

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 02606

<p>Charles L Simpson JR. Petitioner,</p> <p>v.</p> <p>North Carolina Central University Respondent.</p>	<p style="text-align: center;">ORDER</p>
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This matter coming on to be heard and being heard November 5, 2015, in the Office of Administrative Hearings, and it appearing to the undersigned that the Petitioner appears in this matter pro se, and the Respondent is represented by Assistant Attorney General Mr. Matthew Tulchin; this matter was heard more than 180 days from commencement due to extraordinary cause in the form of multiple scheduling issues, as well as attempts to resolve this case short of hearing; and based upon the evidence presented, the undersigned finds the following facts by a preponderance of the evidence:

Procedural History

1. Petitioner filed a Petition for a Contested Case Hearing on April 10, 2015. The matter was assigned to Administrative Law Judge Donald W. Overby on April 24, 2015, and an Order for Prehearing Statements was issued that same day.
2. ALJ Overby issued a Scheduling Order on April 24, 2015 which required discovery to be completed by June 8, 2015, and set hearing for the matter during the week of June 22, 2015. A Notice of Hearing was filed on May 19, 2015, setting the hearing for June 24, 2015.
3. Petitioner filed his Prehearing Statement on May 22, 2015, and the Respondent filed its Prehearing Statement on May 28, 2015.
4. A Motion to Continue was filed on June 4, 2015, and ALJ Overby entered an Order Continuing Hearing on June 9, 2015.
5. The hearing was set for the week of August 24, 2015 due to the unavailability of the Respondent's witnesses, Petitioner's unavailability in July, 2015, and because Respondent's counsel was on secured leave from August 10, 2015 through August 14, 2015.

6. The undersigned was assigned this case on June 10, 2015, and because of the numerous cases scheduled for the week of August 24, 2015, this matter was set for September 1, 2015.

7. Petitioner filed a request for a continuance on August 26, 2015, citing the need to complete discovery and a desire to conduct a settlement conference as the reasons for his request.

8. The undersigned entered an order continuing the hearing, but a mediated settlement conference was held at OAH on September 1, 2015. The mediation was not successful, and the matter was scheduled for hearing on November 5, 2015.

9. Hearing on this matter was held November 5, 2015, and the parties requested a transcript of this hearing to review and assist in preparing their proposed decisions.

10. Respondent requested additional time to submit a proposed decision, and an Order extending time was entered on January 13, 2016.

Background

11. Petitioner is a State employee as defined by Chapter 126 of the North Carolina General Statutes.

12. Respondent North Carolina Central University is the Petitioner's employer. Respondent is governed by Chapter 126 of the North Carolina General Statutes in its dealings with Petitioner related to this contested case.

13. Petitioner began his employment with the University's Police and Public Safety Department in February, 2001. Petitioner has served as a law enforcement officer with the Respondent since that time, attaining the rank of lieutenant.

14. The Department is an accredited law enforcement agency operating and existing pursuant to the laws of the State of North Carolina.

15. Campus police officers have the same powers in their jurisdiction "as municipal and county police officers." N.C. Gen. Stat. § 74G-6.

16. In performance of their duties, "campus police officers shall apply the standards established by the law of this State and the United States." N.C. Gen. Stat. § 74G-6.

Initial Dispatch Regarding James Henry Nelson, IV

17. Shortly after 6:00 pm on September 24, 2014, a female disembarked a shuttle on the campus of North Carolina Central University and approached a white Dodge Charger, believing it belonged to one of her friends. (Resp. Ex. 8, p1).

18. Upon approaching the vehicle, she realized that she did not know the driver.

19. During this brief encounter, the female noticed the driver had a firearm sitting on one leg, with a magazine on the other. (Resp. Ex. 8, p1).

20. The female left and reported to a campus RA that the occupant of the white Dodge Charger with Ohio plates was on campus with a firearm. The RA relayed the information to campus police. (Resp. Ex. 8, p1-2).

21. The occupant of the vehicle, later identified as James Henry Nelson, IV, is a violent and dangerous man based upon his extensive criminal history and his actions in this case, which are more fully set forth herein. (Resp. Ex. 4C).

22. Nelson's duplicate North Carolina Driver License lists his residence as 807 Riverbark Lane, in Durham. (Resp. Ex. 4C).

23. Respondent's evidence showed that Nelson was documented for "Gang Activity" in 2008, and has been charged/convicted of the following offenses:

Offense	Year
Larceny	2008
Narcotics Violation	2010
Larceny	2010
Possession of Drug Paraphernalia	2010
Larceny	2010
PWISD Controlled Substance	2010
Open Container of Alcohol	2011
Weapons Violation	2012
Narcotics Violation	2012
Robbery with a Dangerous Weapon	2012
Att. Robbery with a Dangerous Weapon	2012
AWDWIKISI	2012
Possession of Marijuana	2012
Possession of Drug Paraphernalia	2012
PWISD Controlled Substance	2014

(Resp. Ex. 4C).

24. In fact, Nelson was charged with a felony assault for his actions herein. (The exact charge against Nelson is unclear from the testimony and the exhibits, however, the facts establish possible charges under N.C. Gen. Stat. §14-32 and §14-34.2 at a minimum.) (T., p. 79).

25. At approximately 6:39 pm, Officer Selina Newell of the North Carolina Central University Police Department was dispatched to the area.

26. Reports were also received that there were two individuals in a white vehicle screaming in a potential domestic violence incident. (Resp. Ex. 8, p2).

27. At 6:44 pm, Officer Newell arrived on scene and saw a white Dodge Charger, but the vehicle drove away as she approached the Chidley Hall area on campus. Officer Newell observed no suspicious activity for 10 minutes and left the area.

28. At 7:26 pm on September 24, 2014, Petitioner and Officer Newell rode together in a marked university patrol unit to the Chidley Hall area to assist with a university sanctioned event.

29. Upon arrival, Officer Newell noticed a white Dodge Charger matching the description of the vehicle she had been alerted to earlier in her shift.

Nelson Uses Vehicle as a Deadly Weapon Against Petitioner

30. Officer Newell, upon returning that evening, parked her patrol vehicle at the front driver's side of the white Dodge Charger.

31. Officer Newell informed Lt. Simpson about the earlier dispatch regarding the vehicle, and the two officers approached the white Dodge Charger. Officer Newell and Lt. Simpson were not made aware of the RA's report to campus police.

32. Officer Newell went to the rear of the white Dodge Charger to call in the license plate information, while Lt. Simpson approached the driver's side.

33. As Officer Newell walked by the white Dodge Charger, she shined her flashlight into the interior of the vehicle and observed one individual inside.

34. Lt. Simpson tapped on the window and asked Nelson to roll down the window.

35. Nelson initially refused to roll the window down more than an inch to two inches, despite Lt. Simpson's request. (Resp. Exs. 4A, p2-3, 5; 4C; and 8, p2).

36. Lt. Simpson and Officer Newell smelled an odor of marijuana coming from the interior of the white Dodge Charger. (Resp. Exs. 4, p3, and 8, p2).

37. Lt. Simpson asked the Nelson to produce his driver's license, which he did, and then Lt. Simpson again asked Nelson to roll the window down. Nelson attempted to roll the window back up, began questioning the officer, and yelled at him. (Resp. Exs. 4A, p2-3, and 8, p2).

38. Nelson refused to comply with Lt. Simpson's lawful commands.

39. As the Petitioner walked back toward the patrol car to check the driver's license, Nelson revved the engine. (Resp. Ex8, p2).

40. Officer Newell observed the rear lights quickly change on the white Dodge Charger, signaling to her that the vehicle was about to be put in motion. (Resp. Ex. 4A, p5).

41. Nelson caused the white Dodge Charger to accelerate toward Lt. Simpson.

42. Nelson struck Lt. Simpson with the white Dodge Charger, propelling the officer onto the hood of the vehicle.

43. Nelson continued to operate the vehicle in a forward direction after striking Lt. Simpson. The Petitioner was carried approximately ten feet after the Nelson struck the officer. (T., p246).

Lt. Simpson's Use of Deadly Force

44. After Lt. Simpson slid off the hood of the vehicle and rolled on the pavement, Nelson stopped the white Dodge Charger.

45. Lt. Simpson observed the illuminated brake lights on Nelson's vehicle.

46. At this point, the Petitioner was in a vulnerable position only six feet from the rear of Nelson's vehicle. (Resp. Ex. 4A, p6).

47. When he saw Nelson's brake lights, Lt. Simpson thought "[Nelson] was backing up to finish the job." (T., p. 246).

48. When Nelson applied his brakes, he was in close proximity to Lt. Simpson and in a position from which he still posed an immediate threat to the officer.

49. Lt. Simpson believed that any individual who would assault a uniformed law enforcement officer posed a threat to the general public "in an effort to get away." (T., p. 246).

50. Lt. Simpson was able to get to a kneeling position and discharged one round from his service weapon in the direction of Nelson's stationary vehicle.

51. Officer Newell testified that the vehicle stopped, Nelson "looked left, and Lieutenant Simpson got up ... shot one time, *and then* the driver went east on Lawson." (Emphasis added) (T., p. 23).

52. The testimony provided by Lt. Simpson and Officer Newell established that Nelson's vehicle was stopped and in close proximity to the Petitioner at the time he fired the weapon.

53. Lt. Simpson provided statements as part of the investigations into this incident. His statements are consistent with his credible and believable testimony in this matter. (Resp. Ex. 4A).

54. These statements do not establish that Nelson was fleeing at the time Lt. Simpson fired his weapon.

55. Captain Alphonso White summarized the Petitioner's statements as follows: "I fired one shot at the vehicle.... I could still see his taillights." (Resp. Ex. 4A).

56. Officer Newell's statement to investigators does not mention if Nelson's vehicle was in motion or stationary at the time Lt. Simpson discharged his weapon. (Resp. Ex. 4A). However, the statement she provided is consistent with her credible and believable testimony.

57. After Lt. Simpson fired the shot at Nelson's vehicle, Nelson then fled the scene, speeding away in an easterly direction on Lawson Street. (Resp. Ex. 8, p3).

58. Lieutenant Simpson then fell to the ground due to his injuries from Nelson's actions, and was later transported to the ER at Duke University Hospital for treatment.

59. One .45 caliber shell casing was recovered at the scene. Respondent presented no evidence that a projectile struck the vehicle, or any other object.

60. Officers who arrived on scene noted that the Petitioner was not talkative because he was in pain. In addition, when the Petitioner was transported to the hospital, he was placed on pain medication.

61. However, at 7:33 pm, the Petitioner did notify Captain Alvin Carter by cell phone that he had discharged his weapon. (Resp. Ex. 4C). Petitioner may not have immediately notified his superior, but his actions were reasonable given the facts and circumstances herein.

62. Evidence presented demonstrated that Petitioner sustained injuries to his abdomen, hip, and hand. (Resp. Ex. 4C). Petitioner also sustained a concussion and an injury to his knee. (T., p.273).

University's Response to the Incident and Investigation

63. Respondent issued a press release on September 24, 2015, describing what had transpired. Respondent reported to the public that Nelson "became uncooperative during the investigation and drove off, striking one officer with the vehicle. *In defense of himself*, the officer discharged one round from a service weapon." (Emphasis added) (Resp. Exhibit 4F).

64. The North Carolina Central University Police Department completed an investigation of this incident. The North Carolina State Bureau of Investigation was not contacted.

65. Evidence demonstrates that the Petitioner was cooperative at each stage of the investigation.

66. The narrative in the Department's investigation lists the circumstances surrounding discharge of the firearm as follows: "Officer was struck by a vehicle [and] in the process fired the

weapon as an attempt to arrest and prevent the escape. The black male used a white [D]odge [C]harger as means of deadly force attempting to seriously injury [sic] the officer in attempt to escape.” (Resp. Ex. 4C).

67. In addition, the Department listed the Petitioner as the victim of an assault in the Incident/Investigation report, and Nelson’s vehicle was determined to be a “deadly weapon.” (Resp. Ex. 4C).

68. In fact, the Department’s investigative summary of this incident acknowledges that the white Dodge Charger “became a deadly weapon when the suspect drove the vehicle into Lt. Simpson.” (Resp. Ex. 8, p7).

69. Respondent’s evidence included an alert that Nelson was “Armed and Dangerous.” (Resp. Ex. 4C).

70. On September 27, 2015, the Durham County Sheriff’s Department notified campus police that the white Dodge Charger was abandoned at 3710 Snow Hill Road, Durham, North Carolina, on a dirt path. A sheriff’s deputy confirmed that Nelson had rented the vehicle from Enterprise Rent-a-Car. (Resp. Ex. 4 C).

71. Pursuant to Department policy, Petitioner was immediately placed on administrative leave and Internal Affairs conducted an investigation into the incident. (Resp. Exs. 3-4).

72. At all relevant times herein, Alphonso White was the Administrative Division Captain for the Department. White is currently employed as the Chief of Police for Meredith College.

73. While at NCCU, Chief White was employed as the Training Director and Internal Affairs Director. Prior to working at NCCU, Chief White was a member of the Raleigh Police Department for approximately 30 years. Chief White is an experienced law enforcement officer and has experience conducting internal investigations.

74. On the night of the shooting, White received a call from Captain A. J. Carter concerning possible discharge of Petitioner’s firearm. When it was confirmed that there was a discharge of a weapon, White called the units on campus to make sure they established a crime scene and roped it off so the evidence would remain preserved.

75. Chief White conducted an internal investigation of the shooting as required by Department policy and procedure. White reviewed the scene of the shooting, reviewed the incident reports, and interviewed witnesses, including the Petitioner.

76. Prior to interviewing Petitioner, Chief White explained to Petitioner that he was investigating his discharge of a firearm and read him his administrative rights. Petitioner then acknowledged his rights and signed the Warning for Administrative Investigation form. (Resp. Ex. 4D).

77. Petitioner told White that he fired his weapon based on an imminent threat and to prevent Nelson's escape. (Resp. Ex. 4, T., p. 206-207).

78. Petitioner also stated that he had injuries to his hand, back and stomach and felt justified in firing his weapon based on law and policy. Petitioner provided White with a written statement in addition to his interview statement. (Resp. Ex. 4; T. pp. 206-07).

79. Chief White provided Chief Bell with his findings and analysis in an investigative report prepared at the conclusion of the investigation.

80. Chief White recommended that Petitioner be demoted from the rank of lieutenant and that he receive a five-day suspension. (Resp. Exs. 4, 15; T. pp. 128, 195-96, 199-203).

81. Detective Bryant Hernandez, the Department's criminal investigator, also investigated the incident. Detective Hernandez has been employed with NCCU for nine years as a police officer, two of those years as a detective.

82. At approximately 9:30 p.m. on September 24, 2014, Det. Hernandez received a call from Captain A. J. Carter about the shooting at Chidley Hall. Det. Hernandez arrived on campus and conducted his investigation. (Resp. Ex. 8; T. pp. 55-57).

83. Chief Bell provided a summary of the investigation to the Chancellor on October 16, 2014. (Resp. Ex. 6).

84. The findings submitted to the Chancellor differ from the press release issued to the public on the night of the incident. The October 16, 2014 memorandum states that the Petitioner "did not fire his weapon in self-defense." (Resp. Ex. 6).

85. On November 6, 2014, Chief Bell provided Petitioner with a notice to attend a pre-disciplinary conference due to purported grossly inefficient job performance. In the notice, Chief Bell explained the reasons for the conference; namely Petitioner's discharge of his weapon purportedly in violation of N.C. Gen. Stat. § 15A-401 and General Order 100-02.

86. Petitioner was also informed that he could face disciplinary action, up to and including dismissal, as a result of his grossly inefficient job performance. (Resp. Ex. 9; T., 128-30, 157).

87. A pre-disciplinary conference was held on or about November 10, 2014.

88. Chief Bell informed Petitioner of the purpose of the conference and the allegations against him. Petitioner was provided with an opportunity to respond, and stated that he stood by the statement that he had given Chief White. (Resp. Ex. 9; T., 128-30, 157).

89. Ms. Sylvia Anderson, who is the Director of Employee Relations at the University, learned that the pre-disciplinary conference had been held outside the presence of a human

resources representative. Ms. Anderson informed Chief Bell of this oversight and told him that NCCU's policy and practice require that a HR representative be present during the pre-disciplinary conference. (T. pp. 168-70).

90. A second pre-disciplinary conference was conducted on November 12, 2014.

91. Ms. Anderson presented Petitioner with a letter indicating why the conference was being held. Ms. Anderson asked Petitioner if he had any comments, questions, or more information that he would like to present before Chief Bell and management made a disciplinary decision. Petitioner again indicated that he stood by his prior statement. (T. pp. 129-130, 133, 158-159, 169, 171-172).

92. Following the second pre-disciplinary conference, Chief Bell consulted with his staff and the Chancellor and the decision was made to suspend Petitioner for two weeks without pay.

93. On or about November 13, 2014, Chief Bell suspended Petitioner for two weeks without pay for grossly inefficient job performance; specifically, firing his duty weapon in violation of N.C.G.S. 15A-401 (d)(2) and Police and Public Safety Department General Order 100-02 R1. (Resp. Exs. 1, 2, 10; T. pp. 98-102, 128, 134, 137, 139-140, 142, 159).

Respondent's Policies Concerning Use of Force

94. All employees of the Department are provided with a set of rules and general orders that set forth the Department's authority, employee responsibilities, and code of conduct. These rules and general orders are set out in the North Carolina Central University Police & Public Safety Department Manual and General Orders (the "General Orders"). (Relevant portions of the General Orders were provided in Resp. Exs. 2 and 3).

95. The General Orders set forth guidelines and expectations governing employees within the department, including, but not limited to, information regarding jurisdiction, use of force, appearance, responding to emergencies, active shooter protocol, and traffic enforcement. All Department employees are expected to know, understand, and follow the General Orders.

96. General Order 100-002 R1, which the Petitioner is accused of violating, is entitled "Use of Force" and was in effect at all relevant times herein. (Resp. Ex. 2)

97. Respondent's General Orders contemplate and condone the use of deadly force by law enforcement officers in limited circumstances.

98. General Order 100-002 R1 states the Respondent's policy as follows:

The value of human life is immeasurable in our society. Police officers have been delegated the awesome responsibility to protect life and property and apprehend criminal offenders. The officer's responsibility for protecting life must include his own. It is the

policy of this department to use defensive tactics consistent with “Graham vs. Connor” {The test of reasonableness under the 4th Amendment is not capable of a precise definition or mechanical application... Its proper application requires careful attention to the facts of each particular case, including the severity of the crimes a tissue [*sic*], whether the suspect poses an immediate threat to the officer or others and whether or not he is actively resisting arrest or attempting to evade arrest by flight...} and North Carolina State Law. Officers will only use the force reasonably necessary to accomplish lawful objectives and effectively bring an incident under control, while protecting the lives of the officer and others.

99. This policy acknowledges that all life is important and entitled to protection, including lives of law enforcement officers. The policy further provides that *Graham v Connor* and state law guides use of force inquiries.

100. Deadly force is defined in the “Definitions” section of the General Order as “that force which is reasonably likely to cause death or grave injury or which creates some specified degree of risk that a reasonable and prudent person would consider likely to cause death or grave injury.” Deadly force is then defined again in Section I as “force likely to cause serious physical injury or death.” (Resp. Ex. 2).

101. General Order 100-02 R1, I.a. states that:

An officer is justified in using deadly force to effect arrest or prevent escape only when it is or appears to [be] reasonably necessary:

(i) In defense of oneself ... from what the officer reasonably believes to be the use or imminent use of deadly force;

(ii) To arrest or prevent escape of a person who the officer reasonably believes is attempting to escape by the use of a deadly weapon; [and]

(iii) To arrest or prevent escape of a person who by his conduct or any other means indicates he presents an imminent threat of death or serious physical injury to others unless apprehended without delay.

102. General Order 100-02 R1 III provides that officers may not discharge their firearm at or from a moving vehicle unless that action is taken in self-defense or defense of a third party when that “action is reasonable to preserve human life.”

103. At the time of this incident Nelson’s vehicle was a deadly weapon, as acknowledged by the Respondent and as evidenced by the charge against Nelson.

104. Petitioner was aware of the General Orders because he was a member of the accreditation team that drafted the order. Petitioner was responsible for writing many of the Department’s general orders and policies. (Resp. Exs 1-2, 4; T. pp. 185-86).

105. Public Safety Officers are sworn law enforcement officers and are required to have taken Basic Law Enforcement Training (“BLET”) through the State of North Carolina. In addition, firearm training must be completed yearly.

106. Officers must pass night and day firearm training and complete classes concerning laws which govern use of force and firearms. An exam is then taken after the classroom exercise.

107. Officers are taught that the use of deadly force is only permitted: (1) in self-defense from the use or imminent use of deadly force; (2) to prevent the escape of a suspect from custody who is attempting to escape by using a deadly weapon; (3) to effect an arrest of a person who present an imminent threat of death or serious injury to others; and (4) to prevent the escape from custody of a convicted felon. (Resp. Exs. 12, 13, 14; 87-88, 91).

Based upon the foregoing findings of fact, the undersigned makes the following conclusions of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein, and extraordinary cause exists for this decision being issued beyond the statutory limit.

2. Respondent North Carolina Central University is the Petitioner’s employer and is subject to Chapter 126 of the North Carolina General Statutes.

3. Petitioner is a career state employee as that term is defined in N.C. Gen. Stat. § 126-1.1, and he is subject to the State Personnel Act.

4. The State employer has the burden of showing by a preponderance of the evidence that there was just cause for suspension. N.C. Gen. Stat. § 150B-29(a).

5. Respondent has not met its burden of proof.

6. A career State employee may only be suspended for just cause. N.C. Gen. Stat. §126-35(a).

7. “Just cause, like justice itself, is not susceptible of precise definition. 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.” N.C. Dep’t of Env’t & Natural Res. v. Carroll, 358 N.C. 649, 669 (2004) (internal citations omitted).

8. It would be neither equitable nor fair to suspend Petitioner for his lawful actions which are consistent with the Respondent’s policies.

9. Respondent suspended Petitioner for “grossly inefficient job performance” pursuant to 25 N.C.A.C. 01J .0604(b), claiming that the officer had violated N.C. Gen. Stat. §15A-

401(d)(2) and General Order 100-01 R1. (One section of the November 13, 2014 letter in Respondent's Exhibit 10 references §15A-401(d)(2), while another references §15A-402(d)(2)).

10. Grossly inefficient job performance “occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in: (a) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public or to a person(s) over whom the employee has responsibility; or (b) the loss of or damage to agency property or funds that result in a serious impact or work unit.” 25 N.C.A.C. 01J.0614(5); see also *N.C. Dep't. of Corr. v McKimmey*, 149 N.C. App. 605, 609 (2002).

11. Grossly inefficient performance need not result in actual death or serious bodily injury, only in the creation of the potential or risk of such harm. Id.

12. Here, however, Petitioner cannot be said to have engaged in grossly inefficient job performance as his actions were consistent with management directives in the Respondent's General Orders, with North Carolina law, and with his extensive firearms training.

13. There is no question that Petitioner's lawful and justified actions created the potential for death or serious harm. However, a law enforcement officer's justifiable discharge of his service weapon is contemplated, not only by the nature of his duties, but by Respondent's own policy.

14. The United States Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), held that deadly force may not be used to prevent the escape of an unarmed felony suspect. In that case, the unarmed, fleeing suspect refused to obey law enforcement commands and was shot when he climbed over a fence in an effort to avoid capture.

15. Here, however, Nelson was not fleeing at the time Lt. Simpson discharged his weapon. Respondent's evidence and the testimony herein clearly established that Nelson stopped the white Dodge Charger and then Lt. Simpson, believing Nelson was going “to finish the job” discharged his weapon at the vehicle. It was only after Lt. Simpson fired that Nelson fled the crime scene.

16. Officer Newell and Lt. Simpson provided statements as part of the investigations into this incident. Those statements are consistent with their credible and believable testimony in this matter.

17. These statements read alone do not establish that Nelson was fleeing when Lt. Simpson acted.

18. Lt. Simpson's October 1, 2014 statement reads, “When the vehicle turned right Lt. Simpson slide [*sic*] off the vehicle to the ground, while on the ground Lt. Simpson fired his duty issued weapon once in an attempt to arrest and prevent the escape.”

19. Captain White summarized the Petitioner's statements as follows: "I fired one shot at the vehicle... I could still see his taillights."

20. Officer Newell testified that after the officer rolled off the hood, Nelson "looked left, and Lieutenant Simpson got up ... shot one time, *and then* the driver went east on Lawson." (emphasis added). It is clear, based upon the competent evidence in this matter, that Nelson stopped his vehicle. While the vehicle was stopped, Lt. Simpson fired his weapon.

21. Respondent has failed to prove by a preponderance of the evidence that the vehicle was in motion and moving away from Petitioner at the time he discharged his firearm. In fact, the credible evidence proves that Nelson stopped his vehicle after the Petitioner slid off the hood, and he was in a position to cause serious bodily injury or death to Lt. Simpson.

22. Lt. Simpson was on the ground only six feet from the rear of Nelson's vehicle. Lt. Simpson reasonably believed that Nelson, who had just committed a violent felony against a law enforcement officer, was positioned and inclined to inflict serious bodily injury or death upon him.

23. Had Nelson wanted to simply flee, he could have done so. Nelson, however, chose to stop the vehicle. It was Nelson's actions which led the officer to fear for his safety.

24. In addition, Officer Newell testified that Nelson "looked left" after assaulting the officer. Without testimony from Nelson, it is not discernable what he was looking at when he "looked left." However, it is possible that in looking to his left, he was attempting to locate the injured officer in the driver's side mirror.

25. Whatever his personal motives for doing so may have been, Nelson's actions in stopping the vehicle go to the officer's reasonable beliefs.

26. Given today's hostile and dangerous climate for law enforcement officers, Lt. Simpson's belief that he was in imminent danger of death or serious bodily injury at the time Nelson stopped his vehicle was reasonable.

27. The Petitioner testified that he believed Nelson was attempting to put the white Dodge Charger in reverse to back up and "finish the job" when he saw the vehicle stop and the brake lights illuminate.

28. "An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest." *State v. Anderson*, 40 N.C. App. 318, 321-22, 253 S.E.2d 48, 50-51 (1979) (internal citations omitted).

29. In *Graham v Connor*, 490 U.S. 386 (1989), the case cited in Respondent's use of force policy, the United States Supreme Court determined that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

30. N.C. Gen. Stat. § 15A-401(2) provides that law enforcement officers are justified in using deadly force:

“when it is or appears to be reasonably necessary ... (a) To defend himself ... from what he reasonably believes to be the use or imminent use of deadly physical force; [or] (b) To effect an arrest ... of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay[.]”

31. Consistent with state law, Respondent’s use of force policy contemplates and permits the use of deadly force in General Order 100-02 R1, I.a. which states that:

An officer is justified in using deadly force to effect arrest or prevent escape only when it is or appears to [be] reasonably necessary:

(i) In defense of oneself ... from what the officer reasonably believes to be the use or imminent use of deadly force;

(ii) To arrest or prevent escape of a person who the officer reasonably believes is attempting to escape by the use of a deadly weapon; [and]

(iii) To arrest or prevent escape of a person who by his conduct or any other means indicates he presents an imminent threat of death or serious physical injury to others unless apprehended without delay.

32. Petitioner, an experienced law enforcement officer who was intimately familiar with departmental policy, reasonably believed Nelson would “finish the job.” When Nelson stopped the white Dodge Charger, Lt. Simpson was injured and kneeling six feet from the rear of the vehicle. Petitioner’s belief that the continued use of deadly force against him by Nelson was imminent was reasonable under the facts and circumstances herein.

33. Moreover, upon striking Lt. Simpson with his vehicle, Nelson completed a felony assault against a law enforcement officer and was subject to arrest for the same. Even though the officers may not have known about his extensive criminal history and his illegal possession of a firearm on a college campus, Nelson’s conduct in assaulting an officer with a deadly weapon showed a complete and utter disregard for the safety of others. Nelson’s potentially deadly reaction to a lawful and simple request by Lt. Simpson was not consistent with what an officer could reasonably expect from this type of routine encounter. Nelson’s actions escalated a minor traffic stop and investigation into deadly situation. Nelson, through his behavior, presented an imminent threat of death or serious physical injury to the public at large unless he was immediately apprehended. The fact that no one else was injured by Nelson at the scene, or while fleeing the same, makes his actions no less dangerous.

34. Respondent's policy permits law enforcement officers to defend themselves.

35. Lt. Simpson and Officer Newell were following up on an earlier dispatch involving an individual in a domestic violence situation. The attempted investigation involved a road-side encounter with an individual who was not cooperating or obeying basic and lawful commands. Without warning, Nelson became an aggressor by causing his rented vehicle to accelerate into a law enforcement officer, striking and injuring Lt. Simpson. After Lt. Simpson fell off the hood, Nelson stopped the vehicle. The brake lights were illuminated and visible to Lt. Simpson who was perilously positioned at the rear of a vehicle.

36. Given the totality of the circumstances, Lt. Simpson's use of deadly force was reasonable. Simpson reasonably believed Nelson posed an imminent threat of serious bodily injury or death, and consistent with state law and the Respondent's policy, discharged his firearm at Nelson's vehicle.

37. Even if Lt. Simpson had not acted in defense of himself, his actions were still consistent with state law and the Respondent's policy. Lt. Simpson's discharge of his weapon was also permitted as an attempt to effectuate the arrest of a dangerous and unpredictable individual using a deadly weapon.

38. Respondent did not have "just cause" to suspend Petitioner for two weeks without pay based on grossly inefficient job performance. Because of the particular facts of this case, the punishment of suspension without pay was inappropriate.

39. Discharge of a firearm under these facts did create the potential for death or serious bodily injury. But, Petitioner's use of deadly force was consistent with state law and the Respondent's policy, and justified under the circumstances. Petitioner is not subject to discipline for his lawful actions that do not run afoul of departmental policy.

40. Respondent has substantially prejudiced Petitioner's rights, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and abused its discretion when Respondent suspended Petitioner without "just cause."

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent did not have just cause to suspend Petitioner. Petitioner's suspension is overturned and he is entitled to all salary and benefits withheld by Respondent during the period of suspension. Petitioner is the prevailing party, and the costs of this action shall be taxed to the Respondent.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29(a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 29th day of March, 2016.

Philip E Berger Jr.
Administrative Law Judge