

STATE OF NORTH CAROLINA
COUNTY OF FRANKLIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 11544

Stephen R. Hyer,)
Petitioner,)
vs.)
NC Office of the Commissioner of Banks,)
Respondent.)

DECISION

This contested case was heard before Administrative Law Judge Selina M. Brooks on March 26 and 27, 2012 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Michael C. Byrne
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For Respondent: Tina A. Krasner
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On behalf of Federal Witnesses: Neal I. Fowler
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PROTECTIVE ORDER AND CONFIDENTIAL INFORMATION

A Protective Order was entered on February 3, 2012 by the Honorable Augustus B. Elkins, II concerning certain confidential information and applicable *Tuohy* regulations.

At the call of the case for hearing, the Undersigned confirmed her oral decision given to counsel in a teleconference held on March 23, 2012 to deny Petitioner's Motion To Strike/Bar Witness Testimony of three federal witnesses.

Upon consent of the parties, all witnesses were sequestered throughout the entirety of the hearing. The scope of the testimony of certain federal witnesses was strictly limited as authorized by letter from the United States Department of Justice, dated March 21, 2012. The

courtroom was cleared of all nonparty personnel during the confidential testimony.

Pertinent portions of testimony were placed under seal and the pertinent transcript pages have been sealed under separate cover. (Tr pp 192-215, 217-19, 221-22, 396-98, 446-49 & 464) Exhibits admitted into evidence and identified as confidential were placed under seal pursuant to the Protective Order. (R Exhs 1, 2 & 12)

Subsequent to the hearing, the Undersigned determined that certain prehearing filings as well as exhibits admitted during the hearing that were not marked as confidential contained confidential information as defined in the Protective Order. The Undersigned held teleconferences with Counsel for the Parties on June 18 and 27, 2012. After discussion and upon consent, the Undersigned entered an Order on June 27, 2012, directing the method for redaction and sealing of certain documents in the record. Both Parties have made additional filings in compliance with this Order.

WITNESSES

Respondent presented testimony from the following witnesses: Anthony Troeger, Michael E. Savage, David Picard, Ian David Wallace, and Charlie James Fields, Jr.

Petitioner presented testimony from the following witnesses: Richard Hendricks and Petitioner.

EXHIBITS

Respondent's Exhibits 1-12 were admitted into evidence.

Petitioner's Exhibits 1, 2, 3, 4, 6, 7, 8, 10, 11, 13, 14, 16, 17 and 18 were admitted into evidence.

ISSUE

Whether the Respondent had just cause to dismiss Petitioner from his employment with the Office of the Commissioner of Banks for unacceptable personal conduct.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to: the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

A. Petitioner's Job Duties, Experience and Training

1. Stephen Hyer ("Petitioner") began his employment with the North Carolina Office of the Commissioner of Banks (hereinafter "Respondent" or "NCCOB") on August 22, 2005, as a Banking Investigator (pay grade 70T). At the time of his dismissal on February 21, 2011, Petitioner was a Financial Investigator (at the Journey level for purposes of career banding). His ending salary was \$67,642. (Resp. Prehearing Statement, p 2; T pp 368, 436-37)

2. As a Financial Investigator at the Journey level, Petitioner was responsible for conducting independent field investigations of the financial industries that are regulated by the NCCOB. The Financial Investigator must be familiar with applicable state and federal laws and regulations. The Financial Investigator manages investigative assignments and/or projects; prepares written investigation reports, subpoenas, and witness statements and/or affidavits; researches public records, analyzes facts and documents; interviews and coordinates witnesses; communicates and consults with officers and employees of regulated industries, federal and state agencies, the public and others; and testifies in judicial proceedings. (Pet. Exh. 10; T pp 384-85, 436-37)

3. Petitioner conducted investigations of violations of mortgage lending—the SAFE Act, conducted interviews of people, gathered evidence, and compiled the information into a report which was submitted for consideration of civil enforcement action or possible criminal prosecution. Financial Investigators frequently worked with federal agencies and the investigations or efforts would lead to the prosecution of cases by the United States Attorney's Office. Investigations that involved violations of state law would be referred to various District Attorneys' Offices throughout the state. (T pp 82-85, 145-46)

4. Petitioner had twenty years of investigative experience. He graduated from the N.C. Criminal Justice Academy and was certified in law enforcement in 2004. Petitioner was also a Criminal Justice Instructor and taught classes on Arrest, Search and Seizure, and Constitutional Law. (T pp 443-44)

5. During his tenure with the NCCOB, Petitioner attended numerous conferences and training classes, including an August, 2006 and August, 2008 Financial Crimes Seminar and an April, 2006 Basic Data Recovery Acquisition and Analysis Course. Petitioner has also taken classes in interrogation and interview law. (T pp 442-43)

B. Conduct at Issue: January 4, 2011 Interview

6. Petitioner and Special Agent Anthony Troeger ("SA Troeger"), a criminal investigator with the U.S. Department of Housing and Urban Development's Office of Inspector General ("HUD-OIG"), worked together on a mortgage fraud investigation in January, 2011. (T pp 10-12)

7. SA Troeger had a reputation for being difficult to work with and some NCCOB

investigators refused to work with him. (T pp 358-59, 380-81)

8. Petitioner and SA Troeger conducted an interview of a witness on January 4, 2011 in Burlington, North Carolina (“subject interview”). (Resp. Exh. 1; T pp 12-13) This was the first interview they had ever done together; however, they had worked together on other matters in the past. (T pp 53 & 397)

9. Petitioner and SA Troeger agreed to meet beforehand at an abandoned gas station across the street from where the subject interview was to take place. They sat in SA Troeger’s car and discussed how they were going to conduct the interview. They agreed that it would be a standard two person interview, where the primary interviewer would ask the questions and the secondary person would take notes. SA Troeger was the primary interviewer, and Petitioner was tasked with taking notes. At some point after SA Troeger finished asking his questions, Petitioner asked his own questions. (T pp 13-14 & 391)

10. There was never any discussion about digitally recording the interview. Petitioner and SA Troeger only agreed that they would record the subject interview by taking handwritten notes. (T pp 14, 381, 391 & 446) During the course of the interview, SA Troeger was not aware that Petitioner was in fact digitally recording the subject interview. (T p 15)

11. If Petitioner had made SA Troeger aware that he was digitally recording the subject interview, then SA Troeger would have stopped the interview and told Petitioner to turn off the recorder. HUD-OIG regulations require permission from management prior to recording any interview. In addition, there are Department of Justice rules that must be followed with respect to surreptitious recordings or consensual monitors. (T p 16)

12. During the subject interview, the witness asked at one point if the interview was being recorded. SA Troeger responded, “No, that’s not the case. We don’t do that,’ and ‘[i]f we were going to record it, we would have told you that and we would have a device here on the table that you would see.’” Petitioner remained silent during this exchange. (Resp. Exh. 1; T p 17 & 218)

13. Petitioner testified that when the witness asked SA Troeger whether the interview was being recorded that “[t]his was his [SA Troeger’s] interview and he [the witness] was talking to the HUD investigator, and I stayed out of it completely.” (T p 398)

14. The subject interview lasted approximately 4 to 4 ½ hours. SA Troeger observed Petitioner taking very few notes during that time, only a third of a page or less. Afterwards, Petitioner and SA Troeger went back across the street to Troeger’s car. (T p 18) Petitioner agreed to write up the report and provide his notes to SA Troeger, which he later did via e-mail with a 29 page attachment on January 7, 2011. (Resp. Exh. 12; T pp 19-20)

15. Petitioner testified that he did not intend to be dishonest when he kept silent and did not tell SA Troeger that he had recorded the interview. (T p 424)

16. The Undersigned finds as fact that Petitioner’s intentions notwithstanding, his

silence, his failure to answer the witness's question or to advise SA Troeger of the recording after the interview, was dishonest and not truthful.

17. SA Troeger testified that Petitioner's interview notes appeared to be taken from a recording because they read like a transcript. The notes were very detailed and contained quotes of questions and answers. They were not made during the interview. He spoke to his coworkers and supervisor about the subject interview and his concern that it had been recorded. (T pp 21-22)

18. SA Troeger called Petitioner from his office on January 25, 2011, to ask him for a copy of the recording made during the subject interview. Petitioner answered the telephone and first stated that he did not make a recording. Petitioner then wanted to know whether SA Troeger was talking about a VHS tape that the witness had provided to them. SA Troeger 'clarified, 'No, I'm asking"—'I'm saying that I've looked over your notes and I can tell from the notes that you must have recorded the conversation, the interview we had,' and that I need a copy of that recording". (Tr p 24)

19. Petitioner initially denied that there was a recording, but then asked if SA Troeger would give him until noon the next day. (Resp. Exh. 2; T pp 22-25, 28 & 399-411)

C. NCCOB Informed of Conduct

20. After discussing the situation with his supervisor, SA Troeger contacted the federal prosecutor in the case, Assistant U.S. Attorney Michael E. Savage ("AUSA Savage") to inform him that he believed the subject interview had been recorded. (T pp 28-29, 62) AUSA Savage then called Assistant Attorney General Seth Rosebrock ("AAG Rosebrock"), who represented the NCCOB, to have him look into the situation. (T p 62)

21. Petitioner testified that it was not until AAG Rosebruck called him that Petitioner told anyone that he had recorded the interview. (T p 448)

22. AUSA Savage testified that to his knowledge Petitioner should have been aware that state investigators working with federal agencies had to comply with federal rules. In fact, Petitioner attended the "2nd Annual Mortgage Fraud Training Conference" held at the Office of the NCCOB on December 1, 2010. AUSA Savage presented a lecture on the federal rules of criminal procedure during the conference. He specifically discussed Rule 16 that requires the government to produce verbatim testimony from any witness; and both state and federal investigators, who are working in a federal case, are required to preserve all of their notes and recordings. AUSA Savage also provided written materials on his lecture. Jessica Copeland, with the Mecklenburg County District Attorney's Office, lectured at the conference about State discovery rules and the preservation of evidence, which are even broader than the federal rules. (T pp 62-63, 65-68)

23. The NCCOB was notified of the misconduct alleged against Petitioner on January 25, 2011. Specifically, the allegations were to the effect that Petitioner had knowingly recorded the subject interview without the knowledge of the witness or the federal investigator, and that

when confronted by the federal investigator regarding the matter, Petitioner denied recording the interview. The recording was evidence in the investigation. Management then began an internal investigation that lasted about three weeks. (T pp 22, 24-25, 243)

D. Internal Investigation by NCCOB

24. Petitioner met with his immediate supervisor, David Picard, on January 26, 2011, and told him about the subject interview for the first time. (T pp 86, 89, 448) Mr. Picard is the Director over the Enforcement Division, which is the investigative part of the NCCOB. At the time, he supervised five financial investigators and an analyst. (T pp 75-76) Petitioner told Mr. Picard that he had concealed and activated the NCCOB-issued digital voice recorder during the subject interview without advising the witness or Special Agent Troeger. Petitioner explained to Mr. Picard that during the subject interview, the witness asked if he was being recorded. According to Petitioner, he never acknowledged to the witness or to SA Troeger that he (Petitioner) was recording the interview. Petitioner also told Mr. Picard that he had transcribed the recording, provided an affidavit to SA Troeger, and erased the recording of the interview of the witness on the recording device. (Resp. Exh. 8; T p 86)

25. Shortly thereafter, Petitioner gave Mr. Picard the case file on the subject interview and the NCCOB-issued digital recording device he used during the subject interview. Petitioner also made a request for time off from the NCCOB, and Mr. Picard agreed to the request. Mr. Picard secured the items in the NCCOB's evidence room which remains locked. (Resp. Exh. 8; T p 87)

26. Mr. Picard delivered Petitioner's digital recorder to the SBI Laboratory on January 28, 2011 with the written request that the SBI attempt to retrieve and preserve the recording of the subject interview. (T p 88, 183) Ian Wallace, a forensic scientist with the SBI specializing in digital evidence, conducted the analysis of the digital recorder and generated a report. Mr. Wallace was able to recover sixteen (16) WMA-formatted audio files which he saved to a CD-ROM. (Resp. Exh. 1 & 5; T pp 183-184)

27. The largest of the recovered audio files, identified by the SBI as file 0003 and which contained the subject interview, would not play past the two hours, seven minutes, and 34 seconds time marker. Mr. Wallace unsuccessfully attempted to retrieve data past that time using three separate computer systems. According to Mr. Wallace, file 0003 had been deleted but not overwritten. (Resp. Exh. 6; T pp 185-187) Mr. Wallace produced the SBI's copy of the data that had been retrieved from Petitioner's digital recorder and played portions of it for the Court which were transcribed under seal. (T pp 192-222)

28. Petitioner met with Mr. Picard again on January 31, 2011, at which time he admitted the following: (1) He deleted the subject interview recording and taped over deleted material several times; and (2) He stated that in his interviews of witnesses, it was his practice to tape record the interviews without telling people they were being recorded and without saving a copy of the recordings. Instead, Petitioner would take written notes of the recordings and keep the written notes but they would not be verbatim transcripts of the recordings. Mr. Picard requested Petitioner to provide him with a list of witnesses that he had tape recorded and to

identify them by case number. Petitioner later gave him a list of 14 cases where he may have tape recorded interviews and then erased or taped over them. (Resp. Exh. 8; T pp 87-88)

29. Mr. Picard was not aware that Petitioner had ever tape recorded an interview. He reviewed Petitioner's case files in the investigative management system ("IMS") for a five-year period and there was no evidence of any tape recordings in any of them. (T pp 124-126) Investigators had been trained on how to upload electronic evidence into the IMS and there was a user guide on the system. (T pp 161-162, 241-242)

30. Mr. Picard testified that he was aware of only one occasion where a Financial Investigator (Mr. Billy Rodgers) had used a digital recorder during an interview. In that case, the NCCOB saved the recording and produced the original recording and the recorder to the District Attorney's Office. (T p 126-127, 143, 159-160)

E. Applicable NCCOB Enforcement Division Policies and Procedures

31. Mr. Picard completed the NCCOB Enforcement Division Policies and Procedures Manual on December 17, 2009, and it was approved by Mark Pearce, Deputy Commissioner. (Resp. Exh. 3) The policies and procedures were officially implemented on January 5, 2010, via e-mail to the entire Investigations Unit, and Human Resources and management were copied on the e-mail. Mr. Picard further explained that the policies and procedures regarding investigative activities were specific to the Enforcement Division. The manual was located on the s: drive (a shared drive used by NCCOB employees), and he also had a hard copy in his office for anyone to use. (Resp. Exh. 4; T pp 77-79, 239 & 187-89)

32. During the year prior to the implementation of the policies and procedures, Mr. Picard had announced at several staff meetings that he was writing the manual. He told the investigators that if they had any input or wanted to help write a certain section to let him know. He had also sent out an outline of the manual and solicited input. Petitioner sent Mr. Picard an e-mail with questions about two human resources sections. (T pp 79-80, 127-128 & 385-86)

33. Mr. Picard had initially planned on having a meeting to go through the manual line by line, but no one expressed any interest in reviewing the manual together. In addition, they were all extremely busy during that time. He felt as though his staff were experienced investigators and had a good knowledge of investigative policies and procedures. The investigators were told to review the manual and ask any questions they had concerning it. (T pp 146-148)

34. Section 6.3 *Conducting the Interview*, provides in pertinent part as follows:

Whenever possible, all interviews, especially interviews of subjects, should be conducted by two investigators. . . . With two investigators, one will be the primary questioner that asks most of the questions while the other investigator assumes a secondary role in the interview.

The normal method of recording the interview is note taking. Notes

should be taken contemporaneously at the time of the interview when a particular statement is made. . . . Notes from interviews should be retained as evidence in the case file. This is especially important if the case results in a criminal prosecution as the investigator notes are discoverable.

Other methods of recording interviews are audio and video taping. These methods should especially be utilized if the Financial Investigator is unable to have a second interviewer in the interview process. The person being interviewed should be advised that the interview is being tape recorded and needs to sign a consent form if possible. . . . The tape of the interview should be maintained as evidence and the interviewer should be cognizant that everything stated in the interview is a permanent record and normally undisputed.

(Resp. Exh. 3; T pp 80-82, 240-241)

35. Mr. Picard also explained that the “best evidence rule” requires that the original document, recording or photograph should be utilized in any trial. It is a basic rule of legal procedure for conducting investigations that any investigator should know. Even without the rule, an investigator knows to preserve the original recording of the interview such as the written interview notes or any kind of original recording. (T pp 89-90) He had discussions with the investigators, including Petitioner, to the effect that any interview notes or recordings of the interview should be maintained as evidence. (T p 168)

F. Applicable NCCOB Values

36. Petitioner signed the *OCOB Values* statement on November 29, 2006, indicating that he had read and understood OCOB’s expectations of him as an employee. Those *OCOB Values* provide in pertinent part as follows:

We Value Integrity. We have sound moral principles, display uprightness, honesty, and sincerity in the workplace.

We Value Competence. We have the ability to use knowledge, understanding and practical thinking skills to perform our job responsibilities effectively.

(Resp. Exh. 11; T pp 242-43)

G. Disciplinary Action for Unacceptable Personal Conduct

37. At the conclusion of its investigation, the NCCOB prepared a written Pre-Disciplinary Conference Memo (“PDC Memo”) dated February 16, 2011, which detailed for Petitioner, among other information, the allegations against him and the factual findings of the NCCOB related to those allegations. The PDC Memo informed Petitioner that management was considering severe disciplinary action against him, up to and including dismissal for unacceptable personal conduct. (Resp. Exh. 8; T pp 244-45)

38. Management's concerns about Petitioner's conduct were that he had willfully violated known or written work rules, and he had demonstrated conduct unbecoming a state employee and detrimental to state service. Specifically, Petitioner had violated the NCCOB Enforcement Division Policies and Procedures, Section 6.3 Conducting the Interview, by: failing to notify the witness or the federal investigator that he was recording the subject interview, failing to obtain consent from the witness and failing to retain the recording of the subject interview as evidence in the case file. (Resp. Exh. 8; T pp 248-49)

39. Petitioner had also violated the OCOB Values of Integrity and Competence in that he chose not to inform the witness and the federal investigator that he was tape recording the subject interview, even when asked during the interview by the witness if it was being recorded. He continued to deny having recorded the interview when asked about it by Special Agent Troeger. Petitioner had a great deal of experience as a financial investigator and was certified in law enforcement. He should have known and followed the NCCOB's policies and procedures. His conduct negatively impacted the federal investigation and compromised the NCCOB's relationship with the U.S. Attorney's Office and HUD-OIG. (Resp. Exh. 8; T pp 249-51)

40. Debbie Petersen, Human Resources Director, and Charlie Fields, Director of the Non-Depository Entities Division (the division of the NCCOB to which Petitioner's unit reported), met with Petitioner on February 16, 2011, in Ms. Petersen's office. (T pp 237-38, 245)

41. At the beginning of the meeting, Petitioner was given a copy of the PDC Memo and asked to read it thoroughly, which he did. Ms. Petersen and Mr. Fields then told Petitioner to take the rest of the day off to prepare his response to the findings of the PDC Memo during the Pre-Disciplinary Conference to be held the following day. (T p 247) Petitioner was also provided with a copy of the NCCOB's Disciplinary and Dismissal Policy. (Resp. Exh. 7; T pp 251-52)

42. On February 17, 2011, Ms. Petersen and Mr. Fields met with Petitioner in Ms. Petersen's office for the Pre-Disciplinary Conference, which lasted three hours. During the conference, Petitioner thoroughly reviewed the PDC Memo and was asked by Mr. Fields if any of the information was factually inaccurate. (T pp 252, 259)

43. Petitioner testified that he disagreed with certain facts contained in Section 3, Paragraph 3 of the PDC Memo, as follows: Petitioner said the subject interview lasted 5 hours, instead of the 4 hours identified in the PDC Memo; Petitioner denied only giving Special Agent Troeger a single page of notes at the conclusion of the subject interview, saying he had taken at least 3 to 4 pages of notes during the interview. Petitioner also stated that the last sentence of the first unnumbered paragraph on page 5 was not correct in that he did not deny having recorded the subject interview. However, the sentence before it was correct that Special Agent Troeger had reviewed Petitioner's report and it looked to him that Petitioner had recorded the subject interview. With the exception of the foregoing, Petitioner did not dispute the remaining findings in the PDC Memo. (T pp 252-55)

44. NCCOB management (which included Ms. Petersen, Mr. Fields, and Joseph A.

Smith, Jr., Commissioner of Banks) then met to review all of the information gathered during the investigation and Petitioner's responses during the Pre-Disciplinary Conference. They arrived at a final decision that was unanimous to dismiss Petitioner due to unacceptable personal conduct, and a letter was sent to him on February 18, 2011. (Resp. Exh. 9; T pp 259-60)

45. Petitioner appealed the dismissal internally with the NCCOB. Commissioner Smith upheld management's decision to dismiss Petitioner on May 11, 2011. (Resp. Exh. 10; T p 263)

46. Since his dismissal, Petitioner has worked part-time as a substitute teacher, and for a local sheriff's office. He also continues to work as a teacher for Basic Law Enforcement Training in Wake County. (T pp 367-68)

47. It is not credible that despite all of his training, 20 years of experience as an investigator, and as a teacher for Basic Law Enforcement Training that Petitioner did not know that he needed to save the digital recording of the subject interview as evidence in this case. (T p 444)

48. It is not credible that Petitioner was not aware that the NCCOB Enforcement Division Policies and Procedures were in effect at the time he conducted the subject interview, which was an entire year after they had been implemented. (T pp 387-88)

49. Petitioner has received performance evaluations and a performance audit during his employment with the NCCOB. (Pet. Exh. 7, 8, 10, 11 & 14; T pp 412-28) He disagreed with Mr. Picard's review in 2009 and filed written comments dated December 22, 2009. (Pet. Exh. 10A)

50. In his testimony, Petitioner conceded that he was dismissed for unacceptable personal conduct and not for performance. (T p 439)

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and received proper notice of the hearing in this matter. This office has jurisdiction to hear the matter and to issue a proposed decision to the State Personnel Commission which shall render a final agency decision.

2. At the time of his separation from employment, Petitioner was a career state employee entitled to the protections of the North Carolina State Personnel Act; specifically, the just cause provision of N.C. Gen. Stat. § 126-35.

3. The State Personnel Act permits disciplinary action against career state employees for "just cause." N.C. Gen. Stat. § 126-35. Although "just cause" is not defined in the statute, 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).

4. Respondent has the burden of proof in this contested case hearing to show that it had just cause to dismiss Petitioner. N.C. Gen. Stat. § 126-35(d).

5. Administrative regulations provide two grounds for discipline or dismissal based upon just cause, unsatisfactory job performance and unacceptable personal conduct. 25 N.C.A.C. 1J.0604(b).

6. Petitioner was dismissed from his employment with the NCCOB for unacceptable personal conduct, which includes the willful violation of known or written work rules and conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 1J.0614(8); *see also Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

7. One act of unacceptable personal conduct presents just cause for any discipline, up to and including dismissal. 25 N.C.A.C. 1J.0608(a); *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17.

8. The employee's unacceptable personal conduct may be intentional or unintentional. 25 N.C.A.C. 1J.0610(a). In addition, the employer's work rules may be written or known and a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule. *Hilliard*, 173 at 597, 620 S.E.2d at 17.

9. For conduct unbecoming a state employee that is detrimental to state service, the employer does not have to show actual harm, but rather "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Id.*

10. The Court of Appeals recently concluded that a determination of just cause requires a three-prong analysis: 1) whether the employee engaged in the alleged conduct; 2) whether the alleged conduct falls in one of the categories of unacceptable conduct provided by the Administrative Code; and 3) whether the misconduct amounted to just cause for the action taken. *Warren v. N.C. Dept. of Crime Control & Public Safety*, No. COA11-884, 2012 N.C. App. LEXIS 770 (N.C. Ct. App. June 19, 2012).

11. Applying this three-prong analysis: Petitioner failed to be forthcoming with SA Troeger about recording the interview as alleged by Respondent and failed to save the recording; Petitioner's failure to be forthcoming was dishonest and not truthful and his failure to save the recording violated a written work rule and, therefore, were unacceptable personal conduct; and the misconduct of dishonesty and untruthfulness and the violation of a written work rule are just cause for dismissal.

12. Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to dismiss the Petitioner in accordance with N.C. Gen. Stat. § 126-35 for unacceptable personal conduct.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent had just cause to dismiss Petitioner based on his unacceptable personal conduct. Therefore, Respondent's decision to dismiss Petitioner is AFFIRMED.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to the Decision and to present written arguments to those in the agency who will consider this decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 3rd day of July, 2012.

Selina M. Brooks
Administrative Law Judge