

**STATE OF NORTH CAROLINA**

**BEFORE THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 OSP 10036/11386**

**COUNTY OF WAKE**

ANTONIO ASION,	)
	)
Petitioner,	)
	)
v.	)
	)
NC DEPARTMENT OF	)
PUBLIC SAFETY, et. al.,	)
	)
Respondent.	)

**FINAL DECISION**

This matter was heard before the Honorable Donald Overby, Administrative Law Judge, on January 21-23, 2014 at the Office of Administrative Hearings in Raleigh, North Carolina.

**APPEARANCES**

Petitioner:	Michael C. Byrne Law Offices of Michael C. Byrne 150 Fayetteville Street, Suite 1130 Raleigh, NC 27601
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Respondent:	Tammera S. Hill Assistant Attorney General Post Office Box 629 Raleigh, NC 27602
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**WITNESSES**

Called by Petitioner: None (Petitioner called during Respondent case in chief).

Called by Respondent: Antonio Asion, Benjamin Franklin, LaShanda Langley, Timothy Harrell, Gerald Rudisill, Jeffrey Holmes

**EXHIBITS**

**Petitioner placed the following exhibits into the record:**

Petitioner’s exhibits Numbered 3, 6, and 8

**Respondent placed the following exhibits into the record:**

1. Respondent's 1: Investigatory Placement Memo
2. Respondent's 2: Memo to Col. Bell requesting investigation
3. Respondent's 3: Petitioner's statement
4. Respondent's 4: Sgt. Franklin's statement
5. Respondent's 5: Transcript of Petitioner's interview
6. Respondent's 6: Transcript of Sgt. Franklin's interview; hearsay excluded
7. Respondent's 7: Transcript of Lashanda Langley's interview
8. Respondent's 8: Transcript of Sgt. Franklin follow up interview
9. Respondent's 9: Transcript of Petitioner's follow up interview; hearsay excluded
10. Respondent's 10: Transcript of Sgt. Franklin's 2<sup>nd</sup> follow up interview; hearsay excluded
11. Respondent's 11: Financial Review; conclusory statements excluded, appropriate weight given
12. Respondent's 12: Report of Investigation
13. Respondent's 13: SCP Secondary Employment Policy
14. Respondent's 14: N.C.G.S. 143B-900 (by judicial notice)
15. Respondent's 16: Excerpt of SCP policy manual
16. Respondent's 17: Notification of Pre-disciplinary Conference (PDC); (Stipulated to by Petitioner)
17. Respondent's 18: Petitioner's response to PDC; (Stipulated to by Petitioner)
18. Respondent's 19: PDC transcript; (Stipulated to by Petitioner)
19. Respondent's 20: Dismissal memo; (Stipulated to by Petitioner)
20. Respondent's 21: Appeal to Secretary; (Stipulated to by Petitioner)
21. Respondent's 22: Employee Advisory Committee Report; (Stipulated to by Petitioner)
22. Respondent's 23: Decision of Secretary; (Stipulated to by Petitioner)
23. Respondent's 24: Aimee Fields letter

**PRELIMINARY MATTERS**

1. Petitioner made a motion to exclude witnesses from the hearing room, which the Court granted.
2. Petitioner made a prehearing motion to exclude from evidence all evidence supporting a dismissal that was not cited in the dismissal letter given to Petitioner as required by law, specifically N.C.G.S. 126-35(a). The Court took this motion under advisement and reserved ruling until such time as any particular issue might arise during the course of testimony.

**ISSUE**

Whether Respondent had just cause to dismiss Petitioner for unacceptable personal conduct.

## **BURDEN OF PROOF**

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct.

## **PARTY REPRESENTATIVES**

The Petitioner's party representative was Petitioner Antonio Asion. The Respondent's party representative was Lt. Jeffrey Holmes of the North Carolina State Highway Patrol.

## **FINDINGS OF FACT**

In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered 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. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following FINDINGS OF FACT:

1. Petitioner Antonio "Tony" Asion is a career status employee of Respondent North Carolina Department of Public Safety, State Capitol Police ("SCP"). T. 10. Petitioner was hired by SCP as the deputy chief in August 2012 by Gerald Rudisill, for Deputy Secretary of the Department of Public Safety ("DPS"). At the time Petitioner was hired by DPS, he was working as a Special Agent with the North Carolina State Bureau of Investigation. T. 10. During Petitioner's time with the SBI, he had received no disciplinary action of any kind. T. 100.

2. Prior to moving to North Carolina, Petitioner was employed with the Delaware State Police for 20 years, retiring as a Lieutenant in good standing with that agency. T. 12, 98-99. The mission of the Delaware State Police is both highway safety and criminal investigation, combining the basic missions of what in North Carolina are the Highway Patrol and the SBI. T. 13, 98.

3. Petitioner was hired as Deputy Chief by Gerald Rudisill in August 2012. At the time he was hired, then-Chief Scott Hunter was seriously ill and unable to work. Within a short time of being hired, Petitioner began serving as the acting chief of SCP. T. 13

4. Chief of the SCP, Scott Hunter, passed away in September 2012. T. 13. This was approximately a month after Petitioner was hired. At or about this time, Rudisill named Petitioner as Interim Chief of the SCP. T. 101. Rudisill told Petitioner at the time of this appointment that he was doing a “great job” and he wanted Petitioner to serve as interim chief. T. 101.

5. Because of the rapid series of events, Petitioner had moved very quickly and unexpectedly into the job as Chief of SCP. He had had little to no instruction of what was expected of him. Rudisill had told him to rely on the experience that he brought to the job, especially his experience with the Delaware State Police. T. 15. While the SCP had a policy manual, Petitioner could not recall whether he consulted it in whole or in part. T. 16-17. The administrative assistant who had served under Chief Hunter left SCP shortly after Chief Hunter passed away. Petitioner relied primarily on his more experienced sergeants for advice on day to day practices and policies. T. 17-18.

6. Petitioner met with Rudisill on approximately a weekly basis and spoke to him on other occasions by telephone. Petitioner’s discussions with Rudisill consisted primarily of budgetary matters. T. 18. As to day to day operations and standard practices within the SCP itself, Petitioner tended to rely more on his experienced subordinates within the SCP than on Rudisill. T. 18-19.

7. When Petitioner took over the SCP, the force was suffering from low morale, which concerned the Petitioner. T. 102-103; 215. Petitioner felt that the morale of the officers was very important within a department because it affects how well officers respond, how they perform their work, generally how good an officer they are. T. 103.

8. Different factors contributed to the low morale, including significant budget cuts that reduced the department by fifty percent, and the death of Chief Hunter. T. 103-104. Other factors were poor equipment, the lack of crime books, gloves, and first aid kits. Even their bulletproof vests were expired. T. 104. The issue of the vests was of particular concern to Petitioner because it concerned officer safety and there was no money available to replace the expired bulletproof vests. T. 104-105.

9. A significant factor in this low morale was the low pay received by SCP officers. SCP officers were the lowest paid law enforcement officers within the state government structure, and they were aware of it. T. 106-107. The General Assembly had imposed a freeze, which meant SCP officers were not permitted to be paid overtime. T. 106. One of the issues addressed by Petitioner when he became interim chief was the issue of additional employment opportunities for SCP officers. T. 102-103.

10. When he was hired as interim chief, Petitioner immediately took steps to improve morale. This included soliciting input from officers as to equipment they needed and obtaining grants to provide some of the more critical equipment. T. 108. The General Assembly sets the SCP officer’s pay, and therefore Petitioner was unable to increase their incomes. Likewise the officers were prohibited from earning overtime income from SCP. T. 108. To address the low

pay issue and its effect on morale Petitioner sought additional employment opportunities for SCP officers, particularly “off duty” employment. T. 102-103, 108-110.

11. SCP policies permit officers in that unit to have both “off-duty” employment and “secondary” employment, which are set out in the policy as two entirely separate and distinct entities. R. Ex. 13. The policy acknowledges the distinction by stating “This policy shall apply to both secondary and off-duty employment.” R. Ex. 13, p. 110. (Emphasis added)

12. “Secondary employment” in both policy and practice meant employment by an individual officer by a third party. T. 21. This did not have to be law enforcement related, or related to his/her work with SCP in any regard. T. 21. The method of obtaining this secondary employment involved an officer filing a form which would then go up through the chain of command for approval, being authorized by, among others, Rudisill. T. 21. If approval was given, the SCP would have no further involvement in the secondary employment and would neither handle it administratively nor schedule it. The officer performing such employment would not be in SPC uniform. The evidence was that Petitioner more than once sent requests for secondary employment up through the chain of command for approval.

13. “Off-duty” employment is set out in a separate paragraph in the Policy entitled “Off-Duty Law Enforcement Employment.” (Emphasis added). “Off-duty” employment was employment for a third party that was sanctioned by the SCP, and which the officers did while in uniform. T. 19. The policy specifically addresses using SCP issued firearms in “off-duty” employment. At the time Petitioner was hired, SCP officers were working “off-duty” employment at various times for weddings, receptions, and events at Museums such as the Museum of Natural History’s “Bugfest” festival and the North Carolina Museum of History.

14. At the time Petitioner was hired, “off-duty” work was at buildings within the state government complex, T. 24. The policy does not restrict such employment to state buildings. T. 24, T. 113. In the past SCP officers had worked off-duty employment at private facilities such as the Peace College and the Cardinal Club. T. 210. These events occurred as recently as the year before Petitioner was hired. T. 227. Sgt. Benjamin Franklin testified that prior to Petitioner’s arrival SCP previously had off-duty assignments at car lots, bowling alleys, the homeless shelter downtown and a “Hispanic club”. T. 235. Franklin had informed Respondent of these past assignments prior to Petitioner being dismissed. T. 235, R. Ex. 10. Likewise, Petitioner had been informed of the “off duty” assignments in other than governmental sites.

15. At the time Petitioner became chief, SCP officers were not being paid through the SCP for off duty employment. The individual officers were being paid individually by the entities themselves. T. 110. The SCP had no way of keeping track of when, how often, and how much an individual officer was getting paid or whether all officers were getting paid the same. T. 111. In fact, the SCP had no involvement in the payment process at all. T. 110-111.

16. The Natural History Museum was a significant part of the SCP off-duty work at the time Petitioner joined the force. The SCP officers were not being paid with State funds for work performed at the Natural History Museum. T. 109. Rather, a non-profit group known as Friends of the Museum paid the individual officers.

17. The manner in which the “off duty” employment was being handled at the time Petitioner became interim chief caused the Petitioner concern. T. 110. In addition to the lack of oversight by SCP provided by this system, there was no way to ensure that the officers were getting IRS form 1099s and other tax information properly. T. 112. Officers were also not being paid promptly. T. 110-111.

18. Petitioner learned that under Chief Hunter’s administration, the Chief’s administrative assistant scheduled off-duty assignments during business hours on state time during her eight hour shift. T. 116, 209. The state derived no benefit from the off-duty assignments. Petitioner thought the practice of compensating a state employee with state funds for work that brought no benefit to the state was inappropriate. T. 116.

19. Petitioner was looking for ways in which to benefit the officers with off duty work, and wanted to replace the inappropriate manner in which the work was being scheduled with a proper system. Petitioner wished to (a) increase oversight of the process, (b) avoid using state time for scheduling the off-duty assignments, and (c), obtain compensation for use of SCP vehicles for such assignments.

20. SCP vehicles were sometimes used for off duty assignments. T. 88. The State was not compensated in any way for the use of these vehicles. The gas, insurance, wear and tear, and other expenses caused by the use of these cars for the third parties were not being compensated in any fashion. T. 89-90, 109, 280. At the time Respondent dismissed Petitioner, Respondent had been informed through the internal investigation that SCP vehicles were used without compensation at off-duty events prior to Petitioner becoming interim chief. T. 234-235, Respondent’s Exhibit 10.

21. Accordingly Petitioner made several changes to the program. Petitioner’s authority for making these changes was the SCP policies and procedures giving authority regarding off-duty employment issues to the Chief. T. 117; R. Ex. 13. Petitioner was never told or directed to any policy or rule contradicting his interpretation of the policy that, as Chief, he was in charge of off-duty employment issues. T. 117. There is no evidence to the contrary. See, e.g. T. 213; 400-401.

22. Under the new system institute by Petitioner, SCP charged third parties an hourly fee for the officers provided, as well as a fee for any vehicles used (\$8.50 per hour per vehicle) and a \$1 administrative fee.

23. Lashonda Langley, who previously did the off-duty scheduling, no longer wished to do the scheduling when Petitioner told her she could no longer do that work during business hours and on state time. T. 121, 273. Langley did not want to work any longer than her eight hour shift. T. 274.

24. Respondent contends that it was alright for the scheduling to be done during on-duty time. In other words, it was an acceptable practice to use state government time to schedule the off duty employment of the officers, which offers no benefit to the state government. The

policy for “secondary employment” even states that the secondary employment may be revoked for the “use of state time and/or resources for the benefit of secondary employment.” R. Ex. 13. Respondent’s position is totally untenable.

25. While Langley implied that the special duty fund was a reason she left the SCP, this was untrue. She wanted to leave SCP even before this matter arose and was already looking for another job even while Chief Hunter was alive. T. 268-269. While Langley said she was uncomfortable about the new practices, she did not bring these concerns to the attention of Petitioner. T. 275-276. Langley’s testimony was not credible.

26. When Langley expressed that she did not want to do the work after hours and on her time, Petitioner asked Sgt. Benjamin Franklin to coordinate the off-duty assignments. Franklin had previously coordinated and scheduled these assignments for some period of time under the previous chief. T. 170.

27. Under Petitioner’s new system, Franklin coordinated assignments, made bank deposits, took the funds, and wrote checks to the officers. T. 175. Franklin did all of this work off-duty. Franklin was paid one dollar per man-hour worked. T. 174; T. 176. Franklin was paid approximately \$700 for this work from the administrative fee. The hiring entity paid a one-dollar per hour administrative fee and that money was used to compensate Franklin. No monies due to officers were used to compensate Franklin for this work.

28. Prior administrations did not pay the scheduler for doing that work because they were doing the non-state function of scheduling off duty employment on state time.

29. To handle oversight of the off duty money, Petitioner set up a bank account called the SPC Special Duty Fund. T. 117. This was the same method of handling off-duty monies that he had used at the Delaware State Police. T. 117. When he was hired at SCP he was told by Rudisill to use his experience, including and perhaps especially from Delaware, to make the SCP better. T. 119.

30. Petitioner was aware that the Museum of Natural History had used a non-profit to pay SCP officers for off-duty work at their events both before and during his tenure with SCP. T. 118. Petitioner contends that he was setting up a non-profit to run the money through; however, little to nothing had been done to accomplish that objective prior to his termination, even though he had sufficient time to have at least made good faith efforts to accomplish that goal. There was no non-profit in existence for this purpose at the time he was terminated. Petitioner did obtain a tax ID number from the Internal Revenue Service.

31. The great bulk of the funds in the Special Duties Fund were paid to the officers themselves. Petitioner personally received no funds from the special duty bank account. T. 119.

32. There was a sum collected from the vehicle usage fees that Petitioner used for various programs that he considered to the benefit of the agency. Petitioner originally planned to use these funds for putting stripes on new SCP vehicles, funds which had not been budgeted, these vehicles had not arrived. Petitioner authorized use of some funds to (a) subsidize a

department Christmas party to boost morale, (b) purchase one (1) meal for a retiring officer and his spouse, (c) purchase a bunch of flowers for a SCP officer who had had a double mastectomy, (d) purchase coffee on one (1) occasion for a sergeant's exam, and (e) purchase sweatshirts for rookie officers who had not been provided with uniforms so that they could perform their duties in clothing that identified them as SCP officers. There was no evidence that any of these funds were used for anything other than things which benefitted SCP.

33. The money collected as vehicle use fees was not repaid to the State of North Carolina. The money was commingled with non-state money which was for the use and personal benefit of the officers of SCP who had worked off duty.

34. Under predecessor administrations, no money was collected for the use of state-owned SCP cars by private, non-state functions such as security.

35. Petitioner's efforts at improving morale, such as the Christmas party, did work to improve the morale of the SCP force. T. 214. Petitioner's leadership was described by Franklin as being fairer, more open, more reasoned, and less authoritarian than his predecessor. T. 214-215.

36. As with the previous off-duty funds paid to SCP officers by third parties, these payments were not run through the State's BEACON system. Prior to Petitioner's changes to the off-duty program, when SCP officers were working at the North Carolina State Fair, there was an attempt to run these payments through BEACON and SCP was informed that this could not be done. There was no evidence presented that Petitioner's actions with the Special Duty Fund, any more than the previous system, was an attempt to "circumvent" the BEACON system as eventually alleged by the Respondent.

37. While the SPC policies on off-duty employment stated that officers could not coordinate off duty employment for a fee, both Petitioner and Benjamin were not aware of this policy. Benjamin testified that the other sergeants were not aware of it, either. T. 172- 173. During the time that Benjamin had been employed with SCP, the actual practices used by the department were very fluid and subject to change according to whomever was in charge of the program at a given time. T. 208. Franklin believed that this policy was intended to prevent officers from profiting at the expense of other officers for arranging off duty assignments. T. 221. Previously the scheduling was being done on state-time for non-state work, an obvious abuse of state resources.

38. In addition to wanting to change the system, Petitioner wanted to increase the number of off-duty work opportunities for SCP officers. One of these opportunities was at an establishment called "Brazilian-Ecuadorian-Dance-Club," or "Club BED". In order to open this establishment, it had received approval from both ABC and the Raleigh Police Department. At the time SCP provided security to Club B-E-D, the club was legally licensed to operate. T. 439.

39. From the totality of the evidence presented in this case it is obvious that the Petitioner's agreement to provide security to Club BED was the catalyst for his termination. All



allegations contained in the pre-dismissal letter, which are adopted by reference in the dismissal letter, are relative to the work at the Club BED.

40. The investigation was initiated by Rudisill after he was informed of a letter from Aimee Fields written on January 30, 2014. It is not clear from the letter to whom the letter was originally addressed, although it is believed that it went to Human Resources and then to Rudisill. Fields did not testify in this hearing. While her letter confirms some contentions of how things were handled in the past and that indeed there had been off-site and non-state functions where she had worked, the primary reason for the letter was to complain about the work at Club BED. R. Ex. 24.

41. When Rudisill learned of the security being provided at Club BED, he placed Petitioner on leave and ordered an investigation. T. 365. Rudisill asked the Highway Patrol to investigate, which it did.

42. Petitioner's decision to provide security to Club BED is the basis for his termination as articulated in the myriad of reasons articulated in the pre-dismissal letter. One of the stated reasons is that Raleigh Police Department responded to 14 calls for service during the time that SCP was providing security to Club BED. There is no evidence to support that contention. In fact, the evidence is that RPD did not respond to the location at any time while SCP was there, even when there was a "shot's fired" report.

43. There is no credible evidence to support Respondent's contention of the reputation of Club BED for a history of violence to the point that the Raleigh Police Department and Wake County Sheriff's Department refused to provide service to the Club. The only evidence provided was hearsay upon hearsay with no substantiation. No one from either agency testified at the hearing.

44. Assuming *arguendo*, however, that there was a history of some violence at the club, it makes no sense that a police agency should be forbidden from providing security to such a business. Common sense would seem to dictate that police presence would lessen the bad behaviors associated with the club. To say that security should not have been offered at all is to acknowledge that the lawlessness prevails and that a police agency should not attempt to enforce the laws, an inconceivable position for law enforcement agency to take. Apparently either Raleigh was offering service and quit and Wake Sheriff's Office took over—or the converse is true. Either way, one picked up after the other with apparent knowledge—rhetorically, why should SCP be held to a different standard?

45. While working at Club BED, SCP officers were involved in only two arrests during their approximate four months working at the Club. Both of these arrests would have resulted in Use of Force reports being sent up the chain of command to the attention of DPS management. The credible evidence is that Petitioner did indeed report those incidences to Mr. Rudisill who did not bother to read them. Respondent's contention to the contrary is not supported by credible evidence.

46. Respondent's contention in the dismissal letter that Petitioner failed to report up the chain of command the fact that ABC Commission had requested information from him is without merit. There is no evidence of any policy of any sort which specifies what is to be reported to superiors. In this instance, Petitioner is the Chief—the superior for the department. As the Chief he assumed the role of supervisor, and a test of reasonableness would show that he should not be expected to report up everything that went on. Many things would fall on his shoulders to decide without the necessity to go to his superiors for every decision, especially for giving reports to a sister agency which would seemingly be a routine matter of course. With no clear delineation of what is to be reported up, how can the Chief be faulted for not reporting anything. From the looks of the dismissal letter he was supposed to report everything to Rudisill, making him a mere conduit for decision-making. As is borne out by Rudisill's testimony, Rudisill had no real clue what was happening at the agency anyway.

47. Rudisill made the decision to dismiss Petitioner. Rudisill was in charge of SCP, among other things, and, therefore, Rudisill became Petitioner's direct supervisor when he became Chief. T. 359, 361.

48. DPS/Rudisill also ordered an audit of the Special Duties fund. DPS asked a financial officer, Timothy Harrell, to do the audit. Harrell testified at the hearing that he was requested by "senior management" to look at the special fund. Deputy Director Benny Akins and Secretary Young had made the request.

49. Harrell began his audit with the assumption that Petitioner's off-duty assignments were "unauthorized". At hearing, he stated that this was based on "approval from management". T. 332-333. It was obvious from Harrell's testimony that "management" had given him a certain set of parameters to review and he was not to go outside that box. He put his blinders on and went to work.

50. Harrell neither read nor considered the SCP Secondary Employment Policy in the course of conducting his audit. T. 333. Instead, Harrell simply accepted the contention of management that the assignments were "unauthorized". T. 333. Harrell was not aware that the policy provided that off duty employment was under the auspices of the Chief.

51. Harrell confirmed that the great bulk of the funds in the Special Duty Account were not "state funds" but rather were funds paid to the officers for the off duty assignments. T. 335. He acknowledged that at most approximately one-eighth of the money in the account was "state" money from the use of the state vehicles.

52. In conducting his audit, Harrell made no attempt to learn or understand how the off-duty assignments were handled prior to Petitioner becoming interim chief. T. 336. For example, Harrell was unaware that prior to Petitioner's change in the system, private parties were getting the use of state vehicles for free. T. 336-337. When asked whether that would create or raise a question in his mind, Harrell replied, "Yes". T. 336-337; 349.

53. Harrell was present during Franklin's interview in which the provision of state vehicles for free was discussed. T. 337-338; 340; P. Ex. 6. When shown the specific portion of

the Franklin interview that confirmed the free vehicle usage, Harrell then confirmed that he heard that information. T. 340. Harrell then claimed that the information had not been “verified”. T. 341. There is no indication that anything that Harrell relied on was “verified.”

54. In response to questions from the Court, Harrell confirmed that the Special Duty Account was able to be reconciled and that all the monies were accounted for going in and out. T. 345-346.

55. In response to questions from the Court, Harrell admitted that providing free automobiles on off-duty assignments and scheduling off duty assignments on state time, both of which occurred under the previous system and both of which were eliminated by the Petitioner, were things that would be of concern to DPS. T. 354-355.

56. Harrell confirmed (in response to questions from the Court) that DPS management’s main concern was that Petitioner had been providing security to Club BED, a Hispanic dance club. T. 352-353.

57. Rudisill received a copy of the investigation from the State Highway Patrol, including all the witness interviews. T. 368. He read it twice. T. 368. After reading the investigation report and witness interviews, Rudisill decided to issue a pre-dismissal letter to Petitioner. T. 369.

58. The pre-dismissal letter to Petitioner contains the enumerated allegations which were adopted by reference in the dismissal letter and thus the basis for Petitioner’s termination. Many of the allegations involve activities that were initiated and conducted for years under the supervision of Petitioner’s predecessor, some of which have been discussed above. Others, for instance:

a. Petitioner is faulted for using state vehicles for off-duty assignments. The evidence shows that this practice was used under Petitioner’s predecessor, the late Chief Hunter. The state was not compensated at all under Chief Hunter for use of these vehicles, thus allowing the third parties use of the vehicles for free.

b. Petitioner is faulted for failing to use written contracts with third parties for off-duty work. Prior to Petitioner becoming interim chief, at no time did SCP use written contracts with third parties to whom they were providing off-duty services. T. 212-213; 237, 268. Franklin was asked about this issue more than once during the internal investigation; accordingly, DPS knew that written contracts had not been used under Chief Hunter. This information was in the report given to Respondent at the time it decided to dismiss Petitioner. T. 212-213. Rudisill admitted that this information was available to him at the time he dismissed Petitioner, at least in part, because he violated policy by failing to do written contracts. Rudisill stated that it was a “surprise” to him that no one had ever used written contracts before, including Chief Hunter.

c. Petitioner is faulted for not using worker’s compensation forms for off-duty work. Petitioner assumed that worker’s compensation would cover all work done in uniform under the

auspices of SCP. Franklin believed the same. T. 218. While the off-duty policy references worker's compensation forms, these forms were likewise never used or required for off-duty work under Chief Hunter. T. 217-218; 237, 267-268.

Rudisill admitted that he had access to the policies yet never checked them. The evidence is that the worker's comp forms have never been used, and have not been used since Petitioner's termination, even to the very day of hearing.

Respondent acknowledges that Petitioner asked Chief Hunter about use of the worker's comp forms, but implies that asking the Chief once was not enough. Rhetorically, how many times should he have to ask his Chief the same question.

d. Petitioner is faulted for not "checking out" Club BED or getting permission to do off-duty work there. However, there was no evidence presented that checking out the club or obtaining prior permission was either required by policy or had been practiced in the past. No evidence was presented of any rule or policy that would have barred Petitioner from permitting SCP officers to work at Club BED even if these other agencies had declined to do so.

59. Respondent's accusation that Petitioner "violated" the SCP Secondary Employment Policy by not getting permission for the officers to do off-duty work is not supported by the evidence. Even at the hearing, Rudisill misconstrued the policy as to the distinction between off-duty employment and secondary employment. Ultimately Rudisill admitted that he had never read the policy. The policy and the evidence do not support a finding that the Club BED and other off-duty employment at issue here constitute "secondary employment" of the type that requires approval up the chain of command.

60. There is no policy or past practice basis for the Respondent's allegation that Petitioner committed wrongdoing by opening a bank account without permission or using that bank account to manage off-duty funds. The evidence was that Petitioner conducted himself in this manner precisely as he had handled previous off-duty assignment funds in his previous leadership position in Delaware. T. 409. Moreover, the practice in place before Petitioner arrived involved SCP officers being paid through private sources (the Friends of the Museum). Rudisill admitted that there was no policy about the bank account but rationalized that you cannot have a policy for everything—yet he seeks to hold Petitioner accountable for that very thing.

61. Further, the evidence showed that Petitioner's actions in reforming the off-duty program put an end to some practices that were undesirable and in some circumstances were admitted by the Respondent's witnesses to be problematic, such as the scheduling of off-duty work on state time and the free provision of state vehicles to private parties. Petitioner brought a new level of oversight to the off-duty program that allowed SPC to ensure its officers were paid for off duty work in a timely and equal fashion, monitor the amount of work being done, and ensure that the officers received a single 1099 form for tax purposes.

62. The evidence showed that Rudisill faulted Petitioner, as noted, for many things that were being done under Hunter's leadership. Rudisill testified that he met regularly with Hunter and had a good working relationship with him. T. 384. He testified that Hunter, to his

knowledge, kept him fully informed as to all aspects of his handling of SCP. T. 384. It is quite obvious that Rudisill did not have any idea what Chief Hunter was doing within the department or how the department was being run in general.

63. Rudisill did not know that under Hunter the SCP did off-duty assignments outside of state government. T. 384. This is despite this information being contained in the interviews that he said that he read “at least twice” before dismissing Petitioner. When asked whether the SCP policy made a distinction between state government and non-statement government for off-duty assignments, Rudisill said, “I don’t know.”

64. Despite the SCP policy differentiating between secondary employment and off-duty employment, Rudisill contended at hearing and in the dismissal letter that the Club B-E-D assignments were “secondary employment” and that Petitioner violated that policy by not getting permission for that employment. T. 384-385. However, Rudisill said he had not read the policy yet admitted there was a “distinction” between the two. T. 386.

65. Rudisill, when asked whether he recalled that the interviews had shown every SCP witness stating there was a difference between off-duty employment and secondary employment, replied, “I don’t remember.” T. 386-387.

66. Rudisill said he did not know that under Chief Hunter’s leadership off-duty employment was scheduled and managed on state time. T. 388. Rudisill said that this practice, which went on for a significant period of time under Hunter, would not be appropriate. T. 388-389. Rudisill added, “This is all new information to me.” T. 389.

67. Rudisill professed to be unaware that Hunter allowed the free usages of SCP state vehicles at off duty events. T. 389. However, again, this information was in the reports that he received and indicated he read, before he dismissed Petitioner.

68. When asked about Hunter sharing the information about the off-duty program with him during their meetings, about which Rudisill previously testified Hunter kept him “fully informed,” Rudisill replied, “We didn’t cover everything, now.” T. 390. Yet Rudisill fired Petitioner, in significant part, for not informing him about the provision of security services to Club BED and the operation of the off-duty program, including things that had previously been done by Chief Hunter for years under Rudisill’s supervision.

69. Rudisill agreed that Petitioner had only been on the job for a matter of weeks at the time of the events herein at issue, while Hunter had held the Chief’s job for years. T. 391.

70. Rudisill said he did not feel that SCP would be covered under worker’s comp unless there was “some sort of contract” for off-duty work. T. 395. However, Rudisill was unaware that written contracts had never been used under Chief Hunter. Rudisill admitted that he failed to check the relevant worker’s compensation policies to determine this issue even though he had access to them and could have done so. T. 395.

71. Rudisill was unaware that under Hunter SCP had no oversight into the manner, the rate of compensation and/or timeliness in which officers were paid for off-duty work. T. 398. Rudisill conceded that under the previous system SCP could not tell how much an officer was being paid, if they were being paid the same, or if they were being timely paid. T. 399.

72. When Petitioner's counsel asked Rudisill to confirm that neither his dismissal letter nor his testimony identified a single policy or work rule that prohibited Petitioner from opening a bank account in the manner he did in this case, Rudisill replied, "The only thing I can say is that it's hard to have a policy on everything." T. 401.

73. Rudisill conceded that when he learned about the practices that concerned him he could have simply ordered Petitioner to stop, and that he had no reason to believe that Petitioner would have disobeyed that order. For example, when Rudisill ordered Petitioner not to provide further security for Club BED, Petitioner immediately complied.

74. When asked whether he disputed whether Petitioner handled the off-duty account in the same manner as his prior practice and experience in Delaware, Rudisill answered, "I guess I do not." T. 409.

75. Rudisill said that he had no reason to doubt that SCP had never used either written contracts or worker's comp forms for off-duty assignments. T. 416-417.

76. When asked by the Court, Rudisill admitted that at least to a degree Petitioner was being fired for doing the same things that had been going on at the agency for some time.

77. Under further questions by the Court Rudisill acknowledged that all of the information was at hand, despite the fact that he repeatedly stated that all of this was "new information." He acknowledged that it should not have been new information to him, and that he should have known prior and in order to terminate Petitioner. T. 417- 418.

## **CONCLUSIONS OF LAW**

Based on the Findings of Fact the undersigned makes these Conclusions of Law:

1. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. The parties are properly before the Court and notice of hearing was proper. All parties have been correctly designated and jurisdiction and venue are proper to decide the issue of whether Respondent had just cause to dismiss Petitioner from the North Carolina Department of Public Safety, State Capitol Police Division.

3. Petitioner was a career State employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that

Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear this appeal and issue a Final Agency Decision.

4. N.C.G.S. § 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.” In a career State employee’s appeal of a disciplinary action, the department or agency employer bears the burden of proving that “just cause” existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

5. 25 NCAC 1I. 2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct.

6. 25 NCAC 1J .0604(b) also provides that an employer may discipline or dismiss an employee for “just cause” based upon unacceptable personal conduct or unsatisfactory job performance.

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

8. In pertinent part, “Unacceptable personal conduct” is defined by 25 NCAC 1J.0614 (I) as:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming a state employee that is detrimental to state service.

9. Although “just cause” is not defined by statute or rule, 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).

10. 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).

11. In Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), the Supreme Court states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court said that there is no bright line test to determine “just cause”—it depends upon the specific facts and circumstances in each case.”

12. In Carroll, the Court went on to say that “not every violation of law gives rise to ‘just cause’ for employee discipline.” In other words, not every instance of unacceptable

personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.

13. Further, the Supreme Court held that, “Determining whether a public employee 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. In expounding on Carroll, the Court of Appeals articulates the tests for the tribunal and sets forth what this tribunal must consider as to the degree of discipline. It states:

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish “just cause” for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to “just cause” for the disciplinary action taken. (Internal cites omitted)

Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012)

15. Applying the Warren and Carroll tests to the particular facts and circumstances of this case:

### **Question One: Did the Petitioner Commit The Conduct Alleged?**

16. In order to make this determination, the exact language of the termination letter must be tested to determine if the Petitioner did indeed engaged in the conduct as alleged.

17. The first contention is that Petitioner allowed the officers to use the state owned vehicle for “private purposes.” In performing security for Club BED, the officers were in uniform and performing law enforcement duties and were being paid for those services in and off duty capacity. The use of the automobiles was not “private” in that it did not inure to the benefit of the employee. In fact, the procedure initiated by the Petitioner insured that the use of the vehicles would be compensated separately and apart from any compensation for the individual officers.



18. Petitioner did not violate any policy by permitting the use of the state vehicles for off-duty assignments or by having officers provide off-duty security at locations other than state government buildings.

19. The second bullet point concerns the agreement with Club BED. There is nothing wrong with Petitioner having entered into the contract to provide security for Club BED by the off duty work of his officers. The money for use of the automobiles was/is state money and Petitioner did commingle the funds received from Club Bed. He did spend some of the “state” money on items he perceived to be morale boosters. All of the money in the account was accounted for and there was still “state” money remaining in the account when Petitioner was terminated.

20. While the Special Duties Fund account balanced, the sums taken from the “Vehicle Usage Fee” in the Special Duties Fund did constitute “state funds” and should have been turned over to the state.

21. There was no evidence offered concerning officers being compensated by both the state and Club BED as alleged in the third bullet point.

22. Petitioner did not violate the Secondary Employment Policy or other policy, as noted, by having officers work at Club BED, as alleged in the fourth bullet point.

23. Petitioner did obtain and Employment Identification Number (EIN) form the IRS, and he did open a bank account as stated; however, Petitioner did not violate any policy by setting up the Special Duties Fund or by putting Sergeant Franklin in administrative charge of that Fund. The evidence does not support the conclusion that the fund was set up to circumvent the state BEACON system. There is no evidence that Petitioner was trying to make this a “secret” fund and he personally derived no benefit from the fund.

24. Rudisill’s rationalization that the bank account was improper, even though there is no policy against it, by stating ‘you cannot have a policy for everything’ rings hollow if you are going to fire someone on that basis.

25. Franklin was being paid for administering the account from a specific assessment to Club BED for that purpose. Receiving enumeration for doing the scheduling is a violation of policy; however, it should be noted that to this Tribunal it is completely improper to pay a state government employee on state government time to perform a task that is not governmental and does not inure to the benefit of the State. Apparently, Respondent condones such misappropriation of governmental resources.

26. Petitioner did violate policy (R. Ex. 13) by failing to use written contracts or worker’s compensation forms, although to this very day no one in SCP has ever used such forms.

27. There was no policy rule violation because Petitioner did not check out the history of Club BED. There is no evidence to support the conjecture that the RPD and Wake County

Sheriff's Office had any involvement with Club BED, let alone a turbulent history. But even if they had, there is no reason SCP should be prohibited from providing the service.

28. Respondent contends that the mission of the SCP as contained in the policy manual focuses on law enforcement security for public officials and visitors to the state government complex. R. Ex. 16. However, the service of the SCP is not limited to just that role.

29. N.C. Gen. Stat. 143B -900 states that the purpose of the SCP is to serve as a special police agency of the Department of Public Safety. Public Safety is then articulated as to include protecting all State buildings and grounds with an exception. It is important to note that the SCP is not limited to only those buildings and grounds, but is tasked in particular with providing that service. N.C. Gen. Stat. 143B -900(d) very specifically states

(d) Jurisdiction of Officers.--Each special police officer of the State Capitol Police shall have the same power of arrest as the police officers of the City of Raleigh. Such authority may be exercised within the same territorial jurisdiction as exercised by the police officers of the City of Raleigh, and in addition thereto the authority of a deputy sheriff may be exercised on property owned, leased, or maintained by the State located in the County of Wake.

N.C. Gen. Stat. § 143B-900

30. By statute, then, the SCP has full authority equal to that of the Raleigh Police Department as well as that of the Wake County Sheriff's Department, and within the same territorial jurisdiction as provided.

31. There is no evidence to support the contention that RPD responded to Club BED 14 times while SCP provided security there. In fact, the contrary is true.

32. The contentions that he had some duty to report various and sundry matters up the chain of command are not supported. He did report the use of force matters. Other matters were within his discretion to report. There was no guidance from Rudisill or anyone else as to what should be reported to his superiors. After all, he was the Chief of the department and it would be a reasonable expectation that he should make decisions.

### **Question Two: Did Petitioner's Actions Constitute Unacceptable Personal Conduct?**

33. As articulated above in answering question one, the Court finds that the Petitioner has violated policy. The Court's next consideration is whether these violations constitute Unacceptable Personal Conduct.

34. It is concluded that none of the transgressions of Petitioner arise to "conduct for which no reasonable person should expect to receive prior warning." The commingling of funds is "conduct unbecoming a state employee that is detrimental to state service." The other violations are willful violations of known or written work rules."

### **Question Three: Did The Unacceptable Personal Conduct Justify The Discipline Imposed?**

35. The next required step in the Warren analysis, upon finding unacceptable personal conduct, is determining whether the discipline imposed for that conduct was just. “If the employee’s act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based “upon an examination of the facts and circumstances of each individual case.” The Warren Court refers to this process as “balancing the equities.”

36. To this Tribunal determining what is “just” equates to what is “right”—i.e., what is the right thing to do under these facts and circumstances.

37. In “balancing the equities” and trying to determine what the “right” thing to do is, one must look at why Petitioner did the things that he did. Without looking at the totality of the facts and circumstances one cannot fully understand the “why.” The “why” is like motive. In criminal cases everyone seemingly wants to know what the motive for the offense is. But motive is not an element to be proven, and does not enter into the decision-making. Under these facts and circumstances the “why” is very important as opposed to just looking coldly and blindly at whether or not Petitioner violated rules or policy. Only then can one determine what is the “right” thing to do in assessing punishment.

38. It is noted that in all of the evaluations and investigations in this matter, those doing the looking were looking at the facts very narrowly and oftentimes consciously avoided looking at matters which might have made a difference. No one seemingly wanted to hear that Chief Hunter had been doing the same things for years.

39. There is no question that things would have continued to run smoothly and perhaps Petitioner would still be employed had it not been for Club BED, which went off like a bomb when brought to management’s attention. There was no looking to see if it made sense or was justified. Petitioner was immediately suspended and the investigation with blinders began.

40. Any contention that Petitioner should have sought the counsel of Rudisill is without value. Mr. Rudisill had no clue what was going on in that agency. He trusted everything Chief Hunter did without question but then was taken aback to find out that so much of what Petitioner was doing, much of which was a basis for his termination, was the same thing Hunter had been doing for years.

41. Rudisill told Petitioner to rely on his experience in performing his job and then fired him for doing just that. Rudisill offered no guidance and would seemingly have been of no value had Petitioner even sought his advice.

42. In conducting this Warren/Carroll analysis, the Court notes Petitioner's discipline-free employment history with Respondent, as well as his apparent prior work history. He retired in good standing after twenty years of service with the Delaware State Police, and there is no record of disciplinary problems there. He retired as a Lieutenant. "In reaching this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit." Warren, at 666.

43. In looking at the facts and circumstance pertinent to this contested case, one must consider that the Petitioner was new to the job, and he was placed in charge of a dispirited and diminished agency. He was given little to no direction, even though there is a policy manual. He was directed by Rudisill to rely on his experience, which he did. And he relied on the collective experience of his officers many of whom had been with SCP for many years. He even consulted with Chief Hunter. He had nothing but the best of intentions in everything that he did. Everything that he did was for the benefit of the department. He received no personal gain. Most of what he did, with the exception of the special account, was in keeping with what had been done by prior Chief's, including Chief Hunter. The special account was modeled after what he had done or seen done in Delaware, and was an accepted practice. It was also to be modeled after what he had seen other agencies do, i.e., set up special accounts to handle such transactions, usually through a non-profit.

44. It is clear from the testimony of Rudisill that his superior made little or no effort, either prior to or at the time of Petitioner's discipline, to inform himself of the activities of his own agency. It is equally clear that Petitioner relied in his conduct on his prior extensive experience in law enforcement as well as the advice and counsel of the prior service subordinates in his command.

45. Petitioner was fired in large part for continuing practices which were undertaken by his predecessor and which received no complaints from the agency. It is clear that the provision of security services to Club BED was the primary motivation behind the disciplinary action against Petitioner. Petitioner undertook providing service to Club BED in order to try to assist his officer's in making more money because their income was stagnant and relied on the General Assembly for any increases. Morale was low and this was a measure to help improve morale.

46. The management of the money is the most problematic and most egregious violation. It was not appropriate for the "state" money to have been comingled with non-state money. Petitioner should have been cognizant of that. The manner in which he spent the money on the Christmas party and other relatively minor things to benefit the department and its employees was well intended although improvident.

47. Mitigating factors in the employee's conduct should also be considered in this third prong. See Warren, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985). The Respondent agrees that Petitioner acted as he did with best of motives and with no intention of profiting personally from these actions. The evidence shows that all of the expenditures were made with the intention to improve the moral and conditions of the Petitioner's command.

Petitioner's changes within the department eliminated at least two inappropriate usages of state resources, specifically the scheduling of off-duty employment on work time and the provision of free vehicles to third parties. Further, Petitioner's changes ensured that the officers were timely and consistently paid for their off duty work. There was no evidence that Petitioner's was doing anything other than at the very least a good or even excellent job as Interim Chief. The evidence was that Rudisill intended to make Petitioner the Chief of the department but for the intervening Club BED controversy.

48. To the extent the policy violations and the co-mingling of the Vehicle Usage Fee state funds with the rest of the funds in the Special Duties Fund constituted unacceptable personal conduct, it does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case. It is not "just" to terminate Petitioner under the facts and circumstances of this case; it is not the "right" thing to do.

49. Accordingly, the Court finds that there was not just cause to dismiss the Petitioner for unacceptable personal conduct. A proper discipline would be to demote Petitioner to the position for which he was originally hired, Assistant Chief. An appropriate punishment at the time might have been a period of suspension and possibly without pay; however, Petitioner has been without pay for quite some time now.

Based on these Findings of Fact and Conclusions of Law, and the competent evidence at hearing, the Court makes the following:

### **FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to dismiss Petitioner is **REVERSED**. Petitioner shall be retroactively reinstated by Respondent to the position of Assistant Chief of the State Capital Police, with back pay and all accompanying benefits, with 30 days of pay withheld, as well as attorney's fees paid to Petitioner and his attorney by Respondent.

### **ORDER AND NOTICE**

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

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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

03.0102, 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 9th day of May, 2014.

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Donald W. Overby  
Administrative Law Judge