NO. 22PA14 **TENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

THOMAS C. WETHERINGTON	)	
	)	
Petitioner/Appellee/	)	
Cross-Appellant	)	
v.	)	
	)	**From Wake County**
N.C. DEPARTMENT OF CRIME	)	**File No. 11 CVS 3211**
CONTROL & PUBLIC SAFETY;	)	
N.C. HIGHWAY PATROL	)	**COA 13-405**
	)	
Respondent/Appellant	)	

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONER/APPELLEE/CROSS APPELLANT THOMAS C. WETHERINGTON

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NO. 22PA14 **TENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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THOMAS C. WETHERINGTON Petitioner/Appellee/ Cross-Appellant v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY; N.C. HIGHWAY PATROL Respondent/Appellant	)	**From Wake County** **File No. 11 CVS 3211** **COA 13-405**

****

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONER/APPELLEE/CROSS APPELLANT THOMAS C. WETHERINGTON

****

I. INTERESTS OF NAPO AS AMICUS CURIAE

The National Association of Police Organizations (NAPO) is a coalition of police associations that seeks to protect the rights of law enforcement officers and to enhance public safety through legal advocacy, education and legislation. NAPO represents over one thousand law enforcement organizations, with over

238,000 sworn law enforcement officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement community throughout America, including before this Court. NAPO proudly stands with Trooper Wetherington in defense of the unanimous decision of Judges Stroud, Bryant and McGee of the Court of Appeals and Judge Manning of the Wake County Superior Court.

Of particular concern to NAPO is that the firing appears to be the result of a commonplace mistake of memory or confusion by the Trooper as to a nonmaterial fact. The disregard of, and failure to follow, North Carolina law guaranteeing due process for the trooper by the patrol, the arbitrary and capricious nature of the termination decision, and the disparate treatment this trooper received compared to far more egregious cases also concerns NAPO. If this treatment of professional law enforcement officers becomes the "new normal" in North Carolina, then the profession as a whole is threatened and politicized.

II. STATEMENT OF FACTS

NAPO adopts the statement of facts from Trooper Wetherington's opening brief. In addition, under highly stressful and dangerous law enforcement circumstances, Trooper Wetherington became confused over something that was not

materially significant, with a resulting discrepancy in a statement about the location of his hat when lost.

Trooper Wetherington was employed by the N.C. Highway Patrol in 2007, and had a little more than two years of experience. Trooper Wetherington was terminated based on a single instance of a discrepancy regarding where Wetherington's Trooper hat was located when it was lost. Wetherington did not believe that it was *materially significant* whether his hat was on his head or his light bar when the hat blew into the roadway. (T p 479)

Trooper Wetherington was confused about where his hat was when it blew off into the road during a dangerous traffic stop. Wetherington initially thought the hat was on his head, but later, after much reflection, believed that it was on his vehicle light bar. Wetherington was fired for this trivial discrepancy. Colonel Glover arbitrarily fired Trooper Wetherington following an incomplete investigation and a mechanical and unreasoned termination decision.

Sergeant David Oglesby received an initial call from Wetherington regarding "a traffic stop and a gun issue." (T p 62) He received a second call from Wetherington saying that his hat was lost or it had blown off his head. (T p 62) Oglesby later directed Wetherington to prepare a statement so that he could get a replacement hat. (T p 67; Respondent's Exhibit 5)

Wetherington later told Oglesby that his hat had been discovered. (T p 69) Oglesby explained that after Wetherington started further thinking about it, he indicated the he was not really sure what happened to his hat. (T p 73)

Oglesby testified that he was aware of the studies indicating that law enforcement officers may have *confusion created by elevated danger.* (T p 100) This explains what happened here. Oglesby testified that it would not surprise him if a Trooper was much more focused upon factors of danger as opposed to exactly where his hat was at a particular time. (T p 101)

The initial traffic stop by Wetherington involved two weapons, one of which was a loaded .357 Magnum. (T p 98) Wetherington discovered the loaded weapons in the passenger compartment. (T p 98) Oglesby explained that Troopers are trained to recognize the combined factors of alcohol and two loaded handguns in the passenger part of the vehicle as being *high risk* factors. (T p 99)

After Oglesby requested Wetherington to prepare a statement in connection with requisitioning a new hat, Oglesby reviewed the statement (T p 103) and he did not request that Wetherington amend the statement in any way. (T p 104) There was nothing that Oglesby perceived to be wrong with the statement. (T p 104) Wetherington's written statement provided that "My campaign cover was caught in

the wind and blew into the roadway." (T p 104) Oglesby indicated that this was a true statement. (T p 104)

The Employee Advisory Committee *unanimously* ruled in Wetherington's favor supporting reinstatement. (R pp 176-178)

The Administrative Law Judge ruled against reinstatement and then the State Personnel Commission adopted the recommended decision of the ALJ. (R pp 22-26) However, Commissioner Thomas Stern issued a substantial dissent (R pp 23-26) and articulated three separate basis for his position:

1. The Patrol's decision maker failed to exercise discretion, failed to consider the totality of the circumstances, and made an arbitrary decision;

2. The conduct did not constitute just cause for termination; and

3. The lack of commensurate discipline.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

Trooper Thomas Wetherington earned an excellent record as a young, developing Trooper. Trooper Wetherington made the same simple mistake that hundreds of Troopers have often made: he was confused and not clear about a point of minutia following a dangerous traffic stop with exigent circumstances.

Trooper Wetherington believed that the difference in hat locations was not *materially significant.* (T p 459) The precise location of Trooper Wetherington's hat

when it blew onto the highway is de minimis. Superior Court Judge Howard Manning and the unanimous Court of Appeals saw it for what it was.

The Patrol's truthfulness policy contains several elements. As admitted by Colonel Glover, the untruthful statement must be *willful.* (T p 350; Respondent's Exhibit 8) The vague truthfulness policy as applied does not reach common discrepancies in communications, poor recollection, confusion and inaccuracies. Thus, it is overly broad.

Discrepancies in communications often arise from many different situations. Human memories are imperfect. Human perception is imperfect. Troopers, and Colonels, are also imperfect. Recollections and perceptions are impacted by environmental factors, dangers, stressors and other factors. Judge Manning, and Judges Stroud, Byrant and McGee of the Court of Appeals understood the impact of the dangerous realities of front-line police service by Troopers and correctly applied *Carroll.*

The Patrol's vague truthfulness policy is subject to arbitrary subjective enforcement - or non-enforcement, as demonstrated in other cases. Under Respondent's elastic truthfulness policy, trivial discrepancy alleged by a disgruntled supervisor can put a Trooper's career at risk.

Troopers would then work at the whim of their supervisors without the protections of *Carroll* and its progeny. The last decade has brought new employment related dangers for North Carolina police officers and growing arbitrary and capricious use of government power by some state employers who continue to misapprehend the just cause principle.[1] Many cases before the Office of Administrative Hearings in recent years involved the Highway Patrol's repeated implicit rejection of this Court's rule in *Carroll* and its progeny. Here, Colonel Glover's overt admissions of complete failure of any just cause or mitigation analysis demonstrates that he failed to understand or apply the just cause principle. He

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1. See Kelly v. N.C. Department of Env't. & Natural Res., 192 N.C. App. 129, 664 S.E.2d 625 (2008); *Corbett v. N.C. Department of Motor Vehicles*, 190 N.C. App. 113, 660 S.E.2d 233 (2008); *Ramsey v. N.C. Department of Motor Vehicles*, 184 N.C. App. 713, 647 S.E.2d 125 (2007); *Brookshire v. N.C. Department of Transp.*, 180 N.C. App. 670, 637 S.E.2d 902 (2006); *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276 (1992); *Beatty v. Jones*, 07 OSP 2222, 2008 WL 4378246 (Morrison, ALJ) adopted by State Personnel Commission and Superior Court, per Judge James Hardin, aff'd 2012 WL 381243 (N.C. App. Ct.); *Foard v. N.C. Department of Crime Control*, 08 CVS 21917 (Judge Henry Hight), *aff'g* 07 O.S.P. 0135, 2008 WL 5598371; *Gooch v. N.C. Cent. Univ. 2012 WL 381243*, 09 O.S.P. 2398 (Oct. 27, 2010); *Raynor v. N.C. Department of Health & Human Servs.*, 09 O.S.P. 4648, 2010 WL 3283844 (N.C.O.A.H. July 26, 2010); *Brooks v. N.C. Cent. Univ.*, 09 O.S.P. 5567, 2010 WL 2173482 (N.C.O.A.H. Apr. 28, 2010); *Advani v. East Carolina Univ.*, 09 O.S.P. 1733 (Feb. 10, 2010); *Van Essen v. N.C. State Bd. of Cosmetic Arts*, 09 B.C.A. 2772, 2010 WL 690241; *Nateman v. N.C. Department of Cultural Res.*, 09 O.S.P. 1903, 2009 WL 5560377; *Perkins v. N.C. Department of Corr.*, 08 O.S.P. 2242 (Sept. 17, 2009); *Cassidy v. N.C. Department of Transp.*, 08 O.S.P. 1584, 2008 WL 5510881 (N.C.O.A.H. Oct. 31, 2008); *Goering v. N.C. Department of Crime Control & Pub. Safety*, 07 O.S.P. 2256 (July 29, 2008; adopted by SPC); *Rivas v. N.C. Department of Transp.*, 06 O.S.P. 1322, 2007 WL 2889713 (N.C.O.A.H. July 11, 2007); *Hill v. N.C. Department of Crime Control & Pub. Safety*, 04 O.S.P. 1538 (Sept. 2, 2005; adopted by SPC); *Hardy v. N.C. Department of Crime Control & Pub. Safety*, 02 O.S.P. 1670 (Apr. 24, 2003; adopted by SPC); *Dietrich v. N.C. Department of Crime Control*, 00 O.S.P. 1039, 2001 WL 34055881 (Aug. 13, 2001; adopted by SPC); and *Burgess v. N.C. Highway Patrol*, 07 OSP 0052 (July 16, 2008; adopted by SPC).

ignored the analysis required by *Carroll* in making his decision. The Highway Patrol's disciplinary system collapsed during previous administrations resulting in the imposition of substantial arbitrary discipline and also by allowing true serious misconduct to go uncorrected without appropriate discipline.[2] Here the Patrol failed to prove just cause for termination because, *inter alia*, the discrepancy about the hat's location is not the type of serious violation that would constitute just cause for termination under *Carroll* and other authority. Had the Patrol followed *Carroll,* we would not be here.

The ALJ's decision was threadbare regarding undisputed facts needed for proper and complete just cause analysis implying that the ALJ failed to consider those uncontroverted facts, admissions and factors. Traditional areas of just cause analysis were devoid of findings, including the lack of materiality of the discrepancy, lack of impact on agency operation, the lack of intent to deceive, and the lack of

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2. See cases cited *id;* and *Bulloch v. N.C. Department of Crime Control*, 732 S.E.2d 373 (2012); *Beatty v. Jones,* 721 S.E.2d 454 (N.C. App. 2012; 2012 WL 381243 (N.C. App. 2002); *Royal v. N.C. Department Of Crime Control,* 2007 WL 1928684 (N.C. App. 2007), aff'g 2006 WL 4228219 (Wake Superior Court); *Poarch v. N.C. Department of Crime Control, 758 S.E.2d 849*(2012) *Foard v. N.C. Department of Crime Control,* 08 CVS 21917, *aff'g* 07 O.S.P. 0135, 2008 WL 5598371; *Goering v. N.C. Department of Crime Control & Pub. Safety*, 07 O.S.P. 2256 (adopted by SPC); *Hill v. N.C. Department of Crime Control & Pub. Safety*, 04 O.S.P. 1538 (adopted by SPC); *Hardy v. N.C. Department of Crime Control & Pub. Safety,* 02 O.S.P. 1670 (adopted by SPC); *Dietrich v. N.C. Department of Crime Control,* 00 O.S.P. 1039, 2001 WL 34055881 (adopted by SPC); *Burgess v. N.C. Highway Patrol,* 07 OSP 0052 (adopted by SPC).

mitigation analysis. The decision is substantially incomplete and deprived Wetherington of findings in his favor regarding just cause and arbitrariness issues. NAPO joins Trooper Wetherington's opening brief on cross appeal, where he demonstrated extensive material omissions in fact finding.

Judge Manning correctly found that Trooper Wetherington's termination was arbitrary because Colonel Glover admittedly misunderstood the principle of just cause as he erroneously believed that he had "no choice" but to fire Wetherington. Colonel Glover's analysis failed every aspect of the controlling just cause tests. For the first time, and at this stage, the Respondent launched a challenge to this Court's settled standard of review in state personnel cases under *Carroll.* The issue was neither preserved below, or set out in the petition for discretionary review. As explained herein, the proposed changes in the standard of review conflict with the core of this Court's unanimous precedent in *Carroll.* If adopted, Respondent's changes will effectively permit Patrol personnel decision makers to insulate the Patrol from meaningful judicial review.

Law enforcement officers need meaningful just cause protection from unjust adverse action for many reasons. As Senator Jesse Helms explained:

> Law enforcement officers across America face great challenges every day as they fight the war against crime and drugs. They are on the front line; their lives are in constant jeopardy. All of us owe them our

> gratitude and our respect... *[T]oo often law enforcement officers lose their jobs for frivolous reasons - or for no reason at all. For example, an officer may have a difference of opinion with a superior."*

Senator Jesse Helms, Congressional Record, January 31, 1991(emphasis added).

Carroll has been a thousand points of light and must remain as controlling law in order for the State Personnel Act to remain useful.

IV. ARGUMENT

A. THE EMPLOYER'S ARGUMENT PROPOSING TO CHANGE THE STANDARD OF REVIEW SHOULD BE DISMISSED FOR FAILURE TO PRESERVE THE ISSUE BELOW; IF THIS COURT REACHES THE ISSUE, THIS COURT SHOULD REAFFIRM THE STANDARD IN *CARROLL* THAT HAS FUNCTIONED WELL FOR OVER A DECADE

The N.C. Department of Public Safety sought discretionary review by a petition raising two issues:

I. Whether the SHP had just case [sic] to terminate the employment of Trooper Wetherington.

II. Whether Colonel Glover acted arbitrarily and capriciously in terminating the employment of Trooper Wetherington.

No standard of review issue was raised. When Respondent briefed this case before this Court, a radically different argument was presented addressing issues not raised or preserved below. Rather than briefing the two issues stated in the petition, DPS attempted to rewrite the standard of review in state personnel cases. There was

no complaint about standard of review law before the Court of Appeals or Judge Manning. This is a new issue not previously before the Court.

In *NCDENR v. Carroll,* 358 N.C. 649, 599 S.E.2d 888, 895 (2004), this Court reaffirmed settled standard-of-review law. Questions of law such as just cause are reviewed de novo. 599 S.E.2d at 898. Facts are reviewed under the substantial evidence test, and the whole record test. Despite this settled precedent, the Respondent proposes a fundamental change: "the Court of Appeals should have applied the whole record test to the dispositional phase of the SPC's decision." Appellant's brief at 54-55. Respondent cites a pre-*Carroll* state bar case, *Talford,* in support of its suggestion. Respondent wants to overturn *Carroll* and apply this earlier standard.

DPS is attempting to effectively destroy *Carroll* just cause law by so radically changing the standard of review that an agency will have complete "discretion" in determining the magnitude of discipline imposed. See Appellant's brief at 10. Appellant erroneously claims the courts only have "limited authority" to reverse an SPC decision. Appellant's brief at 19. However, Appellant's contention was not supported with any citation to law. There are multiple cases demonstrating full judicial review in state personnel cases like all other cases subject to judicial review. There is no statutorily or judicially recognized exception to full judicial

review in state personnel cases.

DPS has advanced a draconian view of judicial review to keep judges from reviewing Patrol discipline. DPS's position directly conflicts with core principles from *Carroll* and other cases. DPS has failed to properly preserve the issue for appellate review, and failed to provide any compelling reason for this Court to disturb settled precedent. NAPO consequently urges this Court to decline to hear the issue. Troopers do not work at the pleasure of the Colonel. This Court can preserve the professional status of Troopers and decline to again politicize a highly visible state law enforcement agency.

Carroll and other cases provide for a substantial evidence standard for factual matters and a *de novo* standard for a question of law. 599 S.E.2d at 894. *Carroll* made clear that the question of just cause is a " question of law." 599 S.E.2d at 898. Judges necessarily decide questions of law since *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60, 1803 WL 896 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). Respondent's complaint of judges second guessing Patrol disciplinary action is no more than judges doing their jobs, often finding arbitrary and unlawful Patrol practices.

The import of Respondent's standard of review argument is that after a finding of just cause, the Respondent's decision is a question of fact, which should not be

challenged. It conflates questions of fact and law. It ignores *Carroll,* meaningful judicial review, and should not be adopted.

B. THE NORTH CAROLINA DOCTRINE OF JUST CAUSE AND THE COMMENSURATE DISCIPLINE PRINCIPLE WAS CORRECTLY APPLIED BY THE SUPERIOR COURT AND THE COURT OF APPEALS

The State Personnel Act and its just cause standard were meant to protect the jobs of career Troopers and state employees by requiring state employers to fully justify severe discipline with substantial evidence in order to ensure that the high threshold for proving just cause for termination is met and to preclude arbitrariness, selective enforcement and disparate treatment in discipline. See authorities *supra* in note 1.

The North Carolina Highway Patrol suggests a retreat to a bygone era where Colonels ran roughshod in a *de facto* at-will environment; Troopers worked at their whim. The Patrol's history of retaliation, discrimination, favoritism, cover-ups, unlawful investigations, lack of just cause for severe discipline and other practices has been duly noted by judges across North Carolina. The General Assembly saw the never ending crises and enacted the *State Personnel Act* to promote professionalism, esprit de corp, principled decision making, and strict prohibitions against discipline without just cause. That should not be watered down with Respondent's new proposed standard of review and toothless just cause standard.

In *NCDENR v. Carroll,* 599 S.E. 2d 888 (N.C. 2004), the Court explained:

> "[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." 599 S.E. 2d at 900.

Carroll reaffirmed that a just cause determination is a "question of law." 599 S.E. 2d at 898.

Commentators have addressed some of the pertinent just cause issues in this case.[3] Judge Manning and the Court of Appeals correctly relied upon *Carroll* and *Warren v. N.C. Department of Crime Control and Public Safety,* 726 S.E.2d 920 (2012) (commensurate discipline approach is mandatory). (T p 46)

Carroll held that violations of *agency guidelines* or *state law* do not necessarily constitute just cause for any discipline. 599 S.E. 2d at 900. Thus, even if there was a violation of the truthfulness policy or a law, that certainly should not automatically translate into just cause for termination, as the policy is overly broad and enforcement has been arbitrary and disparate. Colonel Glover's automatic termination theory for truthfulness violations does not comport with *Carroll,* other law and common sense.

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3. See Abrams & Nolan, *Toward A Theory of "Just Cause" In Employee Discipline Cases,* 1985 Duke L. J. 594 (1985); McGuinness, *The Meaning of Just Cause In North Carolina Public Employment Law: Carroll And Its Progeny Provide For A Heightened Multifactor Standard for State Employee Disciplinary Cases,* 33 Campbell L. Rev. 341 (2011); Silver, *Public Employee Discharge and Discipline,* Section 3.01 (3rd Ed. 2001).

Officer Carroll violated both agency policy and state law, and there was no just cause for discipline. *Carroll* explained that the fundamental question is whether "the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." 599 S.E. at 900. See *Bulloch v. N.C. Department of Crime Control,* 732 S.E.2d 373 (N.C. App. 2012).

Eleven years ago, Chief Justice Martin's unanimous opinion in *Carroll* clarified the evolving law of just cause. Since *Carroll,* the Court of Appeals, many Superior Courts and other courts and tribunals have applied *Carroll* in a wide variety of state personnel cases. *Carroll* has been universally praised as it clarified critically important areas of law. There has been no decision where any judge has published any real criticism of the *Carrol* holding and framework. In one area in *Warren v. N.C. Department of Crime Control,* 726 S.E.2d 920 (2012), 2009 WL 2385453, the Court of Appeals suggested a modicum of instruction for commensurate discipline cases. The commensurate discipline rule recognized by *Warren* was challenged in this Court by a petition for discretionary review which this Court denied. 221 N.C. App. 376, 726 S.E. 2d 920 (2012), disc. rev. denied, 366 N.C. 408, 735 S.E.2d 175 (2012). The commensurate discipline principle has been recognized in previous cases. *See, e.g., Ramsey v. N.C. Div. Motor Vehicles*, 02 O.S.P. 1623 (April 26, 2004), *aff'd* 647 S.E.2d

125 (N.C. Ct. App. 2007) (holding that violation of a general order did not constitute just cause for termination), *disc. rev. denied*, 659 S.E.2d 739 (N.C. 2008); *Steeves v. Scotland County Bd. Of Health,* 567 S.E. 2d 817 (N.C. App. 2002); *Gooch v. Cent. Reg'l Hosp.*, 09 O.S.P. 2398 (Oct. 27, 2010) (finding sufficient evidence for a written warning, but no just cause for termination); *Raynor v. N.C. Dep't of Health and Human Servs.*, 09 O.S.P 4648 (July 26, 2010); *Hager v. NCDOC,* 2004 WL 3252142 (Lassiter, ALJ). The core of *Carroll* recognized the commensurate discipline principle from the application of "equity" and a "just result."

C. THERE WAS NO MATERIAL UNTRUTHFULNESS SUFFICIENT TO FULLY PROVE JUST CAUSE REQUIRING TERMINATION OF EMPLOYMENT BASED ON RESPONDENT'S UNDULY VAGUE POLICY

The Respondent's truthfulness policy is vague and without clear elements or standards. Law enforcement employers should incorporate and promulgate policies that are defined, clear and not vague. North Carolina law requires specificity in employment policies in order for policies to be enforceable. E.g., *Faison v. N.C. Department of Crime Control,* 11 OSP 08850, 2013 WL 10255989 (4 February 2013), where the Honorable Melissa Owens Lassiter explained how "North Carolina has long recognized the settled doctrines that prohibit the enactment of policies which are unduly vague or overbroad." *Id,* Conclusion of Law 25. Judge Lassiter found that Lt. Faison's termination was without just cause as it was based on a vague cell phone

usage policy that did not provide "clear notice" to Patrol members as to what was prohibited. Judge Lassiter also found that the Patrol had charged Lt. Faison with untruthfulness when there was not "any actual proof that Petitioner was in fact untruthful. . ."

Cases involving untruthfulness may result in discipline "when the agency can show that the falsification was intentional, material and meant to deceive and affected the agency's operation." I. Silver, *Public Employee Discharge and Discipline*, Volume I, Section 3.08[E], page 287 (3rd Ed. 2001).[4] The employer must therefore prove the following elements for a truthfulness violation:

1. Intentional falsification
2. Meant to deceive
3. On a material matter
4. Effect on the agency's operation.

The Patrol's evidence failed to prove all elements of the alleged policy offense. However, more importantly, even if the Patrol proved a policy violation, like in *Carroll,* the Patrol failed to prove just cause for termination because, *inter, alia,* like *Carroll,* the conduct in issue was not sufficiently severe to justify termination. The

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[4] In *Carroll,* this Court relied upon Professor Silver's treatise in its just cause analysis. 599 S.E.2d at 900.

conduct in issue is understandable when one fully considers the high stress at the stop, the totality of the entire circumstances and Trooper Wetherington's fine record that Colonel Glover never considered because the Internal Affairs officer never bothered to collect it. (T pp 195, 200)

A trivial discrepancy about the location of a hat is insufficient to properly terminate a Trooper. The hat's precise location was neither material nor significant; it is de minimis. *Scott v. N.C. Department of Crime Control,* 2013 WL 4519315, 10 OSP 4582 (2013) reaffirms all of these points of law and just cause analysis in a truthfulness case. There, ALJ Judge Randall May applied the crucial element of materiality, along with mitigation and other evidence and found lack of just cause to terminate an ALE agent who was untruthful about the source of a crack in a windshield.

Appellate cases from other jurisdictions have the same elements for an untruthfulness charge as were applied in *Scott,* including intent to deceive and materiality. See *Gibson v. Department of Police,* 30 So.3d 1032, 1038 (La. App. 4th Cir. 2010) (reversing suspension for alleged untruthfulness where there was insufficient intent to deceive and the conflicting statements were insignificant); *Hunt v. Shettle,* 452 N.E.2d 1045 (Ind. App. 1983) (alleged untruthfulness was insufficient; there was no intent to deceive).

DPS's position ignores the human phenomena of mistake, mental confusion, stress induced trauma, imperfect memory and other common sense considerations. The United States Supreme Court and this Court have recently addressed the principle of mistake in *Heien v. North Carolina,* 135 S.Ct. 530 (2014), aff'g 366 N.C. 271, 737 S.E.2d 351 (2012). There, the Court addressed mistakes by officers in a Fourth Amendment context. The North Carolina Attorney General argued that reasonable mistakes of law should not vitiate a vehicular stop. *Heien* reaffirms that officers should not be punished for reasonable mistakes and mistaken beliefs. See e, g., *Saucer v. Katz,* 121 S.Ct. 2151 (2001) (doctrine of mistaken beliefs).

D. MULTIPLE ANALYTICAL JUST CAUSE FACTORS WERE CORRECTLY APPLIED BY THE SUPERIOR COURT AND COURT OF APPEALS TO REACH A JUST DECISION UNDER *CARROLL*

Because there is no bright-line rule from *Carroll*, a number of analytical factors necessarily must be considered, balanced and applied so that the ultimate personnel decision meets *Carroll's* test of a "just" decision with "equity" and "fairness." 599 S.E.2d at 900.

The most frequently cited formulation of "the seven tests of just cause"[5] has

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[5] *See In re Enterprise Wire Co.*, 46 L.A. 359 (1966). An entire 560 page treatise on discipline and discharge is structured around these seven tests. See *Koven and Smith, Just Cause: The Seven Tests*, (May Rev. 3d ed. 2006). These factors have been widely followed in adjudicating public personnel cases through the country for several decades. See I. Silver, Vol. 2, *Public Employee Discharge and Discipline* (3rd ed. 2001). The

been applied by the State Personnel Commission and North Carolina Courts in implementing the *Carroll* principles. See cases cited in footnote one, and *Bulloch,* 732 S.E.2d at 378.

Carroll approvingly cited the prominent article by Abrams and Nolan from the *Duke Law Journal* whereby the seven factor test was explained. 599 S.E.2d at 900. Lower courts and tribunals have recognized the permissible consideration of the seven factor analytical approach. This Court has tacitly recognized it indirectly. See *Carroll,* 599 S.E.2d at 900, citing Abrams & Noble; see also *The Meaning Of Just*

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following seven questions are posed as factors in determining whether there is just cause for discipline:
1. Did the employer provide the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the employer's rule or managerial order reasonably related to a) the orderly, efficient and safe operation of the employer's business and b) the performance that the employer might properly expect of the employee?
3. Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey the rule or order of the employer?
4. Was the employer's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Whether the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Is the degree of discipline administered by the employer in a particular case reasonably related to a) the seriousness of the employee's proven offense and b) the record of the employee in his service with the employer?

See Roger I. Abrams & Dennis R. Nolan, *Toward A Theory of "Just Cause" in Employee Discipline Cases,* 85 Duke L.J. 594 (1985)(hereafter Abrams & Nolan).

Cause, 33 Campbell L. Rev. at 365-369 (2011).

Factors six and seven of the seven factor test are essentially the same as one of the factors in the *State Personnel Manual,* Section 7, pages 10-11 (February 1, 2011), which sets out a number of analytical factors including:

1) whether more investigation is needed;

2) the type and degree of disciplinary action to be taken;

3) the disciplinary actions received by other employees within the agency/work unit for *comparable performance or behaviors*; and

4) other relevant factors [such as other components of the seven factor test].

See http://www.osp.state.nc.us/Guide/Policies/Section7.pdf. In *Faison, supra.,* Judge Lassiter applied these factors. The ALJ in this case recognized these factors at Conclusion of Law 11 on page 9 of the decision. However, those factors were not considered in this case, thus depriving Wetherington of a complete record and application of those factors.

The seven factor test puts some meat on the bones of *Carroll* and restates what the *State Personnel Manual* provides. A judge has to analyze and apply *something* to determine "equity" and "fairness" and a "just" decision as mandated by *Carroll,* which was not done by the Patrol or the ALJ in this case.

E. TROOPER WETHERINGTON'S TERMINATION WAS ARBITRARY BECAUSE THE PATROL REFUSED TO EVEN CONSIDER THE TOTALITY OF THE FACTS AND FACTORS REQUIRED FOR ANALYSIS UNDER *CARROLL* AND ITS PROGENY

Colonel Glover willfully and arbitrarily failed to discover or apply the compelling mitigation evidence, arbitrarily failed to have the investigation completed, arbitrarily failed to consider the Supreme Court's *equity* standard from *Carroll,* and arbitrarily failed to consider each of the factors identified in the *State Personnel Manual* for considering discipline.

In his *first* termination of a Trooper as a new commander, Colonel Glover misunderstood the most basic principles of just cause analysis, including:

1) the personnel decision must not be made mechanically with a particular quantity of pre-ordained discipline as he admitted, but rather must apply equity and fairness;

2) the decision maker must consider and apply all mitigation evidence;

3) the personnel decision maker must consider a complete and proper investigation of all of the facts and circumstances;

4) the personnel decision maker must weigh and balance various analytical factors;

5) the personnel decisionmaker must consider other discipline imposed for

similar violations; and

6) the personnel decision must apply equity and impose a just result.

Colonel Glover did *none* of this. Rather, he rushed to immediate judgment, erroneously believing that he "had" to terminate when there was any lack of truthfulness. (T pp 326, 337-338).

Colonel Glover's testimony about the *Foard* case further reveals the Patrol's skewed personnel decisions, including ignoring material misrepresentations and not even conducting an investigation, much less terminating, the Captain and Lieutenant who, according to a judicial finding, engaged in misrepresentations and witness intimidation. *Foard v N.C. Department of Crime Control,* 08 CVS 21917 (Superior Court Judge James Hardin)(aff'g 07 O.S.P. 0135, 2008 WL 5598371).

Beatty v. Jones, 721 S.E.2d 454, 2012 WL 381243 (N.C. App.) demonstrates the Patrol's rigid and long practiced refusal to consider mitigation evidence militating against rigid, disparate discipline.

Courts have defined arbitrary and capricious as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." *Blacks Law Dictionary* 96 (5th ed. 1979).[6] Here, the Patrol's rush to

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6. See *U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to

judgment willfully disregarded important facts and just cause factors which rendered Wetherington's termination arbitrary and contrary to *Carroll.*

F. THE PATROL'S SELECTIVE ENFORCEMENT OF PERSONNEL RULES AND DISPARATE TREATMENT IN DISCIPLINE FURTHER DEMONSTRATE THE LACK OF JUST CAUSE FOR TERMINATION

The record, Exhibits 6 and 7, and testimony demonstrates the substantial history of disciplinary disparate treatment that has often occurred in Patrol employment cases.

Selective enforcement of personnel rules and disparate treatment in discipline are significant analytical factors in reaching a "just" decision using "equity" and "fairness" as required by *Carroll* and *Bulloch.*

State Personnel Policy requires the consideration of comparative treatment. See *N.C. State Personnel Manual*, Section 7, Chapter V. Disciplinary Procedures, page 11 (February 1, 2011) (requiring the state employer to consider as a factor in discipline "[t]he disciplinary actions received by other employees within the

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principles, circumstances, or significance... decisive but unreasoned.." *Id.*; *Flower Cab Co. v. Petitte*, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached "without adequate determining principle or was unreasoned."); *U.S. v. Euordif S.A.*, 555 U.S. 305, 316 at n.7 (2009)("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Watts-Hely v. U.S.*, 82 Fed. Cl. 615 (Claims Court, 2008)("the very definition arbitrary and capricious action is decisionmaking that ignores the relevant factors critical to the decision.").

agency/work unit for comparable performance or behaviors").

Exhibit 6 captured some of this disparate treatment evidence. (R pp 182-1 86) The Patrol completely failed to refute this at trial. The 24 examples of Patrol "discipline" in Exhibit 6 show how the Patrol has selectively relaxed its disciplinary policy.

Selective enforcement of personnel rules or the imposition of disparate treatment in discipline are factors indicating arbitrariness and lack of just cause. In *Mims v. N.C. Sheriffs' Commission*, 2003 WL 22146102 at note 2 (affirmed by Wake County Superior Court), the Court explained:

> "Recent cases demonstrate and reaffirm fundamental requirements that there must be uniform rules for consistent application to everyone including law enforcement officers. See, e.g., *Toomer v. Garrett,* 574 S.E.2d 76 (N.C. App. 2002)(government agencies may not engage in disparate treatment or arbitrariness in treating law enforcement officers...").

The doctrine of disparate treatment has been historically applicable in a wide variety of disputes. E.g. *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944) (selective enforcement principles apply even without a special class). However, in *Toomer v. Garrett*, 574 S.E.2d 76, 88-89 (N.C. App. 2002), the Court expressly recognized the disparate treatment rule in *state constitutional* claims. Here, the selective enforcement and disparate treatment is an essential predicate for part of the just cause analysis

under *Carroll*. Why was this Trooper treated differently for "misrepresenting" the location of his hat, when the Colonel knew a Court had found a Captain and Lieutenant had made multiple misrepresentations and intimidated witnesses and they were not even investigated?

V. CONCLUSION

NAPO respectfully prays that this Court affirm the decision below. Alternatively, this Court should remand this matter to the Superior Court for additional findings of facts and conclusions of law so that each of this Court's just cause factors is properly assessed with adequate findings and the due process rights of professional state law enforcement personnel are preserved.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing ***AMICUS CURIAE BRIEF*** has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in first-class postage-prepaid envelope properly addressed as follows and by email:

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