defined by N.C. Gen. Stat. § 126-1, and was subject to the provisions of the State Personnel Act.

II. Petitioner’s Work History

4. Petitioner began his employment with the SBI on December 1, 1985 in the Serology Section. Petitioner graduated from the 17th Special Agent Academy in July 1986 and worked in the Serology Section until January 1994. (P Ex. 1 pp. 339-340)
5. In 1994 Petitioner was transferred to the SBI Training Section where his duties included training and instruction in firearms, physical fitness and defensive tactics. (P Ex. 1 p. 340)
6. In January 2000, Petitioner transferred to the Diversion and Environmental Crimes Unit (“DECU”). In 2003 he transferred to the Clandestine Lab Unit. (P Ex. 1 p. 340)
7. In 2005 Petitioner applied for and was appointed to SBI Human Resources (“HR”). During this same time period he was promoted from Special Agent to ASAC. Petitioner’s duties while working in HR included the hiring of SBI agents and background checks. (P Ex. 1 p. 340)
8. In approximately 2007, at the request of his supervisors, Petitioner began researching the possibility of starting a SBI behavioral analysis (criminal profiling) program. While working in HR, Petitioner began his certification process with the International Criminal Investigation

Analysis Fellowship (“ICIAF”) including obtaining a mentor and sponsor (Jon Perry). In 2009, Petitioner was assigned to the SBI Training and Investigation Support Section, specifically assigned to the Behavioral Analysis Program. (P Ex. 1 p. 341)

III. Termination of Petitioner’s Employment

a. Procedural History

9. In March 2010, in response to serology issues raised by the North Carolina Innocence Inquiry Commission (“NCIIC”) in review of *State v. Taylor*, an independent external review of the SBI Serology Section was conducted (“Swecker Report”). Contemporaneous to the external review, an internal SBI audit of the Serology Section was also performed. (P Ex. 1 p. 340)

10. On August 13, 2010, in response to issues raised in the Swecker Report, Petitioner, along with several other SBI agents, was placed on “administrative duty.” Petitioner was instructed “not to engage in criminal investigation activities, instruction of Bureau employees, crisis negotiations or any assignment not approved by a supervisor”. (T p. 213; P Ex. 1 p. 66)

11. On August 4, 2010, Petitioner had also been notified that he was the subject of an internal SBI investigation regarding an allegation that in September 2009 he had perjured himself while testifying before the NCIIC in the matter of *State v. Taylor*, 91 CRS 71728. (T p. 215; P Ex. 1 p. 234)

12. On August 18, 2012, Petitioner was placed on “investigatory placement” with pay and instructed to remain away from all SBI facilities and told that he should not be in contact with any staff affiliated with the SBI. (T p. 221; P Ex. 1 p. 67)

13. On August 23, 2012, Petitioner was notified that he was the subject of an internal investigation which had been initiated as a result of a review of the SBI Blood Stain Analysis program and the external review (Swecker Report) of the SBI Crime Laboratory practices between 1987 and 2003. The focus of the investigation was to include Petitioner’s conduct, reporting and testimony; plus previous work in the Forensic Biology Section of the Crime Laboratory as it relates to reporting of analysis. (R Ex. 6)

14. On September 3, 2010, Petitioner’s investigatory placement status was extended an additional 30 days to allow continued investigation concerning Petitioner’s job performance and conduct deficiencies regarding Petitioner’s professional responsibilities as an SBI ASAC. (P Ex. 1 p. 6)

15. On October 7, 2010, the NCIIC served Petitioner with a Motion to Show Cause “why he should not be held in criminal contempt for providing false and misleading testimony” during the

commission hearing in *State v. Taylor* on September 3, 2009. *State of North Carolina v. Peter Duane Deaver*, 10 CRS 016362. (P Ex. 1 pp. 89-95)

16. On October 14, 2010, Petitioner's investigatory placement status was again extended an additional 30 days to allow for continued and ongoing investigation concerning Petitioner's job performance and conduct. (P Ex. 1 p. 69)

17. During the internal investigation of the SBI Blood Stain Analysis program it was discovered Petitioner had participated, on May 13, 2009, at the request of another SBI agent, in a videotaped re-construction test examining blood stain on a t-shirt in the matter of *State v. Turner*. Captured on the video, which was shown to the jury in Mr. Turner's murder trial, Petitioner is heard to proclaim, at the success of the re-creation, "Beautiful, that's a wrap, baby." (P Ex. 1 pp. 368, 378-379)

18. On October 25, 2010, while on investigatory leave, and without the approval or knowledge of his supervisors, Petitioner reviewed and corrected a complaint submitted by Jon Perry (Petitioner's ICIAF mentor and sponsor) to the ICIAF against a South Carolina Law Enforcement Division Special Agent, ("SLED") Bo Barton. The complaint alleged that Barton had prepared a second behavioral analysis (criminal profile) of a December 17, 2008 murder after Petitioner had already prepared a final behavioral analysis, in violation of the ICIAF Code of Professional Standards. Petitioner was aware that a copy of his behavioral analysis was going to be attached to the complaint and shared with the ICIAF. (P Ex. 1 pp. 9, 12-18)

19. On October 28, 2010, Petitioner returned to work with the SBI and met with his supervisor, Assistant Director Marshall Tucker. Petitioner did not inform Mr. Tucker of Perry's complaint against Barton or that a copy of his report had been disseminated to the ICIAF. (T p. 560; P Ex. 1 pp. 16, 70)

20. On November 8, 2010, Petitioner was notified that an internal investigation had been initiated related to Petitioner's violating policy by instigating, endorsing, encouraging or assisting in the filing of a complaint against another law enforcement officer without notifying his supervisor. (P Ex. 1 p. 27)

21. On January 4, 2011, Petitioner was served with a Notice of Pre-Disciplinary Conference concerning possible disciplinary action for unacceptable personal conduct. The Notice included six (6) situations or occurrences which were at issue:

- 1) While on investigatory placement (October 25, 2010) Petitioner corrected, reviewed, approved and endorsed the filing of a professional standards complaint and ethics violation against a law enforcement officer with an outside independent organization (ICIAF). The submission of the complaint included confidential SBI criminal investigative information.

2) In April 1992, in the matter of *State v. Carter*, Petitioner incorrectly reported that an item revealed the presence of blood. A review of the laboratory notes revealed that the item tested, in fact, yielded a negative confirmatory test for blood.

3) In October 1991, in the matter of *State v. Taylor*, Petitioner incorrectly reported certain items/slides indicated no sperm or semen when, in fact, semen was present. Petitioner also failed to list his findings for a blue pair of panties, which, upon re-examination, showed the presence of sperm.

4) At the February 12, 2010 meeting of the 3 judge panel of the NCIIC and again at the September 3, 2009 hearing before the entire NCIIC, Petitioner provided false and misleading testimony. On October 7, 2010 the NCIIC filed and served a Motion to Show Cause against the Petitioner requiring him to appear and show cause why he should not be held in criminal contempt.

5) In 2007, after responding to a homicide scene, Petitioner failed to complete an SBI report and open a case file.

6) On May 13, 2009, while assisting in a videotaped re-creation of blood stain pattern in *State v. Turner*, Petitioner was heard giving unprofessional comments. (P Ex. 1 pp. 71-75)

22. On January 5, 2011, Petitioner met with SBI Assistant Director (“AD”) Marshall Tucker and Assistant Director F.D. Brown, Jr. for his pre-disciplinary conference. Petitioner was allowed to present information which related to the issues which had been outlined in the January 4, 2011 Pre-Disciplinary Conference Notice. (P Ex. 1 p. 76)

23. Prior to the issuance of the Pre-Disciplinary Conference Notice and after the January 5, 2011 meeting, Petitioner’s supervisor and SBI management met to discuss the appropriate disciplinary action for Petitioner. (T pp. 235, 507-516)

24. On January 7, 2011, Petitioner received his Notice of Dismissal. The grounds which form the basis for the dismissal are, in pertinent part, as follows:

1) While on investigatory placement (October 25, 2010) Petitioner corrected, reviewed, approved and endorsed the filing of a professional standards complaint and ethics violation against a law enforcement officer with an outside independent organization (ICIAF). The submission of the complaint included confidential SBI criminal investigative information.

2) At the February 12, 2010 meeting of the 3 judge panel of the NCIIC and again at the September 3, 2009 hearing before the entire NCIIC, Petitioner provided false and misleading testimony. On October 7, 2010 the NCIIC filed and served a

Motion to Show Cause against the Petitioner requiring him to appear and show cause why he should not be held in criminal contempt.

3) On May 13, 2009, while assisting in a videotaped re-creation of blood stain pattern in *State v. Turner*, Petitioner was heard giving unprofessional comments.

The conduct exhibited by the Petitioner violated SBI policies and procedures. State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT. (P Ex. 1 pp. 76-88; R Ex. 7)

25. The three items (Nos. 2, 3 & 5) identified in the Pre-Disciplinary Conference Notice (P Ex. 1 pp. 71-75) involving Petitioner's reporting errors or failure to report were dropped from the final decision to terminate after careful consideration and discussion due to the age of the issues and the issues were related to "work product" errors . (T p. 236)

26. After thoughtful consideration and open discussion among the management at the SBI, the decision to dismiss Petitioner from his position with the SBI was made by SBI Director Gregory McLeod. (T pp. 235, 528-529, 533, 562-563)

27. The January 7, 2011 Notice of Dismissal advised Petitioner that he could appeal the decision, outlining the grievance process and attaching a copy of the NC Department of Justice Grievance Policy and Procedures. (P Ex. 1 pp. 76-88)

28. Petitioner elected to appeal the decision and the Step 1 grievance meeting was held on January 27, 2011 with Petitioner, AD Tucker and AD Erik Hooks. Petitioner provided additional information and argument. The decision to dismiss was upheld. Petitioner was advised he could continue with the grievance process. (R Ex. 5)

29. On February 16, 2011, a Step 2 grievance meeting was held with the Petitioner, Director McLeod and Special Agent in Charge ("SAC") Wendy Brinkley. Petitioner was, again, provided the opportunity to provide additional information and argument which was given due consideration; there was not sufficient information to overturn the decision to dismiss. Petitioner was advised he could continue with the grievance process. (R Ex. 4)

30. On March 17, 2011, the Step 3 Grievance Committee convened. The Committee consisted of Joseph Finarelli, Assistant Attorney General; Mellissa Trippe, Senior Deputy Attorney General; James Faggart, Special Agent, SBI; Ann Hamlin, SAC, SBI; Cynthia Vinson, Contract Manager, IT. The Grievance Committee heard presentations from the Petitioner and Director McLeod, received written materials as well as testimony from retired SBI ASAC Randy Myers and retired SBI Assistant Director William Weis. The witnesses did not provide sworn testimony, and it was not recorded. (T pp. 315-316, 359; P Ex. 4)

31. The Grievance Committee recommended the SBI decision to dismiss Petitioner be reversed. (P Ex. 4)

32. On April 19, 2011, NC Department of Justice Chief of Staff, Kristi Jones Hyman, in her capacity as the final agency decisionmaker for the SBI, issued her decision to uphold Petitioner's January 7, 2011 dismissal for the reasons stated in the dismissal memorandum. Ms. Hyman had reviewed the materials submitted to the Grievance committee, their findings and the dismissal memorandum. As the final agency decision maker, the final determination to uphold Petitioner's dismissal was made exclusively by Ms. Hyman and based entirely on the facts and circumstances related to Petitioner's dismissal. Ms. Hyman was closely questioned by Petitioner's counsel at the hearing as to outside influences on her decision. She was clear and emphatic that there had been none. (T pp. 313-318; R Ex. 3)

33. The April 19, 2011 final agency decision notified the Petitioner of his due process rights of appeal to the Office of Administrative Hearings ("OAH") and the deadlines for the appeal. (R Ex. 3)

34. On May 16, 2011, Petitioner filed a Petition for Contested Case with OAH challenging the SBI decision to dismiss him from his position as an ASAC with the SBI. (R Ex. 7)

b. Just Cause Dismissal

i. ICIAF Complaint-Confidential Investigation Material

35. The SBI Behavioral Analysis Program ("profiling") started in 2009. Petitioner was asked to participate in the program; he was the only SBI agent in the profiling program. Petitioner enlisted in the training program of the International Criminal Investigative Analysis Federation ("ICIAF"). Part of the training program included mentoring with an ICIAF member. Petitioner, through the SBI, contracted with ICIAF member Jon Perry to act as his mentor. (P Ex. 1 pp. 51-53) Perry signed a Personal Services Agreement with the Department of Justice and was considered "staff affiliated" with the Department of Justice. (R Ex. 8; T pp. 221, 276-277, 586)

36. Jon Perry is retired from both the Kansas City Police Department and the Virginia State Police and is a member in the ICIAF. The SBI contracted with Perry to "provide training" in the area of profiling and "review" criminal reports for the purpose of training. The contract further stated Perry would keep all information confidential and "not release" any "report" without the "written approval" by the SBI. Petitioner was designated the "contract administrator" and was "responsible for monitoring" Perry's performance. At the time of his dismissal, Petitioner had not obtained ICIAF member status. (P Ex. 1 pp. 44-45; R Ex. 8 pp. 2-3)

37. On December 11, 2008, a young woman in Henderson County, North Carolina was murdered in front of her home. Special Agent Casey Drake ("Drake") was the SBI case agent. Petitioner was asked to review the case files and provide a criminal analysis report ("profile"). On May 7, 2009, Petitioner generated his final 11(a) profile report, referred to as a "blue paper" report, regarding the unsolved homicide. He intended the profile to be used by investigators to generate possible leads in the case. The profile had been completed with input from Petitioner's

mentor, Jon Perry. Petitioner also discussed the case with ATF Agent Ron Tunkel (also a member of ICIAF) and John Cromer (Virginia State Police Officer in training with the ICIAF) (T pp. 225-226; P Ex. 1 pp. 52-53)

38. Drake, along with other investigators, reviewed the analysis provided by the Petitioner and did not agree with his findings. In late August or early September 2010, the Henderson County Sheriff's Office made a request for South Carolina Law Enforcement Agent ("SLED") and ICIAF member Durwood "Bo" Barton ("Barton") to further review and profile the December 2008 murder. (P Ex. 1 pp. 22-23, 38-39)

39. In early October 2010, Perry was contacted by Agent Tunkel and told that Barton had appeared in a news conference to announce his involvement in the case and he was going to release a profile. (P Ex. 1 p. 9)

40. Based on Barton's review of the case and possible release of a profile, on October 26, 2010, Perry filed an ethics complaint against Barton with the ICIAF for "knowingly and directly soliciting the client of another member." Perry stated in his complaint that he was "not the aggrieved member" but was the "mentor" to "Assistant Special in Charge (ASAC) Duane Deaver of the North Carolina State Bureau of Investigation (SBI)", the aggrieved member. (P Ex. 1 pp. 9-11)

41. Attached to Perry's ethics complaint to the ICIAF was Petitioner's final 11(a) SBI criminal analysis report. (T p. 228; P Ex. 1 p. 25) A final 11(a) "blue paper" report is a report that has been entered into the SBI Case Records Management System ("CRMS"). (T pp. 617-619) Petitioner's profile of the Henderson County murder was completed in May 2009 and entered into the CRMS at the SBI on May 7, 2009. (P Ex. 1 p. 53) The report provided to Perry, and ultimately the ICIAF, was the same report Petitioner had provided to the Henderson County Sheriff in an effort to solve an unsolved homicide. (T pp. 277-278)

42. In early May 2009, after his final review, Petitioner forwarded his typed draft profile to the CRMS, and a final "blue paper" 11(a) Criminal Investigation Analysis Report (case # 2008-03474) was prepared on May 7, 2009. Petitioner compared the final "blue paper" profile prepared in 2009 with the version he provided to Tunkel and Perry in 2010 (knowing the profile would be disseminated to the ICIAF) and the reports were the same. The only difference was that a copy was added to Assistant Director Tulley and CRMS had removed some header information. Therefore, irrespective of whether the profiles Petitioner provided to Tunkel and Perry in 2010 were printed on "blue paper" they were, in fact, a final 11(a) SBI Criminal Investigation Report and Petitioner knew this when he released them. (T pp. 617-619; P Ex. 1 pp. 53, 58)

43. On October 25, 2010, while on investigatory leave, and without the approval or knowledge of his supervisors, Petitioner reviewed and corrected the ethics complaint submitted by Jon Perry to the ICIAF against Barton. Petitioner received the complaint at home on his

personal e-mail account and corrected certain portions of the complaint regarding the Henderson County Sheriff Office. Petitioner was aware that his name and SBI position would appear in the complaint. Petitioner was further aware that a copy of his criminal analysis profile would be attached to the complaint and disseminated to the ICIAF. (T p. 228; P Ex. 1 pp. 18, 55-59)

44. On October 5 and October 20, 2010, prior to reviewing and correcting the Perry complaint, Petitioner had provided copies of his criminal analysis profile to Tunkel and Perry, respectively. (P Ex. 1 pp. 18, 58) Tunkel had no contractual relationship with the Department of Justice and was not authorized to review Petitioner's profile reports, even "draft" reports. Petitioner's providing his profile report to Tunkel violated the SBI policies and procedures. (T pp. 122-129, 225-228)

45. Petitioner reviewed, corrected, endorsed and allowed his name and position to be used in a professional standards and ethics complaint against another law enforcement officer with the ICIAF. Petitioner provided his profile report to Perry knowing the report would be disseminated to the ICIAF. Perry was not authorized to receive any SBI reports for the purpose of filing a complaint against another law enforcement officer. Providing the profile report, even a draft report, to be disseminated to the ICIAF was a violation of SBI policies and procedures. (T p. 122-129, 144, 227-228; P Ex. 1 pp. 56-58)

46. Perry was not authorized to receive final confidential SBI reports. To make public or reveal the contents of an official file of the SBI to any unauthorized person is a violation of the SBI policies and procedures. (T p. 126-127, 227) Tunkel and the ICIAF were not authorized to receive and review any SBI reports including draft reports. Revealing the contents of an official file of the SBI to any unauthorized person is a violation of the SBI policies and procedures. (T pp. 122-129, 144, 225-228)

47. Petitioner endorsed, at least by implication, the professional standards and ethics complaint against another law enforcement officer with the ICIAF without the approval or knowledge of his supervisor and without the approval of the Director in violation of the SBI policies and procedures. (T p. 560, 594; P Ex. 1 pp. 56-58)

48. Petitioner returned to work on October 28, 2010; just days after the ethics complaint had been reviewed and served. Upon Petitioner's return to work, following his "investigatory placement," he met with his supervisor Assistant Director Marshall Tucker ("Tucker"). Petitioner never informed Tucker about the ICIAF complaint or that he had contact with Perry during the "investigatory placement" period. Failure to notify his supervisors of the ICIAF complaint or that he had contact with Perry violated the policies and practices of the SBI as well as the terms and conditions of Petitioner's investigatory placement status. (T pp. 560, 594; P Ex. 1 pp. 18-19)

49. On November 1, 2010, Tucker was notified by Assistant Director Brown of the ICIAF ethics complaint against Barton. On November 8, 2010, Petitioner was notified that an internal

investigation had been initiated related to Petitioner's violating policy by instigating, endorsing, encouraging or assisting in the filing of a complaint against another law enforcement officer without notifying his supervisor. (P Ex. 1 pp. 16, 27) The internal investigation found the allegations to be "Sustained (Facts support the allegation or complaint)". (P Ex. 1 p. 65)

ii. Motion to Show Cause Re: Criminal Contempt

50. On April 19, 1993, Gregory Flint Taylor was convicted of the murder of Jacquetta Thomas in Wake County Superior Court. *State v. Taylor*, 91 CRS 71728. (P Ex. 1 p. 89)

51. An SBI Laboratory report dated November 7, 1991, outlining the results of analysis conducted by the Petitioner, including the examination of several items (evidence items 16 and 18) which "gave chemical indications of blood" was submitted at the *Taylor* trial; Petitioner did not testify. (P Ex. 1 pp. 89, 348)

52. On September 7, 2007, the *Taylor* case was accepted by the North Carolina Innocence Inquiry Commission ("NCIIC") for formal inquiry. On August 11, 2009, the NCIIC issued a subpoena to Petitioner compelling him to appear and testify before the NCIIC regarding his lab report, testing and results in the *Taylor* matter. (P Ex. 1 pp. 89-90)

53. Prior to receiving his subpoena to testify (July 2009), Petitioner was called to a meeting with Assistant District Attorney Tom Ford and SBI agents and told the *Taylor* matter was being reviewed by the NCIIC and the SBI was reanalyzing the evidence. Petitioner did no further review or follow-up of his testing or lab reports. (P Ex. 1 pp. 349-350)

54. On September 1, 2009, Kendra Montgomery-Blinn ("Montgomery-Blinn") the Executive Director of the NCIIC telephoned Petitioner regarding his upcoming testimony before the NCIIC. During the taped conversation, Montgomery-Blinn asked Petitioner specifically about evidence items Nos. 16 and 18 and the blood stain testing. Petitioner stated the presumptive blood testing had been performed but the confirmatory testing had not been completed because there was no further sample. (P Ex. 1 pp. 90, 109-110) Montgomery-Blinn explained to the Petitioner that the purpose of the NCIIC hearing was to get all the facts and the NCIIC needed to know "all" the tests Petitioner had performed and he should "volunteer" all the information. (P Ex. 1 pp. 91-115)

55. Petitioner testified before the NCIIC on September 3, 2009. Petitioner testified that item No. 16 had a positive presumptive blood test but he was unable to perform the confirmatory test. He also stated that beyond the presumptive test he "got no result" for item No. 16. (P Ex. 1 pp. 91, 135-137) Later, Petitioner was questioned by former Court of Appeals Judge and NCIIC Member Charles Becton. Judge Becton, seeking clarity on the blood tests that Petitioner had performed, asked Petitioner directly if he "could not do" the confirmatory tests on items Nos. 16 and 18 and Petitioner responded "that's correct." (P Ex. 1 pp. 92, 142-143)

56. Petitioner failed to properly prepare for his sworn testimony before the NCIIC. Despite Petitioner meeting with Mr. Ford in April 2009 and speaking with Montgomery-Blinn two days before his testimony, Petitioner's preparation for this very important matter consisted of reviewing his file "in his car before going to testify." Petitioner failed to notify his supervisor that he had been subpoenaed to testify before the NCIIC. (P Ex. 1 pp. 349-350; R Ex. 9 pp. 160-163)

57. On February 11, 2010, Petitioner testified under oath during a three-judge panel hearing in *State v. Taylor*. In contrast to his previous conversations with Montgomery-Blinn and sworn testimony before the NCIIC, Petitioner testified he had conducted confirmatory tests on evidence items Nos. 16 and 18. (P Ex. 1 p. 92)

58. On August 4, 2010, an administrative, internal investigation was initiated into an allegation by attorney Mike Klinkosum that Petitioner had perjured himself before the NCIIC in September 2009. (P Ex. 1 pp. 213, 234-235)

59. The August 2010 alleged perjury internal investigation included interviews with the NCIIC members and was concluded in late September 2010. The SBI found the perjury allegation to be "Not Sustained (Insufficient facts were found to prove or disprove the allegation)". (P Ex. 1 pp. 214-227, 234, 366)

60. On October 7, 2010, the NCIIC served and filed a Motion for Order to Show Cause directing the Petitioner to appear and show cause why he should not be held in criminal contempt for providing false and misleading testimony during the September 2009 NCIIC hearing in *State v. Taylor*. (P Ex. 1 pp. 89-95) Petitioner failed to notify his supervisor that he had been served with the Motion to Show Cause re Criminal Contempt. (R Ex. 9 p. 161)

61. The Motion for Order to Show Cause for Criminal Contempt alleges the Petitioner "made contrary statements" to Montgomery-Blinn and during the NCIIC hearing. Also, Petitioner's responses to Judge Becton was "intentionally misleading" and in "willful disobedience" of the NCIIC directive and was so misleading as to amount to a "willful refusal" to "answer any legal question." Petitioner's "false" and "evasive" testimony before the NCIIC was in violation of N.C.G.S. §5A-11(n)(2, 3 and 4), *Criminal Contempt*. (P Ex. 1 pp. 93-95)

62. The Motion for Order to Show Cause for Criminal Contempt was served and filed after the NCIIC had been interviewed by the SBI during the SBI's internal investigation regarding the perjury allegation. The NCIIC is made up of members appointed by the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals and includes judges, attorneys, sheriffs, victim advocates and public members. This esteemed judicial body ordered Petitioner to show cause why he should not be held in criminal contempt (N.C.G.S. §5A-11). (T pp. 156-160, 231-232, 329-330,339; P Ex 1, pp. 89-95)

63. The Motion for Order to Show Cause for Criminal Contempt is analogous to an SBI agent being indicted by a Grand Jury. The SBI is not aware of any other SBI agent ever being indicted by a grand jury for a criminal act. (T pp. 245-247,331-333) On October 28, 2010, Petitioner returned to work, following his “investigatory placement,” he met with his supervisor Assistant Director Marshall Tucker. Petitioner never informed Tucker about the Motion for Order to Show Cause for Criminal Contempt. (T p. 560; R Ex. 9 p. 161)

iii. Turner Video

64. On May 13, 2009, at the request of another SBI agent, Petitioner was asked to participate in a videotaped re-construction test examining a blood stain pattern on a t-shirt in the matter of *State v. Turner*. (P Ex. 1 pp. 368, 378-379)

65. As part of the August 2010 SBI administrative, internal investigation of the Blood Stain Analysis program the *Turner* videotaped re-creation was reviewed. (P Ex. 1 pp. 369, 378)

66. Captured on the videotape, after the second SBI agent had conducted a successful “knife swipe” recreation, was the Petitioner stating: “Beautiful. That’s a wrap, baby.” The video re-creation, along with Petitioner’s exclamation, was shown to the jury in *State v. Turner*. Mr. Turner was found not guilty of killing his wife. (T pp. 106-108; P Ex. 1 pp. 368, 377-379)

67. The SBI is entrusted to protect the rights of all citizens of North Carolina and to treat each citizen in a fair and non-biased manner, including criminal defendants. Petitioner concedes that his comment captured in the re-creation video were both embarrassing and unprofessional. (P Ex. 1 pp. 77, 379; T pp. 164, 334-335)

68. Petitioner’s comments, captured on the videotape, were unprofessional, embarrassing and brought disrepute and disrespect to the SBI, and were a violation of SBI policies and practices. (T pp. 164, 232-235, 334-335)

IV. Conclusion

69. The decision process was remarkable for being deliberate, thorough, careful and open to dissenting voices. The internal investigation and initial decision making stretched over five months. Assistant Director Tucker expressed his reservations about firing Deaver to Director McLeod prior to the decision being made to terminate Deaver, and these concerns were addressed. There were three levels of grievance appeals involving different officials at each level. The final agency decision was made by yet a different official, who had not been involved in the grievance meetings.

70. Counsel for Petitioner have pressed the theory that Deaver was scapegoated by the SBI as a means of deflecting public criticism. Little evidence was presented to support this theory; Petitioner, for example, elected not to testify about this. It may well be that others at the SBI should also have been terminated or otherwise disciplined. However, the evidence for Petitioner

fell far short of showing disparate treatment. If Petitioner has substantial information that would show that the SBI routinely presented testimony to courts, or prepared reports, that were misleading – especially on matters relating to the ultimate guilt or innocence of citizens charged with crimes – he owes a duty to the public to come forward with this information, as do others in and out of the SBI. At the hearing of this matter, he did not do so.

71. Petitioner, through counsel, exhibited a distasteful disregard for the judicial system of this state. Contempt dripped from the lips of Petitioner’s counsel when discussing Superior Court Judge Orlando Hudson and his findings with regard to Petitioner. The filing of a contempt motion by the North Carolina Innocence Inquiry Commission was repeatedly treated dismissively, referred to as “mere allegations.” The filing of perjury allegations by a member of the N.C. State Bar seemed beneath Petitioner’s contempt. None of this reflects well on Petitioner, who was seeking reinstatement to a position of trust in service to our system of justice.

72. The SBI acted with just cause in dismissing petitioner from his position as an ASAC with the SBI.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (“OAH”) has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes. The parties have given proper notice of the hearing and all parties are properly before this Administrative Law Judge.

2. There has not been an issue raised as to procedural defects nor to whether the Petitioner was properly and sufficiently apprised with particularity of the acts which lead to his dismissal.

3. 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.

4. Petitioner was a career state employee at the time of his dismissal and therefore entitled to the protections of the North Carolina State Personnel Act, including the provision that prohibits the termination of his employment except for just cause. N.C. Gen. Stat. §§ 126-1 *et seq.*, 126-35; 25 NCAC 01J. 0604(a).

5. N.C. Gen. Stat. § 126-35(a) provides that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.”

6. Because Petitioner has alleged that Respondent lacked just cause for his termination, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a

recommendation to the State Personnel Commission, which will make the final decision in this matter.

7. Respondents followed the proper internal grievance and pre-disciplinary conference procedures. Petitioner was provided correct and adequate due process notice and all procedural requirements necessary to issue a disciplinary action were met. N.C. Gen. Stat. §126-35 (a); 25 NCAC 01J .0608 and .0613.

8. N.C. Gen. Stat. §126-35 (a) requires that before a State employee is disciplined, the employee shall be furnished with “a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action.”

9. N.C. Gen. Stat. §126-35 (a) has been interpreted to require that the acts or omissions be described "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. . . . An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." *Employment Security Commission v. Wells*, 50 N.C. App. 389, 274 S.E.2d 256, (1981)

10. Petitioner was given proper statutory notice of the reasons for his dismissal and the dismissal letter met the requirements of the law. There is nothing ambiguous in the dismissal letter concerning the specific acts committed by Petitioner which led to his dismissal. Petitioner was clearly notified of the specific acts which led to his dismissal allowing him to respond to the charges. The dismissal letter was sufficiently specific. (P Ex. 1, pp. 76-88) N.C. Gen. Stat. §126-35 (a); 25 NCAC 01J .0608 and .0613.

11. Pursuant to N.C.G.S. § 126-35(d) Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to dismiss Petitioner for unacceptable personal conduct.

12. Although the statute does not define “just cause,” the words are to be accorded their ordinary meaning. *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

13. While just cause is not susceptible to a precise definition, our courts have held that 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.” *NC DENR v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). The Supreme Court explained that the fundamental question is whether “the disciplinary action taken was ‘just.’” Further, the Supreme Court held that, “Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken.” *NC DENR v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

14. 25 NCAC 1J .0604(b) provides that an employer may discipline or dismiss an employee for just cause based upon unacceptable personal conduct or unsatisfactory job performance.

15. Pursuant to 25 N.C.A.C. 1J .0608(a), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

16. A sole instance of unacceptable personal conduct, by itself, constitutes just cause for discharge. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

17. 25 NCAC 01J.0614 defines "Unacceptable Personal Conduct" as:

- 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; or
- h) falsification of a state application or in other employment documentation.

18. State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT is a known and written work rule. (R Ex 7) The SBI ETHICS AND CONDUCT Policy and Procedure Manual contains, among others, the following rules:

GENERAL ETHICS (POLICY 5-1)

- A. Employees shall conduct themselves in such a manner as to reflect most favorably upon the Department of Justice, the State Bureau of Investigation, and the profession of Law Enforcement.
- B. Employees shall conduct their private and professional lives in such a manner as not to impede the State of North Carolina, Department of Justice, or the SBI's efforts to achieve its policies and goals, nor bring discredit upon these agencies or upon the employees of any of these agencies.
- C. All employees will receive ethics and conduct training, at a minimum, biennially.

CONDUCT (POLICY 5-2)

1. Conduct, as set forth in this Section, shall at all times govern the official and unofficial actions of each employee of the State Bureau of Investigation, whether their status is "sworn," "non-sworn," "on-duty" or "off-duty."
2. This rule applies to both the professional and private conduct of all employees. It

prohibits conduct which is contrary to the intent and purpose of Bureau policies or goals, or which would reflect adversely upon the Bureau or its employees. It includes not only all unlawful acts by employees, but also all acts, which although not unlawful in themselves, would degrade or bring disrespect upon the employee or the Bureau.

3. Conduct toward the public and fellow employees: Employees shall at all times be respectful, courteous, and impartial when dealing with the public and other employees.
4. Employees shall not use coarse, violent, profane, derogatory, or insolent language or gestures, and shall not maliciously express any prejudice concerning race, religion, politics, sex, or national origin.
5. Employees are encouraged to bear in mind the sensitivity of others and should exercise good judgment when making remarks that may be offensive to others even though these remarks are not meant to be malicious.

UNBECOMING CONDUCT (POLICY 5-3)

- A. Conduct which tends to bring the Bureau into disrepute.
- B. Conduct which reflects discredit upon any employee of the Bureau.
- C. Conduct which tends to impair the operation and efficiency of the Bureau or its employees.
- D. Conduct which impairs an employee's ability to complete work assignments objectively and diligently or to handle classified information.

ENDORSEMENTS AND REFERRALS (POLICY 5-10)

- A. No employee will write any letter or otherwise communicate any recommendation or censure for any person, group, product, or item in the capacity of a Bureau representative and using the image and prestige of the Bureau, without the approval of the Director.
- B. An employee shall not recommend or censure in any manner, except in the transaction of personal business, the employment or procurement of a particular product, professional service, or commercial service such as bondsman, mortician, or private detective.

CONFIDENTIALITY OF INFORMATION (POLICY 5-12)

Records of criminal investigations, intelligence records, and evidence collected and compiled by the Director and his or her assistants shall not be considered public records within the meaning of G.S. 132-1.4, and following, of the General Statutes of North Carolina and may be made available to the public upon an order of a court of competent jurisdiction. Provided that all records and evidence collected and compiled by the Director of the Bureau and his

or her assistant shall, upon request, be made available to the District Attorney of any district if the same concerns persons or investigations in his or her district (G.S. 114-15).

- A. No employee will divulge any information concerning an investigation, evidence, or other non-administrative matter relative to official business of the Bureau, or any other agency to which the employee is privy by virtue of their employment, except to the following:
1. District Attorney if applicable under paragraph A above.
 2. Individuals so designated by an order of competent jurisdiction.
 3. Individuals entitled to an exception by another section of the Bureau Policy and Procedure Manual.
 4. Other Bureau employees or officials of another agency actively engaged in the investigation together,
 5. Others, including Bureau employees, on a need-to-know and right to know basis.

TRUTHFULNESS (POLICY 5-12)

An employee shall be truthful and complete in all written and verbal reports and statements pertaining to Bureau business and their Bureau related activities.

19. While on investigatory placement, without the knowledge or approval of his supervisor, Petitioner reviewed, corrected and approved the filing of a professional standards complaint and ethics violation with the ICIAF against a fellow law enforcement officer.

20. Petitioner willfully violated a known and written work rule, State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *Endorsements and Referrals* (Policy 5-10) when he allowed and/or approved the censure of a fellow law enforcement officer in the capacity of a Bureau representative and using the image and prestige of the Bureau, without the approval of the Director.

21. The submission of the ICIAF complaint included a confidential SBI criminal analysis of an on-going criminal investigation. The ICIAF was not authorized to receive any SBI reports-irrespective if the reports were “drafts” or final “blue paper” reports. The submission of the SBI confidential criminal analysis report was done without Petitioner’s supervisor’s approval or knowledge.

22. Petitioner willfully violated a known and written work rule, State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *Confidentiality of Information* (Policy 5-12) when he allowed and/or approved a confidential criminal analysis concerning an on-going investigation to be disseminated to the ICIAF.

23. Petitioner provided Perry with a final, 11(a) “blue paper” confidential criminal analysis report. Perry was not authorized to receive final reports. Providing the confidential criminal

analysis report to Perry was done without Petitioner's supervisor's approval or knowledge.

24. In October 2010, the North Carolina Innocence Commission served Petitioner with a Motion to Show Cause requiring the Petitioner to show cause why he should not be held in criminal contempt. The Innocence Inquiry Commission alleged that Petitioner had misled the Commission and was not truthful when he testified before the Commission in September 2009 regarding the blood stain analysis tests and results reported out by Petitioner in the matter of *State v. Taylor*.

25. Petitioner's misleading testimony directly impaired the respect due the Commission and was a willful violation of known and written work rules: State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *General Ethics* (Policy 5-1), *Conduct* (Policy 5-2), *Unbecoming Conduct* (Policy 5-3) and *Truthfulness* (Policy 5-12).

26. The North Carolina Innocence Commission's assertions and Motion to Show Cause Re Petitioner's providing false and misleading testimony before the Innocence Commission is conduct unbecoming a state employee that is detrimental to state service.

27. In May 2009, Petitioner participated in a videotaped reconstruction test examining blood stain analysis in the matter of *State v. Turner*. At the conclusion of the recreation, Petitioner is heard to say, "Beautiful. That's a wrap, baby". This video and Petitioner's exclamation was shown to the jury during the *Turner* murder trial.

28. Petitioner's comments on the *Turner* recreation video were unprofessional and adversely impacted on his duties and credibility as an SBI Special Agent and were conduct unbecoming a state employee that is detrimental to his state service.

29. Petitioner's unprofessional and embarrassing comments captured on the *Turner* recreation video and played before a jury in the murder trial were a willful violation of known and written work rules, State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *General Ethics* (Policy 5-1), *Conduct* (Policy 5-2), *Unbecoming Conduct* (Policy 5-3).

30. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v. N.C. Dept. of Correction*, 177 N.C. App. 215, 628 S.E.2d 395, 400 (2006) citing *Hilliard v. N.C. Dept. of Correction*, 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

31. No disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly. 25 NCAC 01J .0604(c)

32. Taken as a whole the allegations against Petitioner are substantial enough to constitute just cause for dismissal.

33. The Petitioner failed to offer any evidence, testimony or documents that the three occurrences identified in the Notice of Termination did not occur.

34. Based on the preponderance of the evidence, Respondent met its burden of proof that it had just cause to dismiss Petitioner for unacceptable personal conduct without prior warning or disciplinary action.

35. Respondent met its burden of proof that it did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse its discretion when Respondent dismissed Petitioner for just cause.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned Temporary Administrative Law Judge makes the following:

DECISION

The undersigned Temporary Administrative Law Judge finds that Respondent's dismissal of Petitioner for just cause should be **UPHELD**.

NOTICE

This matter was commenced prior to January 1, 2012 and the Decision of the Administrative Law Judge in this Contested Case will be reviewed by the agency making the final decision according to standards found in 25 NCAC 01B.0437. The agency making the Final Decision in this contested case is required to give each party an opportunity to request oral argument, file written exceptions to this Decision and to present written arguments to those in the agency who will make the final decision.

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission. 25 NCAC 01B.0437

The State Personnel Commission is required by 25 NCAC 01B.0437 to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 26th day of August, 2014.

James L. Conner II
Temporary Administrative Law Judge