No. COA11-414 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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Charles Jones Petitioner-Appellee v. Bryan Beatty, Secretary of the North Carolina Department of Crime Control and The North Carolina Department of Crime Control and Public Safety; (N.C. Highway Patrol Respondent-Appellant	)	From WAKE COUNTY

****

AMICUS CURIAE BRIEF BY NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, AND THE NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION

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Respondent-Appellant	)	

I. INTEREST OF NAPO, SSPBA AND NCPBA 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 241,000 sworn law enforcement officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement profession throughout America.

The Southern States Police Benevolent Association (SSPBA) is a regional police association that promotes public safety and the rights of police officers.

SSPBA works with and through its constituent organization, the N.C. Police Benevolent Association.

The North Carolina Police Benevolent Association (NCPBA) has served the public and the North Carolina law enforcement profession since the late 1980s. NCPBA works to promote more effective law enforcement in North Carolina through legislation and advocacy to make life safer for all North Carolinians.

II. INTRODUCTION

This is a case about a gross abuse of government power. This case presents issues of enormous importance to the North Carolina law enforcement community as well as the public interest in enhancing delivery of law enforcement services to citizens throughout North Carolina.

The issues presented involve fundamental rights of career state law enforcement officers to enjoy effective just cause protection as provided by the General Assembly through the State Personnel Act. This case involves an important interpretation of North Carolina just cause law which will likely impact all other state law enforcement officers.

The facts and issues in this case have been substantially addressed below by the Honorable Fred Morrison, Senior Administrative Law Judge, the North Carolina State Personnel Commission and the Wake County Superior Court, by the Honorable

James Hardin. R.p. 43-47, 85, 124-129. Judge Morrison, the Commission and Judge Hardin all ruled for Sergeant Jones and concluded that his rights under the State Personnel Act were violated by the employer, the N.C. Highway Patrol.

This case is especially troubling because of the flagrant disregard of the fundamental rights of Sergeant Jones, including his procedural rights, his substantive right not to be terminated without just cause and because of the overt political retaliation against Sergeant Jones. E.g., R.p. 44-45. The Patrol's agents further retaliated against Sergeant Jones by intentional release of confidential personnel information to the news media. R.p. 25-27. This smacks of the same kind of severe misconduct that this Court held stated constitutional and common law claims in *Toomer v. Garrett,* 155 N.C. App. 462, 574 S.E. 2d 76 (2002). *Toomer* and other cases cited herein demonstrate the frequent disrespect of sworn law enforcement officers who serve as the front line guardians of public safety.

The trial transcript and exhibits fully support the 19 page contested case petition. R.p. 4-19 The facts, mostly undisputed, demonstrate that the required steps in the investigative and disciplinary process were intentionally disregarded. The facts reveal overt political intervention by the highest echelons of the executive branch of government, which is precisely what the State Personnel Act was designed to prohibit. R.p. 31, 41, 44-45. Despite the State Personnel Act and its mandatory

processes, the former Governor and some of his senior advisors just decided that "They want him gone." R.p. 44.

The North Carolina doctrine of just cause provides a multifaceted test including numerous analytical factors that were correctly applied below. Valuable state employees are not left subject to the whim of retaliatory and politicized agency officials. Rather, the General Assembly's enactment of N.C.G.S. 126-35 and interpretations of its just cause standard have made clear that the just cause standard is meaningful, effective and bars the sort of protracted severe employer misconduct in this case.

The Patrol's argument regarding just cause is devoid of any meaningful authority to support its position. The decisions below were correctly predicated upon controlling North Carolina law, primarily *NCDENR v. Carroll*, 358 N.C. 649, 599 S.E. 2d 888 (2004) and its progeny.

The last several decades have brought new dangers for police officers and growing abuse of government power by some state employers.[1] As the government

[1]. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (N.C. 1992); *Kelly v. N.C. Dep't of Env't & Natural Res.*, 192 N.C. App. 129, 664 S.E.2d 625 (2008); *Corbett v. N.C. Dep't of Motor Vehicles*, 190 N.C. App. 113, 660 S.E.2d 233 (2008); *Ramsey v. N.C. Dep't of Motor Vehicles*, 184 N.C. App. 713, 647 S.E.2d 125 (2007); *Brookshire v. N.C. Dep't 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); *Foard v. N.C. Dep't of Crime Control,* 08 CVS 21917 (Nov. 10, 2010), *aff'g* 07 O.S.P. 0135, 2008 WL 5598371 (N.C.O.A.H. Nov. 5, 2008); *Gooch v. N.C. Cent. Univ.*, 09 O.S.P. 2398 (Oct. 27, 2010); *Raynor v. N.C. Dep't 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); *Bulloch v. N.C. Dep't of Crime Control,* 05 O.S.P. 1178, 2010 WL 690232 (N.C.O.A.H. Jan. 15, 2010); *Van Essen v. N.C. State Bd. of Cosmetic Arts,* 09 B.C.A. 2772, 2010 WL 690241 (N.C.O.A.H. Jan. 2010); *Nateman v. N.C. Dep't of Cultural Res.*, 09 O.S.P. 1903, 2009 WL 5560377 (N.C.O.A.H. Dec. 2009);

has grown, so has the power of government employers.[2] This is a case of enormous abuse of government power by the North Carolina Highway Patrol.

III. "THEY WANT HIM GONE": THE FACTS DEMONSTRATE THAT THE PATROL PREJUDGED THE MERITS OF THE DISPUTE WHICH WAS TAINTED BY UNLAWFUL POLITICAL INTERVENTION AND RETALIATION

Amici have reviewed the brief of Sergeant Jones. Amici adopt the fully developed statement of facts therein and incorporate that by reference.[3]

On August 30, 2007, Sergeant Jones was served with a complaint alleging a less-serious personal conduct violation. On the same date, the officer assigned to investigate the complaint, Captain Briggs, was informed that he had until October 1,

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Perkins v. N.C. Dep't of Corr., 08 O.S.P. 2242 (Sept. 17, 2009); *Warren v. N.C. Dep't of Crime Control & Public Safety*, 08 O.S.P. 0212 (Apr. 17, 2009); *Cassidy v. N.C. Dep't of Transp.*, 08 O.S.P. 1584, 2008 WL 5510881 (N.C.O.A.H. Oct. 31, 2008); *Goering v. N.C. Dep't of Crime Control & Pub. Safety*, 07 O.S.P. 2256 (July 29, 2008); *Burgess v. N.C. Highway Patrol*, 07 O.S.P. 0052 (July 16, 2008); *Rivas v. N.C. Dep't of Transp.*, 06 O.S.P. 1322, 2007 WL 2889713 (N.C.O.A.H. July 11, 2007); *Hill v. N.C. Dep't of Crime Control & Pub. Safety*, 04 O.S.P. 1538 (Sept. 2, 2005); *Hardy v. N.C. Dep't of Crime Control & Pub. Safety*, 02 O.S.P. 1670 (Apr. 24, 2003); *Dietrich v. N.C. Dep't of Crime Control*, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.A.H. Aug. 13, 2001).

[2]. *See Sam J. Ervin, Jr., Preserving The Coonstitution: The Autobiography Of Senator Sam Ervin* 165, 213–14 (Michie Co. 1984); JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 1–6, 49–51 (Palgrave Macmillan 1995).

3. All of the facts found below are reviewed under the whole record test. *Carroll*, 358 N.C. 649 at 658-660. Under the whole record test, a court may not substitute its judgment for the agency as between conflicting views. *E.g., Watkins v. N.C. State Board*, 358 N.C. 190, 199, 593 S.E. 2d 764 (2008). There is no legitimate basis for this Court to modify the facts, especially in light of the substantial evidence and numerous admissions by Patrol officials. Substantial evidence is such evidence as a reasonable mind might accept as adequate. *Walker v. N.C. Dept. Of Human Res.*, 100 N.C. App. 498, 503, 397 S.E. 2d 350 (1990). The reasonable minds of the ALJ, the Personnel Commission and Judge Hardin all saw the facts virtually the same.

2007 to complete his investigation. On August 31, 2007, Captain Briggs received a telephone call from Major Jamie Hatcher, instructing Captain Briggs that no later than 2:00 p.m. that day, that Sergeant Jones was to be placed on "investigatory placement." Later that same day, Captain Briggs was told that his investigation must be completed *that day*. It was stipulated that on or about August 31, 2007, the former Governor decided that Sergeant Jones "should be dismissed from the highway patrol." R.p. 41

Lt. Everett Clendenin, the former Public Information Officer for the Patrol, told Lt. Colonel C.E. Lockley, Deputy Commander of the Patrol, that the Governor's press office wanted Sergeant Jones "gone." On Friday, August 31, 2007, Secretary Beatty caved in and suspended Sergeant Jones.

On September 5, 2007, Sergeant Jones was informed that his pre-dismissal conference was scheduled for Friday, September 7, 2007. Later, this conference was postponed until Saturday, September 8, 2007 at 10:00 a.m. On Saturday, September 8, 2007 at 9:58 a.m., Lt. Clendenin emailed all Patrol personnel and forwarded them a copy of a *Raleigh News & Observer* article announcing that Sergeant Jones had already been fired notwithstanding the fact that the pre-dismissal conference had yet to occur. Secretary Beatty indicated that "they wanted him gone by the end of the business day or wanted him gone by the end of the day."

Colonel Clay recused himself from the case and made Lt. Colonel Lockley his designee. Lt. Colonel Lockley officially terminated Sergeant Jones' employment. Lt. Colonel Lockley testified as follows and provided a statement which he read from at trial (Exhibit 7; reproduced in the Appendix to this brief):

> If the Governor's Press Office had not intervened in this matter, and let the case run its course, I would not have come to the same conclusion as I did on September 9, 2007. It was clear to me that the outcome of Sgt. Jones' case should be his termination from the Highway Patrol. I arrived at this conclusion from my discussion with Lt. Clendenin after he had been is some discussion with the Governor's press office. "They want him gone" were Lt. Clendenin's words. He mentioned that someone in that discussion suggested that Sgt. Jones should consider resigning.
>
> So the decision regarding Sergeant Jones' career was predetermined, not by the Patrol's disciplinary process but by an outside entity whose purpose was not the fair and equitable treatment of Sgt. Jones. I reviewed Sgt. Jones' statements/comments after his pre-dismissal conference. I gave no consideration to any of his claims or contentions because the ultimate outcome of this case had been pre-determined. I did not follow up! There was no pressure on me from Secretary Beatty as to what the outcome should be.
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> As far as the decision in this case to terminate Sgt. Jones, I did the wrong thing for the right reason (protecting the agency's image). This is the only case that has caused me any uncertainty and because of this matter, my personal integrity has been compromised. I have felt this way since September 9, 2007, since I signed the document terminating Sgt. Jones. This is totally unacceptable to me.
>
> The right thing to do is make a decision based on no interference from the Governor's Press Office, no intense media scrutiny, no rush to

> judgment, and no public outcry. In my opinion, the outcome would be different because Sgt. Jones acted in the manner he was trained, even though it was an ugly manner.
>
> I hope that all the evidence will be reviewed without bias and the factors mentioned above. All the red flags are here to signal a great injustice has been done to Sgt. Jones. We have an opportunity to get it right without more embarrassment and without damaging the agency's image. I hope we take advantage of it. See Transcript at 331-33; Exhibit 7.

The foregoing facts demonstrate the lack of just cause, arbitrariness and the abuse of government power.

IV. THE PATROL MISAPPREHENDS THE NORTH CAROLINA DOCTRINE OF JUST CAUSE; THE COURT BELOW CORRECTLY APPLIED CONTROLLING PRECEDENT INCLUDING *CARROLL* AND ITS PROGENY

The State Personnel Act and its just cause standard were meant to protect the jobs of career state public servants from the arbitrary whim of politicized discipline, by requiring state employers to justify discipline of career state employees and to ensure that the high threshold for determining just cause is met.

The leading case defining just cause is *Carroll*. As the Supreme Court explained in *Carroll*, "[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.[4] Another leading personnel case sums up the bottom line: The law of just cause "requires that there be some significant and meaningful violation in order for there to be just cause for formal disciplinary action .... Ideally it is desired that law enforcement officers should probably be near perfect; however, that is not a realistic standard." *Dietrich v. N.C. Highway Patrol,* 00 OSP 1039, 2001 WL 34055881 (August 13, 2001, Gray, ALJ, adopted by N.C. State Personnel Commission).

In *Carroll*, the Court also enunciated a "reasonable belief" test for the employee. 599 S.E. 2d at 900-02. The Court held that where a state employee has a "reasonable belief" that his conduct was appropriate or necessary, it will ordinarily not constitute just cause for discipline. This reasonable belief test affords reasonable discretion to employees, especially when confronting exigent circumstances or an unclear policy. Many situations arise where police officers have to make immediate judgment-call decisions and decisions involving unclear agency policy as in this case. R.p. 34-36. *Carroll* affords deference to employees when they have a reasonable

4. As further explained in subsequent cases, just cause for termination is a different standard than just cause for lesser discipline. *See, e.g., 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); *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 general order did not constitute just cause for termination), *disc. rev. denied*, 659 S.E.2d 739 (N.C. 2008); *Warren v. N.C. Dept. of Crime Control,* 2009 WL 2385453 (April 17, 2009), aff'd in pertinent part, Wake Superior Court. The "penalty" must match the "deed done by petitioner." *See Raynor*, 09 O.S.P. 4648.

belief that their conduct is appropriate. Sergeant Jones had a reasonable belief that his actions were proper, as they were consistent with his training as admitted by Lt. Colonel Lockley, the Patrol decisionmaker. See Petitioner's Exh. 7.

Carroll also held that violations of agency guidelines or state law do not necessarily constitute just cause for discipline. 599 S.E. 2d at 900. *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. The Court explained that just cause was to be understood as a "flexible" standard, based on notions of equity and fairness, that should be determined based upon the facts of the purported violation in each case. *Id.*

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 determination meets *Carroll's* test of a "just" decision. This Court has applied the *Carroll* principles in many recent cases. E.g. *Kelly v. N.C.D.E.N.R.,* 192 N.C. App. 129, 664 S.E. 2d 625 (2008), and other cases cited in footnote one, *supra.*[5]

5. In *Royal v. N.C. Department of Crime Control*, this Court affirmed the superior court's decision that the Highway Patrol lacked just cause to terminate the employee. *Royal v. N.C. Dep't of Crime Control*, No. COA06-756, 2007 WL 1928684, at *3 (N.C. Ct. App. July 3, 2007). There, the trooper who was fired for conduct that suggested he was having very suspicious discussions with an undercover police officer posing as a prostitute. When the superior court conducted its review, it relied upon the employer's selective enforcement of its personnel rules and disparate treatment in discipline. *Royal v. Dep't of Crime Control,* No. 03 CV 015891, 2006 WL 4228219 (N.C. Super. Ct., Wake County Mar. 28, 2006). The disparate

Arbitrator Carol Daugherty initially articulated the most frequently cited formulation of "the seven tests of just cause."[6] The North Carolina State Personnel Commission has recognized and applied this seven factor test in implementing the *Carroll* principles.[7] In *Burgess v. N.C. Highway Patrol* (07 O.S.P. 0052), Judge Beecher Gray and the State Personnel Commission applied this seven factor just

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treatment militated against a finding of just cause. The reinstatement of the trooper was upheld on appeal by this Court. *Royal*, 2007 WL 1928684, at *4

[6]. *See In re Enterprise Wire Co.*, 46 L.A. 359 (1966). An entire 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 following seven questions are posed 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) Was 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?

An answer of "no" to any one or more of the seven questions normally signifies that just cause does not exist. See Roger I. Abrams & Dennis R. Nolan, *Toward A Theory of "Just Cause" in Employee Discipline Cases,* 85 Duke L.J. 594 (1985). This article was approvingly cited in *Carroll.* 599 S.E. 2d at 900. Virtually all of these factors militate in Sergeant Jones' favor, thus the decisions below are correct.

[7]. *E.g., Bulloch v. N.C. Dep't of Crime Control & Pub. Safety,* 05 O.S.P. 1178, 2010 WL 690232 (N.C.O.A.H. Jan. 15, 2010), adopted by Personnel Commission; *Burgess v. N.C. Highway Patrol,* 07 O.S.P. 0052 (July 16, 2008), adopted by Personnel Commission.

cause test. In *Foard v. N.C. Department of Crime Control and Public Safety*, Superior Court Judge Henry Hight adopted Judge Joe Webster's reliance upon this test.[8] In *Foard,* The ALJ and Judge Hight found that Patrol management officials, including one involved in this case, made misrepresentations and engaged in witness intimidation. Furthermore, in *Bulloch v. N.C. Department of Crime Control*, the ALJ and the Personnel Commission applied this test.[9] Through these decisions, the seven-factor test clearly emerged as the leading analytical model to be used in implementing *Carroll* in North Carolina.

V. THE PATROL'S NON-COMPLIANCE WITH ITS OWN PERSONNEL RULES FURTHER DEMONSTRATES THE LACK OF JUST CAUSE AND GOVERNMENTAL ARBITRARINESS

Another recognized basis to show lack of just cause involves a state employer's lack of compliance with its own rules. A line of cases from the U.S. Supreme Court holds that governmental representations made in a public employer's personnel policies must be "scrupulously" adhered to.[10] Where government employment is premised upon "a defined procedure . . . that procedure must be scrupulously

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[8]. *Foard v. N.C. Dep't of Crime Control & Pub. Safety,* 09 C.V.S. 003519 (Wake Superior Ct.; Nov. 10, 2010), *aff'g* 07 O.S.P. 0135, 2008 WL 5598371 (N.C.O.A.H. Nov. 5, 2008).

[9]. *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety,* 05 O.S.P. 1178, 2010 WL 690232 (N.C.O.A.H. Jan. 15, 2010).

[10]. *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring); *see Service v. Dulles*, 354 U.S. 363 (1957); S.E.C. v. Cherry, 318 U.S. 80, 87–88 (1942).

observed." 359 U.S. at 543 and 546. In short, governmental employers must play by their own rules.

The N. C. State Personnel Commission, administrative agencies and numerous courts have long held that governmental employers must comply with their own rules and that non-compliance by agencies with their own rules constitutes a separate ground for relief. *E.g.*, *Dietrich v. N.C. Highway Patrol*, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.A.H. August 13, 2001; adopted by Personnel Commission). In *Dietrich*, Judge Gray and the Personnel Commission explained as follows:

> As an alternative ground for not imposing formal discipline in this case, the Patrol has failed to comply with its own regulations. . . . Governmental employers must comply with their own regulations. See *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1970), where the Fourth Circuit included a thoughtful discussion of *Shaughnessy* and other United States Supreme Court cases which stand for this central proposition. The Court observed that in *Shaughnessy* that [sic] the Supreme Court vacated a governmental decision because the procedure leading to the order did not conform to the relevant regulations. The failure of the board and of the Department of Justice to follow their own established procedures was held a violation of due process... These principles have been cited as applicable in contemporary public employee constitutional litigation in North Carolina.

The State Personnel Commission recently reaffirmed the rule providing that "there is an alternative ground for not imposing formal discipline where an agency fails to

comply with its own policy."[11] In *U.S. v. Heffner*, 420 F. 2d 809, 812 (4th Cir. 1969), the Fourth Circuit observed that the Supreme Court vacated a governmental personnel decision in *Accardi v. Shaughnessy* because "the procedure leading to the order did not conform to the relevant regulations. The failure of the board and of the Department of Justice to follow their own established procedures was held a violation of due process."[12] In *Heffner*, the Fourth Circuit explained:

> *An agency of the government must scrupulously observe rules, regulations, or procedures which it has established.* When it fails to do so, its actions cannot stand and courts will strike it down. This doctrine was announced in *United States ex. rel. Accardi v. Shaughnessy* . . . . These cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures. 420 F.2d at 811-12. (Emphasis added).

VI. CONCLUSION

The evidence demonstrates that Sergeant Jones' enormously important interests protected by the State Personnel Act were subverted to the political whims of the

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[11]. *Bulloch v. N.C. Highway Patrol,* 05 O.S.P. 1178, 2010 WL 690232, at *38 (N.C.O.A.H. Jan. 15, 2010), adopted by N.C. State Personnel Commission. The Patrol suggests that the procedural violations were "cured" by Secretary Beatty's review. First, there was no such "cure" of anything because Secretary Beatty was directly involved in the multiple procedural and substantive violations. He cured nothing and carried out the violations. Second, the State Personnel Act does not recognize any purported "cure," whatever that means, as any type of defense.

[12]. *Heffner,* 420 F.2d at 812 (4th Cir. 1969) ("The Accardi doctrine was subsequently applied by the Supreme Court in *Service v. Dulles . . . and Vitarrelli v. Seaton* . . . to vacate the discharges of government employees." *See also Yellin v. United States*, 374 U.S. 535 (1959).

former Governor. North Carolina's police community and other state employees deserve better and are entitled to just cause protection.

Amici respectfully pray that this Court affirm the decision below and repudiate the protracted abuse of government power so that the North Carolina law enforcement community can effectively function without obstruction of proper personnel decisionmaking consistent with just cause under N.C.G.S. 126-35.

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Electronically submitted

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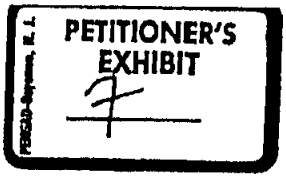
VII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served by first class mail to John O'Hale, Post Office Box 1567, Smithfield, N.C. 27577 and Tamara Zmuda, Jess D. Mekeel, North Carolina Department of Justice, 9001 Mail Service Center, Raleigh, North Carolina 27602 this 23rd day of August, 2011.

/s/ J. Michael McGuinness
J. Michael McGuinness

APPENDIX

Petitioner's Exhibit 7 - Statement of Lt. Colonel C.E. Lockley



IF THE GOVERNOR'S PRESS OFFICE had not intervened in this matter, and let the case run it's course, I would not have come to the same conclusion as I did on September 9, 2007. It was clear to me that the outcome of Sgt. Jones' case should be his termination from the Highway Patrol. I arrived at this conclusion from my discussion with Lt. Clendenin after he had been in some disussion with the Governor's Press Office. "They want him gone" were Lt. Clendenin's words. He mentioned that someone in that discussion suggested that Sgt. Jones should consider resigning. So the decision regarding Sgt. Jones' career was predetermined, not by the Patrol's disciplinary process but by an outside entity whose purpose was not the fair and equitable treatment of Sgt. Jones. I reviewed Sgt. Jones' statements / comments after his pre-dismissal conference. I gave no consideration to any of his claims or contentions because the ultimate outcome of this case had been pre-determined. I did not follow up! There was no pressure on me from Secretary Beatty as to what the outcome should be. As far as the decision in this case to terminate

Sgt. Jones, I did the wrong thing for the right reason (protecting the agency's image). This is the only case that has caused me any uncertainty and because of this matter, my personal integrity has been compromised. I have felt this way since September 9, 2007, since I signed the document terminating Sgt. Jones. This is totally unacceptable to me.

The right thing to do is make a decision based on no interference from the Governor's Press Office, no intense media scrutiny, no rush to judgment, and no public outcry. In my opinion, the outcome would be different because Sgt. Jones acted in the manner he was trained, even though it was an ugly manner.

I hope that all of the evidence will be reviewed without bias and the factors mentioned above. All of the red flags are here to signal a great injustice has been done to Sgt. Jones. We have an opportunity to get it right without more embarassment and without damaging the agency's image. I hope we take advantage of it.

UTCG. 10CW