

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 OSP 05294

<p>George Wes Little Jr Petitioner, v. Department of Transportation Respondent.</p>	<p>FINAL DECISION</p>
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This contested case was commenced by the filing of a petition on May 23, 2016. It was assigned to Senior Administrative Law Judge Fred Gilbert Morrison Jr on May 27, 2016.

STIPULATED FACTS

1. Petitioner George Wesley Little (“Petitioner”) was hired as a law enforcement officer with the DMV License and Theft Bureau in June 1989. Petitioner was promoted to the rank of Lieutenant in 2013. Petitioner remained continuously employed with the Bureau until his termination on February 4, 2016.

2. Law enforcement officers employed by the DMV License and Theft Bureau enforce the rules and regulations governing all NC motor vehicle dealers, vehicle safety and emissions inspection stations, vehicle towing and storage facilities, and vehicle repair businesses within their assigned District. Describing a dealer audit by License and Theft Bureau Inspectors, Petitioner explained, “We’d go in and inspect records, and look at cars to see if they were inspected, look at their title files, and their history, check salesmen license, their dealer plates.”

3. The Districts in the License and Theft Bureau were realigned in September 2014 to match the existing Districts for Driver’s License offices. Prior to the September 2014 realignment, Petitioner was assigned to District VI, which was headquartered in Charlotte and encompassed Moore, Montgomery, Richmond, Anson, Union, Mecklenburg, Cabarrus and Stanly Counties. After the realignment, Petitioner’s duty station was transferred to District II, which is headquartered in Fayetteville and encompasses Bladen, Brunswick, Columbus, Cumberland, Duplin, Hoke, Moore, New Hanover, Richmond, Robeson, Sampson and Scotland Counties. At all times during his employment, Petitioner’s assigned territory included Moore County.

4. Until the investigation and resulting disciplinary action taken against Petitioner that is the subject matter of this proceeding, Petitioner’s approximately 27 year career with the DMV License and Theft Bureau was without blemish. His performance reviews from his

personnel file reflect consistently satisfactory or above satisfactory reviews, as follows: This contested case was commenced by the filing of a petition on May 23, 2016. It was assigned to Senior Administrative Law Judge Fred Gilbert Morrison Jr on May 27, 2016.

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- April 2002-March 2003 = Good
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- January 2014-June = 2.5/3 Meets Expectations

5. Petitioner's wife Teresa Hall Little decided to start a fire extinguisher business in 2008, and the articles of organization for her limited liability company, Little Fire Extinguisher, LLC ("LFE"), were filed on June 2, 2008. Those articles of organization list Teresa Hall Little as the LFE's Registered Agent. LFE has filed an annual report with the Secretary of State's office every year from 2009 – 2016. Each such annual report lists Teresa Hall Little as LFE's registered agent. None of the documents on file with the Secretary of State's office regarding LFE reference Petitioner. Petitioner's wife had no formal fire training other than what Petitioner had taught her and, as described by Petitioner, "from what we learned from another business that was already [running a fire extinguisher business]."

6. LFE has operated continuously since its formation in 2008. LFE has never been profitable, but Petitioner hoped that LFE would become profitable. Petitioner's wife works for the school system and started LFE with the intention that she would eventually be able to quit her job with the school system and operate LFE full-time. Thus far, that has not happened.

7. LFE sells fire extinguishers and also services them. The fire extinguishers LFE services typically need inspection/service once a year. As such, unless a customer was a new customer and required new fire extinguishers, it is typical that LFE will service each of its existing customers' fire extinguishers once per year. LFE's charges for this yearly service begin at \$25-\$30 and up, depending on the number of fire extinguishers needing to be serviced.

8. Petitioner has never been an employee, officer, or manager of LFE. He has never received any direct compensation from LFE. Petitioner and his daughter do however help out with the business. While employed with the DMV License and Theft Bureau, Petitioner serviced fire extinguishers for LFE an estimated 4-5 times each month. While on his lunch break at DMV in Charlotte, Petitioner would sometimes stop and pick up "emergency products, fire extinguishers, you name it, safety products" for LFE. Petitioner transported those products in his state-owned vehicle. Other than transporting materials purchased for LFE in his state-owned vehicle, Petitioner did not conduct LFE business on state time.

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10. Petitioner never completed a secondary employment request form for his assistance with LFE duties. He contends that he did not believe he was required to do so because he did not receive any compensation and because the work was not regular and continuous.

11. During Petitioner's employment with Respondent, he completed secondary employment requests on the following dates:
 - a. 12/20/1990 for the Moore County ABC Board
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 - n. 12/31/2015 for self-employment (CPR classes for 2 companies and shooting fireworks shows for 3 companies)
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12. From early 2008-late 2008, Petitioner's supervisor in District VI was Captain Chuck Ervin. After the retirement of Captain Ervin, Captain Ralph Smith was Petitioner's supervisor in District VI until late 2009. Lieutenant Brian Hawkins was acting supervisor in District VI after the departure of Captain Smith. With regard to Captain Ervin, Petitioner testified, "I don't know. I might have asked him about doing stuff with [LFE]. I mean –I mean, I – you know, asked him what was going on, I wasn't drawing a paycheck out of it or whatever, so I didn't get compensated, so I didn't fill out anything." Petitioner is not sure, however, whether any such conversation took place. Similarly, Petitioner testified that if he had conversations with Captain Smith or Lieutenant Hawkins about LFE, such conversations "would have" included him asking about whether he needed to fill out a secondary employment form for LFE if he was not compensated. Again, however, Petitioner could not recall any specific conversations in which the topic was discussed with Captain Smith or Lieutenant Hawkins.

13. Captain Barry Davis was supervisor of District VI from April 2011-April 2012. Petitioner had a conversation with Captain Davis in which he informed Captain Davis that his wife operated a fire extinguisher business. Captain Davis prepared a letter dated March 28, 2016, addressed "To Whom It May Concern" in which he addressed his conversation with Petitioner. That letter reads, in part, "As a matter of courtesy Mr. Little informed me that his wife operated a fire extinguisher business as a sole proprietor. Mr. Little said he received no salary from the business operated by his wife and had no set duties or schedule to assist her with this business." Captain Davis later signed a sworn statement indicating that Petitioner did not inform him during that conversation that he performed any duties with LFE and instead indicated that he had no involvement whatsoever in the business. Petitioner contends, but Respondent denies, that Petitioner informed Captain Davis that he performed occasional tasks for LFE but that he had no set, regular duties. Based on what Mr. Little told Captain Davis, Captain Davis advised Petitioner that he did not see the need for Petitioner to complete a request for secondary employment form because Petitioner was not "gainfully employed" with LFE. Petitioner did not

tell Captain Davis that he would be helping his wife service fire extinguishers at car dealerships, and Captain Davis, in his sworn statement, indicated that he would not have given permission for Petitioner to do so. Specifically, Captain Davis swore, "Had I known that Inspector Little was servicing fire extinguishers in car dealerships regulated by the License and Theft Bureau, regardless of whether he was being paid, I would have adamantly forbid it. I firmly believe that servicing fire extinguishers in dealerships regulated by the Bureau creates a conflict of interest." Petitioner does not recall that LFE had any car dealership customers as of the time of this conversation with Captain Davis.

14. After the promotion of Captain Davis to the position of Major, Captain Tommy Ratliff became Supervisor of District VI. Petitioner did not have a conversation with Captain Ratliff about helping his wife with LFE.

15. After the September 2014 realignment and duty station transfer to Fayetteville, Petitioner "do[es not] recall" talking to District II Captain Craig Kohlhaas about his involvement in LFE. Petitioner also did not inform Captain James Crissman, who became Captain after the promotion of Captain Kohlhaas to Lieutenant Colonel, about his assistance with LFE. Petitioner contends that, although he did not address LFE with these supervisors, it was his belief that "most of them knew that I did stuff with that business." There is no evidence that Petitioner took any steps to conceal any of his activities in connection with LFE.

16. There is no evidence that Petitioner's work with LFE actually influenced the manner in which he carried out his duties with the DMV License and Theft Bureau. Petitioner did acknowledge that servicing fire extinguishers for dealerships over which he had regulatory oversight could "look bad" to members of the public. Petitioner contends that he did not believe that servicing fire extinguishers in car dealerships for LFE caused a conflict of interest with his responsibilities as a License and Theft Bureau officer. However, Petitioner admits that it "would have been helpful" for License and Theft Bureau management to be informed that he was servicing fire extinguishers in Bureau-regulated car dealerships "just to know what was going on." Petitioner also agrees that "some" members of the public "could" think that servicing fire extinguishers in car dealerships looks bad.

17. In late 2015, Petitioner had a conversation with License and Theft Bureau Colonel Steve Watkins about the need to fill out a secondary employment form for his assistance with LFE. At the time this conversation took place, Petitioner was already under investigation for unreported secondary employment. Colonel Watkins told Petitioner to fill out the form and let management make a decision. In the course of the investigation into Petitioner's involvement with LFE, his computer was scanned, and it was discovered it contained multiple inappropriate images, the vast majority of which had been forwarded to Petitioner by outside sources via email. As a result, Petitioner was demoted from his supervisory role and into an Inspector role. The demotion to Inspector meant that Petitioner would have a new immediate supervisor, District III Captain David Troxler. By the time of Petitioner's demotion, he had not yet completed the secondary employment form as advised by Colonel Watkins.

18. Upon transfer to the Inspector role, Petitioner's new supervisor became District III Captain David Troxler. On December 31, 2015, Petitioner prepared a memorandum to

Captain Troxler which reads, in whole, “Sir I requesting clarification on secondary employment. I assist my wife in her Fire Extinguisher business. I do not receive compensation and she is the sole owner of the business. Do I need to fill out secondary employment request?” Petitioner did not tell Captain Troxler that he already had been advised to do so by Colonel Watkins. Petitioner also did not tell Captain Troxler that he serviced fire extinguishers in car dealerships regulated by the License and Theft Bureau.

19. In addition to his employment with the License and Theft Bureau, Petitioner taught CPR classes as a representative of LFE. Specifically, Petitioner billed for his services using LFE receipts “and then everything is built into the business and the business writes the checks out for renting the equipment and...the cards and all that stuff.” Petitioner explained that teaching CPR was “safety stuff, trying to broaden out...what the business can do. And that way it was – to keep the bills paid in the business.” There is no evidence that the teaching of CPR classes created any actual or perceived conflict of interest with Petitioner’s duties in connection with his employment with DMV License and Theft Bureau.

20. Petitioner’s wife reported the income from LFE on tax returns she filed jointly with Petitioner. Petitioner also was an authorized user of the LFE business checking account and signed checks on occasion.

21. Petitioner taught an in-service Ethics course for the License and Theft Bureau on August 11, 2009 and September 23, 2009. Evaluations indicated that Petitioner was knowledgeable on the subject, motivated about the lesson plan, and that he provided good instruction on ethics.

22. The Office of State Auditor received an allegation via the State Auditor’s Hotline regarding Petitioner’s alleged unauthorized secondary employment and potential conflict of interest with Petitioner’s primary responsibilities as a law enforcement agent. The State Auditor investigated the matter and on January 28, 2016, recommended that the DMV should consider disciplinary action, up to and including termination, for Petitioner’s engagement in, and failure to disclose, secondary employment (business activity) that created a conflict of interest.

23. On February 4, 2016, Petitioner was advised he was dismissed from employment with the DMV for unacceptable personal conduct, specifically:

- Willful violation of the Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment;
- Willful violation of the North Carolina Department of Transportation’s (DOT) Ethics Policy;
- Conduct unbecoming a State Employee that is detrimental to State Service; and
- Conduct for which no reasonable person should expect to receive prior warning

24. Speaking directly to the issue of secondary employment, The Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment – states, in relevant part, “No member [employee] of the License and Theft Bureau may accept gainful off-duty employment which would result directly or indirectly in a conflict of

interest, or would in any way compromise the position of the member or the State of North Carolina with firms or individuals doing business with or desiring to do business with the State or which are regulated by the Bureau.”

25. The North Carolina Department of Transportation’s (“DOT”) Ethics Policy says, “No employee shall have any interest, financial or otherwise, direct or indirect, or engage in any business, transaction or activity that is in conflict or could appear to be in conflict with the proper discharge of his or her duties. An appearance of a conflict of interest exists when a reasonable person would conclude from the circumstances that the employee’s ability to protect the public interest, or perform public duties, is compromised by personal interest.”

26. At the time of Petitioner’s termination on February 4, 2016, he had 26 years and 7 months of state service - all with DMV. His vacation and bonus leave were paid out to him upon termination, and he left 415 sick days (approximately 1 year and 9 months) that would have counted towards retirement had he become eligible. Essentially, Petitioner was approximately 20 months short of reaching the minimum requirements for retirement when he was terminated. His salary upon termination was \$62,735.

27. On May 5, 2016, Petitioner was issued a Final Agency Decision upholding his termination and advising of his right to seek a contested hearing pursuant to G.S. § 150B-23 with the Office of Administrative Hearings. Petitioner timely requested such a hearing.

28. The Parties have stipulated to the facts as stated herein above and consent to decision based on the same without holding a fact-finding hearing.

BASED UPON the foregoing Stipulated Facts, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that any part of a stipulated fact constitutes a mixed issue of law and fact, it is deemed incorporated herein by reference as a conclusion of law.

2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and this matter is properly before OAH for consideration.

3. Respondent contends that Petitioner was dismissed for just cause while Petitioner contends that he was discharged without just cause in violation of N.C. Gen. Stat. § 126-35. Petitioner seeks reinstatement, back pay, restoration of benefits, and attorney’s fees.

4. Petitioner is a “career State employee” as defined in N.C. Gen. Stat. § 126-1.1(a)(2). As a career State employee, Petitioner could be dismissed for disciplinary reasons only for “just cause” and only in accordance with the requirements of N.C. Gen. Stat. § 126-35 and Section .0600 of Subchapter 1J of Title 25 of the North Carolina Administrative Code. N.C. Gen. Stat. § 126-35; 25 N.C.A.C. 01J .0604, 25 N.C.A.C. 01J .0608, and 25 N.C.A.C. 01J .0613.

5. Just cause for discipline or dismissal includes unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b)(2). Unacceptable personal conduct includes conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; the willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 01J .0614(8)(a), (b), (d), and (e).

6. Determining whether the employee engaged in the conduct the employer alleges is the first of the three steps for determining whether just cause for discipline exists. *Warren v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 770, 726 S.E.2d 920, 925 (2012). Dismissal based on personal conduct requires substantial misconduct of the individual who is dismissed. E.g., *Poarch v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 1191, 741 S.E.2d 920, 315 (2012), rev. denied 2012 N.C. LEXIS 1030, 735 S.E.2d 174 (on-duty sexual misconduct of highway patrol officer); *Granger v. University of N.C.*, 197 N.C. App. 699; 678 S.E.2d 715 (2009) (addressing co-workers with racially charged language); *Brunson v. N.C. Dep't of Correction*, 152 N.C. App. 430, 567 S.E.2d 416 (2002) (case worker held in contempt of court while on-duty).

7. The second step of the *Warren* three-part test is to determine whether the employee's conduct falls within one of the categories of unacceptable conduct provided by the Administrative Code. *Warren* at 775, 726 S.E.2d 925.

8. The third step of the *Warren* test is to determine whether the conduct amounted to just cause for the disciplinary action taken. *Warren* at 775, 726 S.E.2d 925. A commensurate discipline approach applies in North Carolina; unacceptable personal conduct does not necessarily establish just cause for all types of discipline. *Id.* Unacceptable personal conduct is misconduct of a serious nature and does not encompass technical violations of statute or official duty without a wrongful intention. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E. 2d 888, 901 (2004).

9. Petitioner's servicing fire extinguishers for LFE did not constitute "gainful off-duty employment" as that term is used in The Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment (DMV Secondary Employment Directive) under the specific stipulated facts of this contested case.

10. Petitioner's servicing fire extinguishers for LFE in car dealerships over which he had regulatory oversight did not create an actual conflict of interest with his responsibilities as a License and Theft Bureau officer under the specific stipulated facts of this contested case.

11. In defining the term "willful", Black's Law Dictionary (Fifth Edition) states that "[a]n act . . . is 'willfully' done, if done voluntarily and intentionally **and with the specific intent to do something the law forbids . . . ; that is to say, with bad purpose either to disobey or to disregard the law** (emphasis supplied).

12. The specific stipulated facts of this contested case show that the Petitioner did not willfully violate the DMV Secondary Employment Directive. Petitioner has never been an employee, officer, or manager of LFE; has never received any direct compensation from LFE (Stipulated Fact 8), and had no set duties or schedule to assist his wife with the LFE business (Stipulated Fact 13).

13. While DOT Ethics Policy (Policy) provides that “[a]n appearance of a conflict of interest exists when a reasonable person **would** conclude from the circumstances . . . that the employee’s ability . . . is compromised by personal interest”, the Policy does not provide that an appearance of a conflict of interest exists when a person **could** conclude the existence of a compromised ability (emphasis supplied. See Stipulated Fact 16). [“Would” is used to express a habitual act. “Could” expresses a possibility. See <http://www.differencebetween.net/language/grammar-language/difference-between-would-and-could>]

14. The specific stipulated facts of this contested case do not show that the Petitioner willfully violated the North Carolina Department of Transportation’s Ethics Policy.

15. The specific stipulated facts of this contested case do not show that the Petitioner engaged in conduct unbecoming a State Employee that is detrimental to State Service.

16. The specific stipulated facts of this contested case do not show that the Petitioner engaged in conduct for which no reasonable person should expect to receive warning prior to discipline or dismissal.

17. Just cause must be determined on the facts and circumstances of each case. *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 901 (2004) (not every violation of law gives rise to “just cause” for employee discipline). The facts and circumstances of this case require balancing Petitioner’s exemplary work performance career against the conduct. Any reasonable weighing of this balance would determine that equity and fairness would not be served by dismissing Petitioner. See, e.g., *Kelly v. N.C. Dep’t of Env’t & Natural Res.*, 192 N.C. App. 129, 664 S.E.2d 625 (2008) (employees’ misdemeanor off-duty violations of fin fish laws administered by Department not just cause for disciplinary 5-day suspension without pay for unacceptable personal conduct). Termination of Petitioner’s employment would not have been “just”.

18. Application of *Carroll* and the *Warren* three-part test for determining whether just cause existed for terminating Petitioner’s employment leads me to the conclusion that firing him was not just under the specific facts and circumstances of this case. Petitioner had a very satisfactory work record for almost twenty-seven years. Petitioner sought and was approved for secondary employment as a fireman in his local community. A local fireman helping his teacher wife by servicing fire extinguishers, with no findings that it affected the performance of his DMV duties, did not constitute serious/substantial misconduct justifying his being dismissed.

19. Based upon the specific stipulated facts and circumstances of this case, the Respondent did not have just cause to terminate Petitioner's employment. Per *Carroll*, it was not just.

BASED UPON the foregoing Stipulated Facts and Conclusions of Law, the undersigned renders the following:

FINAL DECISION

1. Petitioner shall be reinstated to the position from which he has been removed, with the understanding that he has no secondary employment approval going forward for activities involving LFE and businesses, firms or institutions which are regulated by his employer.
2. Petitioner shall be given, from February 5, 2016, until his reinstatement, back pay and restoration of benefits (retirement, sick leave, annual leave, bonus leave, and comp time) to which he was and would have been entitled had he not been fired.
3. With regard to back pay owed to Petitioner, Respondent shall enjoy a credit for any annual leave and bonus leave payout Petitioner received upon termination.
4. Petitioner shall be reimbursed for up to \$7,500 in fees paid to his attorney.

NOTICE

Pursuant to N. C. Gen. Stat. 126-34.02, any party wishing to appeal this Final Decision may commence such by appealing to the North Carolina Court of Appeals as provided in N. C. Gen. Stat. 7A-29(a). The party seeking review must file such appeal within thirty (30) days after receiving a written copy of the Final Decision.

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13. Captain Barry Davis was supervisor of District VI from April 2011-April 2012. Petitioner had a conversation with Captain Davis in which he informed Captain Davis that his wife operated a fire extinguisher business. Captain Davis prepared a letter dated March 28, 2016, addressed "To Whom It May Concern" in which he addressed his conversation with Petitioner. That letter reads, in part, "As a matter of courtesy Mr. Little informed me that his wife operated a fire extinguisher business as a sole proprietor. Mr. Little said he received no salary from the business operated by his wife and had no set duties or schedule to assist her with this business." Captain Davis later signed a sworn statement indicating that Petitioner did not inform him during that conversation that he performed any duties with LFE and instead indicated that he had no involvement whatsoever in the business. Petitioner contends, but Respondent denies, that Petitioner informed Captain Davis that he performed occasional tasks for LFE but that he had no set, regular duties. Based on what Mr. Little told Captain Davis, Captain Davis advised Petitioner that he did not see the need for Petitioner to complete a request for secondary employment form because Petitioner was not "gainfully employed" with LFE. Petitioner did not tell Captain Davis that he would be helping his wife service fire extinguishers at car dealerships, and Captain Davis, in his sworn statement, indicated that he would not have given permission for Petitioner to do so. Specifically, Captain Davis swore, "Had I known that Inspector Little was

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14. After the promotion of Captain Davis to the position of Major, Captain Tommy Ratliff became Supervisor of District VI. Petitioner did not have a conversation with Captain Ratliff about helping his wife with LFE.

15. After the September 2014 realignment and duty station transfer to Fayetteville, Petitioner “do[es not] recall” talking to District II Captain Craig Kohlhaas about his involvement in LFE. Petitioner also did not inform Captain James Crissman, who became Captain after the promotion of Captain Kohlhaas to Lieutenant Colonel, about his assistance with LFE. Petitioner contends that, although he did not address LFE with these supervisors, it was his belief that “most of them knew that I did stuff with that business.” There is no evidence that Petitioner took any steps to conceal any of his activities in connection with LFE.

16. There is no evidence that Petitioner’s work with LFE actually influenced the manner in which he carried out his duties with the DMV License and Theft Bureau. Petitioner did acknowledge that servicing fire extinguishers for dealerships over which he had regulatory oversight could “look bad” to members of the public. Petitioner contends that he did not believe that servicing fire extinguishers in car dealerships for LFE caused a conflict of interest with his responsibilities as a License and Theft Bureau officer. However, Petitioner admits that it “would have been helpful” for License and Theft Bureau management to be informed that he was servicing fire extinguishers in Bureau-regulated car dealerships “just to know what was going on.” Petitioner also agrees that “some” members of the public “could” think that servicing fire extinguishers in car dealerships looks bad.

17. In late 2015, Petitioner had a conversation with License and Theft Bureau Colonel Steve Watkins about the need to fill out a secondary employment form for his assistance with LFE. At the time this conversation took place, Petitioner was already under investigation for unreported secondary employment. Colonel Watkins told Petitioner to fill out the form and let management make a decision. In the course of the investigation into Petitioner’s involvement with LFE, his computer was scanned, and it was discovered it contained multiple inappropriate images, the vast majority of which had been forwarded to Petitioner by outside sources via email. As a result, Petitioner was demoted from his supervisory role and into an Inspector role. The demotion to Inspector meant that Petitioner would have a new immediate supervisor, District III Captain David Troxler. By the time of Petitioner’s demotion, he had not yet completed the secondary employment form as advised by Colonel Watkins.

18. Upon transfer to the Inspector role, Petitioner’s new supervisor became District III Captain David Troxler. On December 31, 2015, Petitioner prepared a memorandum to Captain Troxler which reads, in whole, “Sir I requesting clarification on secondary employment. I assist my wife in her Fire Extinguisher business. I do not receive compensation and she is the sole owner of the business. Do I need to fill out secondary employment request?” Petitioner did

not tell Captain Troxler that he already had been advised to do so by Colonel Watkins. Petitioner also did not tell Captain Troxler that he serviced fire extinguishers in car dealerships regulated by the License and Theft Bureau.

19. In addition to his employment with the License and Theft Bureau, Petitioner taught CPR classes as a representative of LFE. Specifically, Petitioner billed for his services using LFE receipts “and then everything is built into the business and the business writes the checks out for renting the equipment and...the cards and all that stuff.” Petitioner explained that teaching CPR was “safety stuff, trying to broaden out...what the business can do. And that way it was – to keep the bills paid in the business.” There is no evidence that the teaching of CPR classes created any actual or perceived conflict of interest with Petitioner’s duties in connection with his employment with DMV License and Theft Bureau.

20. Petitioner’s wife reported the income from LFE on tax returns she filed jointly with Petitioner. Petitioner also was an authorized user of the LFE business checking account and signed checks on occasion.

21. Petitioner taught an in-service Ethics course for the License and Theft Bureau on August 11, 2009 and September 23, 2009. Evaluations indicated that Petitioner was knowledgeable on the subject, motivated about the lesson plan, and that he provided good instruction on ethics.

22. The Office of State Auditor received an allegation via the State Auditor’s Hotline regarding Petitioner’s alleged unauthorized secondary employment and potential conflict of interest with Petitioner’s primary responsibilities as a law enforcement agent. The State Auditor investigated the matter and on January 28, 2016, recommended that the DMV should consider disciplinary action, up to and including termination, for Petitioner’s engagement in, and failure to disclose, secondary employment (business activity) that created a conflict of interest.

23. On February 4, 2016, Petitioner was advised he was dismissed from employment with the DMV for unacceptable personal conduct, specifically:

- Willful violation of the Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment;
- Willful violation of the North Carolina Department of Transportation’s (DOT) Ethics Policy;
- Conduct unbecoming a State Employee that is detrimental to State Service; and
- Conduct for which no reasonable person should expect to receive prior warning

24. Speaking directly to the issue of secondary employment, The Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment – states, in relevant part, “No member [employee] of the License and Theft Bureau may accept gainful off-duty employment which would result directly or indirectly in a conflict of interest, or would in any way compromise the position of the member or the State of North

Carolina with firms or individuals doing business with or desiring to do business with the State or which are regulated by the Bureau.”

25. The North Carolina Department of Transportation’s (“DOT”) Ethics Policy says, “No employee shall have any interest, financial or otherwise, direct or indirect, or engage in any business, transaction or activity that is in conflict or could appear to be in conflict with the proper discharge of his or her duties. An appearance of a conflict of interest exists when a reasonable person would conclude from the circumstances that the employee’s ability to protect the public interest, or perform public duties, is compromised by personal interest.”

26. At the time of Petitioner’s termination on February 4, 2016, he had 26 years and 7 months of state service - all with DMV. His vacation and bonus leave were paid out to him upon termination, and he left 415 sick days (approximately 1 year and 9 months) that would have counted towards retirement had he become eligible. Essentially, Petitioner was approximately 20 months short of reaching the minimum requirements for retirement when he was terminated. His salary upon termination was \$62,735.

27. On May 5, 2016, Petitioner was issued a Final Agency Decision upholding his termination and advising of his right to seek a contested hearing pursuant to G.S. § 150B-23 with the Office of Administrative Hearings. Petitioner timely requested such a hearing.

28. The Parties have stipulated to the facts as stated herein above and consent to decision based on the same without holding a fact-finding hearing.

BASED UPON the foregoing Stipulated Facts, the undersigned makes the following:

CONCLUSIONS OF LAW

20. To the extent that any part of a stipulated fact constitutes a mixed issue of law and fact, it is deemed incorporated herein by reference as a conclusion of law.

21. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and this matter is properly before OAH for consideration.

22. Respondent contends that Petitioner was dismissed for just cause while Petitioner contends that he was discharged without just cause in violation of N.C. Gen. Stat. § 126-35. Petitioner seeks reinstatement, back pay, restoration of benefits, and attorney’s fees.

23. Petitioner is a “career State employee” as defined in N.C. Gen. Stat. § 126-1.1(a)(2). As a career State employee, Petitioner could be dismissed for disciplinary reasons only for “just cause” and only in accordance with the requirements of N.C. Gen. Stat. § 126-35 and Section .0600 of Subchapter 1J of Title 25 of the North Carolina Administrative Code. N.C. Gen. Stat. § 126-35; 25 N.C.A.C. 01J .0604, 25 N.C.A.C. 01J .0608, and 25 N.C.A.C. 01J .0613.

24. Just cause for discipline or dismissal includes unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b)(2). Unacceptable personal conduct includes conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; the willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 01J .0614(8)(a), (b), (d), and (e).

25. Determining whether the employee engaged in the conduct the employer alleges is the first of the three steps for determining whether just cause for discipline exists. *Warren v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 770, 726 S.E.2d 920, 925 (2012). Dismissal based on personal conduct requires substantial misconduct of the individual who is dismissed. E.g., *Poarch v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 1191, 741 S.E.2d 920, 315 (2012), rev. denied 2012 N.C. LEXIS 1030, 735 S.E.2d 174 (on-duty sexual misconduct of highway patrol officer); *Granger v. University of N.C.*, 197 N.C. App. 699; 678 S.E.2d 715 (2009) (addressing co-workers with racially charged language); *Brunson v. N.C. Dep't of Correction*, 152 N.C. App. 430, 567 S.E.2d 416 (2002) (case worker held in contempt of court while on-duty).

26. The second step of the *Warren* three-part test is to determine whether the employee's conduct falls within one of the categories of unacceptable conduct provided by the Administrative Code. *Warren* at 775, 726 S.E.2d 925.

27. The third step of the *Warren* test is to determine whether the conduct amounted to just cause for the disciplinary action taken. *Warren* at 775, 726 S.E.2d 925. A commensurate discipline approach applies in North Carolina; unacceptable personal conduct does not necessarily establish just cause for all types of discipline. *Id.* Unacceptable personal conduct is misconduct of a serious nature and does not encompass technical violations of statute or official duty without a wrongful intention. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E. 2d 888, 901 (2004).

28. Petitioner's servicing fire extinguishers for LFE did not constitute "gainful off-duty employment" as that term is used in The Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment (DMV Secondary Employment Directive) under the specific stipulated facts of this contested case.

29. Petitioner's servicing fire extinguishers for LFE in car dealerships over which he had regulatory oversight did not create an actual conflict of interest with his responsibilities as a License and Theft Bureau officer under the specific stipulated facts of this contested case.

30. In defining the term "willful", Black's Law Dictionary (Fifth Edition) states that "[a]n act . . . is 'willfully' done, if done voluntarily and intentionally **and with the specific intent to do something the law forbids . . . ; that is to say, with bad purpose either to disobey or to disregard the law** (emphasis supplied).

31. The specific stipulated facts of this contested case show that the Petitioner did not willfully violate the DMV Secondary Employment Directive. Petitioner has never been an

employee, officer, or manager of LFE; has never received any direct compensation from LFE (Stipulated Fact 8), and had no set duties or schedule to assist his wife with the LFE business (Stipulated Fact 13).

32. While DOT Ethics Policy (Policy) provides that “[a]n appearance of a conflict of interest exists when a reasonable person **would** conclude from the circumstances . . . that the employee’s ability . . . is compromised by personal interest”, the Policy does not provide that an appearance of a conflict of interest exists when a person **could** conclude the existence of a compromised ability (emphasis supplied. See Stipulated Fact 16). [“Would” is used to express a habitual act. “Could” expresses a possibility. See <http://www.differencebetween.net/language/grammar-language/difference-between-would-and-could>]

33. The specific stipulated facts of this contested case do not show that the Petitioner willfully violated the North Carolina Department of Transportation’s Ethics Policy.

34. The specific stipulated facts of this contested case do not show that the Petitioner engaged in conduct unbecoming a State Employee that is detrimental to State Service.

35. The specific stipulated facts of this contested case do not show that the Petitioner engaged in conduct for which no reasonable person should expect to receive warning prior to discipline or dismissal.

36. Just cause must be determined on the facts and circumstances of each case. *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 901 (2004) (not every violation of law gives rise to “just cause” for employee discipline). The facts and circumstances of this case require balancing Petitioner’s exemplary work performance career against the conduct. Any reasonable weighing of this balance would determine that equity and fairness would not be served by dismissing Petitioner. *See, e.g., Kelly v. N.C. Dep’t of Env’t & Natural Res.*, 192 N.C. App. 129, 664 S.E.2d 625 (2008) (employees’ misdemeanor off-duty violations of fin fish laws administered by Department not just cause for disciplinary 5-day suspension without pay for unacceptable personal conduct). Termination of Petitioner’s employment would not have been “just”.

37. Application of *Carroll* and the *Warren* three-part test for determining whether just cause existed for terminating Petitioner’s employment leads me to the conclusion that firing him was not just under the specific facts and circumstances of this case. Petitioner had a very satisfactory work record for almost twenty-seven years. Petitioner sought and was approved for secondary employment as a fireman in his local community. A local fireman helping his teacher wife by servicing fire extinguishers, with no findings that it affected the performance of his DMV duties, did not constitute serious/substantial misconduct justifying his being dismissed.

38. Based upon the specific stipulated facts and circumstances of this case, the Respondent did not have just cause to terminate Petitioner’s employment. Per *Carroll*, it was not just.

BASED UPON the foregoing Stipulated Facts and Conclusions of Law, the undersigned renders the following:

FINAL DECISION

5. Petitioner shall be reinstated to the position from which he has been removed, with the understanding that he has no secondary employment approval going forward for activities involving LFE and businesses, firms or institutions which are regulated by his employer.
6. Petitioner shall be given, from February 5, 2016, until his reinstatement, back pay and restoration of benefits (retirement, sick leave, annual leave, bonus leave, and comp time) to which he was and would have been entitled had he not been fired.
7. With regard to back pay owed to Petitioner, Respondent shall enjoy a credit for any annual leave and bonus leave payout Petitioner received upon termination.
8. Petitioner shall be reimbursed for up to \$7,500 in fees paid to his attorney.

NOTICE

Pursuant to N. C. Gen. Stat. 126-34.02, any party wishing to appeal this Final Decision may commence such by appealing to the North Carolina Court of Appeals as provided in N. C. Gen. Stat. 7A-29(a). The party seeking review must file such appeal within thirty (30) days after receiving a written copy of the Final Decision.

This the 6th day of September, 2016.

Fred G Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 OSP 05294

<p>George Wes Little Jr Petitioner, v. Department of Transportation Respondent.</p>	<p style="text-align: center;">AMENDED FINAL DECISION</p>
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This contested case was commenced by the filing of a petition on May 23, 2016. It was assigned to Senior Administrative Law Judge Fred Gilbert Morrison Jr on May 27, 2016.

STIPULATED FACTS

1. Petitioner George Wesley Little (“Petitioner”) was hired as a law enforcement officer with the DMV License and Theft Bureau in June 1989. Petitioner was promoted to the rank of Lieutenant in 2013. Petitioner remained continuously employed with the Bureau until his termination on February 4, 2016.

2. Law enforcement officers employed by the DMV License and Theft Bureau enforce the rules and regulations governing all NC motor vehicle dealers, vehicle safety and emissions inspection stations, vehicle towing and storage facilities, and vehicle repair businesses within their assigned District. Describing a dealer audit by License and Theft Bureau Inspectors, Petitioner explained, “We’d go in and inspect records, and look at cars to see if they were inspected, look at their title files, and their history, check salesmen license, their dealer plates.”

3. The Districts in the License and Theft Bureau were realigned in September 2014 to match the existing Districts for Driver’s License offices. Prior to the September 2014 realignment, Petitioner was assigned to District VI, which was headquartered in Charlotte and encompassed Moore, Montgomery, Richmond, Anson, Union, Mecklenburg, Cabarrus and Stanly Counties. After the realignment, Petitioner’s duty station was transferred to District II, which is headquartered in Fayetteville and encompasses Bladen, Brunswick, Columbus, Cumberland, Duplin, Hoke, Moore, New Hanover, Richmond, Robeson, Sampson and Scotland Counties. At all times during his employment, Petitioner’s assigned territory included Moore County.

4. Until the investigation and resulting disciplinary action taken against Petitioner that is the subject matter of this proceeding, Petitioner’s approximately 27 year career with the DMV License and Theft Bureau was without blemish. His performance reviews from his personnel file reflect consistently satisfactory or above satisfactory reviews, as follows:

- April 2002-March 2003 = Good
- April 2003-March 2004 = Very Good
- April 2004-March 2005=Very Good
- April 2005-March 2006 = Very Good
- April 2006-March 2007 = Very Good
- April 2007-March 2008 = Outstanding
- April 2008-March 2009 = Outstanding
- April 2009-March 2010 = 2.2/3 Meets Expectations
- April 2010-March 2011 = 2.2/3 Meets Expectations
- April 2011-December 2011 = 2.4/3 Meets Expectations
- January 2012-December 2012 = 2.6/3 Meets Expectations
- January 2013-April 2013 = 2.6/3 Meets Expectations
- May 2013-December 2013 = 2.3/3 Meets Expectations
- January 2014-June = 2.5/3 Meets Expectations

5. Petitioner's wife Teresa Hall Little decided to start a fire extinguisher business in 2008, and the articles of organization for her limited liability company, Little Fire Extinguisher, LLC ("LFE"), were filed on June 2, 2008. Those articles of organization list Teresa Hall Little as the LFE's Registered Agent. LFE has filed an annual report with the Secretary of State's office every year from 2009 – 2016. Each such annual report lists Teresa Hall Little as LFE's registered agent. None of the documents on file with the Secretary of State's office regarding LFE reference Petitioner. Petitioner's wife had no formal fire training other than what Petitioner had taught her and, as described by Petitioner, "from what we learned from another business that was already [running a fire extinguisher business]."

6. LFE has operated continuously since its formation in 2008. LFE has never been profitable, but Petitioner hoped that LFE would become profitable. Petitioner's wife works for the school system and started LFE with the intention that she would eventually be able to quit her job with the school system and operate LFE full-time. Thus far, that has not happened.

7. LFE sells fire extinguishers and also services them. The fire extinguishers LFE services typically need inspection/service once a year. As such, unless a customer was a new customer and required new fire extinguishers, it is typical that LFE will service each of its existing customers' fire extinguishers once per year. LFE's charges for this yearly service begin at \$25-\$30 and up, depending on the number of fire extinguishers needing to be serviced.

8. Petitioner has never been an employee, officer, or manager of LFE. He has never received any direct compensation from LFE. Petitioner and his daughter do however help out with the business. While employed with the DMV License and Theft Bureau, Petitioner serviced fire extinguishers for LFE an estimated 4-5 times each month. While on his lunch break at DMV in Charlotte, Petitioner would sometimes stop and pick up "emergency products, fire extinguishers, you name it, safety products" for LFE. Petitioner transported those products in his state-owned vehicle. Other than transporting materials purchased for LFE in his state-owned vehicle, Petitioner did not conduct LFE business on state time.

9. LFE's customers included many different kinds of businesses, as nearly any commercial building is required to have fire extinguishers. As such, LFE's customers included enterprises such as retail establishments, professional offices, and warehouses. LFE's customer base also included car dealerships, including the following Moore County car dealerships: Pinehurst Toyota, Paco's Auto Sales, Pinehurst Hyundai, Leith Honda Aberdeen, On Point Auto LLC, Pinehurst Nissan, Pinehurst Kia, Leith Chrysler Dodge Jeep Ram, Black's Truck Sales, Southern Pines Chevrolet Buick Pontiac GMC, Kirk's Auto Sales, and Southern Pines Auto Sales.

10. Petitioner never completed a secondary employment request form for his assistance with LFE duties. He contends that he did not believe he was required to do so because he did not receive any compensation and because the work was not regular and continuous.

11. During Petitioner's employment with Respondent, he completed secondary employment requests on the following dates:
- a. 12/20/1990 for the Moore County ABC Board
 - b. 2/26/1992 for the Moore County ABC Board
 - c. 1/27/1993 for the Moore County ABC Board
 - d. 2/20/1997 for Southern Pines Volunteer Fire/Rescue
 - e. 1/23/2007 for Southern Pines Fire and Rescue
 - f. 1/16/2008 for Southern Pines Fire and Rescue
 - g. 12/16/2008 for Southern Pines Fire and Rescue
 - h. 12/30/2009 for Southern Pines Fire and Rescue
 - i. 1/5/2011 for Southern Pines Fire and Rescue
 - j. 12/28/2011 for Southern Pines Fire and Rescue
 - k. 12/31/2012 for Town of Southern Pines Fire Department
 - l. 1/29/2014 for Southern Pines Rescue
 - m. 1/14/2015 for Town of Southern Pines Fire Department
 - n. 12/31/2015 for self-employment (CPR classes for 2 companies and shooting fireworks shows for 3 companies)
 - o. 12/31/2015 for Southern Pines Rescue

12. From early 2008-late 2008, Petitioner's supervisor in District VI was Captain Chuck Ervin. After the retirement of Captain Ervin, Captain Ralph Smith was Petitioner's supervisor in District VI until late 2009. Lieutenant Brian Hawkins was acting supervisor in District VI after the departure of Captain Smith. With regard to Captain Ervin, Petitioner testified, "I don't know. I might have asked him about doing stuff with [LFE]. I mean -I mean, I - you know, asked him what was going on, I wasn't drawing a paycheck out of it or whatever, so I didn't get compensated, so I didn't fill out anything." Petitioner is not sure, however, whether any such conversation took place. Similarly, Petitioner testified that if he had conversations with Captain Smith or Lieutenant Hawkins about LFE, such conversations "would have" included him asking about whether he needed to fill out a secondary employment form for LFE if he was not compensated. Again, however, Petitioner could not recall any specific conversations in which the topic was discussed with Captain Smith or Lieutenant Hawkins.

13. Captain Barry Davis was supervisor of District VI from April 2011-April 2012. Petitioner had a conversation with Captain Davis in which he informed Captain Davis that his wife operated a fire extinguisher business. Captain Davis prepared a letter dated March 28, 2016, addressed "To Whom It May Concern" in which he addressed his conversation with Petitioner. That letter reads, in part, "As a matter of courtesy Mr. Little informed me that his wife operated a fire extinguisher business as a sole proprietor. Mr. Little said he received no salary from the business operated by his wife and had no set duties or schedule to assist her with this business." Captain Davis later signed a sworn statement indicating that Petitioner did not inform him during that conversation that he performed any duties with LFE and instead indicated that he had no involvement whatsoever in the business. Petitioner contends, but Respondent denies, that Petitioner informed Captain Davis that he performed occasional tasks for LFE but that he had no set, regular duties. Based on what Mr. Little told Captain Davis, Captain Davis advised Petitioner that he did not see the need for Petitioner to complete a request for secondary employment form because Petitioner was not "gainfully employed" with LFE. Petitioner did not tell Captain Davis that he would be helping his wife service fire extinguishers at car dealerships, and Captain Davis, in his sworn statement, indicated that he would not have given permission for Petitioner to do so. Specifically, Captain Davis swore, "Had I known that Inspector Little was servicing fire extinguishers in car dealerships regulated by the License and Theft Bureau, regardless of whether he was being paid, I would have adamantly forbid it. I firmly believe that servicing fire extinguishers in dealerships regulated by the Bureau creates a conflict of interest." Petitioner does not recall that LFE had any car dealership customers as of the time of this conversation with Captain Davis.

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28. The Parties have stipulated to the facts as stated herein above and consent to decision based on the same without holding a fact-finding hearing.

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2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and this matter is properly before OAH for consideration.
3. Respondent contends that Petitioner was dismissed for just cause while Petitioner contends that he was discharged without just cause in violation of N.C. Gen. Stat. § 126-35. Petitioner seeks reinstatement, back pay, restoration of benefits, and attorney's fees.
4. Petitioner is a "career State employee" as defined in N.C. Gen. Stat. § 126-1.1(a)(2). As a career State employee, Petitioner could be dismissed for disciplinary reasons only for "just cause" and only in accordance with the requirements of N.C. Gen. Stat. § 126-35 and Section .0600 of Subchapter 1J of Title 25 of the North Carolina Administrative Code. N.C. Gen. Stat. § 126-35; 25 N.C.A.C. 01J .0604, 25 N.C.A.C. 01J .0608, and 25 N.C.A.C. 01J .0613.
5. Just cause for discipline or dismissal includes unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b)(2). Unacceptable personal conduct includes conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; the willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 01J .0614(8)(a), (b), (d), and (e).
6. Determining whether the employee engaged in the conduct the employer alleges is the first of the three steps for determining whether just cause for discipline exists. *Warren v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 770, 726 S.E.2d 920, 925 (2012). Dismissal based on personal conduct requires substantial misconduct of the individual who is dismissed. E.g., *Poarch v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 1191, 741 S.E.2d 920, 315 (2012), rev. denied 2012 N.C. LEXIS 1030, 735 S.E.2d 174 (on-duty sexual misconduct of highway patrol officer); *Granger v. University of N.C.*, 197 N.C. App. 699; 678 S.E.2d 715 (2009) (addressing co-workers with racially charged language); *Brunson v. N.C. Dep't of Correction*, 152 N.C. App. 430, 567 S.E.2d 416 (2002) (case worker held in contempt of court while on-duty).
7. The second step of the *Warren* three-part test is to determine whether the employee's conduct falls within one of the categories of unacceptable conduct provided by the Administrative Code. *Warren* at 775, 726 S.E.2d 925.
8. The third step of the *Warren* test is to determine whether the conduct amounted to just cause for the disciplinary action taken. *Warren* at 775, 726 S.E.2d 925. A commensurate discipline approach applies in North Carolina; unacceptable personal conduct does not necessarily establish just cause for all types of discipline. *Id.* Unacceptable personal conduct is

misconduct of a serious nature and does not encompass technical violations of statute or official duty without a wrongful intention. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E. 2d 888, 901 (2004).

9. Petitioner's servicing fire extinguishers for LFE did not constitute "gainful off-duty employment" as that term is used in The Division of Motor Vehicles License and Theft Bureau Policy Manual Directive Number 2.03 – Secondary Employment (DMV Secondary Employment Directive) under the specific stipulated facts of this contested case.

10. Petitioner's servicing fire extinguishers for LFE in car dealerships over which he had regulatory oversight did not create an actual conflict of interest with his responsibilities as a License and Theft Bureau officer under the specific stipulated facts of this contested case.

11. In defining the term "willful", Black's Law Dictionary (Fifth Edition) states that "[a]n act . . . is 'willfully' done, if done voluntarily and intentionally **and with the specific intent to do something the law forbids . . . ; that is to say, with bad purpose either to disobey or to disregard the law** (emphasis supplied).

12. The specific stipulated facts of this contested case show that the Petitioner did not willfully violate the DMV Secondary Employment Directive. Petitioner has never been an employee, officer, or manager of LFE; has never received any direct compensation from LFE (Stipulated Fact 8), and had no set duties or schedule to assist his wife with the LFE business (Stipulated Fact 13).

13. While DOT Ethics Policy (Policy) provides that "[a]n appearance of a conflict of interest exists when a reasonable person **would** conclude from the circumstances . . . that the employee's ability . . . is compromised by personal interest", the Policy does not provide that an appearance of a conflict of interest exists when a person **could** conclude the existence of a compromised ability (emphasis supplied. See Stipulated Fact 16). ["Would" is used to express a habitual act. "Could" expresses a possibility. See <http://www.differencebetween.net/language/grammar-language/difference-between-would-and-could>]

14. The specific stipulated facts of this contested case do not show that the Petitioner willfully violated the North Carolina Department of Transportation's Ethics Policy.

15. The specific stipulated facts of this contested case do not show that the Petitioner engaged in conduct unbecoming a State Employee that is detrimental to State Service.

16. The specific stipulated facts of this contested case do not show that the Petitioner engaged in conduct for which no reasonable person should expect to receive warning prior to discipline or dismissal.

17. Just cause must be determined on the facts and circumstances of each case. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 901 (2004) (not every violation of law gives rise to "just cause" for employee discipline). The facts and

circumstances of this case require balancing Petitioner's exemplary work performance career against the conduct. Any reasonable weighing of this balance would determine that equity and fairness would not be served by dismissing Petitioner. *See, e.g., Kelly v. N.C. Dep't of Env't & Natural Res.*, 192 N.C. App. 129, 664 S.E.2d 625 (2008) (employees' misdemeanor off-duty violations of fin fish laws administered by Department not just cause for disciplinary 5-day suspension without pay for unacceptable personal conduct). Termination of Petitioner's employment would not have been "just".

18. Application of *Carroll* and the *Warren* three-part test for determining whether just cause existed for terminating Petitioner's employment leads me to the conclusion that firing him was not just under the specific facts and circumstances of this case. Petitioner had a very satisfactory work record for almost twenty-seven years. Petitioner sought and was approved for secondary employment as a fireman in his local community. A local fireman helping his teacher wife by servicing fire extinguishers, with no findings that it affected the performance of his DMV duties, did not constitute serious/substantial misconduct justifying his being dismissed.

19. Based upon the specific stipulated facts and circumstances of this case, the Respondent did not have just cause to terminate Petitioner's employment. Per *Carroll*, it was not just.

BASED UPON the foregoing Stipulated Facts and Conclusions of Law, the undersigned renders the following:

FINAL DECISION

1. Petitioner shall be reinstated to the position from which he has been removed, with the understanding that he has no secondary employment approval going forward for activities involving LFE and businesses, firms or institutions which are regulated by his employer.
2. Petitioner shall be given, from February 5, 2016, until his reinstatement, back pay and restoration of benefits (retirement, sick leave, annual leave, bonus leave, and comp time) to which he was and would have been entitled had he not been fired.
3. With regard to back pay owed to Petitioner, Respondent shall enjoy a credit for any annual leave and bonus leave payout Petitioner received upon termination.
4. Petitioner shall be reimbursed for up to \$7,500 in fees paid to his attorney.

NOTICE

Pursuant to N. C. Gen. Stat. 126-34.02, any party wishing to appeal this Final Decision may commence such by appealing to the North Carolina Court of Appeals as provided in N. C. Gen. Stat. 7A-29(a). The party seeking review must file such appeal within thirty (30) days after receiving a written copy of the Final Decision.

This the 6th day of September, 2016.

Fred G Morrison Jr.
Senior Administrative Law Judge