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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

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> Just cause, like justice itself, is not susceptible of precise definition . . . . It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.[1]
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> [T]he disciplinary action taken [must be] 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.[2]

I. INTRODUCTION

North Carolina state employees serve as an enormously important part of our democratic system of government.[3] Over ninety thousand state employees carry out the functions of North Carolina government.[4]

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1. *Id.* at 900.

2. *Id.*

3. As of April 2010, the State of North Carolina had 93,217 full-time, permanent, state employees. *North Carolina Government Workforce Statistics*, N.C. OFFICE OF STATE PERSONNEL, http://www.osp.state.nc.us/data/stats/start.htm (last visited Feb. 24, 2011). Recent developments in several states including Wisconsin, Ohio, Indiana, New Jersey, and California reveal how job security issues for state employees have become high profile disputes capturing national headlines. *See, e.g.*, Adam Sorenson, *What Wisconsin Has Wrought: Labor Unrest Spreads*, TIME, February 23, 2011; Erin McPike, *Union Disputes Spread To Indiana, Ohio*, TIME, February 22, 2011; Michael Shear, *Politics of Wisconsin Labor Fight Spread To Washington*, N.Y. TIMES, February 18, 2011.

4. N.C. OFFICE OF STATE PERSONNEL, *supra* note 3.

The services provided by state employees represent a significant component of the entire management of state government. The day-to-day operation of North Carolina government is essentially dependent upon the service of state employees.

Unfortunately, North Carolina state employees are subject to a broad range of legal and employment risks as a result of their state service.[5] Serving as a state employee thrusts one into a dangerous world of endless investigations, accusations, media scrutiny, and potential discipline, often triggered by the complaints of unsatisfied "customers."

Supervisors often demand perfection in performance and conduct, both on and off-duty. Taxpayers are often quick to take out their frustrations on state employees who are hardly to blame for the many problems facing North Carolina. These state employees frequently are accused of conduct, performance, and other policy violations. These legal risks to state employees have substantially increased in recent years.[6]

The most minor alleged infractions can invoke substantial investigation and the risk of severe discipline, including termination. Discipline for unacceptable personal conduct can be imposed without warning and can be premised upon a single incident as long as the conduct is sufficiently severe that it rises to the level required for "just cause."[7] Fortunately, the State Personnel Act provides insulation from discipline without just cause for career state employees.[8] This just cause standard is essentially one of the few general barriers separating career state employees from the unemployment line, and its application and interpretation is the subject of this Article.

The body of public employment law governing North Carolina state employees consists of layers of federal and state constitutional, statutory, regulatory, and common law.[9] The just cause principle is one of the

5. *See* cases cited *infra* note 29.

6. *See* cases cited *infra* note 29.

7. *See* 25 N.C. ADMIN CODE 1J.0604, .0608, .0614 (2011); *Carroll*, 599 S.E.2d 888.

8. Under the State Personnel Act, just cause protection is only available for career employees who have completed twenty-four months of continuous state employment service. N.C. GEN. STAT. §§ 126-1.1, -35.

9. The United States Constitution affords protections against various types of retaliatory, arbitrary, or discriminatory employment actions. *See* U.S. CONST. amend. I, XIV; *id.* art. I, §§ 1, 14, 19, 35, 36. The State Personnel Act and other legislation provides statutory rights for employees as well. *See* N.C. GEN. STAT. § 143-422.1 (Equal Employment Practices Act). Title 25 of the North Carolina Administrative Code provides various procedural and substantive regulations in part governing state employee

general core principles in the arsenal of protections for career state employees. State personnel disputes often present serious challenges to employees trying to survive in a potential minefield of traps where a single false or unsupported complaint can begin years of investigation and, ultimately, discipline.

This Article explores the doctrine of just cause in North Carolina public employment law. After a review of the leading North Carolina Supreme Court case of *N.C. Department of Environment and Natural Resources v. Carroll*[10] and its progeny, this Article examines applicable just cause standards and analytical tests so that the true meaning of just cause can be better understood. Multi-factor tests are applied in order to employ a more objective just cause standard and to avoid unprincipled conclusions not founded upon established criteria.

II. SOURCES OF PROTECTION FOR STATE EMPLOYEES UNDER THE STATE PERSONNEL ACT

Although many other state and federal employment laws apply to the protection of state employees in specific contexts, the State Personnel Act is a fundamental statutory scheme which grants a number of specific rights to covered state employees.[11] There are also a number of state promulgated regulations which further define related state personnel issues and standards.[12]

The State Personnel Act provides protection from various types of injuries, including retaliation, discrimination, and adverse actions that occur without just cause.[13] The North Carolina Whistleblower Act provides judicial remedies for state employee whistleblowers who report various types of wrongdoing.[14] The North Carolina Constitution likewise affords broad remedies to state employees.[15]

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personnel matters. State employees also enjoy various common law claims under the State Tort Claims Act. *Id.* §§ 143-291 to 300.1a.

10. N.C. Dep't of Env't & Natural Res. v. Carroll, 599 S.E.2d 888 (N.C. 2004).

11. *See* N.C. GEN. STAT. § 126.

12. *See* 25 N.C. ADMIN. CODE.

13. N.C. GEN. STAT. § 126-34.1.

14. *Id.* § 126-84 to -87; *see also* Newberne v. N.C. Dep't of Crime Control, 618 S.E.2d 201, 211–12 (N.C. 2005).

15. Although a thorough review of state constitutional law is beyond the scope of this Article, there is promising hope for state employees pursuing state constitutional claims. For example, in *Toomer v. Garrett*, 574 S.E.2d 76 (N.C. Ct. App. 2002), the North Carolina Court of Appeals recognized disparate treatment claims in a personnel

The enforcement mechanism for these varied regulations is provided by the Administrative Procedures Act.[16] The North Carolina State Personnel Commission hears state personnel cases, usually following a hearing and a recommended decision by an administrative law judge ("ALJ").[17]

Section 126-5 of the North Carolina General Statutes identifies which employees are subject to the State Personnel Act.[18] The statute contains a lengthy list of exemptions and exceptions. Career state employees, as defined in section 126-1.1, are protected by the State Personnel Act.[19] A career state employee, for purposes of being entitled to just cause protection, must have been continuously employed by the state in a position subject to the State Personnel Act, for the immediately preceding twenty-four months.[20]

The State Personnel Act provides the procedure for grievance appeals for career state employees. Generally, this requires any employee having a grievance arising out of his employment that does not involve discrimination to follow the grievance procedure established by his or her department or agency.[21] Employees therefore must exhaust their grievance and internal agency appeals.[22] Section 126-34.1 identifies the various grounds for contested cases under the State Personnel Act.[23] A state employee may file a contested case petition in the Office of Administrative Hearings to challenge eleven specified types of injuries.[24]

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dispute involving a former state employee, Algie Toomer. *See infra* text accompanying notes 236–40; *see also* J. Michael McGuinness, *The Rising Tide of North Carolina Constitutional Protection In The New Millenium*, 27 CAMPBELL L. REV. 223 (2005).

16. *See* N.C. GEN. STAT. § 150(B); *see also* Julian Mann, *Administrative Justice: No Longer Just A Recommendation*, 79 N.C. L. REV. 1571 (2001).

17. The powers and duties of the State Personnel Commission are set forth in section 126-4. *Id.* § 126-4. The commission is authorized to establish policies and rules governing a wide range of state employment issues including but not limited to the appointment, promotion, transfer, demotion, suspension, and separation of employees. *Id.* The Office of Administrative Hearings is comprised of ALJs who hear cases under the Administrative Procedure Act. *See id.* § 150(B). Most of the ALJs have vast experience and expertise in adjudicating just cause and other state personnel cases, and are widely recognized as affording fair hearings.

18. *Id.* § 126-5.

19. *See id.* § 126-1.1.

20. *Id.*

21. *Id.* § 126-34.

22. *Id.*

23. *See id.* § 126-34.1.

24. *Id.*

Perhaps the most common form of state employment dispute is whether there is just cause for discipline. Section 126-35 precludes certain discipline without just cause.[25] Section 126-35(d) places the burden of proof upon the employer to prove just cause for discipline.[26] Any just cause dispute requires a two-part inquiry: (1) "whether the employee engaged in the alleged conduct," and (2) "whether that conduct constitutes just cause for the disciplinary action taken."[27] Ultimately, discipline for career state employees is justified when the employer can prove the particular level of just cause required to justify the discipline imposed.[28]

III. THE GROWING LEGAL RISKS CONFRONTING STATE EMPLOYEES

Because of the prevalence of workplace personnel hazards, maintaining a career as a state employee is not easy. The last two decades have brought new dangers for state employees and growing abuse of government power by state employers.[29] As the government

25. *Id.* § 126-35.

26. *Id.* § 126-35(d).

27. N.C. Dep't of Env't & Natural Res. v. Carroll, 599 S.E.2d 888, 898 (N.C. 2004) (quoting Sanders v. Parker Drilling, 911 F.2d 191, 194 (9th Cir. 1990)) (internal quotation marks omitted).

28. *See id.*

29. *See* Corum v. Univ. of N.C., 413 S.E.2d 276 (N.C. 1992); Kelly v. N.C. Dep't of Env't & Natural Res., 664 S.E.2d 625 (N.C. Ct. App. 2008); Corbett v. N.C. Dep't of Motor Vehicles, 660 S.E.2d 233 (N.C. Ct. App. 2008); Ramsey v. N.C. Dep't of Motor Vehicles, 647 S.E.2d 125 (N.C. Ct. App. 2007); Royal v. N.C. Dep't of Crime Control, 646 S.E.2d 443 (N.C. Ct. App. 2007); Brookshire v. N.C. Dep't of Transp., 637 S.E.2d 902 (N.C. Ct. App. 2006); Lenzer v. Flaherty, 418 S.E.2d 276 (N.C. Ct. App. 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); Williams v. N.C. Highway Patrol, 98 CVS 01217 (Mar. 28, 2000); 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); 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); Jones v. Beatty, 07 O.S.P. 2222, 2008 WL 4378246 (N.C.O.A.H. June 5, 2008); Poarch v. N.C. Dep't of Crime Control & Pub.

has grown, so has the power of government employers.[30] Contemporary North Carolina public sector workplaces present vast opportunities for management officials to employ retaliation and impose various adverse actions.[31] Recent North Carolina cases have reaffirmed many of the state personnel problems festering in state agencies for decades, including: retaliation,[32] discrimination, political patronage,[33] arbitrary and

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Safety, 03 O.S.P. 2004 (Sept. 17, 2007); 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).

30. *See* SAM J. ERVIN, JR., PRESERVING THE CONSTITUTION: 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). For cases demonstrating just cause problems, see *supra* note 29.

31. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (cataloging cases of government retaliation in different contexts). *Toomer v. Garrett*, 574 S.E.2d 76 (N.C. Ct. App. 2002), is perhaps one of the more egregious examples of retaliation and disparate treatment. Toomer settled a personnel claim, and the agency director responded with direct retaliation in the form of releasing plaintiff's personnel file to the media. *Id.* at 82. Many cases have reaffirmed traditional constitutional protections for state employees. In *Debnam v. N.C. Department of Corrections*, 432 S.E.2d 324 (N.C. 1993), the supreme court reaffirmed traditional constitutional protections for public employees during internal investigations. In *Corum v. University of North Carolina*, 413 S.E.2d 276 (N.C. 1992), our supreme court issued the watershed state constitutional decision of the 1990's. *Corum* reaffirmed the importance of free expression for public employee's and held that damage remedies are available for violations of the North Carolina Constitution. *Id.* at 293. *Corum* involved retaliation against a faculty member at Appalachian State University. *Id.* at 280. In *Lenzer v. Flaherty*, 418 S.E.2d 276 (N.C. Ct. App. 1992), *disc. rev. denied*, 421 S.E.2d 348 (N.C. 1992), the court of appeals addressed claims under article I, sections 14 and 19 of the North Carolina Constitution in a speech retaliation case involving a state employee. Lenzer, a physician's assistant, was fired by her state employer, the Alcohol Rehabilitation Center in Butner, for reporting suspected patient abuse to the State Bureau of Investigation and the State Department of Human Resources. *Id.* at 278–79. The court of appeals reversed summary judgment for the defendants on several claims including Lenzer's free speech claim. *Id.* at 282–86. The court of appeals relied heavily upon the analysis in *Corum*, recognizing the whistleblower theory of constitutional protection for public employees. *Id.* Scores of North Carolina just cause cases demonstrate the pervasive problems in state personnel administration. *See* cases *cited supra* note 29.

32. *E.g.*, Brand v. N.C. Dep't of Crime Control & Pub. Safety, 352 F. Supp. 2d 606 (M.D.N.C. 2004) ($63,000 verdict and $50,000 in attorney fees); Newberne v. N.C. Dep't of Crime Control & Pub. Safety, 618 S.E.2d 201 (N.C. 2005); *Corum*, 413 S.E.2d 276.

33. *E.g.*, Gahagan v. N.C. Highway Patrol, 2000 CVS 335 (N.C. Super. Ct., Madison County Nov. 30, 2000). Trooper Michael Gahagan was transferred due to his

capricious actions, discipline without just cause,[34] fraud and misrepresentation,[35] denial of procedural process, defective and improper investigations, deprivations of privacy, refusals to comply with agency policy,[36] intentionally publicized false accusations, defamation, physical battery,[37] and most every other offense on the books.[38]

New weapons are being used by bureaucrats and politicians against North Carolina state employees. Many horror stories appear in recent state employee terminations, especially by the North Carolina Highway Patrol.[39] Despite constitutional and statutory protection for the privacy of most personnel matters, state agencies have blasted state employees in the media, causing additional harm.[40] For example, then Governor Michael Easley publicly weighed in and commented on a pending state employee case in *Poarch v. N.C. Department of Crime Control and Public Safety*, when the Governor's office issued a press release at 9:22 p.m. on a Sunday night proclaiming that the Governor would defy a decision by an ALJ reinstating a state trooper.[41]

Republican political party affiliation following a disagreement with a local Democratic political party operative.

34. *See* cases cited *supra* note 29.

35. For one of the more frightening examples, see *Foard v. N.C. Department of Crime Control & Public Safety*, 09 CVS 003519 (Nov. 10, 2010), *aff'g* 07 O.S.P. 0135, 2008 WL 5598371 (N.C.O.A.H. Nov. 5, 2008). Judges Hight and Webster found that highway patrol management officials engaged in practices of misrepresentations and witness intimidation. *Id.*

36. Scott v. N.C. Dep't of Crime Control & Pub. Safety, 10 O.S.P. 1105 (Oct. 26, 2010). Judge Morrison and the commission granted summary judgment to a terminated state trooper where the Secretary of Crime Control had violated his own agency policy and insisted that he was not bound by his agency policy. *Id.*

37. In one case, Trooper Allen Williams of Columbus County was battered by his first sergeant following a disagreement. Williams v. N.C. Highway Patrol, 98 CV 01217 (N.C. Super. Ct., Columbus County (Mar. 28, 2000). When Trooper Williams filed a complaint about being battered, he was retaliated against by being transferred to Vance County. *Id.*

38. *See* cases cited *supra* note 29.

39. E.g., 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); Jones v. Beatty, 07 O.S.P. 2222, 2008 WL 4378246 (N.C.O.A.H. June 5, 2008).

40. *See, e.g.*, Toomer v. Garrett, 574 S.E.2d 76 (N.C. Ct. App. 2002).

41. Poarch v. N.C. Dep't of Crime Control & Pub. Safety, 03 O.S.P. 2004 (Sept. 17, 2007); *see also* Dan Kane, *Easley: Trooper won't get job back*, RALEIGH NEWS AND OBSERVER, Sept. 24, 2007, at B1. The title of this article was misleading as there was no evidence that Trooper Poarch had any sex on duty. The *Poarch* case involved an assessment of selective enforcement of Highway Patrol personnel rules and disparate treatment in discipline. Trooper Poarch was terminated for an off-duty extramarital

Trooper Monty Poarch was ordered reinstated by an ALJ in light of the egregious disparate treatment in the discipline meted out by the Highway Patrol.[42] Trooper Poarch's case was then pending before the State Personnel Commission when the Governor's office issued its Sunday night press release.[43] Secretary Bryan Beatty of the Department of Crime Control thereafter held a staged press conference about the pending *Poarch* case.[44] The secretary also publicly released confidential personnel information regarding twenty-four instances of patrol discipline.[45]

The employer instigated other efforts in *Poarch* to impugn Trooper Poarch in the media with false allegations while his case was pending before the State Personnel Commission.[46] The patrol commander wrote a letter to the editor of the *Raleigh News & Observer* criticizing the presiding judge.[47] *Poarch* represented a new low in government abuse in the treatment of public employees - at least until the case of Sergeant Charles Jones of the highway patrol.[48]

Jones v. Beatty is another of the recent state personnel cases that have revealed evidence of high level political intermeddling and retaliation in personnel disputes, including arbitrary gubernatorial orders to fire employees. In *Jones*, senior highway patrol officials and high level aides to then Governor Easley engaged in a process of overt politicized retaliation against a state trooper who was falsely accused of animal abuse.[49] The Governor ordered that Sergeant Jones be fired before the investigation into the alleged animal abuse was completed.[50] In fact, the order was arbitrarily issued to fire Sergeant Jones before the end of a particular business day.[51] Secretary Beatty informed patrol

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affair but numerous other employees had engaged in egregious misconduct and were not terminated.

42. *Id.*

43. *Id.*

44. The *Raleigh News and Observer* provided a number of articles covering *Poarch* and other cases. *See, e.g.*, Kane, *supra* note 41.

45. *See Highway Patrol Releases Records Detailing Officers Punishments*, *WRAL NEWS*, *http://www.wral.com/news/local/story/1964633.*

46. *See Bryan Beatty News Conference on Highway Patrol*, http://wral.com/news/state/video/1965765.

47. *See* W. Fletcher Clay, *Ruling Was A Setback To Patrol Discipline*, RALEIGH NEWS AND OBSERVER, Sept. 25, 2007.

48. *See* Jones v. Beatty, 07 O.S.P. 2222, 2008 WL 4378246 (N.C.O.A.H. Nov. 22, 2010).

49. *Id.* (finding that the Highway Patrol failed to prove just cause for termination).

50. *Id.*

51. *Id.*

officials that the Governor's staff wanted Sergeant Jones "gone."[52] Sergeant Jones was then wrongfully fired without just cause and in violation of his procedural due process rights.[53] Judge Fred G. Morrison, the State Personnel Commission, and the Wake County Superior Court all ruled in favor of Sergeant Jones.[54]

Jones is perhaps the most illustrative recent example of a massive degree of overt political obstruction of justice under the State Personnel Act. The facts were substantially undisputed, including that the Governor ordered the unlawful termination of Jones and the end run around the State Personnel Act.[55] The just cause provision of the State Personnel Act provided the necessary protection from this political scheme ordered by the Governor and carried out by his operatives.[56]

On August 30, 2007, Sergeant Jones was served with a complaint alleging a less-serious personal conduct violation.[57] On the same date, the officer assigned to investigate the complaint, Captain Briggs, was informed that he had until October 1, 2007 to complete his investigation.[58] On August 31, 2007, Captain Briggs received a telephone call from Major Jamie Hatcher, then Director of Special Operations, instructing Captain Briggs that no later than 2:00 p.m. that day Sergeant Jones was to be placed on "investigatory placement."[59] Later that same day, Captain Briggs was told that his investigation must be completed that day.[60] It was stipulated in the resulting litigation that on or about August 31, 2007, the Governor decided that Sergeant Jones should be dismissed from the highway patrol.[61]

Lt. Everett Clendenin, Public Information Officer for the highway patrol, told Lt. Colonel C.E. Lockley, Deputy Commander of the

52. Order of Judge Hardin at 9, *Jones*, 2008 WL 4378246 (citing Transcript at 323–24, *Jones*, 2008 WL 4378246). Then Patrol Lt. Everett Clendin informed Lt. Colonel C.E. Lockley that "the Governor wants Jones gone." *Id.* at 6 (citing Transcript at 348). Lt. Colonel Lockley testified that "he did the 'wrong thing' by approving the pre-determined decision to fire Jones." *Id.* at 6 (citing Transcript at 337–43). Much of the evidence is not recited in the orders, but appears in the transcript.

53. *Id.* at 8–9.

54. *Jones*, 08 CVS 21917; *Jones*, 2008 WL 4378246.

55. *Jones*, 2008 WL 4378246.

56. *See id.*

57. Transcript, *supra* note 53, at 705–06.

58. *Id.*

59. Transcript, *supra* note 53, at 707. This is to allow job temporary restructuring during an investigation.

60. Transcript, *supra* note 53, at 710.

61. *Jones*, 2008 WL 4378246.

highway patrol, that the Governor's press office wanted Sergeant Jones "gone."[62] On Friday, August 31, 2007, without any meaningful investigation, Secretary Beatty suspended Sergeant Jones from the highway patrol.[63]

On Wednesday evening, September 5, 2007, Sergeant Jones was informed that his pre-dismissal conference was scheduled for Friday, September 7, 2007.[64] Later, this conference was postponed until Saturday, September 8, 2007 at 10:00 a.m.[65] On Saturday, September 8, 2007 at 9:58 a.m., Lt. Clendenin emailed all highway patrol personnel and forwarded them a copy of a *Raleigh News & Observer* article announcing that Sergeant Jones had already been fired from the highway patrol, notwithstanding the fact that the pre-dismissal conference had yet to occur.[66] 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."[67]

Colonel Clay, commander of the Highway Patrol, recused himself from the case and made Lt. Colonel Lockley his designee.[68] As such, it was Lt. Colonel Lockley who officially terminated Sergeant Jones' employment with the Highway Patrol.[69] Lt. Colonel Lockley later testified as follows:

> 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 Sergeant Jones' case should be his termination from the Highway Patrol. I arrived at this conclusion from my discussion Lieutenant Clendenin after he had been in some discussion with the Governor's Press Office. "They wanted him gone" were Lieutenant Clendenin's words. He mentioned that someone in that discussion suggested that Sergeant Jones should consider resigning.
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> 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 a fair and equitable treatment of Sergeant Jones. I received Sergeant Jones' statements, comments after his pre-dismissal conference. I gave no consideration to any of his claims or contentions

62. *Id.*
63. *Id.*
64. *Id.*
65. Transcript, *supra* note 53, at 715.
66. *Jones*, 2008 WL 4378246.
67. Transcript, *supra* note 53, at 324.
68. *Id.*
69. *Jones*, 2008 WL 4378246.

> because the ultimate outcome of his case had been predetermined. I did not follow up . . . .
>
> As far as the decision in this case to terminate Sergeant Jones, I did the wrong thing for the right reason, protecting the agency—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 Sergeant 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 Sergeant 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 Sergeant Jones. We have an opportunity to get it right without more embarrassment, without damaging the agency's image. I hope we take advantage of it.[70]

The evidence in *Jones*[71] and *Poarch*[72] demonstrates why North Carolina must have an effective just cause standard: to prevent career state employees from unjustified discipline arising out of raw political intervention and obstruction of justice. The last few years have brought significant developments in just cause law in light of the growing abuses of government power by North Carolina state employers.[73] The North Carolina Supreme Court, lower courts and administrative agencies have responded with a series of decisions reaffirming the breadth of just cause protections for state employees.[74]

IV. THE NEED FOR AN EFFECTIVE JUST CAUSE STANDARD

An effective just cause standard is necessary in order to retain a professional and qualified state workforce. State government provides essential core functions and services for all North Carolinians, including such critical services as public safety, public health, public highways,

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70. Transcript, *supra* note 53, at 331–33.

71. *Jones*, 2008 WL 4378246.

72. Poarch v. N.C. Dep't of Crime Control & Pub. Safety, 03 O.S.P. 2004 (Sept. 17, 2007).

73. *See* cases cited *supra* note 29.

74. *See* cases cited *supra* note 29.

and public education.[75] The degree of efficiency with which these core state services are delivered substantially determines part of the quality of life for many North Carolinians. State law enforcement officers, school teachers,[76] public health workers, emergency response personnel, court personnel, transportation workers, social workers, corrections officers, and countless others who perform the day-to-day delivery of government services need effective just cause protection in order for the government to properly function.

The State Personnel Act and its just cause standard were meant to protect the jobs of career state public servants from the whim of inappropriate discipline,[77] by requiring state employers to justify discipline of career state employees and to ensure that the high threshold for determining just cause is met.[78]

In short, an effective just cause standard is enormously important for a number of reasons: (1) to deter political retaliation and the further politicization of state agencies; (2) to promote positive employee morale and *esprit de corps*; (3) to deter arbitrary personnel actions by state employers; and (4) to promote consistency in personnel administration and promote workplace justice for employees and employers. It is for these reasons that North Carolina's personnel system requires an effective just cause standard, applied to appropriately discipline truly improper behaviors while also deterring management from unjustified discipline and other misconduct. Meaningful just cause protection helps to safeguard against arbitrariness, mistakes, errors, retaliation and other misconduct which can deprive a state employee of his or her employment, and also deprive the state of a valuable employee representing a substantial financial investment by the state. An effective just cause standard will protect this investment while at the same time protecting the rights of government workers.

Furthermore, just cause protections promote fairness in the workplace, which leads to employee confidence and positive morale. A positively motivated workforce breeds and environment of collegiality, efficiency and *esprit de corps*. Without meaningful just cause protections, erroneous decisions go unchecked. Discipline without just cause frustrates the entire personnel system by demoralizing North

75. *See, e.g.*, N.C. GEN. STAT. §§ 136, 143 (2010).

76. Local teachers and many other personnel are not covered by the State Personnel Act. The statutory rights of teachers are set forth in chapter 115C, section 325 of the North Carolina General Statutes. *See* N.C. GEN. STAT. § 115C-325.

77. *Id.* § 126-1.

78. *See id.*

Carolina's valuable employees and rewarding abusive management officials for their own misconduct.

V. *CARROLL*: OUR SUPREME COURT'S JUST CAUSE LAW

For state employees with twenty-four continuous months of state service, a state agency employer must prove just cause in order to impose significant discipline,[79] a burden outlined in section 126-35 of the North Carolina General Statutes.[80] Just cause is a term of art in public employment law, although it is not expressly defined by statute in North Carolina.[81] The North Carolina Administrative Code also fails to define just cause.[82] Rather, courts and administrative agencies have

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79. *Id.* §§ 126-1.1, 126-35 (covering termination, suspension, and demotion of state employees).

80. The relevant portions of section 126-35 provide:

> (a) No career state employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted fifteen days from the date the statement is delivered to appeal to the head of the department.
>
> . . .
>
> (d) In contested cases conducted pursuant to chapter 150B of the General Statutes, the burden of showing that a career state employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.

Id. § 126-35(a), (d).

81. *Id.* § 126-35.

82. *See* 25 N.C. ADMIN. CODE 1J.0604 (2011) (providing two "bases" for just cause: (1) unsatisfactory job performance and (2) unacceptable personal conduct); *see also* Follum v. N.C. State Univ., 696 S.E.2d 203 (N.C. Ct. App. 2010); Raynor v. N.C. Dep't of Health & Human Servs., 09 O.S.P. 4648 (July 26, 2010). Title 25, chapter 1J, section 0614(h) of the North Carolina Administrative Code defines unacceptable personal conduct as:

> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> (2) job-related conduct which constitutes a violation of state or federal law; or
>
> (3) convictions of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the state; or
>
> (4) the willful violation of known or written work rules; or
>
> (5) conduct unbecoming of state employees that is detrimental to state service; or

issued decisions which have shaped the body of just cause law in North Carolina.[83] The leading case is *N.C. Department of Environment & Natural Resources v. Carroll*, handed down by the Supreme Court of North Carolina in 2004.[84] As the court explained in *Carroll*, "Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case."[85] Another leading state 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."[86]

In *Carroll*, the North Carolina Supreme Court issued a comprehensive decision clarifying the just cause principle and expanding the breadth of just cause protection for state employees.[87] Justice Mark Martin authored the unanimous decision of the court.[88] The court addressed several issues involving just cause and the applicable tests for determining just cause.[89] The court also broke new ground in several respects and enunciated an effective just cause standard.[90] Ultimately, *Carroll* reaffirmed a time honored principle from

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(6) 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; or

(7) absence from work after all authorized leave credits and benefits have been exhausted; or

(8) falsification of a state application or in other employment documentation.

25 N.C. ADMIN. CODE 1J.0614(h).

83. *See, e.g.*, N.C. OFFICE OF ADMIN. HEARINGS, http://www.oah.state.nc.us (last visited Feb. 23, 2011) (describing the Office of Administrative Hearings' jurisdiction, procedures, and published decisions).

84. N.C. Dep't of Env't & Natural Res. v. Carroll, 599 S.E.2d 888, 899 (N.C. 2004).

85. *Id.* at 900 (quoting Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1242 (7th Cir. 1997)) (internal quotation marks and citations omitted).

86. Dietrich v. N.C. Highway Patrol, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.A.H. Aug. 13, 2001). *Carroll* relied on *State ex rel Ashley v. Civil Services Commission for Deputy Sheriffs*, 395 S.E.2d 787, 790–91 (W. Va. 1990), for the proposition that just cause requires "misconduct of a substantial nature" and does not encompass "technical violations." *Carroll*, 599 S.E.2d at 901.

87. *Carroll*, 599 S.E.2d at 888.

88. *Id.* at 890.

89. *Id.* at 898–905.

90. *Id.* at 900–01.

over one hundred years ago: The courts will be very derelict in their duty if they do not force justice in favor of employees as well as the public.[91]

A. *Carroll's Factual Background*

Like many personnel disputes involving North Carolina state employees, Officer Clifton Carroll's pursuit of workplace justice became a protracted battle where the state agency fought long and hard for six years. The case arose from a job related incident whereby Officer Carroll, a park ranger, was contacted on his job and informed that his eighty-five year-old mother, a patient in a rest home Alzheimer's unit, had collapsed and was unresponsive.[92] The attending nurse described the mother's condition as "very serious."[93] One week earlier, Officer Carroll had been informed that his mother was showing signs of congestive heart failure.[94] Officer Carroll's wife telephoned him and informed him that he needed to call the rest home to confirm permission to admit his mother to the hospital.[95]

Officer Carroll was the power of attorney for his mother's health care decisions.[96] After trying unsuccessfully to reach the rest home by phone, Officer Carroll decided that he needed to leave his work assignment to either reach a phone where he could connect with the rest home or drive to the rest home.[97] Officer Carroll then quickly relayed instructions to his staff and began the six mile drive to the state park area where his personal vehicle was located.[98]

Upon entering the city limits of Kure Beach, Officer Carroll found himself in slow traffic behind a line of cars traveling bumper to bumper.[99] In an attempt to clear the traffic, Officer Carroll engaged his emergency flashers and dash mounted blue lights.[100] As the traffic cleared and he left the Kure Beach city limits, Officer Carroll exceeded the speed limit for approximately six-tenths of a mile by driving up to

91. *See* Greenlee v. S. Ry. Co., 30 S.E.2d 115, 116 (N.C. 1898).
92. *Carroll*, 599 S.E.2d at 890.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

forty-five miles per hour in a thirty-five mile per hour zone.[101] Before exceeding the speed limit, Officer Carroll confirmed that there was no traffic ahead of him and there were no pedestrians or other vehicles on either side of the road.[102]

Officer Carroll reached the Carolina Beach State Park Office, went inside, telephoned the rest home, and spoke with a nurse who updated him on his mother's condition.[103] Unbeknownst to Officer Carroll, three Carolina Beach police officers had observed him traveling with flashing blue lights.[104] These officers arrived at the office to inquire if Officer Carroll needed assistance.[105] They knocked on the door several times while Officer Carroll was inside talking on the telephone with the nurse about his mother's condition.[106] Two of the officers outside believed that Officer Carroll shouted profanity at them while telling them to wait until he was off the phone.[107] Both officers indicated that they did not take offense to any language used by Officer Carroll,[108] while Officer Carroll denied using any profanity at all; a statement which was corroborated by the nurse who he was talking with on the phone.[109] Officer Carroll thereafter met with the officers and explained the situation to them before they left the office.[110]

After the officers informed one of their superiors about the incident, that superior believed that a complaint needed to be initiated, so he brought the incident to the attention of Officer Carroll's supervisor.[111] Subsequently, Officer Carroll was demoted from Park Ranger III to Park Ranger II with a five-percent reduction in salary.[112] The employer contended that the disciplinary action imposed upon Officer Carroll was appropriate because he allegedly violated workplace rules and state law in connection with his driving.[113] These simple facts began a six-year battle over the meaning of just cause.

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101. *Id.* at 891.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 892.
112. *Id.*
113. *Id.*

B. *Procedural History*

Officer Carroll initiated a contested case petition under the State Personnel Act alleging lack of just cause for the discipline imposed.[114] The case was initially tried before Administrative Law Judge Beecher Gray, who issued a recommended decision directing that Officer Carroll be promoted back into his rank along with other relief because there was no just cause for the discipline.[115] Thereafter, the matter was heard by the State Personnel Commission, which unanimously adopted Judge Gray's decision.[116] The respondent then filed a petition for judicial review whereby the trial court reversed the decision of the State Personnel Commission.[117] Officer Carroll appealed and the court of appeals affirmed the superior court's order.[118] The supreme court allowed Officer Carroll's petition for discretionary review, unanimously reversed the court of appeals, and remanded for reinstatement of the decision of the State Personnel Commission in Officer Carroll's favor.[119]

C. *North Carolina Supreme Court Review*

The supreme court began its analysis by reviewing the North Carolina statutory framework for administrative appeals by public employees of disciplinary actions taken against them by their employing state agencies.[120] The supreme court then conducted extensive analysis of the standards of review applicable to administrative law cases.[121] The supreme court ultimately held that both the trial court and the court of appeals erred in their application of the standard of review and determination of what constitutes just cause for discipline.[122] The supreme court explained that a determination of whether a state employer has just cause to discipline career employees requires two separate inquiries: first, whether the employees engaged in the conduct alleged; and second, "whether that conduct constitutes just cause for the *disciplinary action taken*."[123] The court concluded that the first inquiry is

114. *Id.* at 890; *see also* N.C. GEN. STAT. § 126- 35 (2010).
115. *Carroll*, 599 S.E.2d at 890.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 893.
121. *Id.* at 894–97.
122. *Id.*
123. *Id.* at 898.

a question of fact, whereas the second inquiry is a question of law.[124] Thus, the ultimate just cause determination is a question of law.[125]

The court's emphasis upon analyzing the actual disciplinary action taken reaffirms the notion that the just cause analysis is tailored to the quantity of discipline imposed. As further explained in subsequent cases, just cause for termination is a different standard than just cause for lesser discipline;[126] the "penalty" must match the "deed done by petitioner."[127] *Carroll*'s standard that the discipline imposed must be "just" further demonstrates that there is a sliding scale of analysis where a lower threshold for just cause applies to lesser discipline. Simply stated, just cause for termination is a much higher standard than just cause for demotion or suspension.

In *Carroll*, the supreme court also enunciated a "reasonable belief" test for the employee.[128] 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.[129] The adoption of this reasonable belief test is significant in that it affords reasonable discretion to employees, especially when confronting exigent circumstances or an unclear policy. Many situations arise where state employees have to make immediate judgment-call decisions. Employees also frequently have to make decisions involving unclear agency policy. *Carroll* affords deference to these employees when they have a reasonable belief that their conduct is appropriate.[130]

The supreme court in *Carroll* also held that violations of agency guidelines or state law do not necessarily constitute just cause for discipline.[131] This rule repudiated longstanding practices in some

124. *Id.*

125. *Id.*

126. *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).

127. *See Raynor*, 09 O.S.P. 4648.

128. *Carroll*, 599 S.E.2d at 900–02. Other areas of law apply reasonable belief tests. *See, e.g.*, Saucier v. Katz, 533 U.S. 194 (2001) (qualified immunity); Graham v. Conner, 490 U.S. 386 (1989) (excessive force); Sigman v. Town of Chapel Hill, 161 F.3d 782 (4th Cir. 1998) (excessive force).

129. *Carroll*, 599 S.E.2d at 901.

130. *Id.*

131. *Id.*

agencies that routinely imposed discipline for simple policy violations. Under *Carroll*'s logic, a policy violation or even a violation of law does not necessarily rise to the required level of just cause for discipline.[132] The supreme court 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."[133] The court again pointed out that just cause was to be understood as a "flexible" standard, based on notions of fairness, that should be determined based upon the facts of the purported violation in each case.[134]

The conclusion by the supreme court that "not every violation of law gives rise to just cause for employee discipline"[135] is significant because some state employers continue to contend that a violation of policy or law absolutely constitutes just cause for discipline. The court's reasoning demonstrates that just cause determinations are not so simple or technical. Rather, the totality of the facts and circumstances must be assessed using equity and fairness and balanced to a just result.[136]

In analyzing the evidence before it, the court sifted through many pertinent facts and circumstances, including the officer's history, performance, conduct, and "reasonable belief that he could treat the emergency situation with his mother as 'one of necessity.'"[137] The court concluded that "the evidence of record, taken as a whole, supports a reasonable conclusion that [Officer] Carroll was motivated by his 'reasonable belief' that his conduct was necessitated by a medical emergency."[138]

The court observed that although "there is no bright line test to determine whether an employee's conduct establishes 'unacceptable personal conduct' and thus 'just cause' for discipline, we draw guidance from those prior cases where just cause has been found."[139] The court then reviewed a number of cases whereby just cause findings involved

132. *Id.* at 900.

133. *Id.*

134. *Id.* (quoting Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1242 (7th Cir. 1997)) (internal quotation marks omitted).

135. *Id.* at 901 (internal quotation marks omitted).

136. *Id.*

137. *Id.*

138. *Id.* at 903.

139. *Id.* at 904.

matters "of a much more serious nature than" were involved in *Carroll*.[140] Thus, the court employed a comparative analysis.

Just cause determinations are not for trivial or insignificant matters.[141] Rather, they are reserved for substantial violations of work rules which are unjustified under the totality of the facts and circumstances after the application of mitigation principles and balancing.[142] Just cause for termination requires far more than a violation of agency policy or law. Because there is no bright-line rule from *Carroll*,[143] numerous other factors necessarily must be properly considered, balanced and applied so that the ultimate determination meets *Carroll's* test of a "just" decision.[144] *Carroll* clearly demonstrates that just cause determinations cannot be simple or matters of technical precision, but rather, that the totality of the facts and circumstances must be assessed utilizing guiding principles of equity and fairness.[145] *Carroll* and the North Carolina Administrative Code require that mitigating factors also be considered.[146]

Prior to *Carroll*, North Carolina law lacked lucid guidance on the meaning of just cause. *Carroll* enunciated several important governing principles that most lower courts and agencies have embraced. *Carroll* represents a clarification of the law and more meaningful guidance for employers, the State Personnel Commission, and the courts. *Carroll* and the utilization of additional multi-factor tests removed just cause determinations from a virtually subjective test to one with analytical structure.

State employees will make mistakes, some justifiable and some more serious. *Carroll* makes clear that such mistakes or even violations of agency policy or law do not necessarily or automatically translate into just cause for discipline. *Carroll's* just cause standard requires serious analysis of the totality of facts and circumstances so that a meaningful assessment of justification, the reasonable belief of the employee, mitigation, and other elements can be determined. An analysis of lower court personnel cases since *Carroll* demonstrates that *Carroll* has

140. *Id.*

141. *See* Dietrich v. N.C. Highway Patrol, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.A.H. Aug. 13, 2001).

142. *Id.*; *see also Carroll*, 599 S.E.2d at 900.

143. *Id.* at 904.

144. *See id.*; Hill v. N.C. Dep't of Crime Control & Pub. Safety, 04 O.S.P. 1538 (Sept. 2, 2008); Poarch v. N.C. Dep't of Crime Control & Pub. Safety, 03 O.S.P. 2004 (September 17,2007).

145. *Carroll*, 599 S.E.2d at 900.

146. *See* 25 N.C. ADMIN. CODE 1B.0413 (2011).

successfully made just cause law more understandable, clear, analytical, and functional.[147] *Carroll* has broad implications and will further promote workplace justice in North Carolina.

VI. *CARROLL'S* PROGENY AND IMPLICATIONS

The *Carroll* tests have been routinely applied in just cause cases in North Carolina,[148] while other state regulations provide further guidance in determining just cause for discipline.[149] There have been several significant North Carolina appellate cases interpreting just cause since *Carroll* was issued in 2004. Perhaps one of the most instructive of those cases is *Kelly v. N.C. Department of Environment & Natural Resources*, where the court of appeals addressed a case involving just cause for discipline for off-duty conduct.[150] The case arose out of an incident whereby the two petitioners, long term state employees, were fishing in the White Oak River.[151] Petitioners gigged seventeen flounders and two drums.[152] They were stopped by a patrol boat from the Division of Marine Fisheries,[153] and Division personnel inspected the fishing coolers on board the petitioners' vessel and inquired of petitioners if they knew the minimum flounder size limit.[154] Petitioners replied that they thought the limit was either thirteen or thirteen and one-half inches.[155] In fact, the applicable flounder size regulation had recently changed from thirteen inches to fourteen inches.[156] Upon inspecting the coolers, the fisheries officers determined that twelve of the seventeen flounders were less than fourteen inches and that two red drums had been gigged, which was not a permitted technique for taking red drum.[157]

147. *See Hill*, 04 O.S.P. 1538; *Poarch*, 03 O.S.P. 2004; *see also* cases cited *supra* note 29.

148. *See* cases cited *supra* note 29.

149. For example, see title 25, section 1B.0413 of the North Carolina Administrative Code which provides that "all relevant factors and considerations" must be weighed "including factors of mitigation." 25 N.C. ADMIN. CODE 1B.0413; *see also* Etheridge v. N.C. Dep't of Admin., 05 O.S.P. 1771, 2006 WL 3290507 (N.C.O.A.H. Aug. 3, 2006).

150. Kelly v. N.C. Dep't of Env't & Natural Res., 664 S.E.2d 625 (N.C. Ct. App. 2008).

151. *Id.* at 627–28.

152. *Id.* at 628.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

The officers issued each petitioner a citation for taking six undersized flounder and possessing one gigged red drum.[158] The agency that employed the petitioners conducted an investigation, and petitioners were subsequently charged with "unacceptable personal conduct unbecoming a state employee that is detrimental to state service."[159] The agency imposed disciplinary suspensions for five days without pay.[160] The ALJ reversed the suspensions, finding that the agency lacked just cause to discipline petitioners and that their suspensions were arbitrary and capricious.[161] The State Personnel Commission adopted new findings of fact and conclusions of law affirming the decision to discipline petitioners.[162] On judicial review, the Wake County Superior Court found that "petitioners did not intentionally violate the fishing laws, but rather their actions amounted to a careless mistake; that no lasting effects arose from petitioners' conduct; that a recurrence of petitioners' conduct was unlikely; and that petitioners' conduct had not impaired their ability to perform their job duties and would not adversely impact their future ability to perform for" the agency.[163] Therefore, the superior court concluded that the agency did not have just cause.[164]

The court of appeals affirmed the superior court in pertinent part.[165] The court applied the well-settled tests from *Eury v. N.C. Employment Security Commission*[166] and *Carroll*[167] and concluded that the trial court properly found that a *rational nexus* did not exist between the off-duty conduct giving rise to the fishing tickets and the potential adverse impact on petitioners' future ability to perform for the agency.[168]

In another representative case, *Royal v. N.C. Department of Crime Control*, the court of appeals affirmed the superior court's decision that

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 633.
166. *See infra* text accompanying notes 222–23.
167. *See supra* text accompanying notes 124–26, 129–30.
168. *Id.* at 632–33 (citing N.C. Dep't of Env't & Nat. Res. v. Carroll, 599 S.E.2d 888, 898 (N.C. 2004); Eury v. N.C. Emp. Sec. Comm'n, 446 S.E.2d 383, 395–96 (N.C. Ct. App. 1994), *disc rev. denied*, 451 S.E.2d 635 (N.C. 1994)).

the employer lacked just cause to terminate the employee.[169] There, the employee was a state trooper who was fired for conduct that suggested he was having suspicious discussions with an undercover police officer posing as a prostitute.[170] When the superior court conducted its review, it relied upon the employer's selective enforcement of its personnel rules and disparate treatment in discipline.[171] The disparate treatment militated against a finding of just cause. The reinstatement of the trooper was upheld on appeal.[172]

In *Follum v. North Carolina State University*, the court of appeals addressed a termination case arising out of the petitioner's communication, conduct, and treatment of others.[173] After written warnings for the conduct at issue, the conduct continued.[174] Subsequently, serious performance problems were discovered, and termination followed.[175] The employee challenged the sufficiency of the evidence as being insufficient to establish just cause for termination.[176] The court of appeals applied the *Carroll* standard and concluded that the employee's conduct rose to the level required for just cause.[177]

Other appellate cases have carved out additional just cause principles. An example of the heavy burden that an employer must carry in a just cause case appears in *Walker v. N.C. Department of Human Resources*.[178] There, employees were discharged because they did not meet standards for productivity set by their supervisor during a probationary period.[179] The court concluded that when an agency seeks to establish just cause, "it cannot rest solely on the grounds that a supervisor's directives were not carried out to their fullest extent."[180] The evidence demonstrated that each employee had improved during the probationary period, and that they were behind in certain areas such as

169. Royal v. N.C. Dep't of Crime Control, No. COA06-756, 2007 WL 1928684, at *3 (N.C. Ct. App. July 3, 2007).

170. *Id.* at *1.

171. Royal v. Dep't of Crime Control, No. 03 CV 015891, 2006 WL 4228219 (N.C. Super. Ct., Wake County Mar. 28, 2006).

172. *Royal*, 2007 WL 1928684, at *4.

173. Follum v. N.C. State Univ., No. COA09-1466, 2010 WL 2163782 (N.C. Ct. App. June 1, 2010).

174. *Id.* at *2.

175. *Id.* at *3.

176. *Id.*

177. *Id.* at *6–8.

178. Walker v. N.C. Dep't of Human Res., 397 S.E.2d 350 (N.C. Ct. App. 1990).

179. *Id.* at 352.

180. *Id.* at 355.

paperwork due to extraneous forces such as under-staffing and a fire in the office.[181] The evidence also established that each employee was putting in extra efforts to meet the supervisor's requirements.[182] In affirming the decision of the superior court to reverse the discharges, the court of appeals articulated the heightened burden that the employer must establish:

> In attempting to establish that it had just cause to terminate an employee . . . an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough. The agency must show that these quotas and job requirements were *reasonable*, and if so, that the employee made no reasonable effort to meet them.[183]

Ultimately, *Walker* demonstrates that unreasonable employer conduct militates against a finding of just cause.

Many cases have established that an employer's decision to discipline an employee must be supported by "substantial evidence."[184] Our courts have recognized that "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[185] It is "more than a scintilla or a permissible inference."[186] In order to establish justification for the disciplinary action through substantial evidence, the employer cannot "cherry pick" the facts upon which it relies, but must take into account contradictory evidence or evidence from which conflicting inferences could be drawn.[187] For example, in *Wiley v. N.C. Department of Health and Human Services*, the employee, a nursing assistant, was accused of slapping a patient.[188] The agency concluded that the employee had slapped the patient, based

181. *Id.* at 354–55.

182. *Id.* at 355.

183. *Id.*; *see also* Gainey v. N.C. Dep't of Justice, 465 S.E.2d 36, 41 (N.C. Ct. App. 1996).

184. *E.g.*, Overton v. Goldsboro City Bd. of Educ., 283 S.E.2d 495 (N.C. 1981); Teague v. N.C. Dep't of Transp., 628 S.E.2d 395 (N.C. Ct. App. 2006); Mendenhall v. N.C. Dep't of Human Res., 459 S.E.2d 820 (N.C. Ct. App. 1995); Kandler v. Dep't of Corr., 342 S.E.2d 910 (N.C. Ct. App. 1986).

185. Thompson v. Wake Cnty. Bd. of Educ., 233 S.E.2d 538, 544 (N.C. 1977) (internal citations omitted).

186. *Id.*; *see also* Wiggins v. N.C. Dep't of Human Res., 413 S.E.2d 3, 5 (N.C. Ct. App. 1992).

187. Wiley v. N.C. Dep't of Health & Human Servs., No. COA02-169, 2002 WL 31895023, at *3 (N.C. Ct. App. Dec. 31, 2002).

188. *Id.* at *1.

primarily on statements provided by two other employees.[189] However, the statements and testimony of those employees proved inconsistent.[190] Furthermore, those employees testified that the patient was slapped so hard by the petitioner that the slap "echoed" or was "very loud and it rang."[191] However, the evidence revealed that the patient had pale skin and that she bruised often and easily, but on this occasion there were no visible signs of bruising or abuse.[192] This evidence was ignored by the employer.[193] On appeal, the court of appeals concluded that the contradictory evidence must be taken into account by the employer, and where that is not done, just cause is not established.[194] As the court explained, "[t]he accusing witnesses would have the agency believe that an elderly women [sic] with pale, quick-to-bruise skin, was slapped so hard that the slap echoed but no visible signs resulted. It is simply unfathomable that some mark, however slight, would not have been visible after such a riveting slap."[195]

Carroll's just cause test requires a broad analysis of all facts and factors that relate to whether the discipline *is just.* The requirement of mitigation is expressly codified in title 25, section 1B.0413 of the North Carolina Administrative Code, which provides that "all relevant factors and circumstances" must be weighed "including factors of mitigation."[196] This regulation reaffirms the core principles of *Carroll.*[197]

VII. THE SEVEN FACTOR *ENTERPRISE WIRE* JUST CAUSE TEST

Because *Carroll* found that there is no bright-line test for just cause, various factors and tests have been utilized to determine whether government employers have proven just cause for discipline. In 1966, Arbitrator Carol Daugherty articulated the most frequently cited formulation of the concept of what has come to be called "the seven tests

189. *Id.*

190. *Id.* at *4.

191. *Id.* at *2.

192. *Id.* at *4.

193. *Id.*

194. *Id.* at *3.

195. *Id.* at *4.

196. 25 N.C. ADMIN. CODE 1B.0413 (2011); *see also* Etheridge v. N.C. Dept. of Admin., 05 O.S.P. 1771, 2006 WL 3290507 (N.C.O.A.H. Aug. 3, 2006); Dietrich v. N.C. Highway Patrol, 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.A.H. Aug. 13, 2001).

197. *See supra* text accompanying notes 124–26, 129–30.

of just cause."[198] The North Carolina State Personnel Commission has recognized and applied this seven factor test.[199]

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?[200]

An answer of "no" to any one or more of the seven questions normally signifies that just cause does not exist.[201]

In *Burgess v. N.C. Highway Patrol*, Judge Beecher Gray and the North Carolina State Personnel Commission applied this seven factor just cause test.[202] In *Foard v. N.C. Department of Crime Control and Public Safety*, Superior Court Judge Henry Hight adopted Judge Joe

198. *See In re* Enterprise Wire Co., 46 L.A. 359 (1966). An entire treatise on discipline and discharge is structured around Arbitrator Daugherty's seven tests. *See* KOVEN AND SMITH, JUST CAUSE: THE SEVEN TESTS (May Rev. 3d ed. 2006).

199. *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); Burgess v. N.C. Highway Patrol, 07 O.S.P. 0052 (July 16, 2008).

200. *Enterprise Wire*, 46 L.A. 359.

201. *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*. N.C. Dep't of Env't & Natural Res. v. Carroll, 599 S.E.2d 888 (N.C. 2004).

202. *Burgess*, 07 O.S.P. 0052.

Webster's reliance upon this test.[203] Furthermore, in *Bulloch v. N.C. Department of Crime Control and Public Safety*, the ALJ and the North Carolina State Personnel Commission applied this test.[204] Through these decisions, the seven-factor *Enterprise Wire* test clearly emerged as the leading analytical model to be used in implementing *Carroll* in North Carolina.[205]

Of particular importance, the sixth *Enterprise Wire* factor is whether the employer has consistently applied the work rule in question to other employees.[206] Where the evidence demonstrates that the employer has selectively enforced its work rule or has imposed disparate treatment in discipline, this factor militates against a finding of just cause.[207] North Carolina State Personnel Policy expressly provides that state agency

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

204. 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).

205. In *Hill v. N.C. Department of Crime Control*, Administrative Law Judge Chess employed a slightly different multi-faceted set of factors in determining whether there was just cause to terminate a state trooper. These factors necessitate a broad review of a number of sub-factors, which include:

(1) The employee's training and education on the relevant points of inquiry;

(2) The employee's history on the relevant points of inquiry including the state employee's quantity of experience;

(3) Whether the conduct is isolated or a part of a pattern or practice of the employee;

(4) The motivation of the agency in the termination including whether there was any improper considerations;

(5) Was the employee involved in good faith whistleblowing of possible misconduct or other good faith motivations;

(6) Was the employee under any duress or coercion that may have contributed to his or her conduct;

(7) Was the employee motivated by any improper personal self gain;

(8) Any other significant mitigating factors.

These factors were tailored to the particulars of *Hill*, but appear to be analytically helpful in considering *Carroll's* broad standard of whether the discipline was just. *Hill* and other cases following *Carroll* demonstrate the broad totality of circumstances test that warrants consideration of various factors in determining just cause.

206. *In re* Enterprise Wire Co., 46 L.A. 359 (1966). The other just cause tests, including the North Carolina State Personnel Manual, also apply the selective enforcement and disparate treatment principle. Disparate treatment and selective enforcement issues are further addressed *infra*.

207. *Id.*

employers have a duty to consider evidence of disparate treatment in discipline.[208] In *Mims v. N.C. Sheriff's Commission*, 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.[209]

The disparate treatment and selective enforcement principles are helpful in illustrating the employer's actual employment practices regarding the work rule in issue.

A leading national scholar and practitioner has suggested the following factors may be considered in determining just cause:[210]

1. Has the government factually proven the charges by a preponderance of the evidence?

2. Was the imposed punishment proportionate in light of the facts and circumstances of the case?

3. Did the employer conduct a thorough investigation?

4. Were other employees who engaged in conduct similar to that of the employee treated as harshly by the employer?

5. Was the employee's misconduct the product of action or inaction by the employer?

6. Did the employer take into consideration the employee's good or exemplary work history?

7. Did the employer take into consideration mitigating circumstances?

8. Was the employee subjected to progressive or corrective discipline?

9. Was the employer motivated by anti-union bias?

10. Are the employer's rules clear and understandable?

11. Is the employee likely to engage in similar conduct in the future?

12. Was the employee afforded procedural due process in the disciplinary investigation?

The foregoing factors provide similar themes of analysis as provided by *Enterprise Wire* and *Hill*.

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208. *E.g.*, STATE PERSONNEL MANUAL, *supra* note 203, § 7, at 11; *see also* Poarch v. N.C. Dep't of Crime Control & Pub. Safety, 03 O.S.P. 2004 (Sept. 17, 2007).

209. Mims v. N.C. Sheriff's Comm'n, 02 D.O.J. 1263, 2003 WL 22146102 (N.C.O.A.H. June 3, 2003) (citing Toomer v. Garrett, 574 S.E.2d 76 (N.C. App. 2002)).

210. *See* Will Aitchison, *The Rights of Police Officers* 99–101 (6th ed. 2009). Mr. Aitchison has taught just cause and other public personnel law around the country for decades. His treatises are known as the "bible" of public employment law.

The North Carolina State Personnel Manual similarly provides a list of factors for analysis including:

(1) Whether the supervisor should recommend disciplinary action based on the facts.

(2) Whether more investigation is needed to make a recommendation.

(3) The type and degree of disciplinary action to be taken.

(4) The employee's work history.

(5) The disciplinary actions received by other employees within the agency/work unit for comparable performance or behaviors.

(6) Other relevant factors.[211]

The sixth provision affords broad latitude for consideration of other unenumerated factors.

VIII. OFF—DUTY CONDUCT AND JUST CAUSE

As discussed above, government employers can, and routinely do discipline state employees for conduct away from the workplace, wielding a power not possessed by most of their private sector counterparts. Under what circumstances and to what extent can a state employer impose discipline for off-duty conduct? Discipline for off-duty conduct may be proper where the employer can prove a clear relationship between the off-duty conduct and the employer's legitimate interests.[212] The critical component in finding just cause for discipline based on off-duty conduct is the employer's proof of a *rational nexus* between the off-duty conduct and the employer's legitimate interest.[213] Constitutional privacy and related principles generally preclude governmental employers from overreaching into the private lives of employees.[214]

North Carolina cases have recognized a special set of analytical rules in state employee cases, as well as a *nexus* test when the alleged misconduct occurs off-duty. In *Eury*, the court of appeals addressed a

211. STATE PERSONNEL MANUAL, *supra* note 203, § 7, at 11.

212. Eury v. N.C. Emp. Sec. Comm'n, 446 S.E.2d 383, 395–96 (N.C. Ct. App. 1994), *disc rev. denied*, 451 S.E.2d 635 (N.C. 1994)).

213. *Id.*

214. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 530 (1945); Littlejohn v. Rose, 768 F.2d 765, 770–71 (6th Cir. 1985); Thorne v. City of El Segundo, 726 F.2d 459, 468–71 (9th Cir. 1983).

state employee termination case premised upon off-duty misconduct.[215] The *Eury* test was re-affirmed by *Kelly*.[216]

In *Eury*, the employees were caught growing marijuana and were fired.[217] They pled to the misdemeanor charge of maintaining a vehicle for the transportation of a controlled substance in violation of section 90-108(a)(7) of the North Carolina General Statutes.[218] The ALJ found that there was no just cause for termination.[219] The State Personnel Commission adopted some but not all of the ALJ's findings and found just cause.[220] The superior court then agreed with the original finding of the ALJ, and found no just cause for termination.[221] The court of appeals ultimately remanded the case after setting forth an analytical test with factors to address in off-duty state personnel cases.[222]

The court of appeals held that "the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency."[223] The court of appeals explained:

> [I]t is well established that administrative agencies may not engage in arbitrary and capricious conduct . . . . Accordingly, we hold that in cases in which an employee has been dismissed based upon an act of off-duty criminal conduct, the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency . . . . In determining whether a rational nexus exists, the Commission may consider the following factors:
>
> - the degree to which, if any, the conduct may have adversely affected clients or colleagues;
>
> - the relationship between the type of work performed by the employee for the agency and the type of criminal conduct committed;

215. *Eury*, 446 S.E.2d 383.

216. Kelly v. N.C. Dep't of Env't & Natural Res., 664 S.E.2d 625, 632 (N.C. Ct. App. 2008).

217. *Eury*, 446 S.E.2d at 385–86.

218. *Id.* at 386.

219. *Id.*

220. *Id.*

221. *Id.* at 387.

222. *Id.*

223. *Id.* at 395–96.

> - the likelihood of recurrence of the questioned conduct and the degree to which the conduct may affect work performance, work quality, and the agency's good will and interests . . .
>
> - the proximity or remoteness in time of the conduct to the commencement of the disciplinary proceedings;
>
> - the extenuating or aggravating circumstances, if any, surrounding the conduct;
>
> - the blameworthiness or praiseworthiness of the motives resulting in the conduct; and
>
> - the presence or absence of any relevant factors in mitigation.
>
> Although we now recommend certain factors which could be considered by the Commission in employing the rational nexus test, we caution that no list of factors should be viewed as all-inclusive.[224]

These *Eury* factors provide substantial criteria for analysis in each case, to be analyzed in conjunction with the tests enunciated by *Carroll*. These factors demonstrate that there is a heightened standard for the determination of just cause in off-duty conduct cases as compared with more traditional on-duty conduct cases.

IX. THE LEADING TEST FOR DETERMINING THE MAGNITUDE OF DISCIPLINE

When just cause for discipline is properly found, how should an agency properly determine the appropriate level of discipline? *Carroll* held that the disciplinary action must be *just*.[225] This requires that discipline be commensurate with the magnitude of the offense,[226] while taking into consideration a number of specific factors.

In *Douglas v. Veterans' Administration*,[227] the Merit Systems Protection Board enunciated the following factors for application in determining the appropriateness of punishment:

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224. *Id.*

225. N.C. Dep't of Env't & Natural Res. v. Carroll, 599 S.E.2d 888, 900 (N.C. 2004).

226. 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); Ramsey v. N.C. Dep't of Motor Vehicles, 647 S.E.2d 125 (N.C. Ct. App. 2007).

227. Douglas v. Veterans' Admin., 5 M.S.P.B. 313, 329–32 (1981). The *Douglas* test has been widely followed for thirty years. *See* Isidore Silver, *Public Employee Discharge and Discipline* (3d ed. 2001) (reviewing just cause for discipline in chapter three). This treatise was approvingly cited in *Carroll*. *See Carroll*, 599 S.E.2d at 900.

1. The nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional, technical or inadvertent, or was committed maliciously or for gain or was frequently repeated.

2. The employee's job level and type of employment, including supervisory role, contacts with the public and prominence of the position.

3. The employee's past disciplinary record.

4. The employee's past work record including length of service, performance on the job, ability to get along with fellow workers and dependability.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform.

6. The consistency of the penalty with those imposed upon other employees for the same or similar offenses.

7. The impact of the penalty upon the agency's reputation.

8. The notoriety of the offense or its impact upon the reputation of the agency.

9. The clarity with which the employee was aware of any rules that were violated in committing the offense or have been warned about the conduct in question.

10. The potential for the employee's rehabilitation.

11. The presence of mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The foregoing factors have long been recognized as appropriate tools of analysis in determining a just disciplinary penalty. *Carroll's* "just" standard provides for commensurate discipline.[228]

228. *See, e.g.*, *Raynor*, 2010 WL 3283844 ("[T]he penalty of dismissal does not match the deed done by petitioner."); *Ramsey*, 647 S.E.2d 125 ("[D]ismissal under these facts would be a miscarriage of the principles of fairness for this petitioner . . . .").

X. NON–COMPLIANCE WITH AGENCY RULES AS A LACK OF JUST CAUSE

Another recognized basis to show lack of just cause involves a state agency employer's lack of compliance with its own rules. A line of cases holds that governmental representations made in a public employer's ordinances, personnel policies, and handbooks must be "scrupulously" adhered to.[229] Where government employment is premised upon "a defined procedure . . . that procedure must be scrupulously observed."[230] *Vitarelli v. Seaton* reinforced the rule that governmental employers must comply with applicable departmental regulations.[231] In short, governmental employers must play by their own rules.

The State Personnel Commission, administrative agencies and numerous courts have 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.[232] In *Dietrich v. N.C. Highway Patrol*, Judge Gray 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. The Accardi Doctrine was subsequently applied by the Supreme Court in *Service v. Dulles*, 354 U.S. 363 (1959), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), to vacate the discharges of government employees. These principles

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

230. *Vitarelli*, 359 U.S. at 546.

231. *Id.*; *see also* Beacom v. Equal Employment Opportunity Comm'n, 500 F. Supp. 428 (D. Ariz. 1980) (holding that public employees must be accorded benefit of agency regulations.); *accord* Parks v. Watson, 716 F.2d 646, 656 (9th Cir. 1983) (holding that state legislation which provides for particular procedural protection constitutes an entitlement protectable through the Due Process Clause); Derrickson v. Bd. of Educ., 703 F.2d 390, 315 (8th Cir. 1983) (holding that public employer's failure to follow its own regulations may unconstitutionally deprive employees of property interest).

232. *E.g.*, Dietrich v. N.C. Highway Patrol, No. 00 O.S.P. 1039, 2001 WL 34055881 (N.C.O.A.H. August 13, 2001).

> have been cited as applicable in contemporary public employee constitutional litigation in North Carolina.[233]

The State Personnel Commission has 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."[234]

In *United States v. Heffner*, the Fourth Circuit Court of Appeals 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."[235] In *Heffner*, the court 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.[236]

These cases demonstrate that governmental rule compliance is a fundamental requirement for just cause for discipline.

XI. DISPARATE TREATMENT AND SELECTIVE ENFORCEMENT PRECLUDE A FINDING OF JUST CAUSE

Even when just cause for discipline could otherwise be properly determined, and the offending employee is clearly guilty of some misconduct, disparate treatment of offending employees within the agency can preclude a finding of just cause. The last several decades of public employment law have generated hundreds of cases demonstrating that disparate treatment in discipline and selective enforcement of personnel rules are substantial problems that adversely affect public personnel administration. Disparate treatment and selective enforcement are among the factors to be addressed in just cause cases

233. *Id.* (internal quotation marks and citations omitted).

234. Bulloch v. N.C. Highway Patrol, 05 O.S.P. 1178, 2010 WL 690232, at *38 (N.C.O.A.H. Jan. 15, 2010) (citing *Dietrich*, 2001 WL 34055881).

235. United States v. Heffner, 420 F.2d 809, 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." (internal citations omitted)); *see also* Yellin v. United States, 374 U.S. 535 (1959).

236. *Heffner*, 420 F.2d at 811–12.

under the *Enterprise Wire*[237] and other analytical tests. A number of North Carolina just cause cases have been predicated upon findings of disparate treatment and selective enforcement.[238]

The following cases were mostly decided on equal protection grounds and are addressed herein to illustrate the underpinnings of the doctrine of disparate treatment. These cases remain helpful for disparate treatment analysis in just cause cases, and the application of the *Carroll* and other relevant factors and tests.

In *Toomer v. Garrett*, the court of appeals recognized disparate treatment claims in a records dispute involving a former state employee.[239] Toomer settled an employment claim with his former employer, the North Carolina Division of Motor Vehicles.[240] Following his settlement, the secretary of the Department of Transportation retaliated by releasing Toomer's personnel records directly to the news media.[241] Toomer's files were dumped out to the press, but the files of other employees who had settled cases were not.[242] Thus, Toomer's constitutional disparate treatment claim was upheld, which afforded him a second recovery.[243]

Among the leading selective enforcement cases in the public employment context is *Ziegler v. Jackson*.[244] In *Ziegler*, the Fifth Circuit reversed summary judgment and imposed judgment as a matter of law for a police officer who was terminated due to his misdemeanor criminal convictions for presenting a firearm and criminal provocation.[245] Three other officers were retained, despite their convictions for assault and forgery.[246] The criminal charges were different, but the pattern of conduct illustrated the selective enforcement of the personnel rules.[247]

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237. *In re* Enterprise Wire Co., 46 L.A. 359 (1966).

238. *See, e.g.*, Royal v. N.C. Highway Patrol, No. COA06-756, 2007 WL 1928684 (N.C. Ct. App. 2007); *Bulloch*, 2010 WL 690232; Poach v. N.C. Highway Patrol, 03 O.S.P. 2004 (Sept. 17, 2007); Foard v. N.C. Highway Patrol, 09 CVS 003519, *aff'g* 07 O.S.P. 0135, 2008 WL 5598371 (N.C.O.A.H. Nov. 5, 2008).

239. Toomer v. Garrett, 574 S.E.2d 76, 88–89 (N.C. Ct. App. 2002), *disc. rev. denied*, 579 S.E.2d 576 (N.C. 2003).

240. *Id.* at 82.

241. *Id.* at 82–83.

242. *Id.* at 89.

243. *Id.*; *see also* Mims v. N.C. Sheriff's Comm'n, 02 DOJ 1263, 2003 WL 22146102 (N.C.O.A.H. June 3, 2003).

244. Ziegler v. Jackson, 638 F.2d 776 (5th Cir. 1981).

245. *Id.* at 780.

246. *Id.* at 779.

247. *See id.* at 779–80.

Ziegler prevailed as a matter of law.[248] *Ziegler* is often followed in cases involving public employers; these other cases are in accord.[249] *Ziegler* and other cases demonstrate how an employee can be culpable of some wrongdoing, yet still be subject to the benefit of the disparate treatment principle.

In *Abasiekong v. City of Shelby*, the plaintiff employee misused and misappropriated his employer's property and employees for personal gain.[250] The plaintiff used a city vehicle to deliver mulch to his home and used city employees to do personal jobs for him.[251] The plaintiff was subsequently fired.[252] In reversing the trial court and reinstating the plaintiff's verdict, the Fourth Circuit explained:

> In contrast to the treatment dealt Abasiekong, it appears that several white City employees enjoyed with complete impunity and some regularity the use of City vehicles and resources for personal activities. Here is the crux of our decision favoring Abasiekong. Had no disparate treatment favoring whites been established, the impropriety of diversion of public property to private use and enjoyment would doubtless have justified the termination of Abasiekong's employment.[253]

The plaintiff was obviously culpable of significant wrongdoing, yet he prevailed because of the disparate treatment.[254]

The plaintiff misused a city truck and had town employees perform personal work for him on separate occasions.[255] However, other employees misused city vehicles and resources for personal activities.[256] The dispositive point in *Abasiekong* is that various employees had violated the same policy, the details of which likely differed, but one was fired and others were not.[257] *Abasiekong* has been recognized by leading

248. *Id.* at 780.

249. *See* Olschock v. Vill. of Skokie, 541 F.2d 1254 (7th Cir. 1976) (holding that differential discipline violates equal protection if there is a showing of intentional or purposeful discrimination); Massey v. Inland Boatmen's Union, 886 F.2d 1188 (9th Cir. 1989). Equal protection claims have been stated where it was alleged that some were subjected to arbitrary denial of hearing procedures while others were not. *E.g.*, Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980); Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

250. Abasiekong v. City of Shelby, 744 F.2d 1055, 1056 (4th Cir. 1984).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 1056.

256. *Id.* at 1057.

257. *Id.*

commentators as representing the principle that "unequal discipline" can establish disparate treatment.[258]

In *Ciechon v. City of Chicago*, the Seventh Circuit addressed a personnel dispute whereby the plaintiff, a paramedic, was fired as a result of alleged mistreatment of a patient on an ambulance run.[259] However, Ciechon and her partner paramedic, Ritt, were equally responsible for the welfare of a patient.[260] However, Ciechon was fired and Ritt was not punished at all.[261] The court's decision was grounded upon the fact that the defendants chose one of the two employees for disparate treatment.[262]

Since 1944, the Supreme Court has recognized selective enforcement even where there is no special protected class.[263] In *McDonald v. Santa Fe Trail*, the Supreme Court addressed a termination case whereby a substantial number of employees were jointly charged with theft.[264] These employees had misappropriated cargo from one of the company's shipments.[265] Two of the employees were discharged, but another who committed the same offense was not discharged.[266] The Court reasoned that even participation in serious misconduct or crime

258. *See* 2 KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 19.23 at 146 (Wiley Law Publ'ns 1994). In *McDonald v. Santa Fe Trail*, the Supreme Court addressed a termination case whereby a substantial number of employees were jointly charged with theft. McDonald v. Santa Fe Trail, 427 U.S. 273 (1976). These employees had misappropriated cargo from one of the company's shipments. *Id.* at 273. Two of the employees were discharged, but another who committed the same offense was not discharged. *Id.* The Court reasoned that even participation in serious misconduct or crime does not allow an employer to escape from the disparate treatment principle. *Id.* at 283–84.

259. Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982).

260. *Id.* at 522.

261. *Id.* at 515–16.

262. *Id.* at 524.

263. *See* Snowden v. Hughes, 321 U.S. 1, 8–9 (1944). However, the Supreme Court retreated in *Engquist v. Oregon*, 553 U.S. 591 (2008), where the Court held that federal equal protection did not extend to cover the particular facts therein of a class of one discrimination grounded in federal equal protection law. However, *Engquist* has no application to just cause cases under the State Personnel Act, which has different elements and standards. North Carolina recognizes the use of non-suspect class equal protection for public employees under the North Carolina Constitution. *See also* Toomer v. Garrett, 574 S.E. 2d 76 (N.C. Ct. App. 2002).

264. McDonald v. Santa Fe Trail, 427 U.S. 273 (1976).

265. *Id.* at 273.

266. *Id.*

does not allow an employer to escape from the disparate treatment principle.[267]

Many victims of disparate treatment have substantial levels of culpability for committing offenses. For example, in *McDonnell Douglas v. Green*, the plaintiff engaged in unlawfully activity.[268] There, the plaintiff engaged in illegal activity consisting of a "stall in" where he participated in blocking access into the employer's premises.[269] The plaintiff's conduct was criminal and he plead guilty to a criminal charge.[270] The Supreme Court concluded that even his illegal activities did not preclude him from the benefit of the disparate treatment principle and the Supreme Court remanded the case for retrial.[271]

These cases provide a solid foundation of precedent for the disparate treatment rule, and are applicable in just cause analysis under *Enterprise Wire*[272] and other multi-factor tests.

XII. CONCLUSION

Most of North Carolina's state employees work to make life better for the rest of us. Many state employees make mistakes in carrying out the challenging day-to-day delivery of government services. The just cause standard requires much more than mechanical determinations of policy or law violations in order to impose discipline. Rather, the just cause standard requires a broad and probative analytical assessment of a wide range of factors and considerations with a goal of reaching a just result under the totality of the particular facts and circumstances.

Although *Carroll* did not attempt to enunciate a clear, bright-line rule for just cause, *Carroll* enunciated the core guiding analytical

267. *Id.* at 283–84.

268. McDonnel Douglas v. Green, 411 U.S. 792 (1973).

269. *Id.*

270. *Id.* at 795.

271. *Id.* at 804–07. The disparate treatment rule also applies to dancing in public facilities. In *Willis v. Town of Marshal*, 426 F.3d 251 (4th Cir. 2005), the Fourth Circuit applied the disparate treatment doctrine in an interesting case where Rebecca Willis' provocative dancing was questioned by the mayor. Ms. Willis was issued an order that she could no longer dance in the social function building in the Town of Marshal. *Id.* at 254. Despite the fact that the court ruled against Ms. Willis on numerous constitutional theories including First Amendment and Due Process claims, the court reversed the trial court and remanded the disparate treatment claims for trial. *Id.* at 267. Even if Ms. Willis had engaged in misconduct by lewd or suggestive dancing in a public facility, she could not be singled out for disparate treatment and punishment because her dance partner was not thrown out. Ultimately, this case was settled for $275,000.00.

272. *In re* Enterprise Wire Co., 46 L.A. 359 (1966).

principles establishing a solid foundation of just cause protection for state employees.[273] The *Carroll* standard, coupled with *Enterprise Wire* or other multi-factor tests, provides ample guidance for lower tribunals to decide these important cases. Justice Martin's brilliant scholarship crafted a clear opinion which has become a major positive development in public employment jurisprudence.

Carroll's progeny demonstrates that *Carroll*'s just cause protections are meaningful and broad.[274] North Carolina's specialized ALJs and the State Personnel Commission have further refined and improved just cause analysis through the application of the *Enterprise Wire*[275] and *Hill*[276] analytical factors.

As a result of *Carroll* and its progeny, state agencies and employees are able to better understand what just cause means and what analytical tests will be applied in reaching just cause decisions. Fine public servants like Sergeant Jones and many others have had a better day in court because of the *Carroll* standard. North Carolina state workplaces are safer and more efficient because Officer Carroll had the good judgment to challenge unjustified discipline, which resulted in a clarified and vastly improved legal standard of just cause. Officer Carroll reacted as any rational person would have to the trauma involving his mother, but was met with employer action that was anything but rational. North Carolina's ALJs, the State Personnel Commission, and courts will continue to fulfill the crucial import of *Carroll* by reaching a just result after a proper and complete analytical assessment is conducted. Then, workplace justice may be achieved for everyone.

273. *See* N.C. Dep't of Env't & Natural Res. v. Carroll, 599 S.E.2d 888 (N.C. 2004).

274. *See, e.g.*, Follum v. N.C. State Univ., No. COA 09-1466, 2010 WL 2163782 (N.C. Ct. App. 2010); Kelly v. N.C. Dep't of Env't & Natural Res., 664 S.E.2d 625 (N.C. Ct. App. 2008); Royal v. N.C. Highway Patrol, No. COA06-756, 2007 WL 1928684 (N.C. Ct. App. 2007).

275. *Enterprise Wire*, 46 LA 359.

276. Hill v. N.C. Dep't of Crime Control & Pub. Safety, 04 O.S.P. 1538 (Sept. 2, 2005).