

STATE OF NORTH CAROLINA  
COUNTY OF DUPLIN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12OSP07543

<p>David W Morgan, Petitioner,</p> <p>v. North Carolina Department of Public Safety; North Carolina Highway Patrol, Respondent.</p>	<p><b>FINAL DECISION</b></p>
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**APPEARANCES**

PETITIONER: M. Travis Payne  
EDELSTEIN & PAYNE  
Post Office Box 28186  
Raleigh, NC 27611

RESPONDENT: Tamara S. Zmuda  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27609

**ISSUE**

Whether Respondent had just cause to dismiss Petitioner from the North Carolina State Highway Patrol.

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 makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, 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 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.

### **FINDINGS OF FACT**

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. Prior to his termination, Petitioner was employed as a Trooper with the North Carolina State Highway Patrol for approximately five years. (T. p. 9)
3. On June 15, 2010, Petitioner was dismissed from the North Carolina State Highway Patrol for engaging in an acts constituting unacceptable personal conduct. (R. Ex. 18) The unacceptable personal conduct consisted of violating Respondent's policy on Truthfulness, Neglect of Duty, and Unbecoming Conduct.
4. The State Highway Patrol's written policy on Truthfulness states:

Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information. (R. Ex. 3)
5. There are no exceptions to the Highway Patrol's Truthfulness policy. (T. p. 222)
6. The State Highway Patrol's written policy on Unbecoming Conduct states:

Members shall conduct themselves, both on and off duty, in such a manner as to reflect most favorably upon the Highway Patrol and in keeping with the high standards of professional law enforcement. Unbecoming conduct shall include any conduct that constitutes unacceptable personal conduct pursuant to State Personnel Policy and any conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol, or which tend to impair the operation and efficiency of the Patrol or of a member, or which violates Patrol policy. (R. Ex. 3)
7. The State Highway Patrol's written policy on Neglect of Duty states:

Members shall not be inattentive to duty nor neglect their duties. Members shall not engage in any activities or personal business which would cause them to neglect or be inattentive to duty or which would impair their ability to perform such duty. (R. Ex. 3)

A supervisor's failure to take such appropriate action when he/she has personal knowledge of violations of the Rules of Professional Conduct and

Job Performance by subordinates shall be considered serious neglect of duty.

8. The incident for which Petitioner was dismissed arose from a handoff of a DWI traffic stop of Donnie Scholar from Duplin County Sheriff's Deputy Justin Smith. (T. p. 17)
9. It is common practice for smaller municipalities to hand over driving while impaired ("DWI") traffic stops to State Troopers. In this case, there was an unwritten understanding that the Duplin County Sheriff's Department would hand off all DWI stops to the Troopers, and, in exchange, the Duplin County Sheriff's Office would serve all the warrants. (T. pp. 17, 150)
10. Troopers, in general, are provided with a significant amount of training in DWI enforcement. Specifically, Petitioner had a significant amount of training in DWI enforcement. (T. p. 17) Petitioner was trained in DWI enforcement during his Basic Law Enforcement Training and in continuing legal education classes. (T. p. 18) Petitioner was also sensor- and intoximeter-certified.
11. On October 7, 2011, Jason Brock was employed as a Sergeant with the Duplin County Sheriff's Office. (T. p. 142) Sergeant Brock was Deputy Smith's direct supervisor. (T. p. 143) On October 7, 2011, Sergeant Brock received a telephone call that he was needed to help investigate a possible meth lab. (T. p. 143) Sergeant Brock received instructions that he and Deputy Smith were to sit at a remote location near the suspected meth lab and wait for further instructions. (T. p. 143) Sergeant Brock and Deputy Smith, each in their own patrol vehicles, sat in a church parking lot at the intersection of NC 50 and Cypress Road. While waiting at the intersection, Sergeant Brock and Deputy Smith observed a white Ford F250 truck come to the intersection and stop. When the Ford truck moved through the intersection, it spun its tires and made a left turn, driving left of center into on-coming traffic. (T. p. 144) There was some sand and gravel at the intersection. (T. p. 173) Deputy Smith pulled out to pursue the vehicle, and Sergeant Brock followed to back him up. (T. p. 145)
12. Lacey Rae Ward is employed as an Officer with the Warsaw Police Department. (T. p. 119) Detective Ben Parrish was employed with the Duplin County Sheriff's Office. (T. p. 131) On October 7, 2011, at approximately 5:30 p.m., Officer Ward and Detective Parrish were working undercover assisting the Duplin County Sheriff's Office with a narcotics case. (T. pp. 119, 132) Officer Ward and Detective Parrish were together in a patrol vehicle at the intersection of NC 50 and Cypress Road waiting for further instruction on the narcotics case. They were parked in the same church parking lot where Sergeant Brock and Deputy Smith were parked. (T. pp. 120, 131) While Officer Ward and Detective Parrish were waiting for instruction, they saw a white truck approach the intersection. The white truck made a loud screeching sound and spun its tires as it made a left turn into the lane to the left of centerline of NC 50 into on-coming traffic. (T. pp. 121-22, 132-33) Officer Ward saw Deputy Smith and Sergeant Brock pull out to pursue the white truck. (T. pp. 122-23, 134) Subsequently, a call for "shots fired" was received over the radio. Sergeant Brock then requested Officer Ward and Detective Parrish to

back up Deputy Smith at the traffic stop. (T. pp. 123, 134) Officer Ward and Detective Parrish went to the scene of the traffic stop.

13. When Donnie Scholar got out of the white Ford truck, his pants were down below his genitals, and he was hanging on to the door of the vehicle for support. (T. p. 146) Donnie Scholar explained that he had a hip replacement, and he showed Sergeant Brock a hydrocodone patch on his left arm. (T. p. 147) Sergeant Brock smelled a moderate odor of alcohol coming from Donnie Scholar. (R. Ex. 9; T. p. 149) Donnie Scholar was unsteady on his feet, had slurred speech, and had extreme mood swings.
14. Because of Donnie Scholar's slurred speech, unsteadiness on his feet, irate and boisterous demeanor, the portable breath test results, and the medication, Sergeant Brock formed the opinion that Donnie Scholar was impaired. (T. pp. 153-54)
15. Donnie Scholar told Detective Parrish that he was on medication. (T. p. 139) Detective Parrish determined that Donnie Scholar was impaired because of his speech, demeanor, and belligerence. (T. pp. 136-37) Officer Ward, after observing Donnie Scholar, based on her training and experience as a law enforcement officer, believed that Donnie Scholar was impaired. Approximately 30 minutes later, Petitioner arrived on the scene.
16. On October 7, 2011, Petitioner was called to the scene of a traffic stop by Elizabethtown communication. (T. p. 19) The traffic stop involved Donnie Scholar.
17. On the way to the call for shots fired, Sergeant Brock called Petitioner. (T. p. 19) During that telephone call, Sergeant Brock informed Petitioner that he and Deputy Smith had pulled Donnie Scholar over for suspicion of DWI. Sergeant Brock described the situation at the Donnie Scholar traffic stop and informed Petitioner that although Donnie Scholar had some health conditions, it should be left to the Magistrate to determine whether he should be released for his health conditions. (T. pp. 20, 151)
18. Sergeant Brock, Petitioner, Donnie Scholar, and Ivey Scholar, Donnie's brother, went to high school together. (T. p. 152) At the time of the stop, Petitioner knew Ivey Scholar personally. (T. pp. 59, 67)
19. On the way to the scene of the traffic stop, Petitioner did not know the direction from which Donnie Scholar had been traveling. (T. p. 69)
20. It took Petitioner approximately 45 minutes from the time he was called by Elizabethtown communications to arrive at the scene of the traffic stop. (T. p. 21) When Petitioner arrived at the scene of the traffic stop, Donnie Scholar was out of the vehicle. (T. p. 21)
21. When Petitioner arrived at the scene, he did not know how long Donnie Scholar had been out of his vehicle or where Donnie Scholar had been since the stop of the vehicle. (T. p. 22)

22. When Petitioner arrived at the scene of the traffic stop, Donnie Scholar, Glenda Scholar, Ivey Scholar, Deputy Smith, Officer Ward, and Detective Parrish were at the scene. (T. p. 22)
23. Once Petitioner arrived on the scene, Detective Parrish spoke to Petitioner and explained what he observed regarding the spinning of wheels and Donnie Scholar's actions. (T. pp. 137-39) Thereafter, Officer Ward and Detective Parrish left the scene. (T. p. 126)
24. Petitioner talked to Deputy Smith when he arrived at the scene. Deputy Smith explained to Petitioner that Donnie Scholar was pulled over for peeling out at a stop sign, creating tire smoke, and driving left of center into oncoming traffic. (T. pp. 23-4) That was the first time that Petitioner was informed of these reasons for the Donnie Scholar stop. Neither Elizabethtown communication nor Sergeant Brock had informed Petitioner of these exact reasons. (T. p. 24)
25. Deputy Smith also informed Petitioner that he had performed portable breath tests on Donnie Scholar. The results of the tests were .12 and .11. (T. p. 24)
26. On the scene of the traffic stop, Petitioner saw Donnie Scholar leaning against a trampoline. Donnie Scholar never walked around; he remained leaning on the trampoline. (T. p. 29) When Petitioner talked to Donnie Scholar, he smelled alcohol on his breath. (T. p. 27) Petitioner stated that Donnie Scholar was "emotionally a mess." Donnie Scholar would go from crying to sobbing to cursing. Donnie Scholar was belligerent. (T. p. 27)
27. Donnie Scholar admitted to Petitioner that he had been drinking at his mom's house prior to driving to his present location and that he was on medication for a recent hip replacement. (T. pp. 27-8, 30) While Petitioner was at the scene, Donnie Scholar had a red cup with him at the trampoline. Donnie Scholar informed Petitioner that it was a punch mixed drink. (T. p. 29) Petitioner did not smell or otherwise check the contents of the red cup and never saw Donnie Scholar drink from the cup.
28. After observing Donnie Scholar, Petitioner decided to perform his own portable breath test on Donnie Scholar. (T. p. 30) Petitioner always performs his own portable breath test on a subject because he knows that he properly calibrates his alco sensor, and he trusts the reading of his own alco sensor. (T. p. 30) Donnie Scholar registered a .10 and .09 on Petitioner's portable breath tests. (T. p. 31)
29. After obtaining the readings from his own portable breath tests on Donnie Scholar, Petitioner formed the opinion that Donnie Scholar was impaired. (T. pp. 31, 47)
30. Although Petitioner was trained in field sobriety tests, he did not perform any field sobriety tests on Donnie Scholar. (T. p. 32)

31. At the scene of the traffic stop, Petitioner was informed that if Donnie Scholar were charged with DWI for this stop, it would be a habitual DWI charge for Donnie Scholar because of numerous prior convictions for DWI. (T. p. 71)
32. Petitioner informed Deputy Smith that he was not going to arrest Donnie Scholar because by the time he took him to the jail and did the paperwork, Donnie Scholar would blow a .08, and Petitioner said that he never had won a .08 DWI case in Duplin County. (T. pp. 32-3) Petitioner also indicated that he was not going to arrest Donnie Scholar because he was bleeding from his ankle and Petitioner did not want blood in his patrol car. (T. p. 72)
33. Petitioner did not ask Officer Ward or Detective Parrish if they saw Donnie Scholar spin tires or drive left of center into oncoming traffic. (T. p. 65)
34. Petitioner did not ask Sergeant Brock if he saw Donnie Scholar spin tires or drive left of center into oncoming traffic, even though Petitioner was aware that Sergeant Brock was at the scene of the incident. (T. p. 65)
35. Four different law enforcement officers witnessed Donnie Scholar spin tires at the intersection and drive left of center into oncoming traffic: Deputy Smith, Sergeant Brock, Officer Ward, and Detective Parrish. (T. p. 65) These law enforcement officers were from two different law enforcement agencies. (T. p. 235)
36. Law enforcement officers are taught that a traffic violation constitutes reasonable suspicion to pull a vehicle over. (T. p. 233) Driving left of center is a traffic violation.
37. After learning the reason for the stop, Petitioner did not go back to the intersection to observe the road. (T. p. 33)
38. While Petitioner did not charge Donnie Scholar with DWI, he did charge him with Driving While License Revoked and Consuming a Malt Beverage While Driving. (T. p. 34) The charges for driving while license revoked (“DWLR”) and consuming a malt beverage while driving are based on the same reasonable suspicion as the DWI. (T. p. 63)
39. In order to charge Donnie Scholar with consuming a malt beverage, Petitioner had to have probable cause. (T. p. 51) Petitioner also would have had to rely on other Officers’ testimonies regarding reasonable suspicion and regarding the element of driving in order to convict Donnie Scholar for DWLR and consuming a malt beverage while driving. (T. p. 227)
40. Petitioner never asked anyone if Donnie Scholar had the red cup in his hand when he exited the vehicle. Petitioner did not ask Donnie Scholar if he was drinking while driving. Petitioner did not search the vehicle Donnie Scholar was driving. Petitioner never saw Donnie Scholar drink from the red cup and never saw him move or pick up the cup. Petitioner never picked up the cup or smelled the liquid in the cup. (T. pp. 52-54)

41. The only evidence Petitioner had that alcohol was in the cup was Donnie Scholar's statement that it was a punch mixed drink. (T. p. 54)
42. Highway Patrol Troopers have been taught always to corroborate a suspect's admission with independent evidence. (T. p. 252)
43. Although Petitioner relied on Deputy Smith's printout of Donnie Scholar's driving record because he had a tendency to believe Deputy Smith, he also ran Donnie Scholar's name on his in-car computer to confirm. Deputy Smith's printout revealed eight (8) prior DWI charges against Donnie Scholar. (T. p. 35)
44. After leaving the Scholar stop scene, Petitioner saw Deputy Smith parked down the road and stopped for a conversation with him. Deputy Smith also had earlier departed the Scholar stop location. During that conversation, a call came over the radio regarding a four-wheeler. Deputy Smith said he would take the call for Petitioner because Petitioner was supposed to meet his wife for dinner. (T. pp. 57-58)
45. During his interview with Internal Affairs, Petitioner stated that he did not stop down the road and have a conversation with Deputy Smith. (T. p. 55) After being questioned at a later date by Internal Affairs, Petitioner admitted that he may have stopped down the road and had a conversation with Deputy Smith. (T. p. 57)
46. At the end of his shift that night, Sergeant Brock called Deputy Smith to find out how the rest of the stop went with Donnie Scholar. (T. p. 156) Deputy Smith informed Sergeant Brock that Petitioner did not charge Donnie Scholar with DWI, but with other charges. (T. p. 156)
47. The following night, October 8, 2011, Sergeant Brock called Petitioner to ask him why he did not arrest Donnie Scholar for DWI. (T. p. 38) Petitioner told Sergeant Brock that he did not charge or arrest Donnie Scholar for DWI because by the time he would have gotten him down to the station, Donnie Scholar would have blown a .08, and he had never won a .08 DWI case in Duplin County. (T. p. 38) Petitioner also said he did not arrest him because of his medical conditions. (T. p. 156) During this telephone conversation, Petitioner never stated anything about not believing Deputy Smith's reasonable suspicion for the stop. (T. pp. 156-57)
48. Petitioner admitted that his actions at the scene of the stop became the subject of much discussion among law enforcement officers in and around Duplin County. (T. p. 66) Petitioner was concerned that this incident affected his reputation and the Highway Patrol's reputation with members of the Duplin County Sheriff's Office. (T. p. 66)
49. Sergeant Brock became aware that Petitioner's actions at the stop of Donnie Scholar were becoming a topic of much discussion between and among members of the Duplin County Sheriff's Office and the Highway Patrol. Because of the amount of attention the stop was getting from law enforcement, on October 10, 2011, Sergeant Brock went to the Highway Patrol office to talk to Petitioner's direct supervisor, Sergeant Cavanaugh. (T. pp. 157-59,

- 173) Sergeant Brock explained to Sergeant Cavanaugh what happened at the stop, that Petitioner did not charge Donnie Scholar with DWI, and that the situation was becoming a topic of discussion between the Departments. (T. pp. 158-59, 176-77)
50. A few hours later, Sergeant Cavanaugh approached Petitioner and asked him why he did not arrest Donnie Scholar on October 7, 2011. (T. pp. 38-9) Petitioner told Sergeant Cavanaugh that by the time he would have gotten Donnie Scholar to the Magistrate's office, Donnie Scholar would have blown a .08, and Petitioner had never won a .08 DWI case in Duplin County. (T. p. 39) He also told Sergeant Cavanaugh that Donnie Scholar had blood on his leg, and he did not want the blood in his car. (T. p. 178)
  51. When a subject blows a .08 or above, Troopers are trained to place them under arrest and transport them to the Magistrate's office. (T. p. 179)
  52. A few days later, Sergeant Cavanaugh and First Sergeant Thurston met with Petitioner regarding the stop of Donnie Scholar. (T. p. 180) During this meeting, Petitioner gave a different reason for not arresting Donnie Scholar: Petitioner told his supervisors that he did not charge Donnie Scholar with DWI because he did not believe Deputy Smith's reasons for reasonable suspicion to make the stop. Sergeant Cavanaugh asked Petitioner why he did not tell him that the first time he asked Petitioner why he did not charge Donnie Scholar. Petitioner said that he did not want problems with the Sheriff's Department. (T. p. 180) Petitioner never explained why he was untruthful with his own Sergeants.
  53. Several days later, Petitioner called Sergeant Brock and asked to speak to him in person. Petitioner went to Sergeant Brock's residence. Petitioner asked Sergeant Brock why he did not talk to him about the stop before going to Sergeant Cavanaugh. Sergeant Brock informed Petitioner that he had talked to him prior to going to Sergeant Cavanaugh. Then Petitioner changed his story and informed Sergeant Brock that he did not arrest Donnie Scholar for DWI because he did not believe Deputy Smith's recitation of reasonable suspicion for the stop. (T. pp. 160-61) Sergeant Brock was confused and asked Petitioner why he had charged Donnie Scholar with Driving While License Revoked and Consuming from an Open Container of Alcohol if he did not think the stop was proper.
  54. Later, Petitioner called Sergeant Brock again and requested to meet with him and Deputy Smith. They met at the Highway Patrol Office. At the meeting, Petitioner apologized for his actions during the stop of Donnie Scholar and stated that he should have done his job. (T. pp. 161-62)
  55. Petitioner told Internal Affairs that had he made the stop, Donnie Scholar would have been arrested for DWI. (T. p. 47)
  56. Had Petitioner charged Donnie Scholar with DWI, Deputy Smith, Sergeant Brock, Officer Ward, and Detective Parrish could have been called to testify in court as to the evidence constituting reasonable suspicion for the stop by law enforcement. (T. p. 46)



57. In his first interview with Internal Affairs on November 17, 2011, Petitioner stated that he did not perform enough tests or have enough of a visual to determine if Donnie Scholar was impaired. (R. Ex. 9; T. p. 48) In his second interview with Internal Affairs, however, Petitioner admitted that Donnie Scholar was impaired. (R. Ex. 9; T. p. 49)
58. Petitioner was willfully untruthful with investigators of Internal Affairs when he told them that he did not perform enough tests or have enough of a visual to determine if Donnie Scholar was impaired.
59. Sergeant Brock testified that Deputy Smith was one of his best officers, and he thought that Deputy Smith was very honest. Sergeant Brock never had any reason to question Deputy Smith's credibility. (T. p 162)
60. Petitioner admitted that he has no knowledge of credibility issues with Deputy Smith's courtroom testimony. (T. p. 60)
61. Deputy Smith looked up to Petitioner as a role model. (T. p. 167)
62. On November 17, 2011, Petitioner received a notification that a complaint had been filed against him. (T. p. 7; R. Ex. 2) Along with the notification, Petitioner was provided with a copy of Highway Patrol policies H.01 and H.02. (T. pp. 8-9; R. Exs. 3, 4)
63. The Internal Affairs Section of the Highway Patrol conducted an investigation into the complaint filed against Petitioner. As part of the investigation, Petitioner was interviewed once on November 17, 2011, and again on March 12, 2012. Those interviews were recorded and transcribed. The transcriptions of the interviews were admitted into evidence as R. Ex. 9.
64. On May 11, 2006, Petitioner was sworn in as a law enforcement officer. At that time Petitioner became a member of the Patrol and was provided with a Highway Patrol Policy Manual. Petitioner was required to read the manual and sign and date it indicating that he had read and understood it. Petitioner signed and dated the document indicating that he read and understood it and would abide by it. (T. p. 10)
65. The truthfulness policy is a part of the Highway Patrol Manual. Petitioner was informed of the truthfulness policy when he became a Trooper. The truthfulness policy had been stressed to Petitioner throughout his career with the Highway Patrol. Petitioner was made aware early in his career that violating the truthfulness policy was a serious violation and could result in discipline, up to and including dismissal. (T. pp. 10-11)
66. Petitioner made a judicial admission at this hearing, and it is found as a fact, that he was untruthful to Deputy Smith, Sergeant Brock, and Sergeant Cavanaugh in his explanation as to why he did not charge Donnie Scholar with DWI. (T. p. 113)
67. Petitioner admitted that he was untruthful to Deputy Smith when he told him that the reason he did not arrest Donnie Scholar for DWI was because by the time he arrested

him, completed the paperwork, and transported him to the jail, Donnie Scholar would have blown a .08 on a breathalyzer and that he never had won a .08 DWI case in Duplin County. (T. pp. 42-43)

68. Petitioner admitted that he was untruthful to Sergeant Brock when he told him that the reason he did not arrest Donnie Scholar for DWI was because by the time he arrested him, completed the paperwork, and transported him to the jail, Donnie Scholar would blow a .08 and that he never had won a .08 DWI case in Duplin County. (T. p. 42)
69. Petitioner admitted that he was untruthful when he told Sergeant Cavanaugh that the reason he did not arrest Donnie Scholar for DWI was because by the time he arrested him, completed the paperwork, and transported him to the jail, Donnie Scholar would have blown a .08 and that he never had won a .08 DWI case in Duplin County. (T. p. 44)
70. Petitioner admitted that he was untruthful when he told Sergeant Brock and Sergeant Cavanaugh that he never had won a .08 DWI case in Duplin County. Petitioner has won “plenty” of .08 DWI cases in Duplin County. (T. pp. 58, 84)
71. It is widely known in the Patrol that truthfulness is taken very seriously and that the policy must be followed. (T. pp. 321, 337) Truthfulness is paramount to the official duties of a law enforcement officer. If a law enforcement officer loses his credibility, his ability to effectively perform the functions of his job are deeply diminished.
72. By being untruthful, Petitioner compromised his integrity and undercut the confidence that members of the Duplin County Sheriff’s Office had in the Highway Patrol. (T. p. 258)
73. Not wanting to hurt someone’s feeling is not an acceptable excuse for being untruthful in the performance of the duties of a law enforcement officer. (T. p. 260)
74. Patrol policy requires that Troopers charge people and make arrests for clear cut and substantial violations of the law. (T. p. 221)
75. N.C.G.S. 20-138.1 includes a two-prong test for violations of DWI. A person can violate the law by having a .08 or higher blood alcohol content at any time relevant to driving or be appreciably impaired. (T. p. 221)
76. Blowing between a .09 and .12 on a portable breath test is probable cause for the charge and arrest for a clear cut and substantial violation of N.C.G.S. § 138.1.
77. Donnie Scholar, based on the multiple readings of the portable breath tests, was in violation of the DWI statute under the .08 prong, if not both prongs. (T. p. 222)
78. Michael Gilchrist was the Commander of the Highway Patrol in October 2011. (T. p. 200) As Commander of the Patrol, Colonel Gilchrist was responsible for rendering discipline to employees. (T. pp. 200-01)

79. After the complaint against Petitioner was investigated by Internal Affairs, the file was sent to the Director of Professional Standards, Major Jennifer Harris. On June 7, 2012, Major Harris wrote a memorandum to Colonel Gilchrist indicating that based on the facts of this case, her recommendation was that Petitioner should be dismissed from the Highway Patrol. (T. pp. 203-04; R. Ex. 12)
80. Colonel Gilchrist received the entire Internal Affairs file in this case, including Respondent's Exhibits 1 – 12, and considered those documents in determining that he was considering dismissing Petitioner from employment.
81. Based on his initial consideration, Colonel Gilchrist ordered that a pre-disciplinary conference take place. (R. Ex. 13)
82. On June 8, 2012, Petitioner was provided with notification that a pre-disciplinary conference would be conducted on June 13, 2012 at 10:00 a.m. Along with this notification, Petitioner was provided with a copy of the Report of Investigation and supporting documents. (R. Ex. 14) Petitioner also was provided with a Charge Sheet, which indicated the actions for which discipline was being considered. (R. Ex. 18)
83. Prior to Petitioner's dismissal, he was provided with a pre-disciplinary conference. (T. p. 15) At the pre-disciplinary conference, Petitioner was provided with an opportunity to present any information he wanted considered by Colonel Gilchrist before the decision regarding discipline was made. Petitioner's pre-disciplinary conference was recorded and transcribed. The transcription was entered into evidence as Respondent's Exhibit 15. At the pre-disciplinary conference, Petitioner provided documentation that he wanted considered by Colonel Gilchrist. Those documents were introduced into evidence as Respondent's Exhibit 16. (T. p. 15)
84. Colonel Gilchrist received, reviewed, and considered the documents provided by Petitioner at his pre-disciplinary conference prior to rendering a final decision regarding discipline. (T. p. 211)
85. Colonel Gilchrist considered many factors in determining that dismissal was the appropriate discipline in this case. Those factors include, but are not limited to, Petitioner's good employment history, that all troopers with substantiated violation of truthfulness have been dismissed, that Petitioner's explanations to the Internal Affairs investigators were contradictory and not credible, that Petitioner was not truthful during the investigation into this matter, the importance and necessity of truthfulness in a law enforcement position, and the impact Petitioner's actions would have on his ability to effectively perform his job duties.
86. In weighing and balancing the relevant factors, the aggravating factors, particularly the importance of truthfulness and how it affects a law enforcement officer's ability to effectively perform his job requirements, outweighed Petitioner's good work history.

87. After reviewing and considering all the documents in Petitioner's investigation file, the documents presented at Petitioner pre-disciplinary hearing, and Petitioner's performance appraisals, Colonel Gilchrist considered lesser forms of discipline but determined that dismissal was the appropriate level of discipline. (T. p. 212)
88. The Highway Patrol spends a significant amount of time, energy, and money to train Troopers and to ensure that they employ trustworthy individuals who can perform with a minimal amount of supervision. (T. p. 213) Given the nature of a Trooper's job, it is required that Troopers be trustworthy and dependable. Troopers are informed about the importance of truthfulness throughout their careers, starting from when they are cadets in Basic Law Enforcement Training. (T. p. 215) Troopers often work alone and frequently have to testify in court. Truthfulness and credibility are essential requirements of the job. (T. p. 216)
89. On June 18, 2012, Petitioner appealed his dismissal to the Secretary of the Department of Public Safety, Reuben Young. (T. p. 16; R. Ex. 19)
90. On July 23, 2012, Secretary Young upheld the dismissal of Petitioner from the Patrol. (R. Ex. 20; T. p. 16)
91. N.C.G.S. § 126-35(a) provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." 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).
92. While just cause is not susceptible of 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).
93. In Warren v. N.C. Dep't of Crime Control & Public Safety, N.C. Highway Patrol, \_\_\_ N.C. App. \_\_\_, 726 S.E.2d 920(2012), the Court of Appeals established a three-part test to determine whether just cause exists for discipline in personnel cases. First, it must be determined whether the employee engaged in the conduct the employer alleged. Id. at \_\_\_, 726 S.E.2d at 14. Second, it must be determined whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Id. Third, if the employee's conduct qualifies as a type of unacceptable personal conduct, it must be determined whether the conduct amounted to just cause for the disciplinary action taken. Id.
94. The definition of unacceptable personal conduct includes: conduct for which no reasonable person should expect to receive prior warning; the willful violation of known or written work rules; or conduct unbecoming a State employee that is detrimental to State service. 25 N.C.A.C. 1J.0614.

95. The State Personnel Manual advises that an employing agency should consider a number of factors when deciding the appropriate type of discipline to render. State Personnel Manual, Section 7, page 11. Among the factors are: 1) Whether the supervisor should recommend disciplinary action based on the facts; 2) Whether more investigation is needed to make a recommendation; 3) The type and degree of disciplinary action to be taken; 4) The employee's work history; 5) Disciplinary actions received by other employees within the agency/work unit for comparable performance or behavior; and 6) other relevant factors. Id.
96. A Career State Employee can be disciplined for a single act of unacceptable personal conduct up to and including dismissal. 25 N.C.A.C. 1J.0608.

### **CONCLUSIONS OF LAW**

1. All parties properly are before the Office of Administrative Hearings. 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.
2. 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 (N.C. Gen. Stat. § 126-1 et seq.), and specifically the just cause provision of N.C.G.S. §126-35.
3. Under N.C.G.S. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that "just cause" existed for the disciplinary action.
4. Respondent met its burden in proving that Petitioner was untruthful to Sergeant Cavanaugh when Petitioner said that he never had won a .08 DWI case in Duplin County. This untruthfulness was a willful violation of Respondent's written policy and, therefore, constitutes unacceptable personal conduct under the North Carolina Administrative Code.
5. Respondent has met its burden in proving that Petitioner was untruthful to Sergeant Cavanaugh and First Sergeant Thurston when he told them that he did not arrest Donnie Scholar for DWI because he did not think it was a good stop. This untruthfulness was a willful violation of Respondent's written policy and, therefore, constitutes unacceptable personal conduct under the North Carolina Administrative Code.
6. Respondent has met its burden in proving that Petitioner was untruthful when he told Internal Affairs investigators that he did not perform enough tests or have enough of a visual to form an opinion satisfactory to himself as to whether Donnie Scholar was impaired on October 7, 2011. This untruthfulness was a willful violation of Respondent's written policy and, therefore, constitutes unacceptable personal conduct under the North Carolina Administrative Code.
7. Respondent has met its burden in proving that Petitioner engaged in neglect of duty by failing to arrest Donnie Scholar for DWI when he had ample probable cause to do so.

The undersigned finds that this violation amounts to unsatisfactory job performance as defined by the North Carolina Administrative Code.

8. Respondent has met its burden in proving that Petitioner engaged in neglect of duty by failing to gather the evidence necessary to properly support a charge for operating a motor vehicle while consuming an alcoholic beverage in violation of NCGS 18B-401. The undersigned finds that this violation amounts to unsatisfactory job performance as defined by the North Carolina Administrative Code.
9. Respondent failed to meet its burden by proving: (1) That Petitioner was untruthful to Deputy Smith when he said that he never would get a conviction for a .08 DWI case in Duplin County; (2) that Petitioner was untruthful to Sergeant Brock when he said that he did not arrest Donnie Scholar because he would have had to charge him with habitual DWI; (3) that Petitioner was untruthful to Internal Affairs when he said that, while en route to the location of the stop, he checked the intersection for tire impressions and there were none there; and (4) that Petitioner was untruthful to Internal Affairs investigators when he said he did not stop down the road and have a conversation with Deputy Smith, that he did not receive a 10-85 call from the Communications Center, that Deputy Smith did not take the 10-85 call for him, and that he left the scene and went to another call.
10. Respondent has met its burden in proving that Petitioner engaged in unsatisfactory performance of duties when Petitioner failed to charge Donnie Scholar with DWI, despite ample evidence of the violation, and informing law enforcement personnel that the reason he did not arrest Donnie Scholar was because it would have been a waste of time because he never would win a .08 DWI case in Duplin County. The undersigned finds that this violation amounts to unsatisfactory job performance as defined by the North Carolina Administrative Code.
11. Petitioner engaged in the willful violation of Respondent's known work rule on Truthfulness by not being truthful and complete in his oral communications with Sergeants Brock and Cavanaugh and by being untruthful to Internal Affairs investigators when he original told them that he did not perform enough tests to determine if Donnie Scholar was impaired.
12. Respondent considered all relevant and appropriate factors in determining that dismissal was appropriate in the present case.
13. Col. Gilchrist was not arbitrary and capricious in dismissing Petitioner, and he exercised appropriate discretion in making that determination.
14. Respondent had just cause to discipline Petitioner in the form of dismissal.
15. All procedural requirements for terminating Petitioner were followed under the provisions of the North Carolina General Statutes, the North Carolina Administrative Code, the North Carolina State Personnel Manual, the rules and policies of the North

Carolina Department of Crime Control and Public Safety, and the North Carolina Highway Patrol.

### **FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, I find that Respondent's decision to dismiss Petitioner from its employment for unacceptable personal conduct and unsatisfactory performance of duties is supported by a preponderance of the evidence and is AFFIRMED.

It is ordered that Petitioner is not entitled to recover reasonable attorney's fees and costs associated with the filing and prosecution of this contested case.

### **NOTICE**

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 29th day of August, 2013.

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Beecher R. Gray  
Administrative Law Judge