

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 OSP 04775

Matthew Garrett Ward Petitioner, v. North Carolina Department of Insurance Respondent.	FINAL DECISION
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This contested case was heard on April 4, 5, 6, 18, 19, 20, 21 and 22, 2022, at the Office of Administrative Hearings in Raleigh, North Carolina, by Michael C. Byrne, Administrative Law Judge.

APPEARANCES

The McGuinness Law Firm
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PETITIONER'S MOTIONS IN LIMINE

Petitioner's first Motion in Limine sought to confine the hearing to the specific allegations asserted in the dismissal letter as required by N.C.G.S. 126-35. The Tribunal has confined the determination of this case to the admissible evidence to the allegations set forth in the dismissal letter as per N.C.G.S. 126-35.

Petitioner's second Motion in Limine sought to preclude admission of polygraph evidence concerning a polygraph performed on Petitioner on June 18, 2021. This motion was granted insofar as the results of polygraph were concerned, although the parties were permitted to acknowledge that a polygraph examination of the Petitioner did occur. The parties were thereafter instructed to

redact any reference to the results of the polygraph from exhibits admitted into evidence, and witnesses were instructed not to refer to the result of the polygraph examination in any way. The Tribunal has placed no weight or consideration on the results of the polygraph examination of the Petitioner in this matter and has drawn no adverse or other inference based on the polygraph examination of the Petitioner.

EVIDENTIARY MOTION

Petitioner made a general objection at the close of Respondent’s case in chief, pursuant to N.C.G.S. 150B-29 and Rule of Evidence 403, seeking to exclude inadmissible evidence and seeking to have the hearing officer decide the case based on whatever evidence is deemed admissible and reliable. (T. 1618-1619). The Tribunal took the general objection under consideration and noted that he would consider evidence appropriately based on N.C.G.S. 150B-29.

PETITIONER’S MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE (Rule 41(b))

Petitioner made a motion at the close of Respondent’s case in chief to dismiss Respondent’s case for insufficient evidence. (T. 1622-1646). The Tribunal denied the motion without prejudice with leave to renew the motion at the close of all evidence. At the conclusion of all evidence, Petitioner renewed his motion to dismiss for insufficient evidence. The Tribunal took that motion under advisement. After due consideration, that motion is **DENIED**.

ISSUE

Whether Respondent dismissed Petitioner, a career status State employee subject to the North Carolina Human Resources Act, without just cause.

WITNESSES

For Petitioner:

Matthew Garrett Ward
Christopher Guill

For Respondent:

Carmi Guyette
Adam Gelo
Wayne Lamm
Adam Dunn
Will Mayo
Mitch Lanphier
Brad Jenkins
Jeremy Landeck
Elizabeth Langdon

Frank Rodriguez
Latisha Allen
Marty Sumner

EXHIBITS

Petitioner's Exhibits 1-19 and 24-26 were admitted into evidence:

1. Petitioner's NCDOI Performance Evaluations
2. Respondent's Discovery Responses
3. Glock 43X Pistol Specifications and Data
4. Photos of Glock Model 43X
5. Ballistics Report of Josh Wright
6. Garrity Interview Transcript of Adam Dunn
7. Garrity Interview Transcript of Bradley Jenkins
8. Garrity Interview Transcript of Jeremy Landeck
9. Garrity Interview Transcript of Elizabeth Langdon
10. Garrity Interview Transcript of Mitchell Lanphier
11. Garrity Interview Transcript of Will Mayo
12. Garrity Interview Transcript of Frank Rodriguez
 - a. Written memorandum of Frank Rodriguez
13. Written memorandum of Mitchell Lanphier
14. Written memorandum of Jeremy Landeck
15. NONE
16. Written memorandum of Elizabeth Langdon
17. Internal Affairs Interview Notes (taken by Latisha Allen) of Tim Mehus
18. Job description of Marty Sumner
19. Safariland ALS Holster
20. NONE
21. NONE
22. NONE
23. NONE
24. Internal Affairs Interview Notes (taken by Latisha Allen) Statement Clarification of Jeremy Landeck
25. Emails regarding investigatory pay with leave letter
26. Frank Rodriguez's computer drawn markings on Respondent's Ex. 1

Respondent's Exhibits 1-26 and 28-38 were admitted into evidence:

1. Overview of Nash Community College Firing Range Parking Lot and Building
2. Photo – View of Carmi Guyette's Office Window from Firing Range Parking Lot
3. Photo – View from Carmi Guyette's Office Window of Firing Range Parking Lot
4. Photo – View from road looking east towards parking lot and building
5. Photo – View from driveway looking south-southeast towards building
6. Photo – View from building looking southwest towards traffic circle
7. Photo – View from building looking south towards road

8. Photo – Grassy area behind Matthew Ward’s and Jeremy Landeck’s vehicles (morning of May 20, 2021)
9. Photo – Back of Adam Dunn’s SUV and front of Jeremy Landeck’s vehicle (morning of May 20, 2021)
10. Emails between Commander Latisha Allen and Carmi Guyette
11. May 20, 2021 Firearms Training sign-in sheet
12. Fraud Control Group Org Chart
13. Adam Dunn’s hand-drawn diagram of cars in parking lot (submitted with written statement)
14. Computer Diagram of parking lot showing CID vehicle locations on the morning of May 20, 2021
15. Computer Diagram showing positions of vehicles and CID officers
 - a. Overview
 - b. Close-up view
16. May 20, 2021 Email from Marty Sumner requesting statement
17. Photo – Taken by DC Frank Rodriguez prior to scheduled training (morning of May 20, 2021)
18. Written Statement of Adam Dunn
19. Adam Dunn’s computer-generated diagram of where people were at AD event (submitted with written statement)
20. Photos of projectile found in parking lot (3)
21. Written Statement of Will Mayo
22. Written Statement of Mitchell Lanphier
23. Written Statement of Bradley Jenkins
24. Written Statement of Jeremy Landeck
25. Written Statement of Liza Langdon
26. Photo – Liza Langdon’s arm abrasion from May 20, 2021
27. NOT ADMITTED INTO EVIDENCE
28. Written Statement of Frank Rodriguez
29. Internal Affairs Report (Confidential Personnel Record; with redactions per Judge Byrne’s ruling)
30. Matthew Ward’s Position Description as of May 20, 2021
31. Dismissal Letter and Attachments (Confidential Personnel Record)
 - a. Dismissal Letter (with redactions per Judge Byrne’s ruling)
 - b. Index to Attachments and Bates Stamped Attachments (with Redactions per Judge Byrne’s ruling)
32. OFAD and Attachments (currently a Confidential Personnel Record)
 - a. OFAD
 - b. Bates Stamped Attachments (except Attachment 4, which is omitted per Judge Byrne’s ruling)
33. Timeline of Relevant Events (Illustrative exhibit)
34. CID General Order 2
35. Glock Website Information
 - a. G43X information <https://us.glock.com/en/pistols/g43x-us>
 - b. Manufacturing information <https://us.glock.com/en/LEARN/GLOCK-Pistols/Advanced-manufacturing>

36. Petitioner's Discovery Responses
37. Marty Sumner's Handwritten Questions for Garrity Interviews
38. Petitioner Matthew Ward's Garrity Interview transcript (currently a Confidential Personnel Record)

BURDEN OF PROOF

The burden was on Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct. N.C.G.S. 126-34.02; N.C.G.S. 126-35; N.C.G.S. 150B-25.1.

EXPERT WITNESSES

There was considerable testimony in this contested case on the subject of the location, sound, origin, and other aspects of an alleged gunshot. All witnesses testifying on this subject had varying degrees of experience and familiarity with firearms, and all persons present at the scene of the incident giving rise to this case had professional experience and training with firearms. However, no witness in this case was qualified or tendered as an expert in any field, including but not limited to firearms or ballistics.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, including documents admitted into evidence, the Tribunal makes the following **FINDINGS OF FACT**. In making the findings of fact, the Tribunal has weighed all the admissible evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know, or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in this contested case.

Parties and Witnesses

1. Petitioner Matthew Garrett Ward ("Petitioner") worked as Special Agent for Respondent North Carolina Department of Insurance ("Respondent") prior to his dismissal on July 23, 2021, due to alleged acts of unacceptable personal conduct stemming from a claimed accidental discharge of a firearm at Nash Community College on May 20, 2021 ("the Incident"). Except as otherwise found, Petitioner was a credible witness.

2. Christopher Guill ("Guill") was a character witness for Petitioner. While Guill was familiar with Petitioner's background, Guill was not present for the Incident and thus witnessed nothing connected with it. Except as otherwise found, Guill was a credible witness.

3. Carmi Guyette ("Guyette") is a Professor of Criminal Justice, Forensic Science, and Crime Scene Investigation at Nash Community College. Guyette was present at Nash

Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Except as otherwise found, Guyette was a credible witness.

4. Adam Gelo (“Gelo”) is Department Chair of Law Enforcement Criminal Justice Training at Nash Community College. Gelo was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Except as otherwise found, Gelo was a credible witness.

5. Wayne Lamm (“Lamm”) is Lead Coordinator for Law Enforcement In-Service Training for Nash Community College. Lamm was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Except as otherwise found, Lamm was a credible witness.

6. Adam Dunn (“Dunn”) is a Special Agent for Respondent’s Criminal Investigations Division (District III) and a Firearms Instructor. Dunn was present at Nash Community College at the time of the Incident and took charge of the scene after the Incident and testified as to what he heard and witnessed regarding the same. Dunn participated in Respondent’s subsequent investigation of the Incident. Except as otherwise found, Dunn was a credible witness.

7. Will Mayo (“Mayo”) is a Special Agent for Respondent’s Criminal Investigations Division (District IV). Mayo was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Mayo participated in Respondent’s subsequent investigation of the Incident. Except as otherwise found, Mayo was a credible witness.

8. Mitch Lanphier (“Lanphier”) is a Special Agent for Respondent’s Criminal Investigations Division (District IV). Lanphier was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Lanphier participated in Respondent’s subsequent investigation of the Incident. Except as otherwise found, Lanphier was a credible witness.

9. Brad Jenkins (“Jenkins”) is a Special Agent for Respondent’s Criminal Investigations Division (District IV). Jenkins was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Jenkins participated in Respondent’s subsequent investigation of the Incident. Except as otherwise found, Jenkins was a credible witness.

10. Jeremy Landeck (“Landeck”) is a Special Agent for Respondent’s Criminal Investigations Division (District IV). Landeck was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Landeck participated in Respondent’s subsequent investigation of the Incident. Except as otherwise found, Landeck was a credible witness.

11. Elizabeth “Leeza” Langdon is a Special Agent for Respondent’s Criminal Investigations Division (District IV). Langdon was present at Nash Community College at the time of the Incident and testified as to what she heard and witnessed regarding the same. Landeck

participated in Respondent's subsequent investigation of the Incident. As discussed below, the Tribunal finds portions of Langdon's testimony not credible.

12. Frank Rodriguez ("Rodriguez") is a Deputy Commissioner over the Criminal Investigations Division of Respondent. Rodriguez was present at Nash Community College at the time of the Incident and testified as to what he heard and witnessed regarding the same. Rodriguez participated in Respondent's subsequent investigation of the Incident. Except as otherwise found, Rodriguez was a credible witness.

13. Latisha Allen ("Allen") is the former Commander for Respondent's Criminal Investigations Division. Allen was not present at Nash Community College at the time of the Incident and did not witness it. Allen initially served as a joint internal affairs investigator for Respondent's internal investigation of the Incident, as her job duties called for and which she had done, by appearances laudably, in the past without assistance. However, Allen was reduced to a secondary role in the investigation due to Senior Deputy Commissioner Marty Sumner, the agency decision-maker, taking over that process. Except as otherwise found, Allen was a credible witness.

14. Marty Sumner ("Sumner") is Respondent's Senior Deputy Commissioner for the Fraud Control Group. Sumner was not present at Nash Community College at the time of the Incident and did not witness it. Though he was the agency decision-maker for Petitioner's dismissal (Res. Ex. 31), Sumner for practical purposes also led Respondent's investigation of the incident, including but not limited to conducting interviews, arranging for Petitioner to be polygraphed, and contracting for ballistic testing of both Petitioner's service weapons and a bullet found at the scene of the Incident. Except as otherwise found, Sumner was a credible witness.

Petitioner's Work and Service History

15. Respondent's Criminal Investigations Division ("CID") is tasked with investigating criminal matters within the scope of Chapter 58 of the North Carolina General Statutes, including insurance fraud. CID Special Agents, as investigators, have subject matter and territorial jurisdiction for the entire state, and are partnered with State and Federal agencies. (Res. Ex. 12,30; T. 979).

16. Rodriguez supervises the approximately fifty (50) sworn law enforcement officers and two non-law enforcement staff who comprise CID. (Res. Ex. 12); T. 978. CID is a division of the Fraud Control Group, headed by Sumner. Id. The District Operations Section of CID is divided into four (4) Districts that correspond to geographical areas of North Carolina. Id.

17. CID Special Agents are sworn law enforcement officers, who are field-based and work primarily independently but often accompany each other in investigative tasks, including conducting interviews of suspects and witnesses and serving search and arrest warrants, which are essential job functions requiring the presence of more than one officer. (Res. Ex. 30).

18. Petitioner attended and graduated from the University of North Carolina at Pembroke with a degree in Sociology and Criminal Justice in 2010. (T. 1648). Petitioner completed his basic law enforcement education training program at Sampson Community College and

finished in 2011. (T. 1650). Petitioner is a sworn law enforcement officer in the state of North Carolina and is certified by the North Carolina Criminal Justice Education and Training Standards Commission. (T. 1650).

19. Petitioner's law enforcement certificate is in good standing, and he earned an Advanced Law Enforcement Certification, the highest level of certification recognized by the Commission. (T. 1651). There has never been any discipline imposed upon Petitioner's Law Enforcement Certification. Id. Petitioner also earned a General Instructor Certification through the Commission. Id.

20. Petitioner began his employment in law enforcement in 2010 as an Inspector with the NC DMV License and Theft Bureau. All evidence before the Tribunal was that Petitioner exhibited honesty and integrity during his 11-year service with DMV (T. 1613-1616, Guell testimony) and the Tribunal so finds as a fact.

21. Petitioner was hired as a Special Agent with District IV of CID on March 7, 2018. Petitioner was assigned to District IV with CID throughout his employment. (Res. Ex. 12, 30). Prior to the Incident leading to this contested case, there is no evidence of any prior disciplinary action against Petitioner, either in his work for Respondent or during his previous employment with DMV.

22. Petitioner placed three years of Petitioner's performance reviews into evidence, covering the time period from 2017 to 2021 (Pet. Ex. 1). Those reviews, barring Petitioner's 2017-2018 rating which was an "N/A" due to insufficient time to evaluate, show overall reviews of at least "Meets Expectations." Id. "Meets expectations" job performance is: "Performance generally meets and occasionally exceeds the defined job expectations and measurements ... An employee performing at this level is dependable and makes valuable contributions to the organization. His/her judgments are sound, and he/she demonstrates knowledge and mastery of duties and responsibilities." Id.

23. Within those evaluations appear numerous laudatory comments from Petitioner's direct supervisors, Lance Foss ("Foss") and later Lawrence Gibson ("Gibson"). Petitioner was, "very accountable in his work." He was "always willing to complete training and improve his personal development." He "acted very professional with consumers." He "act[ed] in a professional, courteous, and ethical manner."

24. For two of the three performance reviews placed into evidence, Petitioner's indirect (next level) supervisor was Sumner, who dismissed Petitioner in 2021 (T. 1522). Sumner was thus familiar with Petitioner's job performance and work ethic, as reviewed by his direct supervisors, during Petitioner's employment with CID (T. 1360).

25. None of Petitioner's performance reviews in evidence raised questions regarding Petitioner's personal or professional honesty, integrity, or professionalism. There was no evidence at the hearing of any prior questions regarding Petitioner's personal or professional honesty, integrity, or professionalism prior to the Incident at issue in this case. All the evidence is to the

contrary; Sumner himself described Petitioner as a “professional, fine, young, experienced officer.” (T. 1557).

26. Petitioner was acclimated with the process of firearms qualification. (T. 1656). He has considerable experience in the use of various handguns. (T. 1656) In each year of his annual firearms requalification, Petitioner has successfully completed each of his annual trainings. (T. 1657). Petitioner has never experienced any failure in firearms qualifications or related training. (T. 1657). Petitioner has never experienced an accidental discharge or a firearm that he was carrying or possessing. (T. 1657).

Incident of May 20, 2021

27. On the morning of May 20, 2021, shortly before 10:00 am, eight sworn law enforcement officers (“the agents”) with Respondent’s Criminal Investigation Division (“CID”) were gathered in the Nash Community College firing range parking lot, waiting to go inside to begin their annual firearms qualification, which was scheduled to begin at 10:00 am.

28. The eight agents at Nash Community College for firearms qualification on May 20, 2021 were: Rodriguez, Dunn, Jenkins, Landeck, Langdon, Lanphier, William Mayo, and Petitioner. See Res. Ex. 11, 12. All were dressed in identical clothing of black shirts featuring a law enforcement badge and khaki or gray “BDU” type uniform trousers. (Res. Ex. 17).¹

29. Rodriguez was the senior ranking officer present. Dunn was the firearms instructor for that day. Petitioner had completed general instructor school, which is one of the requirements to become a firearms instructor, and it was anticipated by CID that Petitioner would eventually become the firearms instructor for District IV. (T. 233). At this time, District IV did not have its own firearms instructor. (T. 153-154). Dunn is a Special Agent in District III. The remaining special agents were from District IV. See Res. Ex. 11, 12.

30. The Nash Community College firing range parking lot is a flat parking lot with approximately twenty-three (23) parking spots. The parking lot is bordered on the north and east sides by a building. The building to the north side of the parking lot contains classrooms and instructors’ offices. The building on the east side contains classrooms and the firing range. Behind the parking spots to the south there is a flat grassy area, behind which were some trees and Eastern Avenue. To the western side of the parking lot is a grassy area, a traffic circle with entrance to the parking lot, and a road. The view between the parking lot and Eastern Avenue is obscured by trees and foliage. (Res. Ex. 6, 7).

31. The firing range parking lot is directly adjacent to both the firing range and the college’s “Advanced Center for Law Enforcement.” The latter is a large, two-story brick building that surrounds the parking lot on two sides and a partial third side in a “J” shape. (Res. Ex. 1, 2, 4). The building is prominently marked as “Advanced Center for Law Enforcement Training.” Id.

¹ “Our standard training uniform is the black polo shirt and gray or silver 511 pants.” Rodriguez Garrity Interview (Pet Ex. 12) at 11.

32. On May 20, 2021, the grass around this area had been recently mowed and was short and dry. There is a row of parking spots on the north side of the parking lot adjacent to the classroom building, and a row of parking spots on the south side of the parking lot adjacent to the grassy area. (Res. Ex. 1, 4-8, 17).

33. The morning of May 20, 2021 was warm, dry, sunny and clear. (Res. Ex. 17, T. 160).

34. The agents were to qualify using their duty-issued 9mm Glock 43X semi-automatic pistols and AR-15 rifles. Jenkins and Rodriguez also brought off-duty weapons for this purpose. The respective weapons were:

- a. Dunn, Lanphier, Landeck, Langdon, Mayo, and Petitioner all had their duty-issued 9mm Glock 43X pistols and their duty-issued AR-15s with them.
- b. Dunn, Lanphier, Landeck, Langdon and Petitioner had their Glock 43X pistols fully loaded with one in the chamber, and fully loaded magazines in their AR-15s with an empty chamber.
- c. Mayo's Glock 43X pistol was fully loaded with one in the chamber. He had a full magazine in his AR-15. On arriving at Nash Community College, Mayo emptied his magazines because he thought they were going to shoot practice ammo. (T. 415-419)
- d. Jenkins brought his personal .40 caliber Glock handgun, his duty 9mm Glock handgun, and his duty AR-15. Both handguns were fully loaded with full magazines and one in the chamber. The AR-15 rifle was loaded with a full magazine, but without one in the chamber. Jenkins had his duty 9mm Glock on his hip in the holster, and never took it out. Jenkins' secondary weapon was in a bag. (T. 615)
- e. Rodriguez was carrying what he uses as his duty weapon, which is a Carolina Arms Group 1911 .45 caliber pistol, on his hip in a holster. (T. 990). He had two range bags. In one range bag, Rodriguez had his M4 rifle, and in his other bag he had the duty-issued Glock 43X 9mm, and a SIG P320 handgun. Both of the handguns in the range bag were stored inside a smaller, zipped bag. Rodriguez was also carrying an ammo box. (T. 991). The weapons were all fully loaded except for the M4 rifle. (T. 991-992)

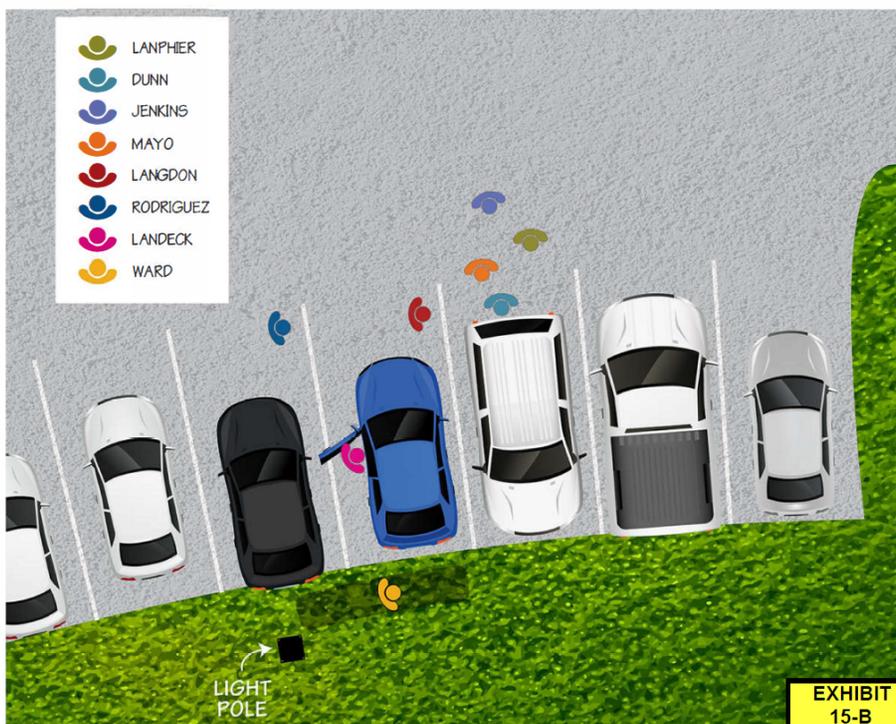
35. Petitioner (as well as other agents) at the time of the Incident had his duty-issued Glock (Pet. Ex. 4) in a "Safariland ALS" holster (Pet. 19). Multiple witnesses testified, and it is so found, that these holsters, when secured and operating properly, render the holstered weapon practically impossible to fire. There was no evidence that Petitioner's Safariland holster (or that of anyone else present) was functioning improperly.

36. The agents arrived at Nash Community College at various times in the hour or so before training was scheduled to begin, beginning at around 9:30 am. Dunn and Petitioner were the earliest arrivals. All of the agents parked in the same row, along the south side of the parking lot. All of the officers except Dunn backed their vehicles into the parking spots so that their trunks

faced south towards the grassy area, trees, and Eastern Avenue. Dunn pulled his Ford Explorer SUV into the parking spot front-first, so his hatch faced north towards the parking lot. (Res. Ex. 8, 9, 13, 14).

37. The agents waited in the parking lot area while Dunn went inside the firing range to set it up for the day. Shortly before 10:00 am, Dunn came outside the building and told the agents to gather their things to come inside. Dunn also told them to come to the back of his SUV to get ammunition. (T. 170).

38. The agents were in various states of either waiting near the back of Dunn's SUV to get ammo or walking towards Dunn's SUV from other areas of the parking lot, when all eight agents heard an unexpected sound that caught their attention. The approximate positions of the agents at the time they heard the sound, as confirmed by their trial testimony, is reproduced on Res. Ex. 15A and 15B. Exhibit 15B is produced herein:



Relative to Dunn (light blue figure in original color-printed exhibit), who was standing directly behind his white State-issued SUV to pass out ammunition, the other agents were:

- (i) Mayo (orange figure) was directly behind Dunn;
- (ii) Lanphier (tan/yellow figure) was behind Mayo and Dunn and slightly to the left of them;
- (iii) Jenkins (purple figure) was behind Lanphier, Mayo, and Dunn, and was slightly to the left of Dunn;
- (iv) Langdon (red figure) was directly to the right of Dunn;
- (v) Rodriguez (dark blue figure) was behind Langdon, some distance from Dunn;

- (vi) Landeck (dark red figure) was forward and to the right of Dunn, and was partially or fully inside his own State-issued vehicle at the time of the sound; and,
- (vii) Petitioner was forward and to the right of Dunn. Id.

39. At the time of the sound, Petitioner was separated from Dunn and all other agents except Landeck by two full size State-issued police vehicles. Id.

40. Most of the agents present almost immediately identified the sound as a gunshot, most likely a handgun. Petitioner and Landeck did not identify the sound as gunshot immediately. Ultimately, neither agent challenged the consensus that the sound was a probable gunshot.

41. Shortly before 10:00 am on May 20, 2021, Guyette, Gelo, and Lamm, who are staff of Nash Community College and sworn law enforcement officers, were in offices on the second floor of the classroom building that borders the north side of the parking lot. They also heard this unexpected sound, and it caught their attention. All three believed that the sound was likely a gunshot. None of the three believed the shot came from inside the range building itself. All three then promptly turned their attention to the parking lot below.

42. Lamm did not see anybody reloading or attempting to reload a weapon. (T. 146) Likewise, Gelo did not see any officer attempting to reload a pistol. (T. 115-116). Gelo did not see anyone looking down, appearing to scoop up anything off the ground or attempting to remove, reload, or replace a magazine. (T. 116) Gelo observed that he had an unobstructed view of the parking lot from his office. Guyette believed that if someone had been looking for a shell casing and reached down and scooped it up, pulled the magazine out of the gun and put another round in there and the magazine back in the gun, he would likely, due to his view of the parking lot, have seen it. He did not. (T. 81-82). Guyette did not see any person discharging a weapon. (T. 91).

43. Neither Guyette, nor Gelo, nor Lamm testified that Petitioner was the source of the gunshot sound they heard, nor did they testify that they saw Petitioner reloading or doing anything suggesting that he had fired a gunshot.

44. While the sound was never definitively established as a gunshot due to the complete lack of physical evidence that a gunshot occurred, the Tribunal finds as a fact that it is more probable than not that the agents and Nash Community College personnel heard a gunshot at the time of the Incident. Accordingly, the sound is referred to as “the gunshot” or “gunshot sound” going forward.

45. All of the agents present at the scene of the Incident had professional training and experience with firearms, some of which (such as Dunn, the firearms instructor, and Rodriguez, with extensive military service) was considerable. However, no expert was tendered or admitted in this contested case with respect to gunshot sourcing or ballistics. The Tribunal accordingly gave the witnesses’ opinions on the source or direction of the gunshot sound appropriate weight as their individual opinions based on their training and experience.

46. The agents provided varying opinions as to the source of the gunshot sound and direction it allegedly came from. The Tribunal summarizes what it considers the most relevant

portions of each agent's opinion (other than Petitioner) as included in (a) the agent's written statement made immediately following the Incident, (b) the agent's statements in his or her subsequent Garrity (internal affairs) interview, and (c) the agent's hearing testimony.

Dunn

Written Statement

47. Dunn's written statement (Res. Ex. 18) states, "I turned back to the vehicle and leaned to get more ammunition, at this time I heard a gunshot from a handgun to my right. The gunshot sounded muffled, then a fraction of a time later I heard what sounded like a round hitting the building." As previously found, the two agents to Dunn's right at the time of the gunshot sound were Langdon, directly to his right, and Rodriguez.

48. Dunn's written statement states, "My initial thought was that we had been shot at." Id.

49. Dunn's written statement does not state that Petitioner was the source or suspected source of the gunshot.

Garrity Interview

50. Dunn's first thought when he heard the gunshot was, "Did somebody take a pop shot at us, or is there a shooter on campus?" Id. at 13.

51. "...[P]rior to this, this is where I feel like my memory may be filling in some gaps, is the amount of time from the shot firing to me hearing something hit, what I thought, was the building or a vehicle or whatever. ... I don't know how long it took for me to hear that thunk." (Pet. Ex. 6. P. 14) Later, Dunn acknowledged that "So that's the part that I don't know if my mind is filling in. I really can't say. I put in my statement a fraction of the time ... but I don't know what that fraction of time was." Id. at 27.

52. "I am confident in saying that the [gunshot] sound came from the right." Id. at 26.²

53. When asked whether there was any way Mayo could have accidentally fired a shot, Dunn stated, "I can't definitively say 100 percent no, because I was leaning in my car and he was here. So I ... [at this point Dunn is interrupted by Sumner]." Id. at 44. Subsequently Dunn says of Mayo, "but I didn't see a gun in his hand." Id.

54. When asked about whether the shot could have come from Langdon, Dunn stated, "Uh huh. She was – so you've got [Mayo] over here, she would have been kind of in a direct line from Will to me, and then [Rodriguez] was behind her." Sumner then asked, "Any possibility of

² Dunn said this directly after Sumner, who asked multiple leading questions in all the Garrity interviews, stated, "Everybody pretty much agrees, looking at that diagram, if you're facing – you were facing the rear of your vehicle. Most everybody agrees that the sound came from the right of your vehicle."

[Langdon firing the shot]?” Dunn replies: “I didn’t see a gun in her hand, again, so that’s. Again, its...” At this point, Sumner cuts him off and begins asking questions about Rodriguez.

55. Dunn did not state in his Garrity interview that he believed Petitioner was the source of the gunshot.

Hearing Testimony

56. After his recollection had to be refreshed with his Garrity interview transcript, Agent Dunn acknowledged that when he first heard the gunshot sound: “When I hear a pop, I immediately come out, and, you know, I’m first thinking, well, are we getting shot at?” (T. 253)

57. Dunn believed the gunshot came from really close by. (T. 173). Dunn believed the gunshot generally came from his right, which was to the right side of his vehicle. (T. 173-174). He could not say whether the sound was more to the front right or back right of him. (T. 181). Based on the direction and nature of the sound, he “knew” it came from the agents. (T. 174). Dunn did not believe the gunshot came from the direction of Jenkins, Lanphier, or Mayo. (T. 181).

58. The sound Dunn heard was not, in his view, consistent with where Langdon was located. (T. 183). Given particularly that he had previously confirmed that Langdon was directly to his right, and that the gunshot came from that same direction, Dunn’s attempted elimination of Langdon’s potential role in the gunshot in his hearing testimony is inconsistent with his Garrity interview statements on that subject, which did not in any way eliminate Langdon as the source except that Dunn did not see Langdon with a weapon.

59. Dunn did not observe any damage to vehicles, the pavement, or buildings that were consistent with a gunshot. (T. 206).

60. Dunn did not hear the sound of a shell casing hitting the pavement after the gunshot. (T. 220)

61. Dunn did not know who the source was for the gunshot sound. (T. 234). No one admitted that they were the source of the accidental discharge. Dunn did not know who the source was for the perceived gunshot sound. (T. 234)

62. Dunn did not testify affirmatively that Petitioner was the source of the gunshot.

Rodriguez

Written Statement

63. “I heard a loud sound, consistent with a gunshot, to my immediate right. A few seconds later, I heard something hit the roof of a vehicle to my left.”³

³ The agent to Rodriguez’s immediate right was Landeck, at the door of his vehicle. Further on, behind Landeck’s vehicle, was Petitioner. (Res. Ex. 15B).

64. Rodriguez's written statement does not allege that Petitioner was the source of the gunshot, nor does it allege anything else about Petitioner.

Garrity Interview

65. "I'm sorry round goes off, a few second later I hear – I hear a noise, which I hit – I believe was the round hitting the roof." (Pet Ex. 12 at 18).

66. "I could not see anyone to my right." Id. at 15.

67. "I have no idea where that round came from and I'm embarrassed by that because I have a lot of years doing the worst and seeing the worst." Id. at 26.

68. "So of all my years and experience, I am positive it was a gunshot, but I cannot tell you it was who or – I can give you a general direction of where it came from, but it was just, you know – so I apologize for that." Id. at 27.

69. Allen asked Rodriguez, "Did you fire the shot – do you know who fired the shot?" Rodriguez answered, "No, ma'am." (Id. at 31).

Hearing Testimony

70. Rodriguez described the direction of the gunshot sound as coming from about 3 o'clock of the direction he was facing. (T. 1002). He stated that the shot was definitely within their group, to his right, and no one else was present. (T. 1009).

71. Rodriguez was asked if he could not identify the two other agents that were to his right, and he responded "Not clearly, no." (T. 1112) Rodriguez confirmed that in his Garrity Interview that he stated, "I don't know who was to my right." (T. 1139). In the hearing, Rodriguez then claimed that it was Landeck and Petitioner to his right. (T. 1140).

72. Rodriguez confirmed that when he was asked in his Garrity interview if he knew who fired the shot, he responded no. (T. 1158).

Jenkins

Written Statement

73. "The rear hatch of [Dunn's] Ford Explorer was open and [Dunn] was handing [Mayo] ammunition from the rear of the vehicle when I heard what sounded like a gun shot [*sic*]." (Res. Ex. 23).

74. Jenkins wrote that Dunn and Lanphier were at the rear of Dunn's vehicle, that Langdon was to Jenkins' right and Rodriguez was to the right of Langdon. Landeck and Petitioner "were in in the area near the front bumper of [Dunn's] Ford Explorer." Id.

75. Jenkins' written statement makes no reference to Petitioner acting suspiciously or acting out of character. Except to identify his belief regarding Petitioner's location, Jenkins in his written statement does not discuss Petitioner at all.

Garrity Interview

76. Jenkins stated that Petitioner and Landeck were in the "grassy area" in front of Dunn's vehicle. (Pet Ex. 7 at 9). Based on the diagram (Res. Ex. 15B) and the testimony of numerous other witnesses, the Tribunal finds that Jenkins' description of Landeck's location is otherwise unsupported by competent evidence and is given little weight.

77. Jenkins stated that his "right ear even experienced ringing, like a heard a loud noise" at the time of the gunshot. Id. at 11.

78. "I didn't witness anyone fire their weapon or try to conceal anything." Id. at 14.

79. "I don't know [who fired the gunshot]. I did not witness it and I can't say 100 percent. Of course, you know, I have my suspicions, and I don't feel bad about talking about it." Id. at 23-24.

80. Jenkins stated that, "And you know, it hurts my feelings that I think it's [Petitioner who fired the shot] him, but I do."

81. Jenkins stated in support of this belief that (i) Petitioner went to use the restroom by himself after the shot which was a "private" restroom instead of the larger restroom inside the building (Id. at 26-27); (ii) Petitioner "made a comment about how bad it could have been" and "kind of shuts down," and (iii) Petitioner "acted very out of character." Id. at 28.

82. Jenkins was further suspicious because Petitioner had referred to the Incident as an "allegation" and was "thinking about a defense" to it in a telephone call the following day. (Id. at 32). In a second telephone call with Jenkins approximately a week later, "[Petitioner] still didn't seem like himself. He just seemed frustrated," and asked Jenkins who he thought might have been responsible for the gunshot. Id. at 33.

83. None of the above conduct or suspicions appear in Jenkins' written statement.

84. Jenkins stated that neither Langdon nor Lanphier could have fired the shot, because "He has his hands full, like [Langdon]" at the time the shot was fired. Id. at 34.

Hearing Testimony

85. Jenkins felt confident that the gunshot came from the right of where he was standing. (T. 625). Jenkins believed the shot was fairly close, within the parking lot, within their group, about 20 feet from him. (T. 626-627). Jenkins saw Rodriguez, Langdon, Dunn, and Lanphier were less than 20 feet from him, at distances ranging from 3 to 14 feet. (T. 627-629). He

believed the gunshot originated from closer than the road or the trees that were to the south of the parking lot. (T. 630)

86. Jenkins, who was standing at the rear of Dunn's SUV, behind Dunn, Mayo, and Lanphier, started scanning immediately after he heard the gunshot, looking for who shot their gun. (T. 630). At the time of the shot, Jenkins saw Lanphier with gear in both hands, Mayo in front of him reaching towards Dunn to get ammunition, and Langdon with her hands full. (T. 630-631). Jenkins did not immediately see Rodriguez at the time of the shot, but as he scanned, he saw Rodriguez with gear in both hands. He didn't see anyone with firearms in their hands. (T. 631)

87. Jenkins did not notice Petitioner or Landeck and did not see anyone else in the parking lot. (T. 632).

88. Jenkins' hearing testimony regarding his suspicions regarding Petitioner was consistent with his claims in his Garrity interview. (T. 756).

89. Jenkins had observed that Petitioner had been walking toward one building that had a restroom and somehow changed directions a little bit and decided to go to another restroom; both restrooms are traditional restrooms and they both had stalls for purposes of privacy. (T. 750). Jenkins acknowledged that there would be several different explanations for why someone may change course and choose one restroom over another. (T. 751).

90. Jenkins did not see anybody fire a shot nor did he see anybody, including Petitioner, engage in any activity that appeared to be reloading. (T. 719-20).

91. Jenkins did not see anyone with a firearm in their hand. (T. 631). Jenkins did not observe any shell casing anywhere when he was looking around. (T. 646). Jenkins did not observe anybody picking up a shell casing. (T. 647). Jenkins did not observe anybody manipulating or topping off their weapons. (T. 647).

Lanphier

Witness Statement

92. "At some point while awaiting rounds I heard a pop sound. The sound did not seem as loud as a typical gunshot, as it was possibly muffled in someone's range bag or holster. I immediately looked up and saw what appeared to be some light smoke or dust in the air immediately behind [Langdon's] leg. The scene appeared to me as if a round was fired very near [Langdon] and struck the ground near her person." (Res. Ex. 22).

93. Lanphier's written statement makes no specific references to Petitioner.

Garrity Interview

94. Lanphier stated that the gunshot came from his right. (Pet. Ex. 10 at 10, 18).

95. Lanphier repeated his written statement comments regarding his seeing “dust” or “smoke” near Langdon’s leg immediately following the gunshot. Id. at 10.

96. Lanphier gave additional details as follows: “To be honest with you, it is hard to describe. But something, like, flashed, and I just – it drew my attention to the back of [Langdon’s] leg, and I can’t recall if it was like a little bit of dust, or it could have been the muzzle. I’m not positive, sir.” Id. at 11. Later in the interview, Lanphier stated that the flash by Langdon’s leg was “low.” Id. at 18.

97. Lanphier stated that “he did hear the bullet hit” a vehicle. Id. at 15, 19. This occurred about ten seconds after he heard the gunshot. Id. at 20.

98. Lanphier did not know who fired the gunshot. Id. at 26.

99. Lanphier did not make any statements expressing suspicion regarding Petitioner.

Hearing Testimony

100. Lanphier did not know who fired the gunshot. (T. 554). He did not testify that he saw Petitioner doing anything at the time of the gunshot.

101. Lanphier believed the gunshot occurred within approximately 10 to 15 feet of him but not so close as to include the agents in the vicinity of Dunn’s vehicle. (T. 524)

102. Lanphier didn’t see any of his colleagues attempt to reload their weapons; he didn’t see anybody pull a magazine out; he didn’t see anybody attempt to reload a magazine by adding a bullet. (T. 579).

103. Lanphier believed that it could easily take 30 to 45 seconds to retrieve a bullet from somewhere, add that to the magazine, put the magazine back in the gun. (T. 580-81).⁴

104. Lanphier reiterated seeing “dust” or “smoke” near Langdon’s leg at the time of the gunshot.

Mayo

Written Statement

105. “[Dunn] grabbed two boxes [of ammunition] and was in the process of extending his hand out to me when I heard a loud noise that was consistent with a gun going off. I immediately turned to my right and observed [Langdon], she appeared startled. [Rodriguez] was behind her. I remember [Langdon] saying that she may have got hit with something on the back of her arm.” (Res. Ex. 21).

⁴ As discussed below, Dunn visually checked the weapons of all agents present shortly after the Incident. No rounds were missing from any agent’s magazine, nor was there any evidence of anyone trying to reload a weapon just after the gunshot.

106. “I assisted in looking for the shell casing. I have no idea where the shot came from. No one has told me that they did it or knew anything about it.” Id.

107. Mayo’s written statement does not discuss anything related to Petitioner’s use of a weapon.

Garrity Interview

108. Mayo stated that the “shot, to me, came from where – the noise, it sounded muffled. But the noise came from where [Langdon] and [Rodriguez] were standing. Not saying it happened there, but from my ear where I was listening, it came that way.” (Pet. Ex. 11 at 12).

109. Mayo confirmed that the gunshot came “To the side of me” (Id. at 13) and “from my right.” Id. at 14.

110. Mayo stated further that he “didn’t hear it [the gunshot] from” the front of Dunn’s vehicle, which is where Petitioner was located (Res. Ex. 15B).

111. Mayo did not hear a bullet striking anything after the gunshot. Id. at 19. He later reiterated, “Yeah, I didn’t hear nothing.” Id. at 20.

112. Mayo did not know who fired the gunshot. Id. at 24.

113. Mayo stated that after the gunshot, “there were two people that were a little bit more worried than the others.” Id. at 32. The first person Mayo identified was Rodriguez, which Mayo found reasonable because “he’s still a supervisor and he wants to make sure everything was going on.” Id. at 32.

114. The second person Mayo identified was Langdon. Mayo’s description of Langdon’s actions and how he found them suspicious occupies more than a page and half of Mayo’s Garrity interview. Summarized, they center on Langdon’s demeanor and emotional responses both just after the gunshot and during the subsequent search for a shell casing or bullet.

Hearing Testimony

115. Mayo did not see anybody with a handgun in their hand following hearing the apparent shot. (T. 446)

116. Mayo did not hear any sound consistent with the mechanism of somebody extracting a magazine out of a weapon and putting it back in the weapon. (T. 484). Mayo did not know who fired the shot.

117. Mayo described the direction of the gunshot sound as coming from his right, around the area where the agents were located. Mayo stated that the sound originated from farther away

than Langdon. (T. 438). He stated it is possible that it originated from where Rodriguez or Petitioner were located. (T. 438-439)

Landeck

Written Statement

118. “I then leaned in [to Landeck’s State-issued car] and reached in to get my two phones which were laying on the center console. As I grabbed them and was easing back out of the car, I heard what sounded like a small firecracker (it had a muffled sound to me). This sound had come from somewhere in front of my patrol car.”⁵ (Res. Ex. 24).

119. “I then realized that [sound] may have been a gunshot. I began looking around but did not see anything unusual or anyone other than us. Somewhere around this time I heard an object hit metal across the parking lot from us. (I’m not sure if it was before or after). I observed like the diagram below, [Rodriguez] was approximately where the green dot is. I observed [Petitioner] behind my patrol car approximately where the orange dot is.” Id.

120. Landeck’s written statement does not discuss any actions by Petitioner regarding use of a weapon.

121. In a subsequent follow up conversation with Allen, Landeck reiterated that he heard the gunshot (which at this point Landeck said did not sound like a gunshot, but rather a small firecracker) coming from the front of his vehicle. “SA Landeck stated that the sound was near the location of Deputy Commissioner Frank Rodriguez.” (Pet. Ex. 24.) In this same conversation, Landeck reiterated that Petitioner was somewhere behind Landeck’s vehicle. Id.

Garrity Interview

122. “The only correction, maybe [to my written statement] is where [Petitioner] was. I know he was behind me but I don’t know if he was right here behind me or right here behind me. I know he was back in this area behind.” (Pet. Ex. 8 at 5).

123. “It wasn’t [Rodriguez] ... because ... it would not have sounded like a snap pop if it was the 223 rifle.”⁶ Id. at 16.

124. Landeck heard a “clink” sound of a possible bullet hitting something approximately ten seconds after hearing the gunshot. Id. at 21-22.

⁵ As shown on Res. Ex. 15B, all cars except Dunn’s were backed into parking spaces. Moreover, Landeck included a diagram showing his car backed in, with Landeck standing beside the car and Petitioner located in the back of the car (Res. Ex. 24).

⁶ This sentence contains ellipsis marks denoting, and exemplifying, Sumner’s frequent interruptions of witnesses in the Garrity interviews.

125. “Question I got, and this is kind of – I’m not trying to step on nobody’s toes and I know it’s – it could be expensive, but why couldn’t we pull barrels out of guns [for ballistics testing?”⁷ Id. at 26.

Hearing Testimony

126. Landeck testified that the shot he heard came from his left toward the front of his vehicle. (T. 851). The sound did not come from the right-hand or rear of his vehicle. (T. 851)

Langdon

Written Statement

127. “I was standing still with both bags still in my hands and my rifle on my back, I saw [Dunn] hand [Mayo] a small box of ammo and then heard a very loud gun shot. I remember scrunching my shoulders up and [Dunn] turning around yelling.” (Rex Ex. 25).

128. “I also felt my right arm sting but did not feel anything hit it.” Id.⁸

129. Langdon’s written statement does not discuss any actions by Petitioner regarding use of a weapon.

130. Langdon’s written statement does not give a direction for the shot.

Garrity Interview

131. Langdon stated that “I thought maybe we had a drive by.” (Pet. Ex. 9 at 10). “I initially thought my God, we just got shot at.” Id.

132. Langdon did not see Landeck or Petitioner at the time of the gunshot. Id. at 9.

133. Langdon could not give any direction for the gunshot. Id. at 17.

134. When Langdon found a bullet, she stated, “Here it is.” Id. at 16.

Hearing Testimony

135. Langdon could not tell what direction that the shot came from. (T. 946)

136. Langdon was the person who actually discovered a bullet in the area. (T. 940).

⁷ This was never done.

⁸ As discussed further below, this claim – that Langdon did not feel anything hit her arm, or that nothing hit her arm – is contradicted by the testimony of multiple credible witnesses and by tangible physical evidence (Res. Ex. 26) and is accordingly found not to be credible.

137. Langdon immediately recognized the sound as a gunshot, is confident that it was a gunshot, and that it was loud. (T. 867). To quantify the sound, she described it as loud enough to make her “scrunch up” and to feel like she was in “some sort of danger.” (T. 871).

138. Dunn and Mayo were directly in front of her within approximately 8-10 feet. (T. 867, 870). Immediately after hearing the gunshot, she looked around and observed Rodriguez close enough to where she could almost touch him. (T. 869-870). She was not aware of where Lanphier, Jenkins, Landeck, or Petitioner were at the time of the gunshot. (T. 870-871).

139. Langdon did not know which direction the gunshot came from. (T. 868). She felt like the sound was close enough that it was right there with the group of special agents. (T. 871). Based on the proximity of the sound, Langdon did not believe that the gunshot originated from Dunn or Mayo, or from Rodriguez. (T. 876).

Aftermath

140. Following the shot, Dunn took charge of the scene and tried to determine if anyone was injured. No one was, barring a mark on Langdon’s arm (of which more below). Dunn sent Langdon inside the building into the restroom to check herself for injuries.

141. Dunn inspected the weapons of every agent present and found no evidence of any weapon having been fired. He found no smell of any primer, no remarkable smell on any of the guns. (T. 349). No ammunition was missing from any weapon. Dunn indicated that there was nothing notable by way of gun powder related odor that he smelled on anybody or anything on the day of the incident. (T. 364).

142. Dunn organized a line search to attempt to find a shell casing. None was found, other than a shell casing found in Rodriguez’s bag. Dunn did not retain the casing, believing that the shell casing was the “wrong” kind of ammunition for that being used that morning. The Tribunal retained the shell casing at the request of Petitioner; neither party requested further testing on that casing.

143. Dunn inspected everybody’s range bags, and he indicated that there were not any powder burns, powder transfer, or a hole in any of the range bags. (T. 222).

144. Dunn believed that given the condition of the grass and the area near Petitioner where the search was conducted, had there been a shell casing, he believed that it would have been discoverable. (T. 208).

145. Dunn did not observe any damage to vehicles, the pavement or buildings that were consistent with a gunshot. (T. 206).

146. Dunn had everyone, all of the officers, get on the grass and he individually went down the line and checked their weapons and their magazines to see if all their ammunition was accounted for. (T. 195). Dunn testified that Petitioner was behind Landeck’s vehicle. (T. 196).

147. Dunn indicated that all of the ammunition was accounted for, with the exception of Mayo's gun as he had already unloaded his magazines prior to checking him but after the gunshots. (T. 197).

148. No shell casing was found in the parking lot during the search period. (T. 1184). Rodriguez acknowledged that they did not search the roof of the building. (T. 1185) Rodriguez did search Eastern Avenue. (T. 1185). Rodriguez testified that nobody searched up on the roof of the building to see if that sound of "metal on metal" heard by multiple agents had been a projectile that came down and hit an HVAC unit or other metal object on the roof. (T. 1198).

149. Dunn repeatedly asked the agents if anyone was responsible for the gunshot. No one claimed responsibility. No person testified that they saw Petitioner fire a shot, reload, pick anything up (such as a shell casing) or manipulate his magazine.

150. Following the gunshot, Langdon had a red mark on her arm. Multiple witnesses testified that Langdon states that something had struck her arm at the time of the gunshot, and the mark on Langdon's arm was photographed (Res. Ex. 26).

151. Subsequently, Langdon claimed that her arm was not struck, but that she scratched herself on her own holster. At hearing, Dunn ultimately acknowledged that the fact that Agent Langdon indicated that she was struck or hit on her right forearm, is not consistent with the subsequent version being offered that she was scratched. (T. 382-384). Dunn acknowledged that he did not hear one single word from Langdon, anything about any scrape by the rear sight of her Glock; she never mentioned that to him. (T. 384). Langdon had told Dunn that she heard the gunshot, her arm got hot, that she felt like she was struck by something and that was her immediate version right after the fact. (T. 385). Dunn acknowledged that the scrape on her arm from the sight on her Glock was inconsistent with what Langdon initially told Dunn. (T. 85).

152. Langdon's subsequent claim and hearing testimony that nothing struck her arm and that she instead "scratched" herself on her holster is not credible. The mark looks like a burn, not a scratch. The skin is reddened, not broken. Langdon did not make this "scratch" claim at the time of the Incident. In examination of Dunn by the Tribunal, Dunn was questioned about Langdon's statement where she indicated that "She heard the gunshot, and her arm got hot. She felt like she was struck by something in her right forearm." (T. 218). Dunn clarified that if someone is hit by a discharged shell casing, that if it "stays on your skin, it will blister because it's hot." (T. 219). It crossed Dunn's mind that Langdon had been hit by a hot ejected shell case, but they were unable to find that shell case. (T. 219).

153. Dunn came across to the Tribunal as a credible and believable professional. So did Rodriguez, who confirmed that not only that Langdon claimed something struck her arm, but that her subsequent claim that nothing did was not consistent with what she said at the time of the Incident. "When she said her arm was grazed, I was very concerned about that." (T. 1034-1035). Rodriguez testified that Langdon said: "I think I felt something graze my arm." (T. 1035). The Tribunal asked Rodriguez whether his impression was that Langdon was saying she felt something "hit her arm" and Rodriguez responded affirmatively. (T. 1035). Rodriguez testified that he observed "maybe a small blemish on her arm." (T. 1036).

154. Mayo testified that Agent Langdon said that “something hurt – something harmed the back of her arm.” (T. 478). Lanphier testified that Langdon “even mentioned that she had a mark or a burn on her arm...” (T. 549).

155. That some sort of mark on Langdon’s arm was related to the gunshot, and not scratch, is further supported by Lanphier’s description of “dust” or “smoke” around Langdon’s leg in the immediate aftermath of the gunshot. Lanphier observed Langdon jerking after the sound of the shot and that “I just see her body shuffle completely.” (T. 589).

156. None of the above means that Langdon herself fired the shot. Multiple witnesses testified she had both hands full at the time of the Incident. However, the change in story regarding the source of Langdon’s injury – particularly as advanced by Sumner in the subsequent Garrity interviews – has the appearance, and gives the Tribunal the impression, of trying to “explain something away.”

157. The significance of Langdon’s injury is not so much that she was (slightly) injured, but rather than if she was struck by something related to a bullet being fired, and this was the sole evidence of that other than the sound itself, that makes it most unlikely that Petitioner could have been responsible as Petitioner was physically separated from Langdon by two large, full-sized police vehicles. Unless, as the Tribunal commented at the hearing, the round supposedly fired by Petitioner had some sort of magical qualities, it is difficult to see how this round would have veered sharply around one or both of those vehicles in order to cause a sort of strike on Langdon’s arm (Res. Ex. 15B).

158. During the parking lot search, Langdon found a bullet (Res. Ex. 20). “Agent Langdon finds the bullet, which is in immaculate condition. It doesn’t look like it’s even damaged hardly.” Lanphier Garrity Interview (Pet. Ex. 10) at 15.

159. From the aggregate of the testimony, the Tribunal finds that most of the agents concluded that the bullet Langdon found was “the” bullet – the one fired by an agent – as opposed to “a” bullet – a bullet lying on the ground outside of a firing range.

160. “We were sure more than one of you heard something hit the car, that dent matches the back side of that projectile to a tee.” Sumner, Rodriguez Garrity Interview (Pet. Ex. 12) at 30. Sumner reached this conclusion on the basis of casting done by a Nash Community College instructor and, by all appearances, on his own beliefs that a “dent” on the car was caused by the bullet in question.

161. The bullet Langdon found was subjected to ballistics examination and analysis testing. (T. 1270-71). A consulting group known as Wright Consulting Group or Ballistics Company was employed for that purpose. (T. 1271). Wright Consulting determined that the projectile had never been fired. (T. 1255) (Pet. Ex. 5). While no one from Wright Consulting testified at the hearing, neither party disputes the ultimate conclusion that the bullet had never been fired.

162. Thus, for purposes of making a factual determination in this case, the bullet Langdon found is irrelevant, except to demonstrate that *there is a complete lack of physical evidence in this case that Petitioner (or anyone else present) fired a round on the date of the Incident, other than the smoke seen around Langdon and the mark on Langdon's arm.*

163. Petitioner volunteered to make an additional weapon that he owned, a Smith and Wesson, available for ballistics testing. (T. 1271). That weapon, as well as Petitioner's State-issued Glock 43X, were submitted to Wright for ballistics testing, but no actual testing of those weapons was done after Wright determined the bullet found by Respondent had never been fired. (T. 1271).

164. At Respondent's direction, Petitioner handed in his computer and cell phone for forensic analysis. The analysis found no relevant evidence related to the Incident in Petitioner's communications or on his computer. (T. 1274).

165. While the trunk of Petitioner's State-issued car was searched after his Garrity interview, no other agent's trunks were searched after their interviews. (T. 1304). Nothing of relevance was found in Petitioner's trunk. (T. 1284).

166. Sumner was present during all of the Garrity Interviews. (T.1368). Those interviews transcripts appear as Petitioner's Exhibits 6-12. Those interview transcripts demonstrate the highly active role that Sumner played in the interviews. Allen was only very minimally involved. The overwhelming bulk of the interviews were conducted by Sumner.

167. Sumner frequently interjected various opinions, beliefs, statements, theories, contended findings, and assertions to the witnesses being interviewed. As Sumner made various statements to the witnesses, he disclosed various parts of the ongoing internal affairs investigation to the witnesses. For example, see Pet. Ex. 6-12; (Dunn) at 23, 28, 29, 30, 31, 32 ("So we have concluded at this point that the bullet y'all found was fired by somebody in your group because of the sound be close enough to ring an ear..."), 34 ("So let me clear that up for you. We also now know [Langdon] did not get hit by anything or she didn't get hit by a piece of hot brass."), 35, 38, 41; Pet. Ex. 7 (Jenkins) at 16 ("Pretty much agreement from everybody we have interviewed that it was a gunshot"), 18 ("Some people described it as having a muffled sound...") ("Several said they heard something metallic hit..."), 19, 20 ("There's no doubt – well, we have concluded that the ding...") ("We have witness statements ... who hears the gunshot"), 22, 24, 25, and 41.

168. Sumner ordered that Petitioner, and no one else, be polygraphed. Allen conducted eight prior internal investigations for Respondent. Some of them led to disciplinary actions. Polygraphs were not used in any of those prior investigations.

169. Allen was aware at the time both that disciplinary action could be appealed and that polygraph results were inadmissible in the courts of North Carolina for any purpose. (T. 760; 1325-26). The Tribunal asked Allen why she would base a portion of the investigation on a technique that she knew to be inadmissible in court. Allen stated that she did not know. (T. 1327). The Tribunal finds this answer not credible, as it is clear that Sumner, who selected the polygraph entity, directed this action. (T. 1327).

170. Despite the conflicting testimony and lack of physical evidence in this case, Respondent determined that Petitioner had fired the shot, and lied about it.

171. Petitioner repeatedly, and in the Tribunal's view credibly, denied that he was the source of any accidental discharge on the date of the Incident.

Factual Determination

172. "Administrative agencies must find facts when factual issues are presented." In re Burke, 368 N.C. 226, 233, 775 S.E.2d 815, 821 (2015). Here, the Tribunal is asked by Respondent to find facts supporting its conclusion that Petitioner had an accidental discharge, and repeatedly lied about it. Petitioner, by contrast, asks the Tribunal to believe his side of the story – that he had nothing to do with any accidental discharge.

173. Ultimately, the Tribunal can do neither. The Tribunal finds that this case, in total, is an example of what is termed by some sources as the "Rashomon Effect."

174. "Rashomon" is a 1950 film directed by Akira Kurosawa. The film deals with an assault on a woman and the murder of her husband. A bandit is accused of the murder, and at his trial, there is the testimony of the bandit, the woman, her dead husband (through a spiritual medium), and a woodcutter who happened to be in the forest at the time of the events. The testimony of each witness is mutually contradictory and self-serving, as each gives his or her version of the events in a way that does not absolve the witness of guilt but allows him or her to appear respectable in the eyes of the audience. "The Rashomon Effect has come to refer to any instance where people perceive the same phenomenon and come away with different ideas and memories about what happened." Anthony Fassano, The Rashomon Effect, Jury Instructions, and Peremptory Challenges: Rethinking Hernandez v. New York, 41 Rutgers L.J. 783, 810-11 (2010).

175. Such it is with this case. Gunshots come from different directions, with different sounds. Some agents think another agent acts suspiciously, while other agents point at different ones. An agent (Langdon) claims that something struck her arm, supported by the testimony of everyone present, – and then claims, under oath, that nothing hit her arm. A bullet initially thought to be "the" bullet turns out to have never been fired at all. Blame is cast on Petitioner – citing things such as his "out of character" actions and because he chose to use a particular restroom – while similar statements regarding the actions of another agent (Langdon) are to all appearances ignored or dismissed.

176. There is nothing regarding Petitioner's personal or professional history that would lead the Tribunal to suspect him of a falsehood. All evidence of Petitioner's character is to the precise contrary.

177. There is zero eyewitness testimony that Petitioner's weapon fired a shot. The three Nash Community College witnesses did not see Petitioner fire a shot. No agent saw Petitioner fire a shot. Likewise, no person saw Petitioner reload his weapon, drop a magazine, or do anything suggesting the absence of a fired round. No person saw Petitioner pick up a shell casing.

178. Most pertinently, there is zero physical evidence that Petitioner experienced a weapon discharge on the date of the Incident. No ammunition was missing from Petitioner's weapons or the weapons of anyone present. Petitioner's handgun was in a holster that makes firing the weapon, per the testimony of all witnesses on the subject, an impossibility. There was no smell of gunpowder, or evidence of powder burns. There was zero relevant evidence found on Petitioner's State-issued phone and computer. There was no evidence of dust or smoke – except near Langdon. No shell casing or bullet (fired) was found, and no evidence of a bullet strike was detected, despite several agents (not all) testifying that they heard a “bullet” hit something.

179. The Tribunal's task in this case is not to solve a mystery, or to determine who – if anyone – among that group of agents fired a shot. It is to determine whether Respondent's finding that Petitioner experienced an accidental discharge in May 2021 is supported by the evidence.

180. Based on consideration of all that evidence, the Tribunal finds that Respondent failed to prove Petitioner experienced an accidental discharge during the Incident. The Tribunal does not know who, if anyone among the agents, fired a shot that day. The Tribunal merely finds that if a shot was fired, Respondent failed to prove that Petitioner was the person who fired it.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case. N.C.G.S. 150B, Article 3; N.C.G.S. 135-48.24.

2. All parties have been correctly designated and there is no question of misjoinder or nonjoinder.

3. All parties received Notice of Hearing in accordance with N.C.G.S. 150B-23(b).

4. To the extent the Findings of Fact contain Conclusions of Law, and vice versa, they should be considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946). The Tribunal need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993). That is particularly applicable in this case, which ultimately turns on one question: did Respondent prove Petitioner fired that gunshot?

5. The burden of proof is on Respondent to show just cause for dismissing Petitioner, a career status State employee subject to the North Carolina Human Resources Act, from employment with Respondent. N.C.G.S. 150B-25.1; N.C.G.S. 126-34.02; N.C.G.S. 126- 35.

6. A “career State employee” is, in pertinent part:

a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:

- (1) Is in a permanent position appointment; and,
- (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the State Personnel Act for the immediate 12 preceding months.

N.C.G.S. 126-1.1; Wetherington v. N. Carolina Dep't of Pub. Safety, 368 N.C. 583, 590-91, 780 S.E.2d 543, 547 (2015).

The Just Cause Framework: Carroll

7. Petitioner, as a career State employee, had a vested property interest conferring a reasonable expectation of continued employment created and protected by State law and further protected by the Due Process Clause of the United States Constitution, as well as Article 1, Section 19 of the Constitution of North Carolina. Peace v. Emp. Sec. Comm'n of N. Carolina, 349 N.C. 15, 321, 507 S.E.2d 272, 277 (1998).

8. A career State employee subject to the North Carolina Human Resources Act may only be “discharged, suspended, or demoted for disciplinary reasons” upon a showing of “just cause.” N.C.G.S. 126-35(a). “Just cause” for the dismissal, suspension, or demotion of a career State employee may be established only on a showing of “unsatisfactory job performance, including grossly inefficient job performance,” or “unacceptable personal conduct.” Harris v. N. Carolina Dep't of Pub. Safety, 252 N.C. App. 94, 102-03, 798 S.E.2d 127, 134, aff'd per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017).

9. This contested case involves only allegations of “unacceptable personal conduct.” “Unacceptable personal conduct” is defined by rule in Title 25 of the North Carolina Administrative Code. N. Carolina Dep't of Just. v. Eaker, 90 N.C. App. 30, 38, 367 S.E.2d 392, 398 (1988), overruled on other grounds by Batten v. N. Carolina Dep't of Correction, 326 N.C. 338, 389 S.E.2d 35 (1990) (Rules promulgated by State Personnel Commission have “force of law” in State personnel cases).

10. “Unacceptable personal conduct” includes:

- (a) conduct for which no reasonable person should expect to receive prior warning;
- (b) job-related conduct which constitutes a violation of state or federal law;
- (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
- (d) the willful violation of known or written work rules;
- (e) conduct unbecoming a state employee that is detrimental to state service;
- (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
- (g) absence from work after all authorized leave credits and benefits have been exhausted; and/or,
- (h) falsification of a state application or in other employment documentation.

25 N.C.A.C. 01J .0614.

11. No complicated analysis of the conduct in this case is required. Respondent determined that Petitioner fired an accidental shot, and repeatedly lied about it to his superiors and throughout an internal investigation. That truthfulness is of the utmost importance to law enforcement officers is well established. Joe T Locklear v. North Carolina Department of Public Safety, 2022 WL 2389874, 21 OSP 01175.

12. The fundamental question in a case brought under N.C.G.S. 126-35 is whether the disciplinary action taken was “just”. Whitehurst v. E. Carolina Univ., 257 N.C. App. 938, 945, 811 S.E.2d 626, 632 (2018). Not every instance of unacceptable personal conduct will “give rise to ‘just cause’ for employee discipline.” Id. at 945, 632.

13. Our Supreme Court emphasizes that “[j]ust 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.” Thus, not every incident of conduct that constitutes a violation of State law, for example, gives rise to just cause for employee discipline. N.C. Dep’t of Env’t & Nat’l Res. v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900-01 (2004) (park ranger violation of State laws regarding speeding and emergency lights not just cause for disciplinary action). “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Carroll at 669, 900.

14. Petitioner’s status as a law enforcement officer does not create a lower standard for his dismissal than for other State employees under the North Carolina Human Resources Act. Whitehurst at 948, 634. In Whitehurst, the employer cited petitioner’s “status as a supervising law enforcement officer” in support of its termination decision. The Court of Appeals rejected this reasoning: “We agree that Whitehurst's position as a law enforcement officer imposed duties upon him which are not commonly shared by other State employees. Nonetheless, Whitehurst is entitled to the exacting protections given to all career State employees pursuant to N.C. Gen. Stat. § 126-35.” Id. at 948, 634.

15. There is no “per se” or “automatic” dismissal of career State employees for unacceptable personal conduct under North Carolina law. In Wetherington v. N. Carolina Dep’t of Pub. Safety, 368 N.C. 583, 780 S.E.2d 543 (2015) (“Wetherington I”), our State Supreme Court specifically rejected the concept of “a fixed punishment of dismissal for any violation” of a given policy. Id. at 592, 548. Such an approach is “antithetical to the flexible and equitable standard described in Carroll,” as “application of an inflexible standard deprives management of discretion.” Id.

16. Lack of just cause may also be established by disparate treatment of employees in disciplinary decisions. Indeed, multiple cases, over many years, have rejected arbitrary and capricious personnel decisions. See, e.g., Toomer v. Garrett, 155 N.C. App. 462 (2002); Owens v. N.C. Department of Public Safety, N.C. Highway Patrol, 245 N.C. App. 230, 782 S.E.2d 787 (2016). Petitioner throughout this case repeatedly described what he described as the arbitrary and unfair nature of the internal investigation leading to his dismissal, and his concerns are not unfounded. However, they are, at least in this case, not ultimately pertinent – the facts simply do

not establish that Petitioner fired the shot, regardless of any slant taken by the internal investigation.

The Just Cause Framework: Truthfulness

17. In addition to its general rejection of “automatic” dismissal, Wetherington I is of specific pertinence to this case, which involves allegations of untruthfulness by a law enforcement officer. So too did Wetherington I, which held, clearly and unambiguously, that the Highway Patrol’s “automatic dismissal” policy for any act of untruthfulness “was an error of law.” Id. at 593, 548. The correct approach was “to allow for a range of disciplinary actions in response” to untruthfulness. Id.

18. After providing the Highway Patrol with a list of required factors in making a proper disciplinary decision, Wetherington I remanded the matter back to the Highway Patrol for reconsideration. Id. The eventual result of that reconsideration was Wetherington v. NC Dep’t of Pub. Safety, 270 N.C. App. 161, 840 S.E.2d 812, review denied, stay dissolved, 374 N.C. 746, 842 S.E.2d 585 (2020) (“Wetherington II”).

19. In Wetherington II, the Court of Appeals emphasized that neither it nor the Supreme Court “suggest that the Highway Patrol should tolerate and foster a reputation for lack of honesty among its personnel, but only that some instances of untruthfulness may call for some discipline short of dismissal.” Id. at 746, 585 (internal citations omitted). Indeed, Wetherington II emphasized, and this Tribunal fully agrees, that “law enforcement officers must uphold the highest standards of truthfulness, particularly in the course of their official duties.” Id. at 746, 585.

20. However, in line with Wetherington I, Wetherington II again held (in accord with Carroll on unacceptable personal conduct generally), that not all acts of untruthfulness by law enforcement officers justify dismissal. Id. at 161, 835 (“Respondent has never been able to articulate how this particular lie [over the manner in which the trooper lost his campaign hat] was so harmful.”).

21. Wetherington I is also in accord with Carroll’s holding that just cause “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.” Carroll at 649, 699, 900-01 (emphasis supplied). Proven material untruthfulness by sworn law enforcement officers. is unacceptable personal conduct. However, not every incident of unacceptable personal conduct justifies dismissal. Therefore, neither does every incident of untruthfulness.

Analysis: The Warren Test and the Wetherington Factors

22. Having reviewed the just cause framework, the Tribunal turns to analysis of whether just cause exists for Petitioner’s dismissal. Our State Supreme Court and Court of Appeals provide clear instructions on how to conduct this analysis.

23. After reiterating Carroll’s holding that “not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline” (Id. at 382, 925),

Warren I announced a framework, now known as the “Warren test,” to analyze unacceptable personal conduct cases in accord with the Supreme Court’s direction in Carroll:

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

Warren at 382-83, 925. Simplified, this test is:

- (i). Did the employee engage in the conduct?
- (ii). If so, was it unacceptable personal conduct?
- (iii). If so, was that unacceptable personal conduct just cause for the disciplinary action imposed?

See Bulloch v. N. Carolina Dep’t of Crime Control & Pub. Safety, 223 N.C. App. 1, 5, 732 S.E.2d 373, 377 (2012); disc rev. denied, 418, 735 S.E.2d 178 (2012); N. Carolina Dep’t of Pub. Safety v. Shields, 245 N.C. App. 131, 781 S.E.2d 718 (2016); dis. rev. denied, 784 S.E.2d 176.3 (“A just and equitable determination of whether the unacceptable personal conduct constituted just cause for the disciplinary action taken requires consideration of the facts and circumstances of each case, including mitigating factors.”)

24. With respect to “balancing the equities,” the principles of “equity and fairness” (Carroll) are not “balanced” between agency and employer. Rather, as Judge Zachary wrote in Whitehurst, “just cause” is a concept “embodying notions of equity and fairness” *to the employee*. 257 N.C. App. 938, 946-47, 811 S.E.2d 626, 633 (2018) (italics in original).

25. Whether just cause existed for disciplinary action against Petitioner is a question of law, reviewed de novo. In that review, the Tribunal owes no deference to Respondent's just cause decision or its reasoning therefore and is free to substitute its judgment for the agency's on whether just cause exists for the disciplinary action taken. Harris at 102, 134.

26. Further, if the matter satisfies the first two prongs of Warren, but just cause does not exist for the particular disciplinary action imposed by the agency, the Tribunal may impose an alternative sanction within the range of allowed dispositions - demotion, suspension without pay,

or written warning. Id. at 109, 808. See also Davis v. NC Dep't of Health & Hum. Servs., 269 N.C. App. 109, 836 S.E.2d 344 (2019) (ALJ acted “well within its statutory authority to ‘[r]einstate any employee’ and ‘[d]irect other suitable action to correct the abuse’ resulting from respondent’s erroneous decision” in reversing dismissal and imposing two-day suspension without pay); see also N.C.G.S. 126-34.02(a)(3).

27. Use of the Warren test as the proper analytical method for determining just cause in “unacceptable personal conduct” cases is well established. N. Carolina Dep’t of Pub. Safety v. Tucker, 241 N.C. App. 399, 775 S.E.2d 36 (2015); disc. rev. denied, 782 S.E.2d 895 (2016); Harris v. N. Carolina Dep’t of Pub. Safety, 252 N.C. App. 94, 96, 798 S.E.2d 127, 130, aff’d per curiam, 370 N.C. 386, 808 S.E.2d 142 (2017); Hardy v. N. Carolina Cent. Univ., 260 N.C. App. 704, 817 S.E.2d 495 (2018); Belcher v. N. Carolina Dep’t of Pub. Safety, State Highway Patrol, 2021-NCCOA-277, ¶ 14, 278 N.C. App. 148, 858 S.E.2d 629 (2021).

28. Subsequent to Warren, in Wetherington I, the Supreme Court provided specific instruction on factors that employers and courts must consider in imposing disciplinary action. They are:

- A. The severity of the violation;
- B. The resulting harm [from the violation];
- C. The employee's work history; and
- D. The discipline imposed in other cases involving similar violations.

29. The Supreme Court held, “we emphasize **that consideration of these factors is an appropriate and necessary component of a decision to impose discipline** upon a career State employee for unacceptable personal conduct.” Wetherington I at 592, 548 (emphasis supplied).

30. These factors are now known as the “Wetherington factors.” See Brewington v. N. Carolina Dep’t of Pub. Safety, State Bureau of Investigation, 254 N.C. App. 1, 25, 802 S.E.2d 115, 131 (2017), disc. rev. denied, 371 N.C. 343, 813 S.E.2d 857 (2018) (“We conclude that the Wetherington factors were sufficiently addressed”); Davis (“The five Wetherington factors inform our analysis”); and (recently), “Precedent from our Supreme Court also requires the review of certain factors to determine whether unacceptable personal conduct warrants the discipline imposed collectively, the ‘Wetherington factors.’” Belcher v. N. Carolina Dep’t of Pub. Safety, State Highway Patrol, 2021-NCCOA-277, ¶ 15, 278 N.C. App. 148, 858 S.E.2d 629.

31. As Belcher demonstrates (along with the Wetherington holdings) “all of these factors, at least to the extent there was any evidence to support them,” must be considered, and that agencies may “not rely on one factor while ignoring the others.” Wetherington II at 161, 832. Indeed, in Wetherington II, the Court of Appeals conducted a detailed analysis of the Wetherington factors and concluded that the Highway Patrol, after remand with specific instructions to consider the factors, instead considered only two of them. This was a significant factor, immediately apparent from the opinion, in the court’s finding a lack of just cause.

32. Considering the Wetherington factors is not a task solely reserved for employing agencies. The Court of Appeals has emphasized that the Tribunal’s task is “to determine the facts,

and to make findings and conclusions based thereupon.” Richardson v. NC State Bureau of Investigation, 274 N.C. App. 249, 849 S.E.2d 367 (2020). That specifically includes the duty to conduct a thorough analysis of each Wetherington factor. Id. There is a notable, and obvious, exception to this duty: when the underlying conduct is not proven by the agency.

Warren 1: Did the employee engage in the conduct?

33. Respondent dismissed Petitioner for “unacceptable personal conduct,” as noted. Respondent’s dismissal letter to Petitioner (Res. Ex. 31) is 26 pages long. However, the alleged unacceptable personal conduct at issue is easily summarized: Petitioner was the source of the mystery gunshot discharge during the Incident. Rather than admit to this action, Petitioner lied to his superiors repeatedly about his actions, including during a Garrity interview conducted through a formal internal investigation. This was material untruthfulness providing just cause for Petitioner’s dismissal.

34. Accordingly, Respondent’s burden in this case was to prove by the greater weight of the evidence that Petitioner fired the shot. Due to the many factors cited above, the Tribunal finds that Respondent did not do so. It is worth repeating that (a) there was absolutely no physical evidence found, such as a shell casing or round, showing or tending to show that Petitioner or any of the agents fired a shot; (b) the “bullet” found at the site had never been fired, and (c) despite suspicions on the part of more than one witness regarding Petitioner’s actions and demeanor, not a single person testified that Petitioner was missing a round, that his weapons showed or suggested a round had been fired, or that they saw Petitioner reloading or picking up a shell casing. In summary, suspicions do not equal proof.

35. As Respondent did not meet its burden under the Warren test to show that Petitioner engaged in the conduct alleged, analysis of the two remaining prongs of the Warren test, and of the Wetherington factors, is superfluous and legally unnecessary.

36. Because Respondent did not prove that Petitioner engaged in the conduct alleged, Respondent did not establish just cause for Petitioner’s dismissal, and the agency’s action must be reversed.

FINAL DECISION

The agency action is **REVERSED**. Respondent shall retroactively reinstate Petitioner to employment with back pay and benefits from the date of his dismissal, including service credit and leave balances. Respondent shall remove all termination documents from Petitioner’s personnel file.

As the Tribunal has ordered both reinstatement and back pay, Petitioner is entitled to reimbursement by Respondent of his attorney’s fees and costs pursuant to N.C.G.S. 150B-33. Petitioner’s counsel shall, within 30 days of this Final Decision, submit indicia of proof on the attorney’s fees and costs incurred in his representation of Petitioner in this contested case.

NOTICE OF APPEAL

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 of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

SO ORDERED.

This the 21st day of November, 2022.

A handwritten signature in blue ink that reads "Michael C. Byrne". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 21st day of November, 2022.



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