

No. 18-1018

Twelfth District

BEFORE THE NORTH CAROLINA COURT OF APPEALS

THOMAS C. WETHERINGTON, )

Petitioner/Appellant, )

v. )

N.C. DEPARTMENT OF )

PUBLIC SAFETY; )

N.C. HIGHWAY PATROL, )

Respondent/Appellee. )

From Brunswick County

No. 16 OSP 09787

AMICUS CURIAE BRIEF OF THE STATE OF NORTH  
CAROLINA FRATERNAL ORDER OF POLICE AND  
NATIONAL FRATERNAL ORDER OF POLICE

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**I. INTEREST OF FOP AS AMICUS CURIAE**

The National Fraternal Order of Police is the world’s largest organization of sworn law enforcement officers, with more than 350,000 members in more than 2,100 lodges across the United States. The North Carolina State Lodge of the Fraternal Order of Police (hereinafter collectively “FOP”) is a voluntary non-profit association active throughout North Carolina and nationwide in promoting enhanced public safety and protection of the law enforcement community.

The FOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and investigation nationwide. The FOP’s

advocacy includes but is not limited to research, education, and lobbying. The FOP has appeared in other cases as amicus curiae. The FOP participates in litigation as amicus curiae when especially important police interests are at stake, as in this case.

The issues in this enormously important case—the application of a truthfulness policy—will directly affect the FOP, including its members and families, and other public employees in North Carolina.

## **II. STATEMENT OF FACTS**

The FOP adopts Trooper Wetherington's statement of facts in his briefs filed with this Court. In summary, during a high-risk traffic stop Trooper Wetherington inaccurately recalled the location of his patrol hat. The location of his hat—a fact completely unrelated to the discharge of his duties as a law enforcement officer—cost him his job and tremendous damage.

## **III. SUMMARY OF ARGUMENT**

The United States Supreme Court has recognized that roadside encounters between police officers and motorists are fraught with danger. In fact, the Court has stated that traffic stops are “especially dangerous,” in part because of the “possible presence of weapons in the area

surrounding the suspect.” *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). That is exactly the “especially dangerous” situation that Trooper Wetherington encountered in the traffic stop that is the genesis of this case.

Officers’ memories after stressful events are often fragmented and not entirely aligned with reality. Therefore, the application of a truthfulness policy must be *objective* to ensure that only *willful* untruthfulness about *significant* and *material* matters is sanctionable by termination. The North Carolina State Highway Patrol recognizes this important practicality in its own policy:

Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall *willfully* report any inaccurate, false, improper, or misleading information. (Emphasis added.)

The accepted elements to a truthfulness violation should be established before an officer can be disciplined. The untruthfulness must have (1) been intentional, (2) been material, (3) been meant to deceive, and (4) affected the police department’s operation. Here, despite acknowledging that he would consider each element, the employer’s decisionmaker failed to do so. As a result, Trooper Wetherington was terminated based on a discrepancy about the location of his hat.

Every truthfulness violation is not equal. Further, to terminate a police officer, there must be just cause. As demonstrated by other cases, proper just cause decision-making in a truthfulness case necessitates an analysis of the complete panoply of just cause factors. *See* Section V.C., *infra*.

Implementing understandable and evenly-applied policies promotes legitimacy and a sense of procedural justice that communities expect from their police departments. A workable truthfulness policy therefore demands flexibility to permit police officers and departments to effectively serve their communities.

#### IV. ARGUMENT

**A. A truthfulness policy must be objective to ensure that only *willful* untruthfulness by police officers about *significant and material* matters amount to a truthfulness violation sanctionable by termination.**

Trooper Wetherington's hat location had no material significance to the traffic stop he conducted on March 29, 2009. Indeed, the location of his hat was an insignificant detail of a traffic stop that involved the presence of alcohol and loaded handguns. Thus, Trooper Wetherington did not rush to correct any discrepancy in his statement regarding the location of his hat.



There are hundreds—maybe even thousands—of types of criminal violations that occur during a traffic stop, each with different far-reaching consequences. Kirk B. Redwine, *The Importance of the Police Report*, Criminal Justice Institute School of Law Enforcement Supervision (Oct. 26, 2003). That is why police officers work hard to recall every facet of an encounter in excruciating detail. The focus of an officer's report is on recalling those matters *material and significant* to the traffic stop and any potential crimes. The location of an officer's patrol hat is undisputedly immaterial and insignificant to either. As Trooper Wetherington testified after he realized that his hat was on the light bar of his patrol car, he felt there was *no material significance* to the exact location of the hat at the time it was lost. (T 479).<sup>1</sup>

During an encounter with the public, an officer is hyper-focused on securing the scene and suspects. In reporting that encounter, the officer recalls clearly those facts that are material and significant to the encounter. An inexact account of events does not amount to *willful* untruthfulness. Discrepancy in an officer's account is routine. An inexact

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<sup>1</sup> Petitioner/Appellant cites to both the 2010 Administrative Hearing and 2018 Administrative Hearing on remand transcripts. The 2010 transcript is cited as (T \_\_\_) and the 2018 transcript is cited as (RT \_\_\_).

account of the location of the officer's patrol hat is neither material nor significant enough to open the door to a genuine truthfulness violation.

The United States Supreme Court has recognized that roadside encounters between police officers and motorists are fraught with danger. In fact, the Court has stated that traffic stops are "especially dangerous," in part because of the "possible presence of weapons in the area surrounding the suspect." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). No discussion of the events encountered by Trooper Wetherington is complete without an examination of the effect that a high-stress incident can have on the memory of a police officer. To that end, scientific research has repeatedly confirmed that:

...officers' memories function at different levels under stress. If an officer has a vivid or distinct memory of a person with a weapon but lacks a clear recollection of an unarmed individual or some object in the environment, this could reflect how memory functions under stress, rather than planned, conscious deception by the officer.

Jeffrey J. Noble, J.D. and Geoffrey P. Alpert, Ph.D., *Criminal Interrogations of Police Officers After Use-of-Force Incidents*, FBI Law Enforcement Bulletin, (Sept. 3, 2013), <https://leb.fbi.gov/articles/featured-articles/criminal-interrogations-of-police-officers-after-use-of-force-incidents>.

Researchers have often noted that officers involved in critical incidents or high-risk encounters are unaware that their memory of the event may be incomplete or inaccurate. It is therefore not unusual for an officer to give a description of an event which may change over time or which may change after the officer is confronted with conflicting evidence. Accordingly, Trooper Wetherington's imprecise recollection of his hat location during the March 29, 2009 traffic stop was a typical reaction by an officer involved in a high-stress incident, and not the result of intentional deception.

These considerations demonstrate why any truthfulness policy must apply an objective standard to ensure that only *willful* untruthfulness is punished. Otherwise, officers will be subject to termination for common, insignificant, and even trivial discrepancies. In this case, Trooper Wetherington's employer failed to apply an objective standard when evaluating his statements, and instead used a subjective analysis that equated Trooper Wetherington's mistakes and inaccuracies with falsehood, lies, and deliberate untruthfulness. Ultimately, it resulted in a young, devoted public servant losing his job and suffering the accompanying consequences—all over the misplacement of a hat.

**B. There are four primary elements to a truthfulness violation.**

This Court should adopt the four elements to a truthfulness violation recognized and accepted by Colonel William Grey in this case and the law enforcement community at large. When truthfulness issues arise, each of the elements should be present for a violation to occur. Untruthfulness by an officer may result in discipline only “when the agency can show that the falsification was (1) intentional, (2) material and (3) meant to deceive and (4) affected the agency’s operation.” Isidore Silver, *Public Employee Discharge and Discipline*, Volume I, Section 3.08[E], page 287 (3d ed. 2001). Colonel Grey, a former Colonel of the North Carolina Highway Patrol, agreed with each of the four elements and testified that he would consider each element when assessing an alleged truthfulness violation. (RT 157-58). However, he did not do so in this case.

Colonel Grey acknowledged the first element is whether there was a *willful* false statement. (RT 158). Trooper Wetherington explained that *he believed* that his patrol hat was still on his head when traveling from the first to the second traffic stop. He later recalled placing the hat on his light bar. (T 474). When Trooper Wetherington initially told Sergeant

Olgesby that his hat was on his head when it blew off, he *honestly* believed that it had been on his head. (T 474). Thus, there was nothing *willful* about Trooper Wetherington's accounting of his hat—rather, he simply mistakenly recalled its location.

The second element is whether the subject is *material*. (T 158). As noted above, hat location is *immaterial*. There is no reasonable dispute in this case that, during the high-risk traffic stop, Trooper Wetherington was primarily focused on the intoxicated occupants of the car and the loaded weapons within their reach. It is therefore unsurprising that Trooper Wetherington formed an initial impression regarding how his hat was lost and that his memory may not have been totally accurate. However, irrespective of Trooper Wetherington's recollection, his patrol hat's location was not material to the high-risk traffic stop.

The third element is whether the statement is *meant to deceive*. (RT 158). Trooper Wetherington testified that he honestly believed the hat was on his head when he initially arrived on scene. (T 474). After the true location of the hat was discovered, Trooper Wetherington did not clarify his initial belief because he did not think that the difference in hat location was materially significant. (T 479). Indeed, in conducting a

traffic stop at night involving loaded handguns and the presence of alcohol, there is *no material significance* to the exact location of a patrol hat. Respondent/Appellee can provide no logical reason for Trooper Wetherington to have intentionally deceived his superiors about such an insignificant detail, and the facts conclusively refute such a conclusion.

The final element is whether there was some damage to the employer because of the false statement. (RT 158). Undisputed is the paramount importance of integrity of law enforcement. The credibility of the judicial system depends on truthfulness of its public servants. The *Brady v. Maryland*, 373 U.S. 83 (1963) decision and its subsequent use as a justification for the discipline and termination of police officers has become a hot topic in law enforcement. Today, many law enforcement agencies take the position that any inaccuracy or misstatement by a police officer automatically results in that officer being unable to act as a witness in criminal prosecutions, and, thus, results in that officer being “unemployable.” That is exactly the position that has been taken by Respondent/Appellee here. However, this Court previously heard and rejected Respondent/Appellee’s argument predicated on *Giglioli/Brady*. *Wetherington v. N.C. Dept. of Public Safety*, 752 S.E.2d 511 (N.C. Ct. App.

2013). Decisions subsequent to *Brady* have clarified that not every misstep of a government witness (i.e. police officer) must be disclosed in the course of a criminal prosecution. See *United States v. Bagley*, 473 U.S. 667, 675 (1985). Only material facts “that, if suppressed, would deprive the defendant of a fair trial.” *Id.*

Here, the Department of Public Safety (“DPS”) maintains Trooper Wetherington can no longer be trusted to testify truthfully in court. Therefore, his credibility as a North Carolina State Trooper is doubted and ability to serve as a witness diminished. His employer stated that it had “no choice” but to terminate Trooper Wetherington’s employment based upon an internal finding of “untruthfulness” which will allegedly disqualify him from acting as a witness in any criminal prosecution because of the mandates of *Brady*. (T 323, 326). The logic employed here by DPS is not only contrary to numerous state Supreme Courts that have squarely addressed this issue, but creates a slippery slope for all police departments. See *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 219 P.3d 675 (Wash. 2009) (en banc) (The Washington Supreme Court held that neither public policy nor the *Brady* decision necessitates the termination of a police officer found to have been untruthful in an

internal investigation.); *see also In re Town of Pelham*, 154 N.H. 125 (2006) (The New Hampshire Supreme Court upheld an arbitration award reinstating a police dispatcher who had been terminated for alleged untruthfulness in an internal investigation.).

The inaccuracies at issue in this case are not the type of false statement targeted by *Brady* and its progeny. If it were, few officers would be employable, let alone able to act as a witness in a criminal prosecution. Trooper Wetherington did not lie under oath and any alleged dishonesty was not disruptive nor repeated. He was not dishonest while performing his official duties.

Colonel Gray acknowledged that the four elements above are recognized and accepted within professional police management and by him as necessary considerations when confronted with truthfulness issues (T 158-59). Had he considered each prior to rendering a decision, Trooper Wetherington would not have been terminated.

**C. No just cause exists for termination.**

Both the Superior Court and this Court of Appeals found that any untruthfulness by Trooper Wetherington regarding his hat *was not just cause* for his dismissal. The Supreme Court of North Carolina did not



decide whether Trooper Wetherington's conduct constitutes just cause for dismissal. *See Wetherington v. N.C. Dept. of Public Safety*, 780 S.E.2d 543 (N.C. 2015). It is undisputed that Trooper Wetherington cannot be discharged except for just cause. N.C.Gen. Stat. § 126-35(a) (West 2013).

As the Administrative Law Judge found, it is well-settled that just cause is a "flexible concept embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." *North Carolina Dept. of Environment and Natural Resources v. Carroll*, 599 S.E.2d 888 (N.C. 2004). Over the course of these proceedings, no new substantive evidence has been introduced. The Superior Court and this Court of Appeals examined the same facts and circumstances as Administrative Law Judge Overby yet came to the opposite conclusion. In a facts and circumstances inquiry, if just cause for Trooper Wetherington's termination did not exist in 2012 and 2013, it certainly does not exist in 2019.

In declining to weigh-in on the just cause issue, the North Carolina Supreme Court remanded the matter to DPS to apply the correct just

cause standard as required by North Carolina jurisprudence. The Supreme Court “emphasized” that consideration of factors such as:

the severity of the violation, the subject matter involved, the resulting harm, the trooper’s work history, or discipline imposed in other cases involving similar violations...is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

*Wetherington*, 780 S.E. 2d at 592. DPS ignored these remand instructions and refused to consider these factors (RT 202). Administrative Law Judge Overby interpreted the Supreme Court’s use of the word “or” in listing the factors as “negat[ing] any mandatory findings or conclusions based on all of those factors.” Thus, DPS determined that it was not bound by the Supreme Court’s remand instructions and asserted that it would act under its proclaimed discretion instead. The ALJ erroneously permitted DPS’s noncompliance with the remand order.

No truthfulness violation occurred. *See* Section IV.B, *supra*. However, if we are to assume *arguendo* that the four (4) truthfulness elements are met, the severity of the resulting violation was trivial. It does not matter where the hat was at the time it was lost. Trooper Wetherington’s hat was not significant, material, or relevant to the high-risk traffic stop he conducted on March 29, 2009.

Truthfulness policies are crucial when the subject matter involved is material to an officer's fulfillment of his or her duties. This matter started as a traffic stop that became high-risk when Trooper Wetherington discovered two occupants, loaded handguns, and the odor of alcohol. Had his "untruthfulness" involved the location of handguns or number of occupants in the vehicle, the subject matter of his untruthfulness would be *essential* to his duties. Instead, the subject matter at issue is inconsistent statements about *hat location*.

There is no *resulting harm* to DPS as a result of Trooper Wetherington's misstatements about his hat. No criminal case was compromised. The traffic stop Trooper Wetherington set out to conduct was properly completed. Nobody escaped justice. DPS argued Trooper Wetherington's actions caused the Patrol to lose confidence in his credibility and his moral courage. Furthermore, significant man hours and resources were spent on the missing hat. This harm is wholly abstract and minimal.

Trooper Wetherington's work history militates a lesser form of discipline—if any—is warranted. He had no prior disciplinary history. In fact, despite his young career, he had developed a respected track record.

See Section IV.D, *infra*. No one can dispute that, prior to the events at issue here, Trooper Wetherington was anything but an officer of integrity.

Finally, other cases involving officer untruthfulness demonstrate that termination here was inappropriate. See *e.g.*, *Scott v. N.C. Department of Crime Control*, No. 10OSP04582, 2013 WL 4519315 (N.C.O.A.H. 2013). In *Scott*, Judge May issued an insightful decision, examining and explaining the correct methodology in a truthfulness case. Other state courts have arrived at similar conclusions. See *Harder v. Village of Forest Park*, No. 05 C 5800, 2008 WL 4561631 (N.D. Ill. May 2, 2008) (applying Illinois law) (A police officer's dishonesty related to "internal police administration" and not related to "an officer's public duties" is not sufficient to warrant termination); *Gibson v. Department of Police*, 2009-1015 (La. App. 4 Cir. 1/13/10); 30 So.3d 1032 (Reversing a 60-day suspension for alleged untruthfulness based upon the fact that the officer may have been confused about details of an encounter unrelated to his law enforcement duties); *Hunt v. Shettle*, 452 N.E.2d 1045, 1052 (In. Ct. App. 1983) (Materially inconsistent statements by a police officer in the court of an internal investigation are insufficient to

support demotion where no evidence existed of *scienter* or intent to deceive); *Matter of Montella*, No. A-3143-16T4, 2018 WL 6174717 (N.J. Super. Ct. App. Div. 2018) (Termination was too severe a discipline for officer's dishonesty on his report).

Just cause for termination—the most severe form of employee discipline—requires substantial proof of substantial misconduct. The *severity of the violation* must be profound, the *subject matter involved* must be paramount, *the resulting harm* must be detrimental, the *trooper's work history* should be suspect, and there should be precedence for termination involving similar circumstances. None of these considerations are present in the matter before this Court.

**D. The equities and mitigating factors do not justify the termination of Trooper Wetherington's employment.**

A workable truthfulness policy must be flexible. Inherent in that flexibility are equities and mitigation factors that must be balanced in determining proper punishment. Considerations of “equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case” must be made. *See Carroll*, 599 S.E.2d at 900.

The appropriate balance between competing concerns must be struck. Recent case law supports this notion of flexibility in a truthfulness policy. *See Montella, supra*. In *Montella*, New Jersey's Civil Service Commission struck a balance between competing concerns where an officer wrote a dishonest dispatch report. The Borough officer wrote in his report that he was near Roxbury when he was notified of the car accident involving his sister and that he left the scene when the Roxbury patrol arrived. The report was inaccurate because the officer was in the Borough when he was notified of the car accident and he stayed for several minutes *after* the Roxbury officers left the scene. The Borough police department terminated the officer, however, the Commission imposed a 120-working-day suspension instead. The New Jersey Superior Court upheld the Commission's decision "in light of the unique facts of this case." *Montella*, 2018 WL 6174717, \*4.

The unique facts and circumstances here highlight several mitigating circumstances that should be considered before a determination on proper discipline can be made:

- Trooper Wetherington was inexperienced. He was twenty-three (23) years old at the time of the first hearing in this matter (T 414).

- The *Employee Advisory Committee* report found that Trooper Wetherington was a very “devoted, dedicated” Trooper, and unanimously recommended reinstatement.
- Trooper Wetherington’s work and conduct history revealed exemplary service and conduct (T 421-424). He had no prior discipline.
- Trooper Wetherington self-reported the lost hat.
- The circumstances at the time his hat was lost included a high-risk traffic stop of two individuals, the presence of two loaded handguns, the odor of alcohol, and a second vehicle pulling in front of the offender car during the stop.
- Several laypersons and some of Trooper Wetherington’s supervisors testified to Trooper Wetherington’s excellent work performance, character, and conduct. Seven (7) letters were written on Trooper Wetherington’s behalf.
- Trooper Wetherington was not performing his official duties.

DPS has failed to strike that appropriate balance needed in a police truthfulness inquiry. A mechanical and technical approach to a truthfulness policy will lead to arbitrary public personnel decision-

making, as was the case here. As the New Jersey Superior Court did in *Montella*, this Court should aim to strike an appropriate balance between competing concerns. Examining the *unique facts and circumstances* here, termination of Trooper Wetherington is unjustified.

## V. CONCLUSION

Truthfulness policies are adopted to promote integrity throughout police departments. But application of a truthfulness policy must be objective to ensure that only *willful untruthfulness about significant and material matters* is sanctionable by termination. A degree of flexibility *must* exist for the spirit of the policy to make sense. Trooper Wetherington's encounter during the 2009 traffic stop is an opportunity to exercise that flexibility in the truthfulness policy.

This Court should reverse the decision below and remand for the entry of relief.

Respectfully submitted,

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N.C. App. R. 33(b)

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## VI. CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to N.C. App. R. 28(j)(2) that the foregoing contains no more than the number of words allowed by the rule.

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**VII. CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing *Amicus Curiae Brief* has been served this day by electronic mail, addressed as follows:

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